**Njeri v Lubutse (Employment and Labour Relations Appeal E182 of 2022) [2023] KEELRC 2985 (KLR) (17 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2985 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL E182 OF 2022**

**AN MWAURE, J**

**NOVEMBER 17, 2023**

**BETWEEN**

**ROSE NJERI ..... APPELLANT**

**AND**

**PRISCAH KHASITSA LUBUTSE ..... RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Chief Magistrate Court of Kenya at Nairobi by Hon. H.M. Nyamberi dated and delivered on 22nd September 2022 in CMEL Case No. 258 of 2019)***

**JUDGMENT**

1. The Appellant filed this appeal vide a Memorandum of Appeal dated 21st October 2022 in which the appellant was dissatisfied with the judgment of the Hon. H.M. Nyamberi delivered on 22nd September 2022 on grounds THAT the learned magistrate erred in fact and law in: -

    1. failing to make a finding that the Respondent had failed to proof her case to the required standard and further failing to dismiss her case with costs to the Appellant.

    2. treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.

    3. when he used his discretion wrongly in awarding excessive damages in the circumstances and failing to consider the fact that no evidence was led before him on the basis of which such as an award could be found.

    4. awarding the Respondent Kshs 418,022.20 as claimed by the Respondent which award was so inordinately high, unmerited, unjustified, disproportionate, excessive and unreasonable.

5. applied the wrong and inaccurate principles and/or considered erroneous, irrelevant and/or extraneous factors in determining the issue of unlawful termination of employment and he erred by failing to consider or by dismissing out of hand, the issues and/or submissions raised by the Appellant.

6. disregarding the evidence of the Appellant on record specifically the employment records showing when the Respondent started working for the Appellant hence resulting to a wrong decision.

7. falling to find that the evidence on record and the pleadings were at variance and especially the Respondent's pleadings.

8. failing to find that the Respondent had willingly absconded work despite the fact that the Respondent admitted in evidence that she was not terminated by the Appellant.

9. proceeding to award the Respondent a sum of Kshs 103,408 on account of unfair termination while the same was never proved by the Respondent to the required standard in law.

10. proceeding to award the Respondent a sum of Kshs 47,760 on account of annual leave earned but not paid while the same was never proved by the Respondent to the required standard in law.

11. proceeding to award the Respondent a sum of Kshs 85,967 on account unpaid house allowance while the same was never proved by the Respondent to the required standard in law.

12. proceeding to award the Respondent a sum of Kshs 141,133.20 on account underpayment of wages while the same was never proved by the Respondent to the required standard in law.

13. proceeding to award the Respondent a sum of Kshs 29,824 on account of service for the period worked while the same was never specifically pleaded and/or proved by the Respondent.

14. awarding special damages which had not been strictly proved and were unjustified and unmerited and his awards were unfair and indefensible and have resulted in a miscarriage of justice.

15. overly relying upon the evidence of the Respondent which was not proved when awarding damages.

16. failing to consider the Appellant's submissions and legal authorities relied upon in support thereof.

17. Over relying on the Respondent's submissions and legal authorities which were not relevant and without addressing her mind to the circumstances of the case.

18. considering extraneous facts that were not relevant to the issues for determination and in failing to consider relevant facts and documents.

2. The Appellant prayed for orders that: -

a. The appeal be allowed and the judgment delivered on 22nd September 2022 be set aside.

b. The costs of this appeal and costs of the application in the subordinate court be awarded to the Appellant.

c. Alternatively, this honourable court do order a retrial of the entire suit before a different magistrate.

**Appellant's Submissions**

3. The Appellant submitted that the learned magistrate erred in law in finding that the Respondent begun her employment on 14th May, 2014 despite the appellant showing payment records indicating that the Respondent started her employment in June, 2015 and the Respondent failing to produce any evidence to establish that she indeed worked for the Appellant from May 2014.

4. It was submitted for the Appellant that the learned Magistrate erred in law in finding that the Appellant wrongfully terminated the Respondent's employment as the Respondent left her employment on her own volition and was never terminated as she alleged. Section 44(4) (a) of the *Employment Act* 2007 provides that absconding duty

   by an employee constitutes gross misconduct and renders an employee liable for summary dismissal.

5. The Appellant submitted that under Section 109 of the *Evidence Act* the Respondent bore the burden of proof to establish she was unlawfully terminated as it provides that the burden of proof as to a particular fact lies on the person who wishes the court to believe its existence and the Appellant submits that during the hearing at the lower court, the Respondent lacked evidence on her allegation that was wrongfully terminated by the Appellant.

6. Further, the Appellant submitted that it is an employee's obligation to inform the employer of the reasons he/she is unable to be at work and the Respondent tendered no evidence to show she attempted to resume work and the Appellant refused and with this regard it is evident she did not unlawfully terminate the Respondent but the Respondent was summarily dismissed for absconding work.

7. The Appellant submitted that the Claimant/Respondent absconded work and she was not entitled to salary in lieu and salary for unfair termination hence the learned magistrate erred in law in awarding the same.

8. The Appellant submitted that the trial court erred in law in awarding underpayment in wages, unpaid house allowance, leave days as the Respondent did not adduce any evidence to corroborate her allegations.

9. Lastly, the Appellant submitted that the learned magistrate erred in law in awarding the Respondent service pay as the *Employment Act* provides that severance pay is only paid only where there is an issue with redundancy.

**Respondent's Submissions**

10. The Respondent submitted that she amended her claim to indicate her date of employment from 14th May 2015 to 14th May 2015 upon realization of the error committed and the law allows for amendment of pleadings to enable the court to properly reach an informed decision. Additionally, the Appellant had a burden to prove that she kept a written record of the employee as set out in Section 74 of the *Employment Act* which she was unable to provide thereby the court found respondent liable to pay the reliefs sought.

11. The Respondent submitted the Appellant confirmed during hearing that she terminated the Respondent without notice and denies the Appellant's submission that she left employment on her own volition fearing what will befall her after the allegation of theft of household items and states the statement is defamatory.

12. The Respondent submitted that during hearing she confirmed to the court that she was operating from her own rented house and the same was not disputed by the Appellant who confirmed she was not paying house allowance.

13. The Respondent further submitted that the Appellant's production of her travel documents did not confirm that the Respondent did go for her annual leave.

**Analysis and Determination.**

14. The issues for this court's determination are:

    1. Whether the learned magistrate erred in law in entering judgment in favour of the Respondent and whether her employment was unlawfully terminated.

    2. Whether the learned magistrate erred in law in granting the Respondent the reliefs sought in her memorandum of claim.

**Issue No 1 Whether the learned magistrate erred in law and in entering judgment in favour of the Respondent and whether her employment was unlawfully terminated.**

15. The Appellant aver that the learned magistrate erred in law and fact by holding that the Respondent was unlawfully terminated and states that the Respondent left her employment on her own volition and was never terminated as she alleged. Therefore, as set out section 44 of the *Employment Act* the Appellant had a right to summarily dismiss the Respondent for absconding her duties without reason or notice.

16. Additionally, the Appellant submitted the learned magistrate erred as the Respondent lacked evidence and/or consistency on her allegations that she was unlawfully terminated. This brings the question as to who bears the burden of proof in employment cases? In *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR the court stated:-

> "
>
> "29. What is the effect of this in view of the provisions of sections 43, 45 and 47 of the *Employment Act*? These sections place the burden of justifying a termination on the employer. All that the law requires of an employee is to provide prima facie evidence of a wrongful termination. Once this is done, it is for the employer to provide evidence to demonstrate that the separation was lawful. To this extent, the *Employment Act* has reversed the concept of burden of proof as encapsulated in section 107 of the *Evidence Act* so as to adopt the reverse burden of proof.
>
> Addressing this issue, the court in *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR had this to say:-
>
> ''The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities."

17. Further Section 109 of the *Evidence Act* which the Appellant relies on states:-

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

18. In addition, Section 47(5) of the Act allocates the respective obligations of the parties in case of unfair termination or wrongful dismissal.

> " For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has accrued shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

19. The Respondent testified during the hearing that when she reported to work on 22/6/2018 the security guard informed her the Appellant had said she should not enter into the compound. The Respondent sent the Appellant a message to which she replied she was outside the country and when she returned she called the Respondent for a talk to which the Appellant informed the Respondent she will pay her in August and the Respondent avers she was orally terminated.

20. In view of the above, the Respondent established a prima facie case for unfair termination under section 43 of the *Employment Act* and the burden of proof thereby shifted onto the Appellant to justify the termination. However, the Appellant only defence was that she had travelled outside the country during the said date and that the Respondent without leave or any lawful cause absented herself from her duties.

21. In respect to summary dismissal on grounds of absconding duties, Justice *B O M Manani in Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR held:-

> " 31. Indeed, my view is that the Appellant had an obligation, if it believed that the Respondent had absconded duty, to lawfully bring the contract of service to closure by invoking the provisions of section 44 of the *Employment Act*. The section permits an employer to terminate an employee who has absconded duty on ground of gross misconduct.
>
> 32. The law as currently designed does not appear to contemplate closure of employment contracts through unilateral abandonment of the parties' obligations under a contract of service. The contract can only be brought to closure as a result of the eventualities contemplated in sections 40 and 41 of the *Employment Act* (redundancy, incompetence, physical incapacity or gross misconduct) or through resignation or mutual agreement with or without notice under sections 35 and 36 of the Act or upon the insolvency of the employer under section 66 and 67 of the Act.
>
> 33. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it. In James Okeyo v Maskant Flower Limited [2015] eKLR the court observed as follows:-

‘’..... the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.’’

22. Section 44 of the *Employment Act* states:

> “ Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
>
> a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work”

23. In *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR, the court held that:-

> “ 17. For the benefit of litigants, the Court wishes to observe that an employer who advances desertion as a ground must be alert to the legal prerequisites to prove desertion. And desertion is not the same as absence without permission or leave, which occurs when the employee has an intention to return to work.

Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee’s duties.

The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary.”

24. Further, in *William Gituma Gateere v RAA Limited* [2020] eKLR the court held:-

> “ It is not enough for an employer to say an employee has deserted duty and do nothing about it as was the testimony of RW1 who in re-examination stated “we cannot force someone to come back if he walks away.” The employer cannot be an observer or sit on the fence where an employee commits any act of misconduct. The law permits, and requires, an employer to take action and bring the matter to a close.
>
> I find that the respondent failed to accord the claimant a hearing in the manner provided under Section 41 of the *Employment Act*. Further, the respondent failed to prove that it actually asked the claimant to explain about the broken seal of the fuel tank as no evidence was produced of the same. This is an explanation that should have been sought in writing and the claimant required to respond to in writing for record purposes.
>
> For the foregoing reasons I find the termination of the claimant’s employment unfair both substantively for want of proof of reason for termination, as well as procedurally, for failure of fair procedure.”

25. This court further relies in the decision *Alex Siboi Masinde & another v K K Security* [2020] eKLR which the court pronounced:-

> " Even if the Claimants had absconded duty as alleged they are still by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the Court to support there having been a disciplinary hearing or notice of the same issued prior to the termination. It is the duty of the Respondent to show this Court it did accord the Claimants fair hearing prior to their termination.

26. In the case of *Felistas Acheha Ikatwa v Charles Peter Otieno* [2018] eKLR the court held that:

> " 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."

27. In the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR the Court held that:

> " .... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."
>
> In view of the foregoing I find that the termination of the Claimants' employment was indeed unlawful, unfair and wrongful."

28. Against this background, this court finds the trial court correctly found that the Appellant unlawfully terminated the Respondent. The Appellant alleges the Respondent deserted duty, however, she failed to satisfactorily show that she undertook any action to establish the Respondent's whereabouts and grant the Respondent proper disciplinary action as set out under section 41 of the *Employment Act* so as to close the employment relationship between the parties.

29. The court finds the claimant/respondent proved her case on balance of probability and so the court proceeds to uphold the judgment entered by the trial magistrate in favour of the respondent.

**Issue No 2 Whether the learned magistrate err in law and in granting the Respondent the relief sought in her memorandum of claim.**

30. Having upheld the trial court's finding that the Respondent/ Claimant's termination was unlawful and unfair, this court finds that the trial court rightfully exercised its discretion in awarding the Claimant one-month salary in lieu of notice (Kshs 10,000) and so the same is upheld.

**31. Annual leave**

The Trial court pronounced itself as follows: -

> " The Respondent ought to have kept record for the annual leave granted to the claimant for every year ending. I have however considered the indication that she took out vacation every year and in this time gave the claimant leave days. She attached photos of her passports which bore visas for various travels. The claimant acknowledged this fact but disputed that she was granted the leave days. I again have considered the two narratives and find that the respondent had a duty to keep records of the claimant leave days. The photos of passport

travel are evidence of travel and not prima facie evidence of leave granted to the claimant. Section 28 of the *Employment Act* provides that an employee shall be entitled after every twelve consecutive months of services with the employer to not less than 21 working days leave with full pay.

32. Having said so this court however finds there is no prove or support of the gist of the amount claimed and how the same was arrived at. The court is inclined to reject that prayer for leave.

33. **Underpayment of wages**

The trial court held: -

> "As at 1st May 2015, the minimum wage stood at Kshs.10594. the claimant at this time was being paid Kshs 8,000 which was increased to Kshs. 10,000. The Respondent confirmed this figure in her examination in chief. The sum was therefore below the minimum wage."

34. This court agrees with the Appellant's submission however that the trial court erred in law in awarding underpayment in wages as the respondent did not tender evidence as to how she arrived at the figure of kshs 141,133.20. the court declines that prayer

35. As for the house allowance the Appellant only argument is that the Respondent did not adduce any evidence to corroborate her allegations, however, she herself admitted during hearing that she did not provide the Respondent housing and the salary she confirmed to have paid the Respondent was not inclusive of the house allowance, this court therefore upholds the trial court's decision to grant the Respondent unpaid house of Kshs 85,967/-.

36. Service pay

The Appellant submitted that the learned magistrate erred in law in awarding the Respondent service pay as the *Employment Act* provides that severance pay is only paid only where there is an issue with redundancy.

37. In *Ephantus Ndirangu Murage v Memusi Trading Limited* [2015] eKLR the court distinguishes between severance pay and service pay thus:-

> "Such severance pay is not similar to service pay. One is due under section 40(f) while the other is due under section 35(5) of the *Employment Act*. One is paid due to redundancy while the other is due to termination where an employer was not making statutory remittances. Severance pay is payable in one situation only that of redundancy while service pay can be paid in both scenarios where there is a termination and the employer was not remitting the statutory dues as under section 35(6) of the *Employment Act*. In this case, the Claimant is seeking for Service pay that was not paid in accordance with the employment contract at clause 9. The Claimant has computed his dues with interest and late payments' interest. What is due is severance pay and not service pay and in the interests of justice, what will be computed is such severance pay as this is what is legally due in a case of redundancy."

38. Service pay is payable under section 35 (5) and (6) of the *Employment Act*.

> "(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund."

39. In view of the foregoing, it is key to note that the Respondent in her memorandum of claim sought for service pay and not severance pay as adduced by the Appellant. This court therefore upholds the trial court's decision to award the Respondent service pay for period worked @ Kshs 29,824/-.

40. The court has already addressed the issue of whether the termination of the claimant was lawful or not and the court has entered a verdict that the claimant was unlawfully terminated from her employment and has upheld the judgment of the trial magistrate. However, the respondent only worked for the appellant for about four years. Compensation of 5 months equivalent of her slay is reasonable as per the guidelines of section 49 (c) of the *employment act*. So, the court will replace 8 months compensation to 5 months which amounts to kshs 50,000/.

28. The award of the trial magistrate is therefore replaced from kshs 418,020.20 to kshs 175,791.

28. The respondent is awarded costs of this appeal based on the current award and also costs of the lower court in the same way based on this award as well as interest at court rates from the date of this judgment till payment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF NOVEMBER 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**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 has 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.**

**ANNA NGIBUINI MWAURE**

**JUDGE**