



**Kamau v Delta Point Distributors Limited t/a Milele Lounge (Appeal E045 of 2022) [2023] KEELRC 1161 (KLR) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1161 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**APPEAL E045 OF 2022**  
**NJ ABUODHA, J**  
**MAY 5, 2023**

**BETWEEN**

**DAVID KAMAU ..... APPELLANT**

**AND**

**DELTA POINT DISTRIBUTORS LIMITED T/A MILELE  
LOUNGE ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of appeal dated 7<sup>th</sup> April 2022, the Appellant herein faulted the judgment of the lower court on grounds inter alia:
  - i. That the Learned Trial Magistrate erred in fact and in law in failing to hold that where the employer fails to produce a written contract of service, the burden of proving or disproving an alleged term of employment stipulated in the contract is on the employer.
  - ii. That the Learned Trial Magistrate erred in fact and in law in failing to find and hold the Appellant was entitled to an award of unpaid annual leave days, public holidays worked and not paid, unpaid overtime and unpaid rest days.
  - iii. That the Learned Trial Magistrate erred in fact and in law by awarding the Appellant 4 months' salary for wrongful and unfair termination, an award which was inordinately low.
  - iv. That the Learned Trial Magistrate erred in fact and in law in failing to take into account the principles of making an award of compensation as set out under Section 49 of the *Employment Act*.



2. In the submissions in support of the appeal, Counsel for the Appellant submitted inter alia that the Trial Magistrates' finding that the Appellant was not entitled to the award of unpaid rest fays for lack of evidence was erroneous. According to the Counsel, the Trial Magistrate failed to appreciate that where an employer fails to produce a written contract of service, the burden of proving or disproving an alleged term of employment is on the employer.
3. The Appellant's evidence was that his engagement was oral. Under Section 9 of the *Employment Act* any employment for a period of more than three months or for work which cannot be completed within three months shall be in writing. The contract between the Appellant and the Respondent having been more than three months ought to have been in writing with details provided for under Section 10 of the Act provided for therein.
4. Counsel further submitted that subsection 7 of Section 10 of the *Act* provided that in my legal proceedings where an employer fails to produce a written contract or particulars prescribed in subsection 1 the burden of proving or disproving an alleged term of employment shall be on the employer. In this regard Counsel relied on the case of *Martin Ileri Ndwiga v Olerai Management Company* [2017] eKLR where the Court stated in material part that:

“Where an employer fails to issue an employee with a written contract of service, the word of the employee is to be believed. The contract of service is not only useful to the employee but also protects the rights of both the employer and employee in the employment relationship. It is therefore to the benefit of the employer such as the respondent to issue a contract of service/employment stating the terms and conditions of such employment.”
5. On the issue of leave, Counsel submitted that Section 28 of the *Act* gives an employee the right to take annual leave of 21 days or as may be agreed between the parties. The Appellant's evidence is that he never took his annual leave for the two years he was employed. It was the Respondent's duty as the custodian of work records to provide that such leave was taken by producing the leave records. The Respondent did not adduce any evidence to show that the Appellant took leave for the two years he worked. It was the Respondent's duty as the custodian of work records to prove that such leave was taken by producing the leave records. The Respondent did not adduce any evidence to show that the Appellant took leave for the years he worked. The Learned Trial Magistrate correctly found that the Respondent failed to address the issue but erred in making a finding that the Appellant had not shown he applied for leave and was denied. In absence of such proof, the Appellant was entitled to unpaid annual leave days for the years served.
6. Regarding rest days, the Appellant's Counsel submitted that the Appellant testified that he worked on every Sunday and was never compensated and further that the Respondent never provided record to rebut the allegation. According to Counsel, the Trial Magistrate erred when he stated that the Claimant had not provided to the required standard that he was not compensated for working on Sundays. According to Counsel, the Trial Magistrate ought to have justified or explained the basis of the finding.
7. The Appellant testified that he never took leave on public holidays and that he worked for 27 public holidays which were particularized in the memorandum of claim. The Respondent never provided any records to rebut the Appellant's claim. According to Counsel, the Trial Magistrate rightly observed that the Respondent neither provided any attendance list to show the Claimant/Appellant worked on the alleged days and was paid yet dismissed the claim. Counsel made similar submissions concerning overtime stating that the Claimant used to work every day from 8.00 am to 8,00 pm for six days but was never compensated for the extra hours. This evidence was never rebutted by the Respondent who produced no records in form of clocking machine printout or attendance/time sheets.



8. Concerning the award of four months' salary as compensation for unfair termination, Counsel submitted that this award was made without taking into account the principles of awards as set out under Section 49 of the Act. Counsel further submitted that the award for four months' salary was inordinately low. In this regard Counsel relied on the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR where the Court of Appeal stated that:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
9. Counsel submitted that in the judgment the Trial Magistrate did not record any analysis of the factors considered in arriving at the award of four months. The Court did not consider the Respondent's length of service or circumstances under which the dismissal took place.
10. The Respondent on their part submitted that it was not in contention that the Appellant was served with a notice to show cause on the day he walked out in protest. He was further given various opportunities to attend to his employer's place of work and provide insight as to the audit queries but he deliberately and willingly ignored to respond adequately. The Appellant instead appointed his lawyer who wrote several letters on his behalf to the Respondent. It was Counsel's submission that none of these letters offered an explanation as to the issues raised but were instead geared towards demanding payments for alleged unfair termination.
11. Counsel further submitted that the Trial Court having made a finding as to the entitlements of the Appellant, the various prayers now sought are afterthought and unwarranted. The Appellant has made claims under various heads which the Respondent addressed before the Trial Court and were considered by the Court in entering judgment. The Trial Court made a finding to the effect that the Appellant was unfairly and unlawfully terminated and proceeded to exercise its judicial discretion to make an award for a five months' salary compensation under this head. This award was arrived at after careful consideration of the factors to be taken into consideration under Section 49(4) and more specifically the employment duration of less than two years. In support of exercise of the discretion of the Court, Counsel relied on the case of *Mbogo & another v Shah*.
12. On the issue of unpaid annual leave, Counsel submitted that the Appellant was employed in the hospitality industry which was characterized by peak and off peak season. Counsel therefore invited the Court to take judicial notice that the Respondent (sic) always took extra off days during off peak seasons to compensate for his annual leave days. Counsel further submitted that there was no pleading nor averment made towards applying for leave and the same being declined by the Respondent.
13. Concerning unpaid rest days, the Respondent submitted that the Appellant's work schedule was flexible as he was expected to work during peak hours and his reporting time was adjustable. The Appellant was in addition adequately compensated for the time he worked and no complaint was lodged concerning unpaid rest days. Further, it was not humanly possible for one to work for seven days without a rest. Besides the Appellant during his testimony confirmed that he worked for six days a week from Monday to Saturday thus leaving Sundays as his official rest day.
14. Regarding public holidays worked and not paid, it was submitted that the Appellant was always given extended off days during the off peak season to compensate him for work down during any public holiday. The claim that the Appellant worked during public holidays therefore rightfully failed.



Further, public holidays are gazette and were in constant change each year. The Appellant however lumped up all the public holidays for the two years he worked without proof or confirming how these arose.

15. Concerning house allowance, the Respondent submitted that the Appellant was paid a gross monthly salary of Kshs.30,000/=. According to the Respondent, this was a consolidated salary which amount reasonably assisted the Appellant to meet accommodation costs.
16. This is a first appeal and has always been stated, its role as such is to re-evaluate, re-assess and re-analyze the evidence on record and determine whether the conclusions reached by the Trial Court should hold. The Court however keeps in mind that it never listened to witnesses and observed their demeanor during cross examination.
17. On the issue of the award of four months' salary as compensation for unfair termination, even though the Trial Court did not give reasons for the same, this Court as the first Appellate Court notes that the Appellant had worked for the Respondent for only two years. It could not be said that during the period he ah invested so much of his tie on the job to the extent that the termination could have put him to greater disadvantage.
18. Borrowing from the rules of redundancy of "last in, first out", the Appellant could in the event of a redundancy been among the first to be declared redundant under this rule.
19. The Court therefore finds the award of four months' salary as reasonable in the circumstances and will not disturb the same.
20. Concerning other heads of claim, the thrust of the Appellant's contention has taken on the provisions of Section 9, 10 and Section 74 of the *Employment Act*. Section 9 requires employment contracts for a period exceeding three months to be in writing. While Section 10 provides for employment particulars. Section 74 places the responsibility of keeping employment records on the employer. Section 10(7) provides that in any legal proceedings where an employer fails to produce a written contract or the written particulars prescribed under Section 10(1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
21. The foregoing provision places these responsibilities on the employer. It therefore follows that failure to discharge this statutory burden inevitably leads to a finding in favour of an employee who alleges that his or her contracts included the stipulation under Section 10(1).
22. The Court has carefully considered the evidence of the Respondent's only witness Mr. Erick Mmata Keya and has noted that he largely dwelt on the reasons and circumstances under which the Appellant left or was terminated from employment. He did not rebut either directly or indirectly the allegations by the Claimant concerning leave, rest days, public holidays, overtime and house allowance. The Learned Trial Magistrate therefore had no ground to refuse to grants the Appellant these prayers during the trial. These grounds of appeal therefore are successful and the Court therefore substitutes the order of the Trial Court dismissing these heads of claim and hereby with an order allowing and entering judgment for the same as computed under paragraph 16 of the statement of claim.
23. The appeal being partially successful, each party shall bear their own costs.
24. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF MAY 2023**

**ABUODHA J. N.**



**JUDGE**

**In the presence of:-**

**Mugwe for the Appellant**

**Wangare for the Respondent**

