



**Buyoywa v Nobken General Supplies (Appeal E049 of 2022)
[2023] KEELRC 431 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 431 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E049 OF 2022
AK NZEI, J
FEBRUARY 16, 2023**

BETWEEN

PATRICK SHIKUVALE BUYOYWA APPELLANT

AND

NOBKEN GENERAL SUPPLIES RESPONDENT

*(Being an appeal from the judgment of Hon. Nabibya, Principal Magistrate
delivered on 16th June 2022 in Mombasa CM ELRC No. 130 of 2021)*

JUDGMENT

1. The Appellant was the claimant in Mombasa CMC-ELR Case no. 130 of 2021 whereby he had sued the Respondent alleging unfair termination of employment and claiming compensation for unfair termination of employment, salary underpayment from January 2014 to November 2018, one month salary in lieu of notice, salary for the month of November 2018, unpaid leave for 3 years, unpaid house allowance, service pay and unpaid public holidays.
2. The Appellant had pleaded:-
 - a. that he was employed by the Respondent as a driver since 1st January 2014 to 2nd November 2018 at a daily salary of ksh 350.
 - b. that on or about 2nd November 2018, the Respondent's director, One Kennedy Okello Odira, verbally terminated the Appellant's employment on account of alleged deteriorating health condition on the part of the Appellant and inability to drive.
 - c. that the reason for the Appellant's deteriorating health and inability to drive was as a result of an injury which the Appellant had sustained in a motor vehicle accident that took place on 14th September 2017 while the Appellant was driving the Respondent company's vehicle to deliver goods to a customer.



- d. that termination of the Appellant's employment was orchestrated by the fact that he (the Appellant) was persistently asking for assistance from the Respondent in paying his medical bills and procuring medicines for the fractures that he had suffered.
 - e. that the Respondent's decision to terminate the Appellant's employment was unfair and unprocedural, and that the Respondent acted in breach of provisions of both *the Constitution* of Kenya and the *Employment Act* 2007.
3. The claimant set out his claim against the Respondent as follows:-
- a. One month salary *in lieu* of notice.....ksh 23,039.40
 - b. Salary for the month of November 2018.....ksh 23,039.40
 - c. Underpayment for the period between
 - i. Legal Notice No. 197 ksh 16,602-700x12 (1st January 2016 to 31st December 2016)ksh 115,244.
 - ii. Legal Notice No. 117 ksh 18,595.20-7000x12 (1st January 2017 to 31st December 2017)...ksh 139,140.
 - iii. Legal Notice No. 3 ksh 23,039.40-7000x11 (1st January 2018 to 31st December 2018). ksh 176,433.40
 - d. Leave pay (ksh 23,039x3).....ksh 69,118.20
 - e. House allowance (15%X23,039.40X3 years)ksh 124,442.76
 - f. Service pay (15 days X11,519.70X 3 years).....ksh 34,559
 - g. 12 months salary being compensation for unfair termination of employment (ksh 23,039.40X12).....ksh276,472
- Total.....ksh 1,043,821.76
4. The Respondent filed Response to the Appellant's claim, denied the claim and pleaded:-
- a. that the Appellant was a long time friend of the Respondent who occasionally helped the Respondent with delivery of goods.
 - b. that the Respondent never terminated the claimant's employment as the Appellant had never been its employee; and that there was no connection between the alleged termination and the accident that took place on 14th September 2017.
 - c. that the Appellant was not entitled to the money claimed.
5. At the trial, the Appellant adopted his witness statement dated 3rd March 2021. The witness statement was a replication of the averments made in the statement of claim. The Appellant further produced in evidence documents listed on a list of documents filed together with the claim. The documents included a demand letter dated 27th January 2021, a police abstract form on a motor traffic accident that occurred on 14th September 2017 and a P3 Form. Cross examined, the Appellant testified that the Respondent's offices were in Kongowea, and that the claimant had other employees, including casuals. That the Appellant and the other employees were paid monthly in cash. That daily rates were totalled and paid at the month end.



6. The Respondent's witness, Kennedy Okelo Ochieng (DW1), adopted his statement dated 13th July 2021 as his testimony. He denied having employed the Appellant. He also produced some two documents in evidence.
7. Cross-examined, the Respondent's witness (DW1) testified:-
 - a. that he started seeing the Appellant in 2017, and that the Appellant helped the Respondent (DW1) occasionally in delivery of supplies, and would pay him in cash upon completion of that day's work.
 - b. that the Appellant got involved in an accident while working for that day.
 - c. that the Respondent (DW1) had send the Appellant when the accident occurred.
 - d. that the Appellant was assigned only when work was available and would be paid in cash.
8. The Respondent did not, however, produce any documents or employment records on his employment engagement with the Appellant from the year 2017 as DW1 alleged. It was not enough to tell the trial Court that the Appellant was assigned duty only when work was available. From when to when, what was the frequency of such assignments; was it on daily basis?
9. The Respondent (DW1) admitted on oath that he had send the Appellant when an accident occurred on 19th July 2019. The Appellant testified that the accident occurred while he was delivering goods to a customer. The Appellant testified that he remained in employment until 2nd November 2018 when his employment was orally terminated by the Respondent's director (DW-1)
10. The trial Court delivered its judgment on 16th June 2022. This judgement appears to be inconclusive. The Appellant appealed against the judgment and set out ten grounds of appeal, which I summarise as follows:-
 - a. that the trial magistrate erred in finding that the Appellant was a causal labourer hired intermittently when the Appellant had pleaded and adduced evidence that he worked continuously as a driver for the Respondent during the years 2016, 2017 and 2018.
 - b. that the trial magistrate erred in law and in fact by deciding the case before her against the weight of evidence.
 - c. that the trial magistrate erred in law and in fact by dismissing the Appellant's claim.

I will tackle the foregoing grounds together.

11. It is clear from the evidence on record that on a balance of probability, there was an employment relationship between the Appellant and the Respondent which, according to the Respondent started in the year 2017. The Appellant did not challenge or rebut the documentary evidence adduced by the Respondent which seemed to indicate that during the years 2015 and 2016, the Appellant worked as a driver for a company known as Reef Hotels (Management) Limited.
12. Upon considering the pleadings filed and evidence presented before the trial Court, issues that present for determination are as follows:-
 - a. whether the Appellant was employed by the Respondent and if so, for how long.
 - b. whether the Appellant's employment was terminated by the Respondent, and if so, whether the termination was unfair.
 - c. whether the Appellant is entitled to the reliefs sought.



13. This is a first appeal. As stated in the case of *Mursal & Another v Manese* [2022] eKLR:-
- “A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another v Associates Motor Boat Co. Ltd & Another* [1968] E.A. 123 and in *Peters v Sunday Post Ltd* [1958] E.A. page 424.”
14. On the first issue, and as already stated in paragraph 11 of this judgment, it is my finding that there existed an employment relationship between the Appellant and the Respondent, starting from the year 2017 as stated by the Respondent. The Appellant testified that this relationship continued until 2nd November 2018 when the Respondent verbally terminated it.
15. Failure by an employer to give a written contract to an employee stating the terms of the employment relationship should not, and cannot disadvantage the employee. Section 10(7) of the *Employment Act* provides that:-
- “if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
16. The particulars of a contract of employment prescribed in Section 10(1) of the *Employment Act* are enumerated in Section 10(2) of the Act, and they include:-
- a. the name, age, permanent address and gender of the employee.
 - b. the name of the employer
 - c. the job description of the employment.
 - d. the date of commencement of the employment.
 - e. the form and duration of the contract.
 - f. the place of work.
 - g. the hours of work.
 - h. the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefit.
 - i. the intervals at which remuneration is paid, and the date on which the employee’s period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and (emphasis added)
 - j. any other prescribed matter.
17. The Respondent produced in the trial Court a casual payment list of a company known as Reef Hotel (Management) Co. Ltd for some months in the years 2015 and 2016, ending on 22nd May 2016, on which the Appellant’s name appeared. The Respondent (DW1) testified that he started assigning the Appellant duties in the year 2017, without stating the exact date when this employer-employee relationship commenced in the year 2017. DW-1 testified that the Appellant was paid for work done



- each day worked. The Respondent did not produce any records in this regard. On the other hand, the Appellant testified that he was paid monthly at the rate of ksh 350 per day. The Respondent did not produce any employment contract or records in rebuttal of the Appellant's pleadings and oral evidence.
18. From the evidence on record, and on a balance of probability, the date of commencement of the Appellant's employment by the Respondent was after 22nd May 2016, and according to the Respondent, the date of commencement was 2017.
 19. On the second issue, the Appellant testified before the trial Court that his employment was terminated by the Respondent on 2nd November 2018 due to the Appellant's deteriorating health and inability to drive as a result of work injuries sustained by him on 14th September 2017 in the course of his employment with the Respondent. DW-1 admitted the occurrence of that accident while the Appellant was on duty. The Respondent (DW1) denied terminating the Appellant's employment, but did not tell the trial Court how the Appellant stopped working for the Respondent. It is my finding that the Respondent terminated the Appellant's employment.
 20. On whether this termination was unfair, it was not demonstrated that the Respondent adhered to the mandatory procedure prescribed in Section 41 of the Employment Act. It was also not shown that the Respondent complied with Section 35(1) (c) of the Act or that the Respondent acted in accordance with justice and equity in terminating the Appellant's employment (Section 45(4) (b) of the Employment Act). I find and hold that termination of the Appellant's employment by the Respondent was unfair.
 21. On the third issue, and having found that termination of the Appellant's employment was unfair, I award the Appellant the equivalent of eight months' salary as compensation for unfair termination of employment. The Appellant pleaded and testified that his salary was paid monthly in cash at the rate of ksh 350 per day. The equivalent of eight months' salary is ksh 84,000. I also award the Appellant ksh 10,500 being one month salary in lieu of notice as Section 35(1) (c) of the Employment Act was not complied with.
 22. The claims for salary underpayment, house allowance, leave allowance, service pay and public holidays worked were not proved, and are declined. The Appellant, who was represented by Counsel, should have done better in pleading and proving these claims, which are in the nature of special damages and must therefore be specifically pleaded and proved.
 23. Finally, and having considered written submissions filed on behalf of both parties, the trial Court's judgment delivered on 16th June 2022 is hereby set aside, and is substituted with judgment for the Appellant against the Respondent as follows:-
 - a. the equivalent of eight months' salary being compensation for unfair termination of employmentksh 84,000
 - b. one month salary in lieu of noticeksh 10,500Total ksh 94,500
 24. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
 25. The Appellant is awarded costs of this appeal and of the proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16THFEBRUARY 2023.

AGNES KITIKU NZEI



JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Appellant

..... for Respondent

