



REPUBLIC OF KENYA



KENYA LAW
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**Manyaki v Njuka Consolidated Company Limited (Appeal E031 of 2023)
[2023] KEELRC 2376 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2376 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E031 OF 2023
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

ERICK KIBAARA MANYAKI APPELLANT

AND

NJUCA CONSOLIDATED COMPANY LIMITED RESPONDENT

*(Being an appeal from the judgment of the Hon. Magistrate, D.
O. Mbeja dated 30 March 2023 in CM ELRC No. E737 of 2021)*

JUDGMENT

1. On 31st March 2023, the appellant filed the Memorandum of Appeal and on 29 May 2023 filed the Record of Appeal which were served upon the respondent. On 24 July 2023 both parties attended court for taking hearing directions and agreed to address the appeal by way of written submissions. Only the appellant complied and filed submissions on 4 August 2023.
2. The respondent only filed written submission on 21st September 2023 after the judgment date had issued on 19 September 2023.
3. The background to this appeal is a claim filed by the appellant in Magistrate's Court ELRC No. E737 of 2021 on the grounds that he was employed by the respondent as a security officer/Dog handler on 25 August 2014 until 12 July 2021 when his employment was unfairly terminated through summary dismissal. At the time, he was earning a wage of Ksh. 14,000 per month. The claim was that the respondent refused to pay his salary arrears amounting to Ksh. 114,575 together with 12 months' compensation for unfair termination of employment at Ksh. 188,000; notice pay at Kshs. 14,000; service pay for 7 years at Ksh. 49,000; and annual leave days for 7 years at Ksh. 49,000.
4. In response to the appellant's case before the trial court, the respondent's case was comprised of mere denials. No work records were filed and no witness was called.



5. The learned magistrate delivered judgment on 30 March 2023 with findings that the respondent herein terminated the appellant's employment unfairly and awarded him compensation at 98,000 but made a finding that the appellant had failed to prove his case on salary arrears, service claim was not justified since there were statutory deductions, there was no proof that leave days were not taken and that he should be issued with a Certificate of Service.
6. Aggrieved, the appellant filed the appeal herein on the grounds that the trial court made findings based on wrong considerations particularly that there were no salary arrears. That had the evidence by the appellant been taken into account in its totality, the claims made ought to have been awarded hence the appeal, seeking to set aside the judgment and or review the findings and make awards as claimed.
7. In the written submissions, the appellant's case is that the appellant worked for the respondent as a security officer for 7 years from 25 August 2014 until 12 July 2021 when he was issued with summary dismissal notice without any reasons, explanations or payment of his due wage arrears at Kshs. 114,575.
8. The appellant's employment was terminated on the grounds of redundancy but such a record was not submitted since the notice that issued was a summary dismissal without payment of terminal dues. The respondent never adduced any evidence to challenge the claim or file any work records to support its responses as required under Section 10(6) and (7) of the *Employment Act*, 2007 and the claims made should have been awarded as held in *Gilbert Kasumali Kithi v Nyali Beach Holiday Resort* [2015] eKLR and *Trust Bank Limited v Paramount Universal Bank Limited & 2 others*, High Court No.1243 of 2001 that where a party fails to call evidence, the filed pleadings remain mere statements of facts and unsubstantiated. On this basis the appeal is also not challenged with any response or written submissions and should be allowed.
9. As addressed above, the respondent failed to file written submissions within the allocated timeline. The record filed is without leave.
10. This being a first appeal, the court is required to re-evaluate the entire record of the trial court and make own findings.
11. As the employer, upon the appellant filing his claim, the respondent had a legal duty pursuant to Section 10(6) and (7) of the *Employment Act*, 2007 to respond to the claim and file work records.
 - (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
 - (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
12. Part of the supporting records filed by the appellant with his memorandum of Claim was the letter dated 12 July 2021 by the respondent. This related to Tabulation of Wages Arrears noted as Ksh. 129,575.
13. The appellant signed the letter in acknowledgement that this was the money owed to him by the respondent at the end of his employment.
14. On the same date, 12 July 2021 the appellant executed another letter Employee Acknowledgment Certificate upon receipt of Ksh. 15,000 from the respondent for part payment of my wages arrears. The appellant claimed Ksh. 114,575 owed in salary arrears.



15. Upon his claim, the respondent had a duty to file records that such amount was paid to the appellant directly or through his bank which record is missing.
16. Pursuant to Section 35(4) of the *Employment Act*, 2007 despite the appellant executing the Employee Acknowledgment Certificate on 12 July 2021, any dues owed to him and remained unpaid, these are lawfully due;
 - (4) Nothing in this section affects the right—
 - (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
 - (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.
17. The appellant's right to claim his terminal dues cannot be negated by the employee acknowledgment certificate.
18. In the case of *Thomas De La Rue v David Opondo Omutelema* [2013] eKLR the court gave emphasis to the legal requirements that;

... a discharge voucher per se does not absolve an employer from the statutory obligation and that it cannot preclude the Industrial Court [Employment and Labour Relations Court] from enquiring into the fairness of a termination. ...
19. Without any work records to confirm payment of wage arrears, the trial court ought to have addressed and made this award for Kshs. 114,000 which is due.
20. The learned magistrate made a finding that the respondent as the employer terminated employment on the grounds of redundancy attributed to economic factors and the appellant was paid his terminal dues as stated in the letter dated 12 July 2021. There is no matter of a redundancy pleaded or evidence called in this regard. Even in a case where there was a redundancy, which is not the case here, Section 40(1) of the *Employment Act*, 2007 read together with Section 45(2)(b)(ii) requires that where there is a redundancy, the employer must issue notice and undertake the due process of paying the employee terminal dues including severance pay for years worked.
21. On the letter dated 12 July 2021 by the respondent to the appellant, there is no matter of a redundancy addressed and the claim for unfair termination of his employment addressed and found with merit, notice pay and compensation should have been assessed and awarded separately with given reasons. The general award of Ksh. 98,000 is without explanation or details as to what this covered or redressed.
22. Notice pay is due following termination of employment without notice or due process pursuant to Section 35 of the *Employment Act*, 2007 and the appellant is hereby awarded Kshs. 14,000.
23. For unfair termination of employment, the Ksh. 98,000 is without reasons as addressed above. The appellant served the respondent for 7 years, there is no record filed to suggest that he was of gross misconduct to justify the sanction of his summary dismissal and an award of 7 months' gross wages is hereby found appropriate compensation all at Kshs. 98,000.
24. Taking of annual leave is a legal right under the provisions of Section 28 of the *Employment Act*, 2007. Where the appellant took his annual leave days, the record is not filed by the respondent as the employer. The pay in lieu thereof is due.



25. However, the employee should not be allowed to accumulate annual leave for more than 18 months without the approval of the employer. Where the employee has applied for annual leave and this was not allowed beyond the statutory limits, evidence in this regard should be tendered. On the wage of Kshs. 14,000 per month, under Section 28 of the Act, the appellant was entitled to 21 leave days each year. for 18 months, at the end of his employment he was entitled to 32 leave days all tabulated to Kshs. 15,000 in annual leave pay.
26. For this reasons, the appeal is found with merit and the appellant is entitled to costs.
27. Accordingly, judgment in Mombasa CM ELRC No. E737 of 2021 is hereby reviewed and the appealed allowed in the following terms;
 - a. Compensation for unfair termination of employment Ksh. 98,000;
 - b. Salary arrears Kshs. 114,575;
 - c. Notice pay Kshs. 14,000;
 - d. Leave pay Ksh. 15,000
 - e. Costs of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

