



REPUBLIC OF KENYA



**Njoki v Kilonzo (Appeal E149 of 2021) [2023] KEELRC 748 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 748 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**APPEAL E149 OF 2021**  
**B ONGAYA, J**  
**MARCH 28, 2023**

**BETWEEN**

**JACQUELINE NJOKI ..... APPELLANT**

**AND**

**GEORGE KIOKO KILONZO ..... RESPONDENT**

*(An appeal from the judgment of Hon. A.N. Makau Principal  
Magistrate, Nairobi, delivered on 29.10.2021 in ELRC No. 1126 of 2019)*

**JUDGMENT**

1. The appellant filed the memorandum of appeal dated November 23, 2021 through J.K.Kibicho & Company Advocates. The appeal was against part of the judgment and the grounds of appeal were that the learned trial Principal Magistrate erred in law and fact as follows:
  - a. In holding that the respondent's employment had been converted from casual to permanent employment and awarding the respondent the reliefs sought for unpaid leave and service pay.
  - b. In finding that the respondent was being paid Kshs 20,000.00 as monthly salary without any sufficient evidence to prove the same.
  - c. In holding that the respondent was entitled to compensation for accrued unpaid leave of Kshs 420,000.00 contrary to evidence adduced by both parties.
  - d. In finding that the respondent was entitled to service pay of Kshs 210,105.00.
  - e. By overly relying upon the evidence of the respondent which was not proved when awarding the remedies.
  - f. By erring in evaluation and analysis of the pleadings and the evidence adduced.





responsibilities. The monthly salary was Kshs 20,000.00. On November 25, 2016 his services were unilaterally and summarily terminated by the appellant on allegations that the respondent had stolen valuables from the respondent through her house-help. The appellant continued to harass the respondent through persons claiming to be police officers which forced him to report the matter at Parklands Police Station and investigations showed the respondent was not at fault with respect to allegations of theft. The employment was terminated unlawfully, unfairly, maliciously and irregularly upon unfounded and unsubstantiated grounds and was not given chance to make representations – the aim being to avoid payment of final dues and was contrary to article 41 of the Constitution and section 41 of the Employment Act, 2007. The certificate of service was not issued per section 51 of the Act. The particulars of claim included:

- a. Unpaid salary for November, 2016 Kshs 20,000.00.
  - b. One-month accrued pay *in lieu* of the notice Kshs 20,000.
  - c. Accrued leave for 21 years Kshs 420,000.00.
  - d. Service pay for 21 years Kshs 210,105.00.
  - e. Compensation for unfair termination Kshs 20,000.00 x 12 months = Kshs 240,000.
  - f. Total claim Kshs 910,105.00.
6. The respondent prayed for judgment against the appellant for:
- a. A declaration that the termination of the respondent’s employment was unfair, unlawful, and in breach of sections 41, 45 of the Employment Act.
  - b. Award of Kshs 10,134,000.00 on account of terminal dues owed to the respondent.
  - c. Damages for unlawful termination of employment to the tune of Kshs 552,000.00 representing 12 months’ salary.
  - d. An order for issuance of a certificate of service by the appellant to the respondent.
  - e. Costs of the suit plus interest.
  - f. Any other or further relief as the Court may deem fit and just.
7. The appellant filed on August 19, 2019 the reply to memorandum of claim through M/S J. K. Kibicho & Company Advocates. The appellant pleaded as follows. The respondent was engaged as a casual labourer doing menial jobs at appellant’s work place and at appellant’s rental premises if and when the work was available up to 2002 when his services were terminated for incompetence, insubordination and forgery. Between 2002 to 2011, the respondent never worked for the appellant in any capacity and at no time was there a termination of employment unilaterally, verbally, and unprocedurally. Between May –November 2016, the respondent stole valuable items and jewellery from the appellant’s possession in collusion with the appellant’s house help and after being confronted and requested to defend himself, failed to do so prompting the appellant to place him under suspension for two weeks pending investigations. Thereafter the respondent disappeared and never reported back to work after the two weeks’ suspension. The respondent was entitled to summary dismissal in view of the theft but he was not dismissed and did not perform duties diligently. Further and in alternative, the respondent on diverse dates in 2016 without the appellant’s authority removed the appellant’s valuable items and jewellery from the appellant’s premises and a report made at Parklands Police Station. He was suspended for two weeks to allow investigations into the theft. At the end of the suspension, the respondent failed to resume duty. There was no ill-will, illegality, or irregularity. The appellant denied



all the claims and prayed that the respondent's suit before the trial Court be dismissed with costs. A reply to the response was filed on August 27, 2019 reiterating the memorandum of claim.

8. As submitted for the respondent, this being a first appeal the Court's role is to re-evaluate the evidence and make its own conclusions bearing in mind that it did not by itself take the testimonies of the witness. The Court has considered the record of appeal, the memorandum of appeal, the memorandum of cross-appeal, and the submissions filed for the parties and returns as follows.
9. The 1<sup>st</sup> issue for determination is the tenure of the employment relationship, the terms, and the applicable salary. The parties are in agreement that they were in some employment relationship. What is in dispute is the tenure, the terms of service, and the attached rate of payment. The respondent testified that he worked for the appellant initially as a seller of wines and spirits and later a care taker and a driver. He had been employed initially in 1995. The appellant confirmed that the respondent was employed in her wines and spirits shop since 1995. He worked for 6 years because in 2021 the appellant's contracted estate agent refused to work with the respondent who therefore lost the employment in 2002 when he was fired by the appellant's agent. The respondent gave no account by way of testimony to respond to the appellant's account. The appellant's further testimony was that between 2002 to 2011 the respondent did not work for him after termination in 2002. Similarly, the record shows that the respondent did not answer to that account. The appellant further testified that the employment relationship resumed in 2011 when the claimant requested to be re-employed and he worked until events of the separation in 2016. The Court returns that there is no reason to doubt the appellant's account in circumstances of the case. In 1995 to 2001, the appellant testified that the respondent earned Kshs 3,000.00 and there is no reason to doubt that figure. As for the period 2011 to 2016 the appellant states the respondent was adequately compensated without stating exact wage amounts. In the witness statement the respondent stated he earned Kshs 20,000.00 per month. In the cross-examination he stated, "I was employed by respondent in 1995. I cannot recall how much salary I was being paid." The Court finds that the respondent's contradictory testimony that he cannot recall the wage and then the monthly wage was Kshs 20,000.00 cannot be trusted. The Court returns that it is that he was duly compensated for the work done at an amount that appears not to have been fixed but varied based on assignments. In making that finding, the Court has considered the memorandum of claim. At paragraph 11 he bases the calculations on Kshs 20,000.00 monthly pay. However, in the prayers he introduces Kshs 10,134,000.00 in terminal dues upon unknown multiplier or base. He also introduces a prayer for Kshs 552,000.00 purported to represent damages for unlawful termination at 12 months' salary and, which the Court finds to have no co-relation as is inconsistent to the alleged Kshs 20,000.00 monthly wage. The Court returns that the respondent worked for the appellant from 1995 to 2001 as a seller of wines and spirits at Kshs 3,000.00 per month and then from 2011 until separation in 2016 upon due compensation based on assigned tasks or errands.
10. The 2<sup>nd</sup> issue was whether the termination was unfair. The testimonies by the parties are that the circumstances were that the appellant travelled and upon return her jewellery was missing. The respondent and the appellant's house-help were implicated. The appellant reported the matter at Parklands Police Station. The appellant told the respondent and her house help to go away (take suspension) for 2 weeks to think about it. The appellant testified that the respondent then never came back so that he deserted without being dismissed at all. On his part, the respondent testified confirming allegations of theft of the jewellery and involvement of the police. He further testified that the house help claimed it was the respondent who had asked for the bangles or appellant's jewellery. He further stated that the appellant never called him back to work. He stated in cross-examination that he also felt threatened and made his own report to the police station. The Court has considered that evidence. The Court returns that indeed the house help reported to the appellant in presence of the respondent that it was the respondent who had taken the jewellery. The Court returns that with such undisputed



report, whether the respondent took (stole) the jewellery or not and whether he was to be recalled from the suspension or he was by his own obligation to report back, the Court returns that such report amounted to an existing and valid reason as at the time of separation and which otherwise entitled the appellant to summarily dismiss the respondent. Further, the Court returns that the evidence was that the respondent was put on two weeks' suspension and thereafter by his own testimony he was threatened and did not go back. The Court finds that he was never dismissed and further returns that there was no constructive unfair termination as urged for the respondent because, at all material time the appellant has not been shown to have breached the terms and conditions of service that would push the respondent to consider himself as dismissed. The Court returns that there was no termination at all and in any event the reasons for separation were genuine and existed per section 43 of *the Act* and were fair per section 45 of *the Act* as relating to the appellant's alleged misconduct of theft.

11. Turning back to the grounds of appeal and in view of the foregoing findings, the Court returns as follows:
  - a. As submitted for the appellant, the trial Court did not err in finding thus, "...it is correct that he was not called back to work and he did not go back to work after the expiry of the two weeks' suspension. He is not claiming the suspension was illegal or unfair and as such I find there were sufficient reasons for the respondent to suspend him for two weeks. It was the claimant's duty to report back to work and not wait to be called back. I find his excuse that he was not called back to work to be unjustifiable when he knew there were pending issues against him under investigations." The Court upholds the trial Court's finding that there was no unlawful termination. The Court further returns that in the circumstance, the trial Court did not err in finding that notice pay and compensation were not available. The cross appeal must fail.
  - b. The Court finds that while service pay would be available to the respondent under section 35 of *the Act* as he was not a member of NSSF, it is difficult to determine the base for award of such pay as the Court has already found that the respondent was duly compensated for work done as assigned and the respondent failed to show a regular rate of wage. Further the trial Court erred to the extent that the evidence is that from 2002 to 2011 the respondent was not in the appellant's employment so that service pay would not fall for the entire period from 1995 to separation in 2016. The Court further considers that a claim for service pay for 1995 to 2001 would fail as time barred under section 4(1) of the *Limitation of Actions Act* prescribing 6 years for a claim based on contract and even, section 90 of the *Employment Act, 2007* if it were to apply, but which did not for that cause of action, prescribing 3 years of limitation.
  - c. Similarly, the trial Court erred in awarding purportedly accrued leave days for 21 years whereas the respondent had not served for 21 years and, the wage base for awarding the same was not explained at all. Further, it was in error for the trial Court to award salary for 25 days worked in November, 2016 in view of the incoherent account of the wage base and the Court having found the evidence was that the respondent was assigned and duly compensated for the assignment done by the respondent, upon a moving pay rate as it is in piece rate work. As submitted for the appellant, there was no reason to discredit the appellant's account that the respondent was paid per errand and there was no monthly wage. The appellant's submissions are upheld in that regard.
  - d. The Court has considered all circumstances of the case including the informal manner the appellant managed the employment relationship and returns that each party to bear own costs of the suit and appeal. The Court considers that had the appellant formalised the relationship such as by setting out the errand (piece rate or work) terms of service in writing, the dispute might not have escalated in the manner it turned out to be.



In conclusion the appeal and cross-appeal are hereby determined with orders:

1. The cross-appeal is dismissed.
2. The trial Court's judgment is hereby varied by setting aside the award in favour of the respondent being unpaid salary Kshs 20,000.00; accrued leave for 21 years Kshs 420,000.00; service pay Kshs 210,105.00; and costs of the suit.
3. The appeal is allowed.
4. Each party to bear own costs of the appeal and proceedings in the lower court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS TUESDAY 28<sup>TH</sup> MARCH, 2023**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

