



**Haji v Syed Hassan Zaidi t/a Imamia Electrical & Hardware (Employment and Labour Relations Appeal E022 of 2022) [2023] KEELRC 1200 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1200 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E022 OF 2022**

**M MBARŪ, J**

**MAY 4, 2023**

**BETWEEN**

**BWANA RASHID HAJI ..... APPELLANT**

**AND**

**SYED HASSAN ZAIDI T/A IMAMIA ELECTRICAL &  
HARDWARE ..... RESPONDENT**

*(being an appeal against the judgment and decree of the learned trial magistrate Hon. Charles Ndegwa, SPM delivered on 8th March 2022 in Mombasa CMELRC No.729 of 2019)*

**JUDGMENT**

1. The background of the appeal herein is that on July 8, 2016 the appellant was employed by the respondent as a driver on a wage of Kshs 15,000 per month which increased to Kshs 18,000 by November 26, 2018 when his employment was terminated. On November 24, 2018 the appellant reported to work but was accused of stealing from the respondent then directed to go home and await communication only to have his employment terminated without notice or payment of terminal dues. the appellant claimed for;
  - a. Notice pay at Kshs 21,924.30;
  - b. Unpaid leave for 2 years at Kshs 35,445.48;
  - c. Prorated leave for 4 months Kshs 5,907.58;
  - d. Service pay for 2 years Kshs 25,318.20;
  - e. Underpayments for 27 months Kshs 106,442.10;
  - f. Compensation for unfair termination of employment at Kshs 263,307.60; and



- g. Costs.
2. In response, the respondent's case was that on November 24, 2018 he bumped into the appellant in the washroom as he was exiting and found several goods stashed in the washroom. He immediately summoned him for an explanation on the said goods but there was no satisfactory answer and for purposes of conducting investigations, he should proceed with his duties but on November 26, 2018 the appellant failed to report back to work. There was no termination of employment but the appellant absconded duty and hence left employment on his own volition.
  3. The response was also that the appellant was allowed to take his annual leave, NSSF deductions were made and remitted and for absconding duty, no compensation or notice pay should be awarded.
  4. In his judgment, the Leaned Trial Magistrate held that the appellant absconded duty after being found to have stolen goods from the respondent and he had to prove the claims for underpayment and was awarded service pay, leave pay, and for absconding duty he should pay the respondent in lieu of notice.
  5. Aggrieved by the judgment of the trial court, the appellant challenged the same on the grounds that the findings that he absconded duty and should pay in lieu of notice was an error of law and fact, the underpayments were not assessed properly and he should be awarded as claimed.
  6. Both parties attended and agreed to file written submissions.
  7. The appellant submitted that there was no evidence that he had absconded duty or abandoned his employment as held in *James Okeyo v Maskant Mubas [2021] eKLR* that an employee does not dismiss himself and the decision to end employment should come from the innocent party. Where the appellant is alleged to have absconded duty, the respondent should have invoked the provisions of Section 44 of the *Employment Act, 2007* (the Act). the respondent did not call the appellant for a disciplinary hearing or issue any notice after the alleged abandonment of employment and hence notice pay and compensation should be awarded as held in *James Ashiemi Namayi v Menengai Oil Refineries Limited [2016] eKLR*.
  8. The appellant also submitted that under the provisions of Section 41 of the Act, he should have been invited to attend a disciplinary hearing before his employment was terminated by the respondent and hence the trial court erred in failing to award him notice pay, compensation or assessing his underpayments.
  9. The respondent submitted that the appellant has already been paid the judgment award of Kshs 17,007 and with such settlement, the appeal should be dismissed with costs. The trial court correctly made a finding that there was abandonment of work without notice contrary to Section 44(4)(a) of the Act which allow for summary dismissal as held in *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited [2020] eKLR*. Absconding duty without good cause is voluntary termination of employment and in this case, the respondent made efforts to trace the appellant without success.
  10. The finding that the appellant failed to prove his claims for underpayment were correct and should be upheld and the appeal has no merits.
  11. This being a first appeal, the court is required to re-evaluate the evidence and made own conclusions based on the record and the submissions by the parties.
  12. The twin issues which emerge for determination are whether the trial court made a correct analysis of the evidence before it and on the findings.



13. Where an employee is alleged to have absconded duty, such amounts to desertion and summary dismissal should issue subject to the provisions of Section 44(4)(a) of the Act save, the employer should ensure due process pursuant to Section 41(2) of the Act. the employer must invite the employee to a hearing on short notice and allow the employee to make his representations in the presence of another employee.

Section 41(2) of the Act requires that;

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
14. Where the employer is unable to address the provisions of Section 41(2) of the Act due to the continued absence of the employee, the circumstances of such absence must be addressed and demonstrated by the employer. This is by showing that efforts were taken to trace the employee through the last known address, the given employment details were applied to contact the employee and where such failed, notice issued to the Labour Officer in the area as required under Section 18(4) and (5)(b) of the Act which requires that upon summary dismissal, the employer should pay the employee all owing dues and where such employee cannot be traced, the matter reported to the Labour Officer.
- (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
- (5) Upon the termination of a contract of service—
- (a) .
- (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.
15. Therefore, where an employer is unable to comply with the mandatory provisions of Section 41(2), 44(4) or 18(5) of the Act, the circumstances of such matter must be brought to the attention of the court. In the case of *Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021)* (Judgment), the court held that;

'Even where an employee had committed gross acts of misconduct, which acts warranted summary dismissal, the law required that before such sanction was undertaken, an employer had to ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer was unable to hear the employee in defence, such had to only be in exceptional circumstances which the employer had to demonstrate.

Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.'

16. In this case, there is no notice which the respondent issued to the appellant to resume duty after his alleged abandonment of duty, there is no letter sent to his last known address and there is no notice issued to the Labour Officer. The response that there was abandonment or abandonment of duty



leading to termination of employment lacked any justification and the finding of the trial court in this regard was in error.

17. With regard to assessment of the claims made, the appellant was a driver employed on July 8, 2016 earning Kshs 15,000 per month which was later increased to Kshs 18,000 and is claiming underpayments from July, 2017 to November, 2018.
18. Under the Regulation of Wages (General) (Amendment) Order, 2017 taking effect from May 1, 2017 a driver's minimum wage was Kshs 17,447.15 per month. On a wage of Kshs 18,000 the appellant was not being underpaid.
19. For the period of May 1, 2018 the minimum wage for a driver was Kshs 19,319.50 and until October 30, 2018 the underpayment of Kshs 1,319.50 x 6 total due Kshs 7,914.
20. On the findings that the appellant absconded duty and hence he should pay in lieu of notice, on the analysis above, without the respondent complying with the mandatory provisions of Section 41(2) of the Act, notice pay is due based on the last due wage under the Minimum Wage Orders all at Kshs 19,319.50.
21. Without taking the appellant through the due process to address any misconduct, pursuant to Section 43 and 45 of the Act, this resulted in unfair termination of employment and compensation is due. In assessing the compensation to be awarded, the court is required to look at the provisions of Section 45(5)(b) of the Act with regard to the conduct and culpability of the employee up to the date of termination. The appellant was alleged to have been found with stolen goods. Such matter is not addressed or challenged. The evidence by the respondent that the appellant was found with stolen goods was not challenged in any material way. To award compensation in such circumstances would not suffice and such is tabulated at zero (0).
22. In the Memorandum of Claim, the appellant claimed for service pay for two years and this was awarded at Kshs 16,500. In his evidence, the appellant admitted that he was issued with an employment contract dated July 8, 2016 and the wage paid was inclusive of the NSSF dues. Service pay is only due where the employer fails to abide
23. with the provisions of Section 35(5) of the Act. Having admitted the contract terms, to award service pay is in error.
24. In the result and for reasons given in the assessment, the appeal is allowed and the judgment in Mombasa CMELRC No 729 of 2019 set aside and substituted with the following orders;
25.
  - a. Notice pay Kshs 19,319.50;
  - b. Underpayments Kshs 7,914;
  - c. 21 leave days Kshs 12,600;
  - d. Pro-rated leave days Kshs 5,907
  - e. Dues (a), (b), (c) and (d) shall be paid less Kshs 17,007 already received by the appellant; and
  - f. Each party shall bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF MAY, 2023.**

**M. MBARŪ**



**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

