



**Owuora v Shiva Mombasa Limited (Appeal E058 of 2024)
[2024] KEELRC 13452 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13452 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E058 OF 2024
M MBARŪ, J
DECEMBER 17, 2024**

BETWEEN

LINUS ALUOCH OWUORA APPELLANT

AND

SHIVA MOMBASA LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. Sogomo Gathogo
delivered on 8 March 2024 in Mombasa CMELRC No.720 of 2019)*

JUDGMENT

1. The appeal arises from the judgment delivered on 8 March 2024 in Mombasa CMELRC No.720 of 2019. The appellant is seeking the judgment to be set aside in its entirety and payment of costs.
2. The appeal is on 3 grounds;
 1. The learned magistrate erred in law and fact by dismissing the claimant's [appellant] case and finding that the claimant was lawfully terminated.
 2. The learned magistrate erred in law and fact by finding that the appellant's summary dismissal by the respondent was fair despite the said termination being in want of valid reasons and fair procedure and thereby arrived at a wrong decision by ignoring the provisions of the *Employment Act*, especially Section 41, 43, 45, 47 and 49.
 3. The learned magistrate erred in fact and law by not awarding the appellant herein all the remedies sought/prayed as against evidence presented before the court.
3. Parties attended and agreed to address the appeal by way of written submissions.



4. The appellant's case is that he was employed by the respondent in January 2020 as a prime mover driver of a heavy commercial vehicle on a fixed-term contract of one year, renewable until 29 March 2019. The contracts were in writing and continuous from January 2010 to March 2019.

5. His case was that his wages were always adjusted every 2 years, as in 2015 and 2016, the wage was ksh.32,058;

From 2017 to 2018, the wage was Ksh.35,265 and 2019 the wage was Ksh.38,790.

6. The claim was that the respondent had the habit of unlawfully recovering monies from the wages paid in the form of advances in the event of mechanical or bodywork damage to the vehicle he was driving. The appellant's main duties were to distribute beer from East African Breweries Nairobi to the company depot at Mombasa. At times, he would supply fertilizers from Mombasa to Eldoret, Nakuru, and Narok, working alone without assistance.

7. Under the contract, the appellant was allowed 21 leave days but was only granted 14 from 2010 to 2016. From 2017 to 2019, he went on leave and was not paid in lieu of leave. He worked during public holidays.

8. On 19 March 2019, the appellant was sent from Mombasa to Narok in truck No.KEC 146L 7061 to deliver fertilizer to Ololunga, Ndovu Estate. The vehicle was overloaded, and he stayed at Mariakani weighbridge for 2 days and left for Narok on 21 March 2019 after the respondent paid for the excess. He arrived on 23 March 2019. From Narok, he was directed by Peter Wesonga to head to Kenya Breweries Limited at Ruaraka, Nairobi, where beer was loaded at night for delivery in Mombasa. He notified the manager that he was running out of diesel and was allowed to fuel at a nearby fuel station for 80 litres. He arrived at the depot on 25 March 20219. The respondent confirmed there were 50 litres of fuel in the tank.

9., On 26 March 2019, the appellant was notified that he had siphoned fuel and was required to attend before the executive chairman on 27 March 2019. The notice indicated that the amount of fuel allegedly siphoned was 48 litres and that from 19 to 25 March 2019, he had covered 1382 kilometres. The appellant was directed to write an apology and attended before the chairman, who accused him of siphoning fuel of 48 litres. On 28 March 2019, the appellant was issued a notice terminating his employment and offered one month's pay in lieu of notice and leave days not taken, but the appellant declined to sign.

10. The claim was that there was unfair termination of employment for lack of due process. He claimed for the following dues;

- a. 2 months' notice pay Ksh.77,580;
- b. Salary for March 2019 Ksh.38,790;
- c. Leave for 2017-2019 and 7 days from 2010 – 2016 Ksh.164,581.40;
- d. Unlawful deductions Ksh.107,400;
- e. 591 public holidays and off time Ksh.191,040.75;
- f. 12 months compensation Ksh.465,480;
- g. Costs of the suit.

11. In response, the respondent admitted that the appellant was employed through a letter dated 1 February 2013 on a fixed contract of 11 months, the term of which was renewable at the respondent's



- discretion. Through a letter dated 13 January 2014, the contract was renewed for a term of one year, ending 31 December 2014. There were annual renewals from 2015 to 2019, and employment was terminated on 29 March 2019. The appellant was fully compensated in cash for his terminal dues for every term contract. Over time, while working on weekends and public holidays, the appellant was paid ksh.500 per clause 3 of his contract.
12. The response was that on 25 March 2019, the respondent received a report from Scania East Africa Limited that from 5 January to 25 March 2019, fuel had consistently been siphoned from motor vehicle No.KCE 146L while under the control of the appellant. Through a letter dated 26 March 2019, the respondent invited the appellant to a meeting on 27 March 2019 to show cause why he should not be dismissed for siphoning fuel and violating the set regulations and practice. By letter dated 27 March 2019, he responded and attended a meeting with the chairman, where he denied the allegations. Upon considering the response, employment was terminated upon payment of two months' notice and untaken leave days. The claims made are not justified and should be dismissed.
 13. The learned magistrate, in the judgment, held that there was an unlawful and unfair termination of employment and awarded the following;
 - a. Two months' notice pay ksh.77,580;
 - b. Unpaid salary for March 2019 Ksh.38,790;
 - c. Compensation nil.
 14. The appellant, therefore, submitted that the trial court erred in dismissing the claim on the basis that termination of employment was lawful. This was contrary to Sections 41, 43, 45, 47, and 49 of the *Employment Act*. Compensation should have been assessed and awarded based on the last wage of Ksh.38, 790.
 15. The salary claim for March 2019 was not paid, and it is due at Ksh.38, 790.
 16. Leave pay should be assessed for 10 years, save for the 7 days taken for 2010/2016. The respondent admitted the appellant did not take his annual leave from 2017/2016 to 2019 and offered Ksh.80, 892. In evidence, the respondent's admissions should have been addressed and the same award. The claim is for ksh.125, 321.
 17. On unlawful deductions, the appellant submitted that he suffered illegal deductions for repairs to his allocated vehicle amounting to Ksh.107, 400. His payment statement is evidence of such deductions.
 18. The claim for public holidays and off time are dues since work done, whatever reasons led to termination of employment, should be paid. The respondent's evidence that there was a payment of Ksh.500 for work on Sundays was without evidence.
 19. The appellant submitted that gratuity/service pay is due as provided for under clause 4 of the employment contract dated 1 January 2019 at Ksh.33, 730, unless there was summary dismissal. In this case, employment was terminated upon notice and service pay is lawfully due under the contract as held in the case of *Kenya Ports Authority v Munyao & 4 others Petition E008 of 2023*.
 20. The appeal should be allowed with costs.
 21. The respondent submitted the appellant was found to be siphoning fuel from his allocated motor vehicle, and an investigation conducted by Scania East Africa Limited, which fitted the fleet management system in all the vehicles, including KCE 146L ZE 7061 driven by the appellant, monitored it and established that there was fuel siphoning. The appellant was issued a notice to show



- cause and replied that he wanted to do so. He was invited to a meeting by the chairman, and he denied the claims. He was offered two months' notice pay, and his employment was terminated for good cause and procedurally.
22. The trial court analyzed the facts well; the finding should be confirmed, and the appeal should be dismissed. The appellant did not deny the evidence submitted by the respondent that, through a tracking report from Scania East Africa Limited for January to March 2019, he had siphoned fuel from his allocated vehicle. He was cross-examined and tried to disprove the investigation report but failed to address the fact that his car had a tracking system that demonstrated siphonage of fuel. The respondent thus had a valid and justified reason for terminating employment.
 23. The respondent submitted that the appellant was paid his full terminal dues. The evidence produced demonstrated that he was paid Ksh. 149, 108.90, subject to statutory deductions. The respondent also produced payment and discharge vouchers for each year worked from 2013 to 2018. These facts were not disputed. The appeal should be dismissed with costs.
 24. The salary for March 2019 was paid in full, and there is no justification for claiming payment until December 2019.
 25. Accrued leave days were taken or paid; pay slips are required to confirm these payments.
 26. Service pay under clause 4 of the contract was only payable upon termination of employment, not upon summary dismissal, as is the case here.
 27. The alleged unlawful deductions arose from salary advances, which are recoverable by the employer. There is evidence to demonstrate that the appellant took wage advances, and these were lawfully deducted, as held in *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR and *Jane Vuligwa v Good Earth (Group) Limited* [2021] eKLR.
 28. On alleged public holidays and off days, the respondent submitted that no particulars of the days claimed should be particularized as held in *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR. These claims are not justified and should be dismissed with costs.

Determination

29. This is a first appeal. The mandate is to review, reassess, and analyse the record and make conclusions. However, the court must consider that the trial court benefited from hearing the witnesses testify.
30. The trial court erred in finding that employment was terminated lawfully on the first and second grounds of appeal, but this is incorrect. After analyzing the procedures undertaken by the respondent in terminating employment, the learned magistrate found that there was an unlawful and unfair termination of employment. However, there is an NIL award in assessing the remedies upon such finding. There are no reasons for the NIL award.
31. Indeed, where the employer terminates employment unfairly and contrary to the procedures under Sections 41 and 43 of the *Employment Act*, it is unlawful and contrary to Section 45. Under Section 49 of the Act, the court is required to assess the compensation due based on the last gross wage paid for a maximum of 12 months. However, the compensation awarded must be given a basic reason for allocating between zero (NIL) Awards for a maximum of 12 months.
32. In this case, without any reasons being assigned to the NIL award, this court can review and consider the provisions of Section 45(5) of the *Employment Act*, the procedures taken by the employer before employment termination and the employee's conduct. His case was that he had siphoned fuel from his allocated vehicle. There were investigations and a report from Scania East Africa Limited that from



- 5 January to 25 March 2019, fuel had consistently been siphoned from motor vehicle No.KCE 146L while under the control of the appellant. In his response to the notice to show cause, he does not address such matter, but these details were only submitted to the respondent through a letter dated 13 January 2020. During the meeting between the appellant and the chairman, such a matter still needed to be brought to his attention.
33. Indeed, whereas the respondent had a genuine reason to warrant the appellant's summary dismissal for breach of his employment contract over the alleged siphoning of fuel from his allocated motor vehicle, the motions of Section 41 of the [Employment Act](#) were not adhered to.
 34. The learned magistrate addressed these facts well and relied on case law but did not assign any reasons for the NIL award. The appellant had worked under his various term contracts until this case arose. The only lapse was the mandatory due process under Section 41 of the [Employment Act](#). For this lapse, the court finds an award of one month of gross pay justified at Ksh.38, 790.
 35. On the other remedies sought, each was assessed by the learned magistrate with a finding.
 36. The claims for unpaid leave, unlawful deductions, unpaid public holidays, and service gratuity were all at the NIL award.
 37. The learned magistrate found that the employer keeps leave records for unpaid leave. The appellant had been accorded leave days while in service.
 38. Indeed, each run on its terms under the term contract and lapsed save for the last contract. Each should have been addressed based on any claim accruing under the provisions of Section 89 of the [Employment Act](#) within 3 years and for continuing injuries within 12 months from the date of cessation as held in the case of *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR). Any work injury that accrues monthly should be addressed within 12 months, and for work-related claims, under each contract, the appellant had 3 years to address.
 39. The third ground of appeal relates to the remedies sought. The claims for unpaid holidays and off days/ rest days are specific, and the public holidays worked should be particularized in the Memorandum of Claim and not under the written submissions. This would give the respondent a fair chance to address and file a response accordingly. The mix-up of the claim for public holidays and overtime does not do justice to the appellant's case. Each is regulated differently, and the particulars of each would have assisted the trial court in making an analysis. Equally for this court, without giving the necessary facts of which public holidays, as gazette by the Minister, the appellant was at work, such an assessment is practically impossible.
 40. The trial court cannot be faulted.
 41. Regarding the unlawful deductions, the respondent filed worksheets on salary advances to the appellant. These were recorded through wage deductions, which are allowed under Sections 17, 18, and 19 of the [Employment Act](#). Once the employee is advanced monies by the employer, they are recoverable from his wages, and the payment statements filed confirm these facts.
 42. Service pay ordinarily accrues where the employer fails to remit statutory directions and has not adhered to Section 35(5) and (6) of the [Employment Act](#). In this case, the respondent filed payment statements and remitted statutory dues to the appellant.
 43. However, parties are allowed to provide terms and conditions of employment under the contract of employment. In this case, the appellant filed various service contracts, and the last contract, dated 1 January 2019, under clause 4, provided for service pay of Ksh. 33, 730 at the end of the contract.



44. This contract was not served to the end. The service pay claimed needed to mature.
45. The claim was filed on 30 July 2019. Under the provision of Section 89 of the *Employment Act* [then Section 90], this benefit is due at the end of employment.
46. For the 3 years of service, under the law, service pay is due.
47. For the contract from 1 August 2018, services pay is due at ksh.30, 664.
48. Under the contract dated 1 January 2017, service pay is due at ksh.30, 664.
49. Claims dating back to 3 years are time-barred and should have been addressed under the provisions of Section 89 of the *Employment Act*, which is couched in mandatory terms.
50. Through an annual contract payments Voucher dated 10 January 2014, the appellant was paid for the period ending 31 December 2013.
51. The total due in service pay is Ksh.61, 328.
52. Regarding costs, the appeal was partially successful. Each party should meet its costs.
53. For the payments due, the appellant has since been paid Ksh. 149, 108.90 in terminal dues. This comprises two months' notice pay, days worked, and terminal benefits. It should be paid less than what is due.
54. Accordingly, the judgment in Mombasa CMELRC No.720 of 2019 is hereby reviewed and judgment entered for the appellant and the following orders issued;
 1. Employment terminated unlawfully and unfairly;
 2. Compensation awarded at ksh.38,790;
 3. Offered two months in lieu of notice Ksh.77,580;
 4. Pay for March 2019 Ksh.38,790;
 5. Service pay Ksh.61,328;
 6. These dues under (b), (c), (d) and (e) are to be paid less Ksh.149,180.90 already paid in terminal dues;
 7. Each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 17 DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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