



**K B Sanghani & Sons v Achola (Appeal E074 of 2023)
[2023] KEELRC 3078 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3078 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E074 OF 2023
M MBARÚ, J
NOVEMBER 16, 2023**

BETWEEN

K B SANGHANI & SONS APPELLANT

AND

CLIFF OTIENO ACHOLA RESPONDENT

*(Being an appeal from the judgment of Hon. D A Orimba
delivered on 26 July 2023 in Mombasa CMELRC No.684 of 2019)*

JUDGMENT

- 1 The appeal herein arises from the judgment in Mombasa CMELRC No.684 of 2019 delivered on 26 July 2023.
- 2 The background of the appeal is a claim filed by the respondent herein, Cliff Otieno Achola against the appellant on the grounds that he was employed as a site supervisor on 7 December 2016 at a wage of Ksh. 35,000. The wage was inclusive of house allowance per month and Ksh.300 food allowance per day. Work was from 6am to 6pm daily all 12 hours without payment for overtime. He claimed that on 8 June 2019 the appellant refused to pay the agreed wage and informed him that his contract had been terminated. He was accused of failing to keep work records which was not true since such records were kept by the pump attendant and there was a fuel centre clerk mandated to keep records of all vehicles supplying fuel. His duties did not involve keeping such records. It was the respondent's case that there was loss and misappropriation of fuel which acts were criminal in nature and could only be adjudicated by the appropriate criminal justice mechanism which the appellant failed to address.
- 3 Therefore, he claimed that there was unfair termination of employment and the following terminal dues;
 - a. one-month notice pays Ksh. 35,000;



- b. unpaid May and June salary Ksh. 70,000;
 - c. unpaid food allowances for 197 days' x 300 = Ksh. 59,100;
 - d. unpaid overtime for 183 weeks at Ksh. 615,531;
 - e. unpaid weekly rest days for 183 days Ksh. 492,690.90;
 - f. unpaid public holidays for 3 years for 42 days Ksh. 113,076.60; and
 - g. compensation for unfair termination of employment Ksh. 420,000.
- 4 In response, the appellant denied the claim and also made a counterclaim. The respondent was employed as site supervisor at Bamburi Plant and was in charge of operations with duties which included maintaining and keeping all records of fuel consumption by excavators under him. The wage was agreed at Ksh. 35,000 which catered for house allowance and work hours from 6am to 6pm. Notice before summary dismissal was not mandatory under the employment contract as alleged.
- 5 In May 2019 the appellant requested the respondent to provide all weekly records of fuel consumption to verify and cross check with the findings of Komatsu fuel tracking system which showed a misuse and overconsumption by the excavators under the supervision of the respondent. He refused to provide the records despite being advanced with two months' salary in May 2019. This resulted in gross misconduct. Employment was terminated in accordance with the law due to gross misconduct for neglect of duty and failure to take directions following misappropriation of fuel. These reasons were communicated verbally to the respondent and he was given a hearing to make his representations and the claims made are not justified.
- 6 In counterclaim, the appellant's case was that the respondent led to massive loss of funds due to misappropriation of fuel use in the year 2016 to 2018. The noted variances were that;
- For KHMA 190J
- in the year 2018 at Nyali yard the loss was Ksh. 4,195,070;
 - in 2017 at Nyali yard the loss was Ksh. 3,755,290;
 - in 2016 at Nyali yard the loss was Ksh. 3,966,930 total loss Ksh. 11,917,290
- For KHMA 763A
- in the year 2018 at Nyali yard the loss was Ksh. 3,320,130;
 - in 2017 the loss was Ksh. 1,655,280;
 - in 2016 the loss was Ksh. 1,699,690 total loss Ksh. 6,674,690
 - overall loss Ksh. 19,931,010.
- 7 The respondent failed to appraise management on his operations with overdrawings and misappropriation of fuel and failing to keep work records leading to the loss of Ksh. 19,931,010 which is counterclaimed. The loss was noted following forensic audit carried out in the books of accounts and judgment should be awarded with costs.
- 8 The trial court heard the parties and in the judgment delivered on 26 July 2023 there was a finding that there was unfair termination of employment and hence awarded the respondent a sum of Ksh. 1,805,699 as claimed together with costs.



- 9 Aggrieved, the appellant has nine grounds of appeal on the basis that the trial court erred in failing to make a finding as to how the respondent was dismissed from his employment which he said was done verbally and which had no evidence or an independent witness. The finding that the appellant failed to prove its case for lack of records was to shift the burden on the wrong party instead of putting into account that the respondent deserted duty and despite attempts to recall him being fruitless, there was a good justification leading to termination of his employment.
- 10 Other grounds of appeal are that the trial court erred in making a finding that the respondent had proved his case with regard to claims for unpaid food allowances, overtime, rest days by the default of the appellant filing work records. The award of 12 months' compensation was excessive and without justification as required under Section 49 of the *Employment Act*.
- 11 The Trial court failed to give due consideration to the counterclaim which had merit and should be allowed.
- 12 Parties attended and agreed to address the appeal by way of written submissions.
- 13 The appellant submitted on four broad areas with regard to grounds that the respondent failed to prove his claim that there was verbal termination of employment; that he abandoned his employment and the reliefs sought and awarded were not justified and should be dismissed and the counterclaim assessed and awarded with costs and interests.
- 14 The appellant submitted that the respondent testified that he took his annual leave and when he resumed duty on 22 March 2019 he was informed that his employment had been terminated which contradicted his claim to the effect that on 8 June 2019 the appellant refused to pay his wages and verbally informed him that his contract of employment had been terminated. Without proof of who terminated the respondent in his employment, such resulted in desertion of duty an act of gross misconduct and under Section 47(5) of the *Employment Act* (the Act) the burden of proof was on him to prove it was unfair which he failed to do. The burden of proof is upon he who asserts in terms of Section 107 of the *Evidence Act*. In the case of *Wilson Mudogo Mulima v Worldwide Movers (K) Limited* [2014] eKLR on a claim of verbal termination of employment, the duty was on the employee to prove and to call evidence in this regard. In the case of *K B Sanghani & Sons v Peter Idewa Papa* ELRC Appeal No.62 of 2021 the court held that there was no evidence on the date employment was terminated and the evidence given was assumptive and presumptive full of inconsistencies hence of no probative value.
- 15 Effectively, by the respondent failing to state the date his employment was terminated he absconded duty hence frustrating his employment. The appellant made efforts to contact him without success. The respondent testified that in February 2019 Mr. Sanghani told him to provide fuel reports of diesel consumption of all machines that were under him which he supervised but he failed to provide any satisfactory reports even though he had been accorded all the necessary support. From April 2019 he absconded duty without any valid reasons and failed to submit the reports required. He did not work in May and June 2019 and to this extent the appellants evidence is the only coherent material in this regard and should be applied as held in the case of *Catherine Musembi Mbutia v Perfect Touch Drycleaners Limited* [2020] eKLR.
- 16 On the remedies sought, notice pay is not due in a case where the employee absconded duty. The respondent was paid for May and June 2019 but failed to work and a further claim of notice pay at Ksh. 35,000 would be unjust payment. On the claim for house allowances, the wage paid was consolidated and inclusive. The payment for food was only due to employees at Bamburi quarry and addressed in the contract of employment which was not the case for the respondent. In any event, the respondent



- was away from the Nyali yard from January 2019 and he then took annual leave from 15 February to 22 March 2019 after which he did not report back to work and cannot claim for provisions of food or an allowance.
- 17 The claim for overtime pay is not justified as the work hours were agreed in the contract of employment. In the case of *Rogelio Ole Maradiaga v General Cargo Services Limited* [2016] eKLR that the employer is the custodian of work records and where the employee is claiming overtime, the records of the employer in this regard to apply.
 - 18 On the claim for work during two rest days each week, the respondent testified that he was at work for 6 days each week and he received his full month wages. This put into account, a claim for two rest days should have been dismissed.
 - 19 A claim for work during public holidays was without evidence and particulars as held in *Reef Hotel Limited v Josephine Chivatsi* [2021] eKLR. Without evidence, such a claim should have been dismissed.
 - 20 The appellant also submitted that the award of compensation at 12 months was too excessive. The respondent worked for less than 3 years, he refused to take directions and this should have been put into account. The loss to the appellant was almost Ksh.20 million which was not mitigated. The award made should have been less statutory deductions and upon the consideration of the counterclaim on the merit and based on the evidence presented before the trial court, it should have been allowed with costs. Part of the duties by the respondent related to holding morning meetings with all employees on risk assessment, provide reports for additional fuel on excavator machines on site, supervise fueling and planning operations as Mr. Narendra testified. failing to undertake his duties properly caused loss and damage to the appellant and the reasons for the counterclaim.
 - 21 The respondent submitted that, the appellant as the employer has not submitted any evidence as to how employment was terminated. Summary dismissal should arise from the employer. The employer is the legal custodian of work records which should have been submitted to confirm termination of employment or that their desertion of duty. In the case of *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR the court held that where an employee is alleged to have deserted duty, it is necessary for the employer to show that it had taken steps to bring the employee to account which was not the case here leading to unfair termination of employment.
 - 22 Notice pay is due at Ksh. 35,000 for lack of due process. The response that the appellant had paid for two months in May and June 2019 is without evidence to justify lack of adherence to the law as held in *Abigael Jepkosgei Yator & another v China Hanan International Co. Limited* [2018] eKLR. Without work records to demonstrate that the appellant paid the due food allowances, such is due as claimed and awarded. under the contract, the clause on remuneration allowed for Ksh.300 food allowance per day.
 - 23 The payment of overtime was due since the contract allowed for 12 hours work per day which is over and above the minimum work hours. There was no rest day allocated which is contrary to the law and the Wage Orders provide for 52 hours each week for a period of 6 days. For the two weekly rest days due, the respondent is entitled to the due pay together with the Public Holidays.
 - 24 Trial court correctly assessed the claims and made an award which should be confirmed.
 - 25 The respondent submitted that on the counterclaim, this was determined as comprising a criminal case or a debt to be recovered outside the employment dispute. there was no warning or notice to give an account for the alleged loss and without any records, the findings by the trial court was proper and the counterclaim was properly dismissed.



Determination

- 26 This being a first appeal, the court has a duty to re-evaluate the entire record, the evidence and findings together with the submissions by the parties and arrive at own findings.
- 27 At the heart of the appeal is the issues of how employment terminated and the remedies sought by the respondent and ultimately whether the counterclaim is with merits.
- 28 The appellant's case is that in May 2019 the respondent was directed to give an account of the fuel consumption by the excavators as part of his operational duties, he failed to render an account and despite being facilitated in this regard and paid for May and June 2019 he failed to give account and proceeded to desert duty. Upon a forensic audit, the appellant had incurred a loss of Ksh. 19,931,010 due to the negligence of the respondent which comprise the counterclaim herein.
- 29 The respondent on his part asserted that his employment was verbally terminated by the appellant without good cause or payment of his terminal dues. The matters addressed in the counterclaim are criminal in nature and should have been addressed as such through criminal investigations or claimed as a debt.
- 30 In employment, the employer has a duty to regulate the employee in his duties. It is not sufficient to state that the employee deserted duty. The employer is required to demonstrate what measures were taken to bring the employee who is absent to account and where there is no response, Section 44(4)(a) of the *Act* allow the employer to dismiss the employee from his employment. To secure itself, the employer such as the appellant is required to serve such notice upon the Labour Officer in accordance with Section 18(4) of the *Act*. The foundation of such matter is that the employee cannot terminate himself from his employment. The employer must complete the circuit by issuing the notice terminating employment to the subject employee. To leave the employee at large on the grounds that he absconded duty is to invite claims as herein done.
- 31 The appellant's assertion that efforts to trace the respondent when he failed to render an account on the fuel variances and losses is without evidence. There is no written notice. No notice issued to the labour officer.
- 32 In the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR the court held that;
- The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels.
- ...
- Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it.
- 33 The respondent's case is that on 6 June 2019 his employment was verbally terminated by the appellant upon allegations that he had refused to keep work records which was not his duty.



- 34 The appellant on their part submitted that the respondent took his annual leave from 15 February to 22 March 2019 after which he did not report back to work. Efforts to trace him to render an account for fuel variances were fruitless.
- 35 However, the appellant asserted that they gave the respondent time to give an account on fuel variances and losses and paid him for the months of May and June 2019. Such payments and requirements could not have arisen outside his employment. The assertions that the respondent did not report back to work after his annual leave ending on 22 March 2019 is negated by the directions and time allocation to account for fuel losses in May and June 2019.
- 36 Without any notice terminating employment as analyzed above, the date when employment terminated is as stated by the respondent, the 6 June 2019.
- 37 The evidence by the appellant that the respondent was paid his wages due in May and June 2019 is not challenged in any material way. Where employment terminated on 6 June 2019, which included wages paid for days worked, in terms of Section 35 and 36 of the Act, the award for notice pay should have factored such matter and allocated pay for 24 days paid for less 30 days' pay due and allocated pay for 6 days only.
- 38 At a wage of Ksh. 35,000 per month, notice pay due to the respondent is Ksh. 7,000 only.
- 39 On the reasons leading to termination of employment, the respondent was under a written contract of employment. His duties were spelt out to include *as per defined in your job description and any other suitable duties that may be assigned to you by the management from time to time that you shall not ...*
- The job description is not attached to the contract.
- 40 However, under the Act, an employer is allowed to give the employee instructions that are proper and lawful. Failure to abide such directions amounts to gross misconduct in terms of Section 44(4) of the Act and the employer is allowed to issue the sanction of summary dismissal.
- 41 The respondent was the Site Supervisor for the appellant. He was required to render an account for fuel use by the excavators. In the Memorandum of Claim, the respondent took the view that these were not his duties and the person to render account was the fuel attendant and clerk who kept the records. The appellant directly instructed the respondent to render an account in this regard and proceeded to pay him for two months to ensure such task was completed. He failed to do as directed.
- 42 At the end of employment on 6 June 2019, the respondent had refused to address lawful instructions by the employer. Such was a sufficient reason for summary dismissal save no notice issued in this regard. There was lapse in due process. Employment terminated unfairly for want of procedural justice despite the appellant having a substantive reason to do so.
- 43 In addressing the compensation to allocate an employee who has alleged unfair termination of employment, the court is required to look at the conduct of the employee and the culpability in terms of Section 45(5) of the Act;
5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;



- b. the conduct and capability of the employee up to the date of termination;
- c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
- d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any previous warning letters issued to the employee.

- 44 In the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR the Court of Appeal held that where the employer genuinely believes that there exists a genuine reason to justify termination of employment, such is allowed in terms of Section 43 of the Act. In *Matsesho v Newton* (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) (29 July 2022) (Judgment) the court gave emphasis that where the employer has reasonable grounds to entertain a genuine belief that the employee had been misappropriating money meant for other purposes at the work place and this has led to financial losses to the employer, then, summary dismissal is justified and in assessing compensation due to the employee, such matters must be factored.
- 45 The general award of 12 months by the trial court in the judgment is not given any background or foundation as to why the maximum was allocated. Indeed, as the appellant correctly submitted, the respondent had worked for less than 3 years and had refused to take lawful instructions with regard to his employment. When called to render an account over fuel variances, he refused leading to termination of employment.
- 46 To award compensation in a matter that justified summary dismissal was to reward gross misconduct contrary to the principles outlined under Section 45(5) of the *Act*. The award must be reasonable, fair and equitable and take into account the culpability of the employee.
- 47 Compensation given context, the conduct of the respondent addressed, zero (0) award should apply.
- 48 On the claim for unpaid wages for May and June 2019, such is addressed above and what is due is pay for notice upon terminating of employment on 6 June 2019.
- 49 With regard to the claim for unpaid food allowances for 197 days at 300 per days, in his evidence before the trial court, the respondent's case was that from 27 December 2018 his food allowance was not paid. In his evidence in court he confirmed that the food allowance would be paid to buy milk while at the work site due to dust.
- 50 This then required the respondent to demonstrate his tabulation of 197 days that he was at work so as to earn such an allowance. The taking of annual leave from 15 February to 22 March 2019 are not accounted for. Work was for 6 days in a week which ought to have been gone into in the tabulation of the claim and further the end date of 8 June 2019. The contract required as follows;
- ... further the management shall pay you Kshs 300/= being your daily food allowance. The same shall be paid to you at the end of each day or in arrears per week/month. this allowance caters for your food allowance and shall not be applicable when you are away on leave or rest day.
- 51 This exercise of tabulation of time ought to have been gone into by the respondent as the claimant to allow the appellant to address. Pleadings without particulars was not sufficient.



- 52 The trial court did not give any reasons for the global award in this regard. The claim for food allowances is not justified.
- 53 On the claim for overtime pay, the respondent was under a written contract of employment. His work hours were an agreed item from 6am to 6pm. His wage was agreed to Ksh. 35,000 per month to take care of such overtime hours.
- 54 The respondent was therefore not earning a minimum wage allowing him the claim for overtime pay outside the agreed all-inclusive wage of Ksh. 35,000.
- 55 The claim for two rest days is on the basis the respondent had 183 rest days due. Indeed, under Section 27 of the *Act*, the employee has the right to a rest day per week. It is a single day in every 7 days and not two days. Section 27(2) requires that;
- (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.
- 56 The respondent testified that he was at work for 6 days each week. Such addressed in terms of Section 27 of the *Act*, his claim for two rest days pay per week has no legal foundation.
- 57 Allocation for pay following work during public holidays is now settled in terms of the Court jurisprudence. Public Holidays are not general day. All are gazetted by the Minister. A claim thereof must give a chronology as to how such days are allocated. Without particulars thereof, the general claim cannot suffice.
- 58 With regard to the counterclaim, the only response by the respondent thereof is that matters of alleged misappropriation of funds and loss of money are criminal in nature and the appellant ought to have applied criminal procedures or debt recovery proceedings. In employment and labour relations, once an employee is allocated a duty and he fails to do it properly and is careless in undertaking the duty, the loss thereof should be recovered from the employee. The detriment to the employer caused by the conduct of the employee is recoverable lawfully from the employee in accordance with Section 17, 18 and 19 of the *Act*.
- 59 The respondent can therefore not be justified to claim that there were no criminal proceedings against him for the fuel losses to the appellant. A forensic audit was conducted which revealed a fuel loss amounting to Ksh. 19,931,010 and for which the respondent failed to render an account. The response that if such a loss occurred it should have been recovered as a debt was to avoid the obvious. Brought to account, the respondent as the employee should have seized the opportunity to give his representations in this regard.
- 60 Ultimately, the counterclaim was not challenged in any material way. The respondent lost the single opportunity to clear himself. He further squandered the chance to give a proper defence to the counterclaim. He cannot blame the appellant or shift the burden.
- 61 The option to apply criminal procedures or debt recovery measures did not preclude the appellant from recovering its losses caused by the conduct of the respondent as the employee at the end of employment. The sum of Ksh. 19,931,010 is hence due as counterclaimed.
- 62 The counterclaim is allowed as prayed.
- 63 Both parties have claimed costs. In employment claims, award of costs is not automatic. The provisions of Section 12(4) of the *Employment and Labour Relations Court Act*, 2011 make costs discretionary and reasons must be given. The appeal successful, each party to pay own costs.



64 Accordingly, the appeal herein partially succeeds and the judgment in Mombasa CMELRC No. 684 of 2019 is hereby set aside and the following Orders issued;

- a. Compensation is awarded at zero (0);
- b. The award of Notice pays hereby reduced to Ksh. 7,000;
- c. Certificate of Service is hereby confirmed; And

65 On the counterclaim;

The counterclaim is found with merit and judgment hereby entered for the appellant against the respondent in the following terms;

- a. Fuel loss at Ksh. 19,931,010;
- b. The awards shall be offset from whichever is higher; and Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

