



**Citibus Limited v Muriuki (Employment and Labour Relations Appeal
E036 of 2022) [2023] KEELRC 3027 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3027 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E036 OF 2022
MA ONYANGO, J
NOVEMBER 24, 2023**

BETWEEN

CITIBUS LIMITED APPELLANT

AND

JAMES GACHANJA MURIUKI RESPONDENT

*(Being an appeal arising from the Judgment of the Chief Magistrate
Court at Milimani Commercial, Nairobi before Honourable M.W.
Murage delivered on 4th March 2022 in CMEL case No. 914 of 2019)*

JUDGMENT

1. The Appellant herein was the Respondent in Nairobi CMEL No. 914 of 2019 in which it had been sued by the Respondent herein, vide a Statement of Claim dated 20th May 2019 in which the Respondent sought terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 4th March 2022 in favour the Respondent against the Appellant.
3. The Appellant being dissatisfied with the said Judgement filed the instant appeal vide a Memorandum of Appeal dated 16th March 2022 as amended by the Amended Memorandum of Appeal dated 5th October 2022. It raises the following grounds of appeal in the Amended Memorandum of Appeal:
 - (i) The presiding trial magistrate erred in fact and in law in finding that the Respondent's claim had merit even after evidence was adduced that the Respondent was procedurally and for a good cause summarily dismissed by the Appellant
 - (ii) The presiding trial magistrate erred in fact and law in finding that the Respondent was unlawfully and unfairly terminated from employment in disregard of the law and the evidence before her



- (iii) The presiding trial magistrate erred in fact and in law in awarding inordinately excessive damages for unfair termination and other terminal benefits such as statutory underpayments, house allowance, notice and leave arbitrary and without any legal basis and in total disregard of the evidence tendered and well established legal principles guiding the same and the law.
 - (iv) The presiding trial magistrate misdirected herself by completely disregarding the evidence, the submissions and authorities tendered by the Respondent/ Appellant herein
 - (v) The presiding trial magistrate erred in fact and law by failing to appreciate that the Respondent had not discharged the burden of proof placed upon him and did not prove his case on a balance probability
 - (vi) That without prejudice to the above, the learned magistrate erred in law and facts in failing to find that Articles 159 of *the Constitution* recognizes and promotes alternative dispute resolution mechanisms
 - (vii) That the learned magistrate erred in law and facts in failing to find that he lacked jurisdiction to give a decree in favour of the Respondent in view of the previous proceedings and the resolution made by the minister of Labour in the joint conciliation meeting involving the parties herein which had resolved that the Respondent had no valid claim against the appellant herein.
4. The Appellant prayed for the following reliefs:
- (a) The appeal herein be allowed and the judgment rendered by Hon. M. W. Murage on the 4th March 2022 be set aside;
 - (b) The whole decision being appealed from herein be set aside;
 - (c) Any other orders as the honourable court may deem fit to grant under the circumstances of the case;
 - (d) Costs of this appeal and costs in the lower court be awarded to the Appellant.
5. The appeal was disposed of by way of written submissions. The Appellant's submission dated 5th October 2022 and the Respondent's submissions dated 15th December 2022 are on record.

Analysis and Determination

6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified as was stated in the Classical case of *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. Vide his Statement of Claim dated 20th May 2019, the Respondent herein sued the Appellants seeking for orders that;
- (i) A declaration that the Respondent's act of terminating the Respondent's employment was un-procedural and amounted to unfair termination of the Respondent
 - (ii) Kshs 694,698 as particularized in the statement of claim
 - (iii) Costs of the suit
 - (iv) Interest on (b) and (c) above
 - (v) Such further or other relief as this Honourable Court may deem fit



8. In that Statement of Claim, the Respondent avers that on or about April 2017, he was employed by the Appellant as a driver in Nairobi earning a salary of Kshs 23,000 per month.
9. He contends that he served the Appellant with loyalty and diligence until 10th October 2018 when he was wrongfully and unlawfully terminated from employment and did that further he was not paid his terminal dues.
10. The Appellant on its part filed a Memorandum of Reply on 14th October 2019 and denied the allegation that it terminated the Respondent from employment. The Appellant stated that the Respondent deserted duty on 7th October 2018 when, due to inattention and reckless driving, he drove the Respondent's motor vehicle into a ditch along Limuru Road and abandoned it there.
11. It was contended that the Respondent failed to report to duty and was called to a disciplinary hearing to show cause why his services should not be terminated for negligent, reckless and inattentive driving of the Respondent's(sic) motor vehicle and for abandoning the said motor vehicle but he chose to keep off and desert duty.

The Evidence Adduced

12. At trial, the Respondent, James Gachanja Muriuki testified as CW1. He adopted his witness statement as his evidence in chief. He maintained that he was not issued with a notice, was not heard before being dismissed and that he was not paid house allowance.
13. On being cross examined by Counsel Enonda, the Respondent maintained that he was involved in an accident before his employment was terminated. He stated that he was driving the Appellant's motor vehicle when he hit a post and that he reported the incident to his manager, Mr. Macharia, who in turn sent one Mr. Duncan to tow the Respondent's motor vehicle to its office. He further stated that he did not know how much was paid to repair the motor vehicle and that he never committed to pay the damages. According to CW1, he was terminated from employment a day after the accident.
14. On its part, the Appellant called Mr. John Kamau Kanyonyo who testified as RW1. He introduced himself as the Director of the Appellant. He adopted his witness statement as his evidence in chief. It was RW1's testimony that the Respondent caused several accidents. That before his employment was terminated he was invited to a disciplinary hearing but he opted not to attend.
15. On cross examination, RW1 reiterated that the Respondent was invited to a disciplinary hearing but he never showed up. RW1 conceded that he had not produced records in court to show that the Respondent went on leave. He further admitted that the Respondent was not issued with a notice to show cause after he allegedly deserted duty and further, that no warning letter was issued to the Respondent.

The Appeal

The Appellant's Submissions

16. In its submissions dated 5th October 2022, the Appellant faulted the trial magistrate for what it termed as "overturning the resolution of the Ministry of Labour to the detriment of the Appellant". According to the Appellant, since the Respondent was aggrieved by the said resolution made against him by the Ministry of Labour, he should have challenged the same by way of Judicial Review under Article 47 of *the Constitution* instead of filing a suit before the learned magistrate.



17. The Appellant further submitted that the termination of the Respondent's employment was procedural, fair, just, proportional and lawful as he had negligently caused an accident, abandoned the Respondent's motor vehicle in a ditch and deserted duty.
18. The Appellant maintains that the Respondent was summoned to show cause why his services should not be terminated on account of unauthorised use of the Appellant's said motor vehicle and for careless, reckless and negligent driving, but he opted to desert duty.
19. It was submitted that the Respondent was paid his full salary of Kshs. 23,000 for the month of October 2018 notwithstanding the fact that he only worked for 7 days in the month of October 2018 before deserting duty.
20. Lastly, the Appellant submitted that the Respondent's employment was terminated procedurally and fairly and as such he was not entitled to the excessive and baseless awards which were arbitrarily made in his favour by the trial magistrate.
21. In summary, the Appellant submitted that the Respondent is not entitled to any pay in lieu of notice, house allowance and damages for unfair termination as assessed by the trial court as the termination of his employment was fair and procedural.

Respondent's Submissions

22. The Respondent in response to the issues raised by the Appellant on whether this appeal was properly before the lower court submitted that the said averment is misplaced in law. It was submitted that a labour complaint filed before the labour office does not take away the jurisdiction of the Employment Court to handle such a complaint. It was the Respondent's case that any resolutions emanating from the labour office do not bind this court.
23. The Respondent in summation maintained that from the evidence tendered before the trial court he was not subjected to any due process before his employment was terminated. It is submitted that the Appellant failed the procedural and the substantive test.
24. According to the Respondent, the trial court made a proper finding of law and fact that the Respondent's termination from employment was unfair and unlawful.
25. It is submitted that the instant appeal is not merited and the court was urged to dismiss it with costs.

Determination

26. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that fall for determination are:
 - i) Whether the trial court erred in holding that the termination of the Respondent from employment was unfair; and,
 - ii) Whether the awards made to the Respondent was justified.
27. The Appellant in its evidence and submissions before the trial court relied on the defense that the Respondent deserted duty after he was involved in an accident in the Appellant's motor vehicle which he was driving. The Appellant maintains that after the accident occurred the Respondent abandoned its motor vehicle in a ditch and never showed up at the Appellant's premises.



28. The *Black's Law Dictionary* (Eleventh Edition) defines desertion as:
- “The wilful and unjustified abandonment of a person’s duties or obligations.”
29. In the case of *Felistas Acheba Ikatwa v Charles Peter Otieno (2018)* eKLR the court observed as follows;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
30. In the instant case, from the trial court’s record, the Appellant did not present any facts from which the court could conclude that the Respondent deserted duty with no intention of returning to work. The Appellant did not demonstrate in its evidence that it made reasonable attempts to contact the Respondent.
31. The Appellant therefore failed to discharge the burden of proving that desertion was a reason for termination of employment as required by section 43 of the *Employment Act*, 2007.
32. From my re-evaluation of the evidence, I find that the learned trial magistrate applied the correct principles in reaching the decision that the Respondent’s employment was unfairly terminated by the Appellant.
33. The next issue is whether the awards made to the Respondent by the trial court were justified.
34. In his statement of claim, the Respondent sought for payment of his terminal dues which he tabulated as:
- a) Salary balance for October 2018 Kshs 30,627.00
 - b) Minimum wage balance (30,627- 23,000)x 32 Kshs 340,000
 - c) Notice Pay Kshs 30,627
 - d) Leave days (30,627 x 1.5) Kshs 45,941
 - e) House allowance (15/100 x 30,627 x 1.5 x 12) Kshs 82, 693
 - f) Unfair termination (30,627x12) Kshs 367,524
 - Total Kshs 694,698
 - g. From the judgement of the trial court, the Respondent was awarded Kshs. 690,233 as the principal amount plus interest.
35. For an appellate court to interfere with the award made by a trial court, it must be convinced that the trial court acted upon some wrong principle of the law or that the award was excessive and baseless as alleged by the Appellant. The Appellant did not file any documents in court even though the record shows that it filed a List of documents with the Respondent’s pay slip for October 2018 as the only document attached. It is an employer’s duty to produce documents in a trial according to section 10 of the *Employment Act*. Where no documents are produced the employer is estopped from denying the averments of an employee.
36. From the judgment of the trial court, there is no evidence to justify the award on underpayments. The Respondent did not adduce evidence on the size of the motor vehicle he was driving. From the record



I deduce that the vehicle was used for picking and dropping the Appellant's clients hotel staff. (See paragraph 12 of Memorandum of Reply).

37. According to the Third Schedule to the Regulation of Wages (General) Order, a driver medium sized vehicle is defined to mean a person employed to drive a vehicle over 2 tons weight or heavy commercial vehicle of less than 8 tons capacity with or without trailer, in both cases including handling to and from tailboard and is in possession of a driving license for the class of vehicle concerned. The Respondent did not prove that the vehicle he was driving was more than 8 tons or that he had a driver's license for a vehicle heavier than a medium sized vehicle for which he was paid. According to the wages order for 2018 produced by the Respondent, he was entitled to Kshs. 23,039.40 from 1st May 2018. His employment was terminated on or about 7th October 2018. He did not produce the wages orders for the years before 2018 or prove that for those years he was underpaid. The wages order that the Respondent produced is dated 19th December, 2018, after he left employment.
38. I therefore find that the trial court erred in law and fact in finding that the Respondent was underpaid.
39. I further find that the tabulation for leave was based on an erroneous formula. Section 28 of the employment Act provides for annual leave at the rate of 21 days per year or 1.75 days per month. Having worked for 32 months and in view that leave days are based on working days only, the formula should be salary divided by 26 days times 1.75 days times the number of months worked.
40. I accordingly set aside the award of the trial magistrate in so far as the same related to the finding of underpayment and annual leave and in place thereof make the following awards:
- a) Salary balance for October 2018 Kshs 23,000.00
 - b) Notice Pay Kshs 23,000.00
 - c) Leave days (23,000 ÷ 26 x 1.75 x 32) Kshs 49,538.50
 - d) Unfair termination (23,000x6) Kshs 138,000.00
- Total: Kshs 233,538.50.
41. In view of my findings above, I will order that each party bears its costs of the Appeal.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 24TH DAY OF NOVEMBER 2023.

M. ONYANGO

JUDGE

