



**Haroon v Kashali (Appeal E006 of 2023)
[2023] KEELRC 3451 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3451 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E006 OF 2023
M MBARÚ, J
NOVEMBER 23, 2023**

BETWEEN

ABDULRAHIM HAROON APPELLANT

AND

MWALIMU KASHALI RESPONDENT

JUDGMENT

1. The appeal herein arises from the judgment of the Hon. Principal Magistrate in Mombasa CMELRC No.210 of 2020 delivered on 29 December 2022 on the grounds that the judgment of the trial court and finding that there was unfair termination of employment and that the respondent is entitled to terminal dues was in error as no reasons were given for such finding. The evidence before the court as not fully evaluated leading to a wrong decision especially the fact that the respondent had absconded duty and was guilty of gross misconduct.
2. Other grounds of appeal are that the trial court erred in allowing the respondent's claim and awarding compensation and terminal dues based on an alleged oral contract and the judgment should be set aside and substituted with an order dismissing the claim.
3. Both parties attended court and agreed to address the appeal by way of written submissions.
4. The background of the appeal is that the respondent herein filed Mombasa CMELRC Cause No.210 of 2020 on the grounds that in January 2013 he was employed by the appellant as a shop assistant based at Kizingo area near Likoni ferry. The employment was based on an oral contract and paid a wage of Kshs. 15,000 per month which was without a house allowance. The respondent worked until 18 June 2020 when the appellant terminated his employment without giving any reasons which was wrongful and unfair. He claimed the following dues;
- 5.



- a. Notice pay Kshs. 21,067.43;
 - b. 7 years' service pay Kshs. 147,472.01;
 - c. 7 years leave pay Kshs. 147,472.01;
 - d. Underpayments Kshs. 319,198.27
 - e. Compensation for unfair termination of employment Kshs. 252,809.16;
 - f. Certificate of service; and
 - g. Costs.
6. The appellant responded to the claimant that the respondent was employed as a casual but he was of gross misconduct through deliberate disobedience of lawful instructions from the employer. The respondent committed acts of theft and threatened to physically assault the respondent when confronted with the evidence and the claims made were without merit.
 7. In the judgment of the trial court, there was a finding that employment terminated unfairly and awarded notice pay, underpayments and 6 months compensation all at Kshs. 466,670.28 together with costs and interests.
 8. The appellant submitted that the trial court failed to analyse the evidence before court in its entirety. The complaint made by the respondent to the labour office under Section 47 of the *Employment Act, 2007* (the Act) is beginning on the parties. The outcome of such decision is binding on the parties in terms of Article 159 of the *Constitution*. The respondent admitted that he absconded duty and then requested for payment of his wages but then filed suit on the grounds that there was unfair termination of employment. The matters before the labour officer put into account, the award of notice pay, underpayments and compensation should not have issued.
 9. There was no proof that the respondent was employed as an assistant shop attendant. He was a casual employee and the assessment of underpayments were in error and the appeal should be allowed with costs.
 10. The respondent submitted and relied on the written submissions filed at the lower court on the basis that he was denied entry at his workplace on 18 June 2020 which matter he reported at the labour office who had taken a predetermined position against him. He filed his claim before the lower court due to unfair termination of employment.
 11. The respondent submitted that under Section 8 of *the Act*, the appellant retained him on an oral contract of employment contrary to the principles outlined in the case of *Robai Musinzi v Mohammed Safdar Khan* [2012] eKLR. He was employed as a casual first but later became a shop assistant with underpayments as held in *Harrison Meshack Lusimbo & another v Mareba Enterprises Limited* [2013] eKLR. the appellant alleged desertion of employment is without evidence but unfair termination of employment contrary to the principles outlined in the case of *Kenfreight (EA) Ltd v Benson Nguti* [2016] eKLR and the appeal should be dismissed and the award of the trial court confirmed.
 12. This being a first appeal, the court is required to re-evaluate the record of the trial court and analyse and arrive at a conclusion taking into account that the trial court had the opportunity to hear the parties in evidence.



13. The issues which emerge for determination are what was the nature of employment; whether there was unfair termination of employment and whether the remedies sought and allowed in the judgment should be allowed.
14. The respondent's case is that he was employed on casual terms and then became a shop assistant but no contract issued.
15. The appellant on the other hand asserts that the respondent was employed on casual terms.
16. Indeed, as the respondent submitted, under Section 8 of *the Act*, an employer is allowed to employ an employee on oral terms but such oral terms should convert to a written contract where the employment is continuous and exceeds 24 hours and the employee continues to undertake duties which are not likely to end. In such a case, the employee becomes protected under Section 37 of *the Act*. The employee has rights under the Act.
17. The respondent was employed from January 2018 to 18 June 2020, such period ceased being for casual employment and converted to term employment protected under Section 37 of *the Act*. The failure to issue a written contract with terms and conditions of employment left the appellant exposed.
18. The respondent testified before the lower court that on 18 June 2020 he asked for an advance payment and then I was not able to continue working. I went to the labour office. I had an advance payment.
19. This evidence is corroborated by the appellant's evidence that on 18 June 2020 the respondent reported to work and asked for advance payment. He pushed him and then left. He did not report back to work.
20. The respondent, stopped reporting to work after he failed to secure payment advance. His report to the Labour office confirms this position that on 3 June 2020 he took a pay advance of Kshs. 14,000 and on 18 June 2020 he requested for Kshs. 5,000 but the appellant declined. He decided to leave his employment and demanded to be paid for the period worked, leave days, holidays and notice pay.
21. His report to the labour office then forms material evidence in this case.
22. The report was initiated by the respondent as the employee who felt aggrieved by the action of the appellant in refusing to give him a salary advance.
23. The report of the labour officer is a primary record for the court. This is the office located for the court to receive complaints at the first instance and assess the shop floor.
24. Having deserted his employment, the respondent cannot turn around and assert that his employment terminated unfairly and that he should be paid compensation or notice. Such are remedies removed from him upon his conduct to abandon his employment for no good cause and after receiving a salary advance for June 2020 at Kshs. 14,000 whereas the monthly wage was Kshs. 15,000.
25. On the claim for service, indeed both parties confirm that the statutory dues to NSSF and NHIF were paid. Service pay is not due.
26. With regard to the award of underpayments, the respondent without any written contract assigning him the role of shop assistant, the protections under Section 37 of *the Act* placed him as a general worker covered under the Minimum Wage Orders.
27. Upon employment in January 2013, the basic wage for a general worker in Mombasa, the claims for underpayments are based on three phases only;
 - from May 2015 to April 2017 at Kshs. 56,099.68;
 - from May 2017 to April 2018 at Kshs. 111,412.84; and



May 2018 to June 2020 at Kshs. 151,685.

28. From May 2015, the wage due to a general worker is Kshs. 10,954.70. The respondent was earning Kshs. 15,000 over and above the minimum wage.
29. From May 2017, the wage due is Kshs. 12,926.55 and the respondent was earning Kshs. 15,000 over the minimum.
30. From May 2018, the wage due is Kshs. 13,572.90 and the respondent was earning above such wage.
31. The claim for underpayments assessed, even where there was no housing provided or an allowance paid, the wage paid being above the minimum due, the respondent was well compensated.
32. The respondent being a general worker, his wage was regulated. The underpayments awarded by the trial court were in error.
33. All claims well assessed, it would have been apparent to the trial court that the appellant did not file any work records even where the respondent was said to be a casual employee. The claim for annual leave ought to have been addressed in this regard. Without any record that the respondent took his annual leave or was compensated for such time. The finding by the labour officer that the appellant had a passport to prove that he would be closed for several weeks each year was not submitted before the trial court.
34. Under Section 28(2) of *the Act*, the respondent was entitled to annual leave pay for 18 months based on the last wage paid all at 32 days. Total due is Kshs. 16,000.
A certificate of service should issue at the end of employment.
35. With regard to costs, under Section 12(4) of the *Employment and Labour Relations Court Act*, 2011 costs are discretionary in employment and labour relations claims and should issue rarely taking into account the circumstances of each case. It is not a matter of course that every successful claimant should be awarded costs.
36. Accordingly, the appeal is with merit and is hereby allowed save the respondent shall be paid the annual leave pay at Kshs. 16,000. Judgment is Mombasa CMELRC Cause No. 210 of 2020 is hereby set aside and the respondent awarded Kshs. 16,000 only. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

