



**Hassan t/a Big Road Enterprises v Juma (Appeal E009 of 2022)
[2023] KEELRC 1262 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1262 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E009 OF 2022**

**M MBARÚ, J
MAY 11, 2023**

BETWEEN

ISMAIL A HASSANT/A BIG ROAD ENTERPRISES APPELLANT

AND

GODFREY NAMISI JUMA RESPONDENT

*(Being an appeal against the Judgement of Hon ML Nabibya delivered
on 21st January, 2022 in Mombasa CM ELRC No. 814 of 2019.)*

JUDGMENT

1. The background to the appeal is a claim filed by the respondent herein in Mombasa CM ELRC No 814 of 2019 on the grounds that he was employed by the appellant as a turn boy at a wage of Kshs 6,000 per month from February 13, 2015 to July 30, 2019 when his employment was terminated unfairly and without payment of his terminal dues and hence claimed the following dues;
 - a. Notice pay of Kshs 6,000;
 - b. Salary for July 2019 Kshs 6,000;
 - c. Leave allowance from February, 2015 to July, 2019 Kshs 16,800;
 - d. Service pay for 4 years Kshs 13,800;
 - e. Underpayment of wages for 4 years Kshs 368,580;
 - f. Compensation Kshs 72,000;
 - g. Certificate of service; and
 - h. Costs of the suit.



2. In response, the appellant's case was that the respondent was employed as a tire helper on April 1, 2016 and worked until August 30, 2017 when he voluntarily left employment. He re-applied for employment on January 12, 2019 and worked until July 29, 2019 when he voluntarily left without notice. At the time, he was being paid a wage of Kshs 6,000 per month. There was no termination of employment, the respondent voluntarily left his employment without notice and through a letter dated August 9, 2019 the appellant informed the labour officer that the respondent had absconded duty. The appellant would close its offices in December and allow all employees including the respondent to take annual leave and the claims made should be dismissed.
3. The appellant filed a contract agreement dated April 1, 2016, a contract agreement dated January 12, 2019 and letter dated August 9, 2019 to the labour officer together with payment statements.
4. The trial court heard the parties and in judgment delivered on 21st January, 2022 held that there was unfair termination of employment and awarded the respondent notice pay, leave allowance, service pay, underpayments and 12 months' compensation.
5. Aggrieved, the appellant has challenged the trial court on the grounds that employment did not commence in February, 2015 as alleged since there is a contract issued in the year 2016 and then re-engaged on January 12, 2019. The appeal is also that in evidence the respondent admitted that he had signed his contracts and letters of appointment and had such records been taken into account, it would have been apparent that employment did not commence in the year 2015. Upon the respondent absconding duty, a letter was sent to the Labour officer on August 9, 2019 to demonstrate the respondent had absconded duty and the finding that there was unfair termination of employment was erroneous and notice pay and compensation should not be awarded.
6. The appeal is also that the respondent deserted duty on the basis that he was ill but failed to produce a medical certificate and by proceeding to assess underpayments, annual leave and costs was in error and the appeal should be allowed and the judgment set aside.
7. Before the trial court, the respondent testified that on July 30, 2019 he reported on duty after being away for 2 days and told his supervisor that he was unwell. The supervisor, Mr Ali advised him to go back home and when he returned he had not carried his treatment notes and Mr Ismael the supervisor sent him away.
9. Upon cross-examination, the respondent testified that he signed a letter dated November 4, 2019 and a contract dated 1.4.4.2016 [April 1, 2016] and January 12, 2019 but he had started work in the year 2015. In the year 2017 he was at work but without any contract.
10. Both parties filed written submissions which are analysed taking into account this being a first appeal the court has the duty to re-evaluate the evidence and arrive at own conclusions taking into account the trial court had the opportunity to hear the parties in evidence.
11. Absence from work due to sickness is allowed but upon return, an employee is required to submit a certificate of incapacity in terms of Section 30 and 34 of the *Employment Act, 2007* (the Act). Where indeed the respondent got ill after being away at work on 28th and July 29, 2019 his supervisor, Ali allowed him to take time and attend treatment. Upon return on July 30, 2019 the respondent did not have any medical record of illness. In his testimony before the trial court he admitted to these facts.
12. Being away from work without a justifiable cause is a sufficient ground for summary dismissal pursuant to Section 44(4)(a) of the *Act*. An employee who is allowed time off due to illness and fails to submit a certificate of incapacity effectively frustrates his own employment and cannot blame the employer



- as held in the case of BIFU v Barclays Bank of Kenya Limited [2014] eKLR that once an employee is allowed time off to attend to his illness, a duty exists to return to work with a certificate of incapacity.
13. Without producing any certificate of incapacity, the respondent was absent from work without justifiable reasons and he frustrated his own employment. The fact of the appellant sending notice to the Labour Officer on August 9, 2019 demonstrates compliance with the provisions of Section 18(5) (b) of the Act which requires an employer to report to such office termination of employment where the subject employee cannot be reached;
 - (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.
 14. Employment terminated for a valid reason, notice pay and compensation are not available. To this extent the appeal is found with merit.
 15. The respondent admitted to signing contract dated April 1, 2016. In the year 2017 there was no contract. He signed another contract on January 12, 2019.

The claim before the trial court was filed on September 12, 2019.
 16. Employment was regulated under a written contract for the year 2016, casual terms in the year 2017 and there is no account for 2018 and a new contract was issued on January 12, 2019. In terms of Section 90 of the Act, in assessing the claims made, the court can only go back to the last written contract of January 12, 2019. The reason is that an employer is allowed to convert casual employment to a written contract spelling out terms and conditions of service in terms of Section 8, 9 and 10 of the Act.
 17. On the claim for wages due in July, 2019 the respondent claimed for Kshs 6,000 which was awarded.
 18. On the claims for underpayments, the letter of employment stated that the respondent was a Tyre Helper. Such title is not defined under the Wage Orders. The nearest this can be is a general worker. for the period of January 12, 2019 to 30 July, 2019 the minimum wage for a general worker was Kshs 13,572.90 and the respondent was earning Kshs 6,000 per month with an underpayment of Kshs 7,572 and for 7 months the underpayment is Kshs 53,010.30.
 19. With regard to service pay, the appellant filed various payment statements with deductions for days the respondent remained absent from work. Service pay is due in terms of Section 35(5) and (6) of the Act where there are no statutory deductions. The benefits accrue annually. The respondent worked under a year in his contract and service pay is calculated based on an annual pay and not prorated.
 20. On the claim for leave pay, for the 7 months under the contract dated January 12, 2019 Section 28(1) (b) gives the formula of 1.75 days each month worked before a year is complete
 - (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.
 21. At a wage of Kshs 13,572.90 for 7 months, the leave pay due is Kshs 5,541.
 22. Certificate of service should be issued in terms of Section 51 of the Act whatever reasons existed leading to termination of employment.



23. On the reasons above, the appeal partially succeeds and the judgment in Mombasa CMELRC No 814 of 2019 is hereby reviewed and the following awarded;
- a. Underpayment awarded at Kshs 53,010.30;
 - b. Wage for July, 2019 Kshs 6,000;
 - c. Leave allowance for 7 months Kshs 5,541;
 - d. Certificate of service; and
 - e. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

