



REPUBLIC OF KENYA



**S S Dhillon Transporters (K) Ltd v Wamiti (Appeal E041 of 2023)
[2024] KEELRC 13620 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13620 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E041 OF 2023
JW KELI, J
DECEMBER 18, 2024**

BETWEEN

S S DHILLON TRANSPORTERS (K) LTD APPELLANT

AND

STANLEY WAINAINA WAMITI RESPONDENT

*(Being an appeal from the Judgment and decree of Hon. Cheloti BM (PM)
delivered on the 10th day of March 2023 in the Milimani CMEL NO. 168 of 2019)*

JUDGMENT

1. S S Dhillon Transporters (K) LTD, the appellant herein, being aggrieved by the Judgement and decree of the Hon. Cheloti B.M (PM) delivered on 10th March 2023, appealed to this Court vide memorandum of appeal dated 3rd April 2023 seeking for the following Orders:-
 1. That the appeal be allowed.
 2. That Judgement of the lower court be set aside and replaced with order as follows:
 - a. A declaration that the dismissal of the Respondent was lawful and Justified.
 - b. A declaration that the claim for house allowance from 9th November 2016 downward were time barred and therefore unrecoverable.
 - c. A declaration that the claim for leave allowance from 9th November 2016 downward were time barred and therefore unrecoverable.
 - d. The award of the compensatory be set aside.
 - e. Such other or further relief this Court may deem fit to grant.
 3. That the cost of the appeal be awarded to the Appellant.



Grounds of the appeal

2. That the learned Principal Magistrate erred in law and fact in holding that the Claimant's services were unfairly terminated or that the unfair termination was caused by the Appellant.
3. The learned Principal Magistrate erred in law and fact in overlooking the Respondent's conduct and behavior in arriving at a conclusion that his services were unfairly terminated or indeed terminated by the appellant.
4. The learned Principal Magistrate erred in law and fact in awarding House allowance while the evidence tendered before the Court vis a vis the general conduct of the parties clearly showed that the Respondent was receiving a consolidated salary which was inclusive of the House allowance.
5. The learned Principal Magistrate erred in law and fact in allowing the portion of claims in respect of the leave and house allowance which were time barred and unrecoverable in the law.
6. The learned Principal Magistrate erred in law and fact in failing to appreciate and deduce that the Respondent was due to his conduct throughout his employment, estopped from claiming Leave and House allowance or alternatively that such a claim had been abandoned or foregone through the conduct and behavior of the Respondent.
7. The learned Principal Magistrate erred in law in failing to equate the number of off days given to the Respondent (apart from Saturdays and Sundays) as leave days and thereby exposing the appellant to double payment.
8. The learned Principal Magistrate erred in law and facts in failing to take into account all the relevant factors in awarding compensatory damages and thereby awarding compensatory damages which were excessive, disproportionate and unfair in the circumstances.
9. The learned Principal Magistrate erred in law and fact in failing to appreciate that it was the duty of the claimant to prove the date of employment and which he failed to do.
10. The learned Principal Magistrate erred in law in failing to appreciate that the Appellant could not have employed the Respondent before the same was incorporated or before acquiring legal status.
11. The learned Principal Magistrate erred in law in awarding leave and house allowance from 2016 downwards whereas there was no evidence that the Claimant was an employee of the Appellant for that period and when there was overwhelming evidence that the company was not in business during the said period.
12. The learned principal magistrate erred in law and fact by discrediting the appellant evidence and relying only on the contested and uncorroborated evidence of the respondent.
13. The compensatory damages awarded were excessive and unfair in the circumstances of the case.
14. The record of appeal was received in Court on the 21st November 2023. A supplementary record of appeal was received in Court on the 5th of March 2024.

Back ground to the appeal

15. The trial court heard the case interpartes with both parties calling witnesses to give their evidence. The Learned Trial Magistrate delivered judgment in the matter on the 10th March 2023 in favour of the claimant in the following terms:-
 - a. The claimant is awarded payment instead of notice at Kshs. 29,950



- b. The claimant is awarded six months' worth of damages amounting to Kshs. 179,950
- c. The claimant is awarded a house allowance at Kshs. 593,010.
- d. The claimant is awarded payment in lieu of leave days granted at Kshs. 329,450
- e. The claimant is awarded a salary for days worked at Kshs. 8,985
- f. Net award Kshs. 1,141,095
- g. Interest on (f) the above is awarded from the date of judgment, at court rates.
- h. The awards are subject to statutory deductions
- i. The claimant is awarded costs of the suit at court rates from the date of judgment. (pages 102-103 of the record of appeal)

Written Submissions

16. The appeal was canvassed by way of written submissions. The appellant's written submissions drawn by Paul Mwangi & Company Advocates were dated 4th March 2024. The respondent's written submissions drawn by Gichachi & Company Advocates were dated 23rd May 2024.

Determination

17. The court is sitting on the first appeal. The duty of the court sitting as the first appellate court is as stated in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR)⁶ "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."⁶

Issues for determination

18. The Appellant in written submissions raised the following issues: -
 - a. Whether the Learned Principal Magistrate erred in law and fact in holding that the claimant's employment services were unfairly terminated.
 - b. Whether the Learned Principal Magistrate erred in law and fact in failing to take into account all the relevant factors in awarding compensatory damages.
 - c. Whether the Learned Principal Magistrate erred in law and fact in awarding leave and house allowance
 - d. Whether the Learned Principal Magistrate erred in law and fact in awarding leave and house allowance which were time-barred by limitation.
 - e. Whether the Learned Principal Magistrate erred in law and fact in discrediting the appellant evidence and relying only on the contested and uncorroborated evidence of the respondent.
19. The respondent in written submissions addressed the same issues as the appellant.
20. The court adopts the issues raised by the parties in the determination of the appeal which are framed as follows: -



- a. Whether the Learned Principal Magistrate erred in law and fact in holding that the claimant's employment services were unfairly terminated
- b. Whether the Learned Principal Magistrate erred in law and fact in the awards of compensation, leave, and housing.

Whether the Learned Principal Magistrate erred in law and fact in holding that the claimant's employment services were unfairly terminated.

Appellant's submissions

21. The appellant relied on the provisions of section 47(5) of the *Employment Act* to wit:- "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." The appellant submits that the respondent failed to report on 8th November 2018 to Ngoringori(Narok) to collect cargo for delivery to Nairobi as instructed. He failed to notify his employer or supervisor of his whereabouts and absented himself from work since 9th November 2018. The appellant's evidence was that the respondent switched off the phone on 8th November 2018 until the time he presented himself on 9th November 2018. That this evidence was not controverted and the same could have been done by provision of call logs data from Safaricom. That the act by the Respondent amounted to gross misconduct according to section 44(3) of the *Employment Act*.
22. To buttress its submissions, the appellant relied on the decision in Kenya Shoe and Leather Workers Union v Fast Track Management Consultants Limited (2015)e KLR where Justice Mbaru stated:- "to refuse to undertake work as directed by the Respondent manager at the shop floor under the guise of lack of written letter from the general manager is not sufficient to invite the Court to negate the decision taken to terminate the Grievant from his employment." The appellant relied on a related decision in Ann Njoroge v Topez Petroleum Limited (2013)e KLR where the court held that on proof of an employee having absconded duty the sanction was summary dismissal without notice.

Respondent's submissions

23. The Respondent on this issue submitted that his evidence was that he was directed by the appellant on the 8th November 2018 to drive a lorry from Nairobi to Narok (Ngoringori) and was expected to arrive on the 9th November 2018. The respondent arrived at the farm on the 9th November 2018 but instead of being allocated duties by the supervisor he was asked to hand over the keys to the lorry and was arrested and locked up at Ngoringori AP camp until 6 .00pm of the same day. That RW during cross-examination confirmed that the respondent was arrested (page 94 of the record of appeal). The appellant in response alleged the respondent left Nairobi on 7th November 2028 and was expected at Narok on 8th but went to Bomet on their own frolic only to arrive at Ngoringori on 9th November 2018. The respondent asserted that the appellant failed to produce work tickets/worksheets of the lorry to prove he left Nairobi on 7th November 2018 and not 8th November 2018. The appellant in defense stated the lorry was car tracked but no evidence was produced in the court of the lorry having been tracked to Bomet. That it was the burden of the appellant to prove the respondent's phone was off. That there was no show cause on the said absenteeism as held by the trial court.



Decision

24. The trial court on the issue held that the appellant had not proved the Respondent absconded duty. The trial court stated that if the respondent was absent from work and reappeared on 9th November 2018 that was not absconding but absence from work without leave and notice to show cause having not been issued he was unfairly dismissed.
25. Unfair termination is composed of two elements, substantive fairness related to reasons under sections 43 and 45(2) of the *Employment Act* and procedural fairness under section 41 of the *Employment Act* as held in *Walter Ogal Anuno vs. Teachers Service Commission (2013) eKLR*:- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness.” The court finds that the trial court failed to pronounce itself as to whether or not the Respondent was absent from duty without permission.

Re-evaluation of evidence

26. In the witness statement the claimant stated he was directed by the Respondent’s/Appellant’s manager to drive to Narok from Nairobi on the 8th of November 2018 and arrived on the 9th of November 2018 at 9 am at Narok, Ngorongori. He was asked by the supervisor to hand over keys to the Lorry and was arrested on the same day and released without charges. He reported to Nairobi Headquarters and was informed of his termination (pages 10-11).
27. The response was to effect that the Respondent had been instructed to leave the Kampala office in Nairobi for Narok on the 7th November 2018 and was expected to arrive on the 8th November 2018 at 9.00hrs but arrived on 9th November 2018 at 9.00hrs with clear evidence of transport of sand. The lorry had been located at Longisa Bomet. The respondent failed to pick up calls between 7th November 2018 and 9th November 2018. The respondent abandoned the lorry and disappeared only to re-appear vide the suit (pages 25-36 of the record of appeal were the statement of defense and RW1 witness statement). The court noted the car track record was on pages 58-59 of the Record of Appeal. There was no evidence of a disciplinary process. The reply to the defense was not on the record.
28. During the cross-examination the Respondent denied having driven to Bomet. He stated he did not switch off his phone, and that he was arrested at Narok, locked up, and released without any charges, he went back to Nairobi for his dues. He denied having absconded duty.
29. RW1 told the court that the claimant was arrested for doing trips not assigned using the company truck. That the claimant deserted duty and was not terminated. During cross-examination, RW1 told the Trial Court that the Lorry was traced to Bomet instead of Narok where it had been sent. It is recorded that the car track report was not filed in court. RW1 told the court the claimant had not returned after the arrest.
30. The court noted that there was no interrogation of documents produced in the Trial Court. On page 52 of the Record of appeal was a consignment order for goods for KBN 181 F (the Lorry assigned to the Respondent under paragraph 3 of the witness statement of Bhupinder Kaur Dhillon at page 32 of the record). The consignment note is dated 8th December 2018. The driver’s name is Vaati Peter. The loading order was produced on page 54. The date is overwritten as 7th December 2018 with an indication it was earlier written as 8th December 2018, there is a compliance stamp of 8th December 2018. On page 59 was a document titled Trip Summary. It indicated that the trip started on 7th November 2018 at 17.10hrs. On 8th November 2018, the Lorry was on the road to Narok and arrived at Ngorongoro in the morning of 9th November 2018. The court finds that the trial court recorded



that the car track record was not produced. RW1 evidence was to effect that the Respondent did not report back after the arrest.

31. The respondent produced his demand letter dated 20th November 2018 which stated that the claimant on 15th November 2018 went to the Appellant's offices and inquired about the fate of his job and he was told his services were terminated (page 24). The court deduced from the demand letter, evidence of the respondent, that from 9th November 2018 when he was arrested and released on the same date, he absented himself from work for 6 days without permission consistent with the evidence of RW1. The employer was to find he deserted work (albeit absented himself without leave of employer) which is a ground for summary dismissal under section 44(4)(g) of the *Employment Act* to wit:-⁹ (4) Any of the following matters may amount to gross misconduct to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;” The Respondent did not justify before the Trial Court the absence from duty for the period between arrest and release of 9th November 2018 and date of return on 15th November 2018 as stated in the demand letter (page 24 of the record of appeal).
32. The Court holds despite having valid reasons for the termination the employer was still obliged to comply with procedural fairness as stated in section 41(2) of The *Employment Act* to wit:-¹⁰ (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
33. The Court on the re-evaluation of the evidence before the Trial Court, finds that the respondent was not afforded an opportunity to be heard before termination. Section 41 of the *Employment Act* is couched in mandatory terms. The court on the re-evaluation of the evidence held that the reasons for termination based on absence from work without leave were valid, what RW1 called desertion. The termination was unfair for lack of procedural fairness. In the circumstances, the Respondent was entitled to compensation for unfair termination in form of Notice Pay of 1 month gross salary. This is consistent with the principle that an employee cannot be compensated for their own wrong, the wrong being abstention from duty for 6 days or so without permission of the employer. The award of compensation for 6 months is set aside and substituted with a One-month salary instead of Notice.

Whether the Learned Principal Magistrate erred in law and fact in the awards leave and housing.

34. On leave, the Appellant submits that off days amounted to leave and as consolidated they were 24 days per month beyond the statutory annual leave days. It also submitted that claims beyond 3 years were statutory time-barred. The Appellant also submitted that the Respondent could not have been employed before its incorporation in 2010. The court gives benefit of doubt to the respondent as to the date of employment as the appellant failed to produce contrary evidence to rebut the claim of employment by the respondent in 2007.
35. The respondent submits that the defence of off days was not substantiated. This was a continuing injury and hence accrued over the years. On this issue, the trial Court simply stated that the employment records were not produced



36. Annual leave entitlement is a basic condition of service of employees according to section 28 of the *Employment Act* to wit:- “ Annual leave
- (1) An employee shall be entitled—
 - (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;
 - (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.
 - (2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under sub-section (1)(a) into different parts to be taken at different intervals.
 - (3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.
 - (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.”
37. The appellant admitted and even in submissions that the respondent was not granted the right to annual leave on the basis of off days. Annual leave is a basic right of employees that cannot be taken away on the basis of off days which was not even proven. The court has in various decisions held that leave falls under continuing injury claims hence accrued every year is not granted as long as the employee was not allowed to take the same. Where the employee had a chance to take leave and fails to do so the same is limited to 18 months under section 28(4) of the *Employment Act* as held in *Abongo v Chemelil Sugar Co Ltd (Appeal E051 of 2022)* [2023] KEELRC 2591 (KLR) (25 October 2023) (Judgment) Justice Radido in a claim for untaken leave for 76 days held: -‘25. The Appellant prayed to be awarded the equivalent of 76 months accrued leave in the sum of Kshs 132,757/-.
26. Section 28(4) of the *Employment Act*, 2007 circumscribes how many leave days can be carried forward. The period is only up to 18 months.
 27. The Appellant did not suggest or testify that he accumulated leave over 76 months with the approval of the Respondent or that he applied for leave and was denied.
 28. The Principal Magistrate did not, therefore, err in declining to award this head of the claim.”
38. In the instant case the Appellant admitted that the Respondent had no chance to take leave. Annual leave is a claim in the nature of continuing injury. The Court of Appeal in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) considered cases of continuing injury and observed citing authorities:- “There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of



“a continuing injury” as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase “a continuing injury” and whether the respondent’s claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes “a continuing injury.” From the record, we note that the respondent’s counsel only cited the definition of ‘back pay’ in the Black’s Law Dictionary 9th Edition at page 159 which defines it as “the wage or salary that an employee should have received but did not because of an employer’s unlawful action as setting or paying the wages or salary” to support her claim that back pay was a continuing state of affairs.” The Court adopted with approval the elaborate definition of continuing injury claims in *M. R. Gupta v Union of India*, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of “continuing wrong” and “recurring wrongs” and reversed the decision. It held: “The appellant’s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant’s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant’s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....”

39. In the upshot, applying the foregoing authorities, the Court holds the claim of untaken leave to be a continuing injury. The Respondent was informed of termination of service on 15th November 2018 when he reappeared before the employer having been absent since 9th November 2018. He filed his claim on 8th February 2019. This was within the 12 months under section 89 of the [Employment Act](#) (Rev 2024) to wit:-⁴ Limitations

Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#) (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” The court in the upshot finds no basis to disturb the finding on untaken leave by the Trial Court save for the amount which is set aside and substituted with an award for 21 days annual leave of each year worked at a salary of Kshs. 29607 thus 21/30 x 29607 x 11 total sum of Kshs. 227,973.90.

Housing allowance.

40. The claimant/respondent pleaded he was never paid housing allowance. In response the appellant pleaded the salary was Kshs. 29607 and not Kshs. 29 950 per month as pleaded by the claimant. The claimant amended his claim after response to reflect the salary of Kshs. 29607. The court deduced that this was an oral contract. During the cross-examination the Respondent RW1 told the court the salary was a consolidated amount. The trial court did not weigh and apply in judgment the statement



by RW1 at cross-examination that the pay was consolidated. It simply stated the employee records were not produced. The court is of the considered opinion that, in an oral contract (the claimant did not produce any contract) statutory minimum conditions of service apply. In 2018 the minimum wages order (SPECIAL ISSUE Kenya Gazette Supplement No. 1 (Legislative Supplement No. 1) CORRIGENDA) for a lorry driver was Kshs. 23039.4. The court takes judicial notice of the Kenya Gazette under section 59 of the Evidence Act. Housing allowance is 15% of the wages thus Kshs. 3455.91. The Court holds that, in the absence of a written contract to the contrary, the salary paid to the Respondent Kshs. 29607 factored the housing allowance. The award of housing allowance was thus not justified and is set aside in its entirety.

Conclusion

41. In the upshot, the court holds the appeal to be partially successful and sets aside the Judgment and Decree of Judgment of Hon Cheloti BM (PM) delivered on the 10th day of March 2023 in the Milimani CMEL NO. 168 of 2019 between the parties and substitutes it as follows:-

Judgment is entered in favour of the Claimant against the Respondent as follows: -

- a. Payment in lieu of notice for Kshs, 29,607.
- b. Payment in lieu of untaken leave Kshs. 227,973.90.
- c. Salary for days worked in November Kshs. 8985.
(The amounts (a, b and c) are payable subject to statutory deductions of PAYE)
- d. The Claimant is awarded costs of the suit and interest at court rates from the date of judgment until payment in full.

42. The appeal being partially successful, each party is to bear its costs in the appeal.

43. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18th DAY OF DECEMBER, 2024.

JEMIMAH KELI,

JUDGE.

In The Presence Of:

Court Assistant: Caleb

Appellant : - Wangui

Respondent: Absent

