



REPUBLIC OF KENYA



**KENYA LAW**  
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**Foremost Limited v Mwakulomba (Appeal E042 of 2021)  
[2023] KEELRC 1916 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1916 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E042 OF 2021  
M MBARÚ, J  
JUNE 29, 2023**

**BETWEEN**

**FOREMOST LIMITED ..... APPELLANT**

**AND**

**GEOFFREY MGOGHO MWAKULOMBA ..... RESPONDENT**

*(Being an appeal from the judgment of Chief Magistrates Court Mombasa,  
Hon. G Kiage delivered on 18 June 2021 in CM ELRC No.60 of 2018)*

**JUDGMENT**

1. [Being an appeal from the judgment of Chief Magistrates Court Mombasa, Hon G Kiage delivered on June 18, 2021 in CM ELRC No60 of 2018]
2. The background to this appeal is a claim filed by the respondent in Mombasa CM ELRC No 60 of 2018 on the grounds that he had been employed by the appellant as a group assistant human resource and administration manager earning a wage of Kshs 70,000 but his employment was unfairly terminated on March 6, 2017 and he claimed the following dues;
  - a. Notice pay Kshs 70,000;
  - b. Unpaid salaries Kshs 210,000;
  - c. Compensation for unpaid time to end of contract Kshs 280,000;
  - d. Accrued leave days Kshs 6,244; and
  - e. Costs.
3. In response, the appellant's case before the trial court was that it was part of the respondent's contract of employment as the employee to abide by the rules and regulations and he signed a 6 months contract for



- the period of 12 January to June 1, 2017 but the respondent faced financial challenges in March 2017 and several staff including the respondent went away with company property alleging non-payment of salaries and as a group of employees reported the matter to the labour office and the same was addressed accordingly.
4. The respondent hence deserted duty and there was no unfair termination of employment as alleged. He abused his position and engaged with other companies and stated that he would only return company property after filing suit which amounted to criminal conduct and due to duty desertion, the claims made should be dismissed.
  5. The appellant also demanded the respondent to return company property and listed the following;
    - a. Lap top valued at Kshs 49,500;
    - b. Laptop bag Kshs 3,500;
    - c. Mouse Ksh500;
    - d. Kaspersky Kshs 1,500
  6. The appellant also admitted that it owed the respondent the following dues;
    - a. January 2017 wages Kshs 30,929.10;
    - b. February wage Kshs 53,520.15;
    - c. March wages Kshs 25,913.50
  7. The learned magistrate heard the parties and delivered judgment on June 18, 2021 with a finding that there was employment which was frustrated by factors beyond the appellant's control but it owed the employee, the respondent notice pay, unpaid salaries and accrued leave days which were awarded.
  8. Aggrieved by the judgment, the appellant filed the instant appeal on the grounds that the trial court failed to appreciate the threshold and burden of proof under Section 47(5) of the [Employment Act, 2007](#) (the Act) and that the respondent deserted employment without notice and hence not entitled to notice pay. The award of salary for 3 months failed to factor that there were part payments and what was due was Kshs 110,362.75 and not Kshs 210,000 and by dint of Section 42(4) the respondent was still under his probationary contract terms and was only entitled to notice at 7 days and the appeal should be allowed and the appellant awarded costs.
  9. Both parties attended court for taking hearing directions on April 20, 2023 and agreed to address the appeal by way of written submissions and a mention date allocated for May 22, 2023 to confirm compliance. Only the respondent filed written submissions
  10. This being a first appeal, the court has a duty to review the pleadings and findings of the trial court and make own conclusions taking into account the lower court had the chance to hear the witnesses.
  11. In the response of the appellant before the lower court, it was acknowledged that due to financial challenge from March 2017 they were unable to pay salaries including that of the respondent. The employees abandoned work and carried away company properties. The matter was reported to the Labour Office and the same dealt with accordingly.
  12. The appellant also admitted to owing the respondent salaries amounting to Kshs 110,362.75 and gave an outline as to how such was tabulated.
  13. The appellant also noted the respondent as the employee had left with its property worth Kshs 63,200.



14. The learned magistrate analysed the evidence and the pleadings and made a finding that the appellant was faced with a situation beyond its control resulting in termination of employment but never issued notice to the respondent and hence was entitled to notice pay based on his last wage off Kshs 70,000 and for the 3 months that he was not paid, he was entitled to the full month's pay all at Kshs 70,000 x 30 total Kshs 210,000. For the untaken leave days, the respondent was awarded Kshs 6,244.
15. The appeal is that the respondent did not prove his case in terms of the threshold under Section 47(5) of the *Act*. However, the learned magistrate analysed the reasons leading to termination of employment and made findings that employment terminated due to events beyond the control of the appellant. This is not faulted.
16. Indeed, under section 40 read together with 45(2) of the *Act*, stipulates what is unfair termination;
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employee's conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.
17. An employer faced with an operational requirement is allowed to terminate employment by redundancy. Such is lawful and legitimate, save there must be notice and the employee must be paid for work done. See *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR.
18. The appeal that the respondent was on a probationary contract and hence only entitled to 7 days' notice in terms of Section 42 of the Act is not in tandem with the rights the appellant enjoys under Section 40 and 45(2) of the *Act*, based on the operational needs facing the appellant at the time, March 2017, notice ought to have issued to the respondent as the employee or payment in lieu thereof. The provisions of Section 42 that he was on probationary terms cannot aid the appellant.
19. The assertions that the respondent abandoned work is also without evidence. An employee who abandons work and the employer leaves them at large has nobody to blame but itself. The employee who abandons employment does not dismiss himself. The decision to formally end the employment relationship should come from the innocent party. In this case, the appellant as the employer who alleges that there was desertion of duty as held in *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR that;

The implication of the foregoing is that absent evidence that the Respondent followed the procedure aforesaid in handling the Appellant's absenteeism the Respondent cannot lawfully plead abandonment of employment by the Appellant as a way of closure of the employer-employee relation between them.
20. The findings by the trial court that the appellant ought to have issued notice or payment in lieu thereof is sound and shall not be disturbed. The award of Kshs 70,000 is justified.
21. With regard to assessment of unpaid salaries, the response that the appellant owed the respondent Kshs 110,362.75 was not challenged and the rationale to tabulate the same at full month wages is contrary to the evidence adduced during the hearing. The due wages are Ksh 110,362.75.



22. At the end of employment, the employer is allowed to lawfully withhold such salary or make a deduction from the salary and terminal dues, the amount or value of amount of property held by the employee, lost or not returned to the employer in terms of Section 19(1) (b) of the Act;
- (1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—
- (a) ...;
  - (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
23. there is no response to the defence by the appellant that the respondent left with him a laptop, a bag, a mouse and Kaspersky all valued at Ksh 63,200 the property of the appellant. Such amount ought and should be taken into account while awarding terminal dues.
24. To this extent, the appeal is successful and allowed with a review of the judgment in Mombasa CM ELRC No 60 of 2018 in the following terms;
- a. Notice pay Ksh 70,000;
  - b. Unpaid salaries Kshs 110,362.75;
  - c. Untaken leave days Kshs 6,244;
- These dues shall be paid less Kshs 63,200 owed to the respondent; and
- Terminal dues paid shall be subject to the provisions of Section 49(2) of the Employment Act, 2007.
- d. Each party to bear own costs.

Orders accordingly.

Delivered in open court at Mombasa this 29 day of June, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... **and** .....

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