



**Kalu Works Limited v Mnalo (Appeal E158 of 2024)
[2024] KEELRC 13419 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13419 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E158 OF 2024
M MBARÚ, J
DECEMBER 16, 2024**

BETWEEN

KALU WORKS LIMITED APPELLANT

AND

JAMES MALUKI MNALO RESPONDENT

*(Being appeal from the judgment of Hon. R.N. Akee delivered
on 27 June 2024 in Mombasa CMELRC 229 of 2019)*

JUDGMENT

1. The appeal arises from the judgment delivered on 27 June 2024 in Mombasa CMELRC 229 of 2019. The appellant is seeking that the judgment be set aside, the court to find that employment was terminated lawfully and the respondent is not entitled to severance pay, notice pay or 12 months compensation. These awards are dismissed with costs.
2. The background of the appeal is a claim filed by the respondent before the trial court. He claimed that he was employed by the appellant as a machine operator from April 2009 to 1 October 2016, when he reported to work. Still, the operations manager told him his employment had been terminated. There was no notice, hearing or payment of terminal dues. This resulted in unfair termination of employment and claimed the following dues;
 - a. Notice pay Ksh.21,330;
 - b. Accumulated leave days ksh.162,108;
 - c. Severance pay Ksh.74,655;
 - d. Underpayments Ksh.735,840;
 - e. 12 months compensation Ksh.255,960;



- f. Certificate of service;
 - g. Costs of the suit.
3. In reply, the appellant admitted that the respondent was initially employed as a trainee machine operator at Mariakani, Kilifi County, on 14 May 2009. He left employment on 30 September 2016 as a casual labourer, earning a daily wage of Ksh.461, including a house allowance. He was paid under the Wage Orders;
- In the year 2014, the respondent was paid Ksh.307 per day;
- In the year 2015, the respondent was paid Ksh.461 per day;
- In the year 2016, the respondent was paid Ksh.461 per day;
4. Through a contract dated 30 April 2016, the appellant offered the respondent a contract with a consolidated wage of Ksh.12, 971. The benefits under the contract included annual leave, work for 6 days and extra pay for piece rate.
5. The response was that throughout his employment, the respondent constantly remained absent from work which included;
- 8 to 14 November 2013;
- 22 May to 7 June 2014;
- 29 August to 14 September 2015;
- 31st March to 9 April 2015; and
- 28 June to 3 July 2016.
6. On 30 April 2016, the respondent was offered a written contract, which he accepted and was to expire on 3 November 2016, but he refused to accept the contract. He returned the unsigned contract to his supervisor, Jeremiah Olwande, and he remained on casual employment until 30 September 2016, when he left his shift and never resumed work. On 11 November 2016, the appellant issued notice to the Labour Officer. The respondent was registered with NSSF and NHIF, and claims for notice pay are unjustified. Claimed annual leave is time-barred under Section 90 of the *Employment Act*, and a severance claim is not applicable. The claim should be dismissed with costs.
7. The learned magistrate delivered judgment on 27 June 2024 and held that there was an unfair termination of employment and made the following awards;
- a. Notice pay Ksh.21,330;
 - b. Severance pay Ksh.74,655;
 - c. Compensation ksh.255,960;
 - d. Certificate of service;
 - e. Costs of the suit.
8. Aggrieved, the appellant filed this appeal on 14 grounds. The appeal is that the learned magistrate erred in law and fact in awarding the respondent notice pay at Ksh.21, 330 while there was no proof of unfair termination of employment. Employment was on piece rate and payments were done accordingly.



Severance and compensation pay is not justified in this case and there was no redundancy or unfair termination of employment.

9. Both parties attended and agreed to address the appeal through written submissions.
10. The appellant submitted that the respondent was employed on a daily wage based on piece rate returns. He left his employment without notice and there was no case of redundancy to justify the award of severance pay as held in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. Based on piece rate work, notice pay and compensation awards are not justified. The respondent was registered with NSSF and NHIF and he took his annual leave based on piece rate. The 12 months compensation is not justified and went against judicial principles held in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR.
11. The respondent did not file any written submissions.

Determination

12. This is a first appeal. The duty is to analyze the facts before the trial court and make conclusions. However, we must take into account that the trial court had the opportunity to see and hear the witnesses.
13. The respondent's case is that the appellant employed him from April 2009 until 1 October 2016. He alleged that his employment was casual.
14. The appellant, on the other hand, asserts that the respondent was employed at a piece rate and paid a daily wage. On 30 April 2016, he was issued with a written contract, which he declined to sign. He then deserted work on 30 September 2016 and could not be traced, so notice was issued to the labour officer.
15. Refusal to execute the written contract as required under Section 10(3) of the *Employment Act* resulted in a significant lapse on the part of the respondent. The legal duty of the employer to issue a written contract to the employee within two months of employment was not actualized. The failure by the respondent to sign the employment contract dated 30 April 2016 was gross misconduct as defined under Section 44(4) of the *Employment Act*. Lawful and proper instructions by the employer bind the employee to comply.
16. However, the appellant did not take any action.
17. The respondent was left at large. He reported to work as and when he wished and was paid his daily wage weekly. At the end of the employment relationship, the respondent was not bound under written terms.
18. However, the appellant's lapse in addressing the gross misconduct and the respondent's failure to execute the employment contract exposed the appellant. The respondent became protected under Section 37 of the *Employment Act* by continuing to report to work under unregulated work terms. He became entitled to terms and benefits under the law.
19. Without an employment contract, the respondent remained a casual labourer and cannot claim under any other title.
20. Desertion of duty is gross misconduct that justifies summary dismissal. Upon the causal employment of the respondent, the appellant reported the matter to the labour officer as required under Section 18 of the *Employment Act*. That report dated 11 November 2016 insulated the appellant from claims of notice pay and alleged unfair termination of employment. See *Haroon v Kashali* [2023] KEELRC 3451 (KLR); *Jawadu Hamad Omar v East Africa Sea Food Limited* [2017] KEELRC 178 (KLR) that



the report to the labour officer is a primary record for the court. This is the office located for the court to receive complaints at the first instance and assess the shop floor. Upon desertion of work, the employer has the legal duty to make a report to this office and submit that evidence in court once a claim is filed.

21. Under Section 18(4) of the *Employment Act*, upon desertion of duty, a report to the Labour office is made, and the employee terminal dues should be assessed based on the applicable law.
22. On the claim for accumulated leave days, under Section 28 of the *Employment Act*, an employee protected under Section 37 is entitled to leave at 21 days per year. However, accrued leave should accumulate up to 18 months under Section 28(4) of the Act.
23. In this case, the appellant made a case of various days when the respondent was absent from work without good cause. These days include 31st March to 9 April 2015; and
24. 28 June to 3 July 2016. The respondent did not consider these responses when tabulating his claims for accrued leave days. He does not offer a defence to such absence from duty.
25. On the claim for severance pay, the finding that the respondent deserted duty and the matter was reported to the Labour Office indicates that this is not a case of redundancy to justify an award of severance pay.
26. This was issued in error.
27. The respondent secured under Section 37 was entitled to a minimum wage on the claimed underpayments. His last day at work was 30 September 2016. Under the Wage Orders, the respondent placed at Mariakani, Kilifi County, was entitled to a daily wage of Ksh.349.50, and he declined the written contract that gave him the benefit of Ksh.12, 926.55 per month.
28. Within this period, the appellant paid the respondent Ksh.461 per day. This amount is over and above the legal minimum and includes the house allowance. Any claim beyond what was paid is not justified.
29. A claim of underpayments accrues daily or monthly. In this case, the respondent would be paid weekly, and hence, where he sought underpayments, this became a continuing injury and should have been addressed within 12 months from the date of cessation. See *Bichanga v Mount Kenya University* [2024] KEELRC 985 (KLR) and *Kitonyi v National Cereals Produce Board* [2024] KEELRC 968 (KLR). All continuing injuries must be addressed within 12 months, and beyond such a period, they are time-barred.
30. In this case, the claim for underpayments is not justified.
31. In this regard, the appeal is with merit and is allowed with costs. The judgment in Mombasa CMELRC 229 of 2019 is entirely set aside.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

