



**Samin v Aquamist Limited (Employment and Labour Relations Appeal
E197 of 2022) [2023] KEELRC 3019 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3019 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E197 OF 2022**

**SC RUTTO, J
NOVEMBER 24, 2023**

BETWEEN

PETER ONYANGO SAMIN APPELLANT

AND

AQUAMIST LIMITED RESPONDENT

(Being an appeal from the whole Judgment of Hon. E. M Kagoni (Mr.) Principal Magistrate dated 4th November 2022 in MCELRC Cause No. E538 of 2022 at Milimani, Nairobi)

JUDGMENT

1. Through a Memorandum of Claim dated 4th March 2022, the Appellant instituted a suit at the Chief Magistrate's Court at Milimani being MCELRC Cause No. E538 of 2022 in which he averred that he was employed by the Respondent as a Storekeeper sometimes in June 2012. It was the Appellant's case that he served the Respondent diligently and was able and willing to continue with such service.
2. The Appellant further averred that on 13th February 2021, the Respondent without notice and or justifiable cause terminated his services. Terming his termination malicious, illegal and unreasonable, the Appellant sought against the Respondent the sum of Kshs 1,023,086.07 being one month's salary in lieu of notice, salary underpayments, service gratuity and compensation for unlawful termination.
3. The record reveals that the matter proceeded as an undefended cause at the trial Court.
4. From the record, the Appellant testified in support of his case and thereafter, filed written submissions.
5. The learned trial Magistrate upon evaluating and analyzing the evidence on record as well as the written submissions, delivered his Judgment on 4th November 2022, thereby dismissing the Appellant's Claim.



6. In dismissing the Appellant's Claim, the trial Court concluded that he was not terminated from employment but rather proceeded for his annual leave and never returned. In the end, the Court found that the Appellant had not proved unfair termination.

The Appeal

7. The Appellant was aggrieved by the trial Court's decision hence the instant Appeal. In his Memorandum of Appeal dated 11th November 2022, the Appellant raises the following grounds: -
 1. That the learned Trial Magistrate erred in law and fact in holding that the Claimant(sic) did not deny, address and/or rebut the allegations levelled upon the claimant under letter dated 25th November 2021.
 2. That the learned Trial Magistrate erred in law and fact in holding that the Claimant(sic) did not distance himself from the allegations that he never reported to work after his leave ended.
 3. That the learned Trial Magistrate erred in law and fact in holding that during the period of the Claimant's(sic) employment there was a compliant (sic), a fact that was not proved by the Respondent during trial.
 4. That the learned Trial Magistrate erred in law and fact in holding that the Claimant(sic) left work whilst proceeding on his annual leave and never returned to work and as such absconded work.
 5. That the learned Trial Magistrate erred in law and fact in holding that the Claimant (sic) had not proved unfair termination.
 6. That the learned Trial Magistrate erred in law and fact in holding that the Claimant(sic) is still an employee of the Respondent and disciplinary proceedings were being considered.
 7. That the learned Trial Magistrate erred in law and fact by dismissing the Claimant's(sic) entire claim based on a letter dated 25th November 2021 which the Respondent did not substantiate during trial.
 8. That the learned Trial Magistrate erred in law and fact by dismissing the Claimant's uncontroverted evidence and testimony before (sic) trial court.
 9. That the learned Trial Magistrate erred in law and fact by holding that the Claimant(sic) was paid beyond the minimum wage and as such the Claimant's(sic) salary was not in contravention of the *Regulating of Wages (General) (Amendment Order 2018)*.
 10. That the learned Trial Magistrate erred in law and fact by holding that the Claimant(sic) would be entitled to four months' salary as compensation in view of the fact that the Claimant is was guilty of misconduct by absconding work.
 11. That the Learned Magistrate erred in law and fact by disregarding the appellant's evidence and submissions.
 12. That the Learned Magistrate erred in law and fact by demonstrating open bias against the appellant.
 13. That the learned Trial Magistrate erred in law and fact by not applying the law correctly.



The Submissions

8. The Appeal was canvassed by way of written submissions. The Appellant submitted that the learned trial Magistrate erred by holding that he did not deny, rebut and/or address the allegations raised in the letter dated 25th November 2021 as it is evident that he addressed those allegations in his witness statement where stated that he went back to work on 13th February 2021 and was informed that his services were no longer required and as such, was terminated.
9. It was the Appellant's further submission that he did not abscond work as alleged by the Respondent in the letter of 25th November 2021.
10. The Appellant maintained that the learned trial Magistrate erred by dismissing the entire claim based on allegations in the letter dated 25th November 2021, which the Respondent failed to substantiate during the trial. In the Appellant's view, these facts were not challenged by the Respondent and as such, the same ought to have been admitted as true facts in regards to his termination.
11. In further submission, the Appellant stated that he had proved that he was not given any valid reason for the termination and that he was not issued with a Notice to Show Cause for allegedly absconding duty.
12. The Appellant further maintained that his salary was below the minimum wage as provided for by the law and as such, he is entitled to the underpayments sought in the Memorandum of Claim.

Analysis and determination

13. This being the first appeal, the Court is duty bound to revisit and exhaustively re-evaluate the evidence presented before the trial Court and draw its own independent conclusion but bearing in mind that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses. This position was reaffirmed by the Court of Appeal in the case of *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123.
14. I have carefully considered the record before me, the submissions by the Appellant, as well as the law, and to my mind, the following issues fall for determination by the Court: -
 - a. Whether the Appellant was terminated from employment;
 - b. If the answer to (a) is in the affirmative, whether the Appellant's termination from employment was unfair and unlawful;
 - c. Whether the remedies sought by the Appellant lie in law.

Whether the Appellant was terminated from employment

15. The Appellant's case at the trial Court was that he was terminated from employment on 13th February 2021 without notice and or justifiable cause.
16. From the record, the Appellant did not exhibit a letter of termination. Therefore, there is no direct evidence confirming that the Appellant was terminated from employment.
17. It is apparent from the record that the Appellant engaged an Advocate who in turn, addressed the Respondent, through a letter dated 4th November 2021, on allegations that it had unlawfully terminated his employment without affording him an opportunity to be heard.



18. In a letter dated 25th November 2021, which was exhibited by the Appellant at the trial Court, the Respondent through its Advocate addressed the Appellant's Advocate as follows:
- “Peter Samin commenced his annual leave on 2nd January 2021 but did not return to work when his leave ended. He is yet to return to work as at the date hereof. While your client remains in employment, our client intends to commence a disciplinary process against him for absconding work without leave or other lawful cause and willful neglect of duty.”
19. What manifests from the aforementioned letter, is that from the Respondent's end, it had not terminated the Appellant's employment and that it still considered him its employee. Indeed, the Respondent was categorical through its Advocate that the Appellant remained its employee and was even contemplating disciplinary action against him for absconding work.
20. The *Black's Law Dictionary, 10th Edition* defines the term “Termination of Employment” to mean: -
- “The complete severance of an employer-employee relationship.”
21. Applying the said definition to the instant case, it is clear that termination of employment had not occurred. If that were the case, then it would not have been logical for the Respondent to indicate that it was considering taking disciplinary action against the Appellant. Indeed, that was sufficient proof to the Appellant that the employment relationship was still subsisting and there was no complete severance.
22. It is also worth pointing out that Section 47(5) of the *Employment Act* places the burden of proving that an unfair termination or wrongful dismissal has occurred on the employee. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal.
23. My position is fortified by the determination of the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, where the learned Judges reckoned as follows: -
- “So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
24. Applying the above determination to the instant case, it is evident that in light of Section 47(5) of the *Employment Act*, the Appellant had the onus of proving that there was complete severance of the employment relationship between him and the Respondent. Indeed, that was the foundation of the Appellant's case.
25. In this case, there was no evidence that the employment relationship had come to an end. In any case, the record bears that as of 25th November 2021, the employment relationship was still subsisting. The bottom line is that the Appellant had not been terminated from employment.
26. Assuming that indeed the Appellant had been informed by the Respondent's Human Resource Manager that his services were no longer needed, one wonders why he did not set the record straight upon receiving the letter from the Respondent's Advocate that he had not been terminated. Further, did he attempt to report back to work thereafter upon such confirmation that he was still the Respondent's employee?



27. In the ordinary scheme of things, one would expect that upon the Appellant being notified that he was still an employee of the Respondent, he would have reported to work or at least through his Advocate, set the record straight with regards to his termination.
28. It is against this background that I cannot help but find that the Appellant has failed to prove on a balance of probabilities, that he was terminated from employment.
29. Having found that there was no termination, it is not logical to consider whether the Appellant's termination was unfair and unlawful, as that issue falls by the wayside.
30. To this end, the Court is unable to fault the finding by the learned trial Magistrate.

Reliefs

31. As the Court has found that the Appellant has failed to prove that he was terminated from employment, the claims for compensatory damages and notice pay, which are attendant to such a finding, do not lie.
32. Turning to the issue of salary underpayments and unpaid house allowance, it is clear that the two claims constitute continuing injuries. A continuing injury is a wrong that is not committed by a single event or breach. It is committed continuously over a period of time. Therefore, in this case, every time the Appellant was underpaid, a breach was committed.
33. The *Black's Law Dictionary*, defines continuing injury to mean: -

“An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory.”
34. Section 90 of the *Employment Act*, addresses the limitation period in respect of a continuing injury as follows:

[90] Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” Underlined for emphasis
35. Essentially, the *Employment Act* has placed a time bar of 12 months in the case of a continuing injury, from the date of cessation of the said injury. In this regard, cessation of the injury occurs when the breach is halted.
36. Fundamentally, a claim for continuing injury should be made within 12 months upon cessation of the alleged continuing injury.
37. In the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR, the Court of Appeal considered the import of the aforesaid Section 90 with regards to a continuing injury and had this to say:

“Regarding ‘a continuing injury’, the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.”



38. The logical question to ask thus, is when did the continuing injury cease in this case? Revisiting the record, the Appellant averred that he was terminated from employment on 13th February 2021. In this case, the Appellant did not indicate when last, he received his salary from the Respondent. Ideally, that would be the date the injury ceased.
39. In the absence of a payment period, it is my view that the date that triggered the instant case being 13th February 2021, would be the benchmark date in determining the claim for a continuing injury. I say so because, on that day, the Appellant had all the necessary facts with regards to his claim for salary underpayment and unpaid house allowance. Therefore, if at all he was aggrieved that he had been unlawfully terminated from employment, it follows that he was aggrieved enough to bring a suit for salary underpayment and unpaid house allowance. Therefore, by dint of Section 90 of the Employment Act, he had up to 13th February 2022, to move the court.
40. It is not clear from the Memorandum of Claim when the suit was filed at the trial court. Be that as it may, it is notable that the Memorandum of Claim is dated 14th March 2022. It therefore follows that the suit was either filed on the same day it is dated or thereafter but cannot be before 14th March 2022. Clearly, this was outside the stipulated time for a claim for continuing injury and as such, the claim was statute barred by the time it was filed.
41. In light of the foregoing, the claims for underpayment and unpaid house allowance cannot be sustained.
42. With regards to the claim for service pay, the same is declined as the Appellant was a registered member of the National Social Security Fund (NSSF) hence he falls within the exclusions under Section 35(6) of the Act. He is therefore not eligible for service pay.
43. The net effect of my finding is that the Appellant is not entitled to any reliefs he had sought at the trial Court.

Orders

44. It is against this background that I dismiss the Appeal in its entirety and make no orders as to costs.

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

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STELLA RUTTO

JUDGE

Appearance:

For the Appellant Ms. Nyambane

For the Respondent No appearance

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article



159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

