



**St. Elizabeth Academy Karen Limited & another v Chege (Appeal
E062 of 2023) [2023] KEELRC 2835 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2835 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E062 OF 2023
M MBARÚ, J
NOVEMBER 9, 2023**

BETWEEN

ST. ELIZABETH ACADEMY KAREN LIMITED 1ST APPELLANT

ST. ELIZABETH ACADEMY KAREN LIMITED 2ND APPELLANT

AND

PETER NGARI CHEGE RESPONDENT

*(Being an appeal from the judgment of Hon. J.B. Kalo delivered
on 20 June 2023 in Mombasa CMELR No. 145 of 2019)*

JUDGMENT

1. The appeal herein arises from the judgment in Mombasa CMELRC No.145 of 2019 delivered on 20 June 2023. The background of the matter being a claim filed by the respondent against the appellant on the grounds that he was employed as the principal of the appellant's Bamburi campus in January 2016 on a verbal contract at a monthly wage of Kshs. 45,000. On 16 January 2019 he received two agents of the appellant, Mr Kisa and Tuku who directed him to hand over his duties and despite writing an email to the director, Ms Anne Wanjiku on 17 January 2016 about the matter, there was no response. Following the handing over of his duties, the respondent took it that his employment had been terminated.
2. The respondent's claim was that at the principal, he had been constrained to use his personal monies to run the school amounting to Kshs. 137,238 without a refund by the appellant. His salary would be delayed on several occasions and a balance of Kshs. 260,000 remained unpaid. He was not paid a house allowance or provided with a house and his dues to NSSF and NHIF were not paid and thus claimed the following dues;
 - a. Notice pay Kshs. 45,000;



- b. Unpaid salaries Kshs. 260,000;
 - c. Expenses incurred Kshs. 137,235;
 - d. House allowances Kshs. 324,000;
 - e. Service pay Kshs. 67,500;
 - f. Damages for unfair termination of employment Kshs. 540,000;
 - g. Unremitted NSSF and NHIF Kshs. 78,480; and
 - h. Certificate of service;
 - i. Costs.
3. On their part, the appellant's responded and counterclaimed on the grounds that the respondent was asked to give books of accounts for examination but he refused and left. Another officer was appointed to run the school after the respondent failed to attend to his duties or to submit the books of accounts as required. He knew what was going on due to complaints by parents and from the director who had called him that due to his non-cooperation, this would lead to summary dismissal. The email communication sent on 17 January 2016 was unnecessary since the respondent had already abandoned his duties and disobeyed lawful instruction and summary dismissal had already taken effect.
4. The respondent took away the school cash book and receipts file which he is still holding to create an impression that he used his money for school activities. The alleged non-payment of salaries is lost from the fact that the respondent alleged that he used his own monies to finance school activities.
5. The salary paid was inclusive of house allowances, summary dismissal was justified without notice or payment of damages. He is not entitled to service pay since he stole and mismanaged finances.
6. In counterclaim, the appellants case was that the respondent was put in a position of responsibility but mismanaged the school and stole money and took away the books of account. Upon a reconciliation of the book, the sum of Kshs. 210,400 is missing and hence counterclaimed with costs.
7. In the judgment by the learned magistrate, there was a finding that there was unfair termination of employment and the following awards issued;
- a. Notice pay Kshs. 54,000;
 - b. Salary arrears Kshs. 260,000;
 - c. House allowances Kshs. 324,000;
 - d. 12 months' compensation Kshs. 540,000;
 - e. Costs and interests.
9. Aggrieved by the judgment, the appellant filed this appeal on eleven grounds that the ex parte judgment denied the appellant a fair chance to be heard on the merits and resulted in a judgment with awards without evidence of any unfair termination of employment which was excessive. The award of 12 months' compensation was without a legal foundation and the award of costs and interests was in error as the sum claimed was non-liquidated at the time of filing he suit. the award of salary arrears from October 2017 to November 2018 at Kshs. 260,000 was without proof as well as house allowances which were not part of the employment contract and the wages paid were consolidated. Notice pay was awarded at Kshs. 54,000 instead of Kshs. 45,000 without any basis.



10. Further grounds of appeal are that the trial court failed to address the counterclaim which should be allowed and the judgment in favour of the respondent set aside.
11. Both parties attended and agreed to address the appeal by way of written submissions.
12. The appellant submitted that the award of 12 months' compensation in the matter was excessive and without justification. No reasons were given with regard to the maximum award available. The respondent only worked for the appellant for 3 years and had this been put into account and the circumstances of his abandoning duty, the maximum award would not have issued as held in *International Planned Parenthood Federation v Pamela Ebot Arrey Effiom* [2016] eKLR.
13. The award of interests from the date of filing suit is in error since the claim was not then liquidated and ought to be upon judgment until payment in full, if at all. The award only coalesced upon judgment and not before. To award interests from the date of filing suit defeats the purpose as held in *Charles Mwalia v the Kenya Bureau of Standards* [2001] 1 EA.
14. The judgment award should be subject to statutory deductions as held in *Ernest Kibet Tormoi v Kenya Farmers Association Limited* [2019] eKLR as this is a statutory requirement.
15. The respondent claimed for salary arrears from October 2017 to November 2018 at Kshs. 260,000 and also claimed refund of his expenses at Kshs. 137,000 without explaining how he was able to do so without a salary. As the accounting officer, he had access to school funds and he failed to account for funds leading to the counterclaim for Ksh210,400.
16. The respondent had a consolidated wage and Section 31 of the Employment Act allowed for such payment and should not have been awarded for house allowances as a separate item.
17. The appellant also submitted that the counterclaim was not heard on the merits and should be allowed as this is not contested. The sum of Kshs. 210,400 was misappropriated, the respondent took away the books of account and has refused to render an account for these funds.
18. The respondent failed to prove his case to the required standards, and the award of notice pay at Kshs. 54,000 was in error as his wage was not of such an amount and the appeal should be allowed.
19. In response, the respondent submitted that his claim before the trial court proceeded ex parte upon the appellant failing to attend as directed by the court and after an application made on 2 February 2021 when the advocates applied to cease acting for the appellant for lack of instructions and which was allowed on 27 April 2021. The hearing notices were properly served and the hearing proceeded upon the court being satisfied that there was proper service and the appellant cannot blame the respondent for failing to attend court as required.
20. On the evidence, the learned magistrate applied Section 49 of the Employment Act, 2007 (the Act) and made an award of 10 months which is lawful and justified. The basis was Kshs. 54,000 per month x 10 all at Kshs. 540,000. The summary dismissal was found unfair and notice pay at Kshs. 54,000 was justified.
21. The respondent submitted that the payment of interests on the award should accrue from the date of filing suit as every claim is quantified. Order 2 rule 4 of the Civil Procedure Rules allow for the court to award interests on all quantified claims on matters specifically pleaded.
22. Section 49(2) of the Act requires that any payment is made to an employee should be subject to statutory deduction. These deductions are done by the employer and the appellant ought to have calculated the payable deduction for remittances as necessary. Salary arrears were awarded on good



basis. There is no evidence by the appellant that the claimed salaries were paid together with due house allowances.

23. The counterclaim though pleaded had no evidence. The appellant kept on changing its advocates and none was present during the hearing to urge its claim hence cannot justify to urge it at the point of appeal. The issue of notice pay at Kshs. 54,000 instead of Kshs. 45,000 is an innocent mistake that can be corrected by the court.
24. This being a first appeal, the court has the duty to re-evaluate the entire record and findings of the trial court and make findings but take into account that the learned magistrate had the opportunity to hear evidence from the parties.
25. With regard to ex parte proceedings before the trial court leading to the judgement delivered on 20 June 2023, the appeal herein relates to the judgment delivered and not the ruling following application to set it aside. On the record is the appellant's application dated 30 August 2022 seeking to set aside ex parte proceedings of 18 August 2022 which application was heard on the merits and a ruling delivered and the same dismissed.
26. There is no appeal with regard to that application and its outcome. To urge it within this appeal upon the judgment of the trial court would not achieve the ends of justice.
27. As outlined above, the respondent's case before the trial court is that he was employed at as the principal Bamburi Campus at a wage of Kshs. 45,000 per month. There is no written contract with an outline of terms and conditions of employment. This is contrary to the provisions of Section 10(3) of the Act which requires the employer such as the appellant to issue and employee with a written contract of employment. Such a contract does not only protect the rights of the employee but those of the employer and when a dispute such as herein arises; the written contract becomes relevant.
28. The appellant's case that the respondent failed to hand over books of accounts to its agents when called upon to do so and then proceeded to act contrary to instruction and hence there was summary dismissal is a procedure contrary to the provisions of Section 41, 43 and 44 of the Act. An employee does not dismiss himself from employment. Even in a case where the respondent is alleged to have left with books of account and refused to return to work when directed to hand over such books, the appellant as the employer should have issued him with notice to allow him to attend and respond. To leave him at large only attracted a claim as herein done.
29. In the case of *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR the court held that;

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.

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.



30. This position is given emphasis in the case of in James Okeyo v Maskant Flower Limited [2015] eKLR the court held that 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.

Equally in this case, the appellant as the employer should and ought to have followed the due process with regard to the respondent exit from employment. No notice issued, and no letter of dismissal issued. There is no effort to demonstrate what measures were employed to cause the respondent to attend and address any matter of misconduct or gross misconduct before or after his alleged exit from employment.

This resulted in termination of employment on the part of the appellant without due process and the award of notice pay and compensation were justified.

The respondent has conceded that the application of Kshs. 54,000 instead of Kshs. 45,000 was in error.

Indeed, the respondent, in his pleadings admit that his last wage was Kshs. 45,000 per month and this ought to have applied in assessing the notice pay due in terms of Section 35 of the Act.

With regard to award of compensation, the respondent's case is that the award of Kshs. 540,000 was based on 10 months' salary at Kshs. 54,000 and not 12 months. This interpretation is different from the finding of the learned magistrate who assessed he award at 12 months in the judgment and the decree that issued.

The multiplier of Kshs. 54,000 is in error and this has no foundation based on the claim.

31. Equally, the award of compensation must be given reasons and justification. In Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR the court held that an award of the maximum of 12 months' pay must be based on sound judicial principles, and that the trial judge must justify or explain why a claimant is entitled to the maximum award.
32. The Court of Appeal in the case of Ol Pejeta Ranching Limited v David Wanjau Muhoro Civil Appeal No 42 of 2015 held that;

Was the award of Kshs 3,489,084/- representing the Respondent's 12 months' gross salary as compensation for unfair termination justifiable? Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include payment equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as ... the conduct of the employee which to any extent caused or contributed to the termination...

33. Reasons and justification must be gone into in making an award following a finding that there was unfair termination of employment. In Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR the Court held that in granting 12 months' salary as compensation for unfair termination, it considered the Claimants long service.
34. The respondent worked for the appellant from January 2016 to 16 January 2019 a period of 3 years. This put into account, compensation commensurate to 3 months' gross wages should suffice all at Kshs. 45,000 x 3 = Kshs. 135,000.



35. With regard to the claims made, these ought to have been assessed on the merits. The respondent had no written contract. His wage was not regulated and hence, Minimum Wage orders applied to him and a wage of Kshs. 45,000 per month is over and above the minimum wage and to claim a house allowance over and above such wage is unjust enrichment.
36. On the claim for unpaid wages from October 2017 to November 2018, the appellant as the employer is the legal custodian of work records. Where the respondent as paid for such period, upon service of the summons herein, these work records should have been filed in terms of Section 10(6) and (7) of the Act which requires that;
- (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
- (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer
37. This burden is not discharged and the learned magistrate correctly assessed this claim and accordingly awarded at Kshs. 260,000.
38. On the claims for expenses incurred at Kshs. 137,235, there are no findings in this regard in the judgment. An employee who expends personal funds for and on behalf of the employer should seek approval and prior authorisation. Where the expense incurred is necessary and made out of necessity, the employee should at the earliest opportunity bring this to the attention of the employer and seek approval and reimbursement. To proceed and make expenses on behalf of the employer without approval, a challenge on the source of such funds may arise.
39. The respondent has no communication that he got approval or that he sought approval upon undertaking use of his personal funds for the benefit of the appellant. He cannot claim without such authority.
40. Service pay is due where the employer fails to abide the provisions of Section 35(5) and (6) of the Act. Without any written contract, without the appellant filing any payment statement in terms of Section 17 and 20 of the Act with an outline as to what deductions and employment benefits accrued to the respondent, service pay at the rate of 15 days' wage for the 3 years served is due and the claim for 67,500 should have been awarded.
41. The claim for unremitted dues to NSSF and NHIF these are due to the statutory body and not to the employee.
42. With regard to the counterclaim, at the end of employment, the employer is allowed to deduct unaccounted for monies that the employee has incurred during the course of employment. such should be deducted from the terminal dues in terms of Section 19(b) and (d) that (b) with regard to a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee; and where an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money.
43. The respondent does not deny that he was the principal Bamburi Campus. He was asked to hand over books of accounts. The appellant's case is that he left with these books. Indeed, the records filed by the respondent in support of his claim are in their nature, records which the employer should have in its custody. These includes petty cash vouchers, receipts and other work records of the appellant. Keeping



these records and producing them in evidence demonstrate criminal conduct by holding records of the employer to its detriment contrary to Section 44(4)(g) of the Act;

- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
- 44. By keeping the books of accounts, the respondent denied the appellant these records to be able to undertake its financial obligations and he should not be allowed to benefit from this gross misconduct.
 - 45. In this regard, in the payment of terminal dues, the employer is allowed to deduct the sum of Kshs. 210,400 due from the respondent and which remains unaccounted for.
 - 46. With regard to payment of costs and interests, in employment and labour relations, unlike other superior court, the award of costs and interests is not a matter of course. This should be sparingly awarded in terms of Section 12(4) of the Employment and Labour Relations Court Act, 2011. Reasons must be given to the extent that the employee, whose employment is unfairly terminated once compensated is restored and unless a respondent has failed to abide the due process and attend when invited to, each party ought to bear own costs. In this case, the record of the trial court demonstrates the appellant on several occasions hired advocates who applied to cease acting and introduced new advocates stalling proceedings and should pay costs.
 - 47. With regard to ward of interests, Section 26(1) of the Civil Procedure Act provides that interest may be ordered on any principle sum before filing of the suit, with further interest at rates the court may deem fit and reasonable from the date of the decree to the date of payment.
 - 48. Accordingly, the appeal herein partially succeeds and judgment in Mombasa CMELRC No.145 of 2019 is hereby reviewed in the following terms;
 - a. Notice pay awarded at Kshs. 45,000;
 - b. Compensation awarded at Kshs. 135,000;
 - c. Unpaid wages of Kshs. 260,000;
 - d. Service pay Kshs. 67,500;
 - e. A certificate of service shall issue in terms of Section 51 of the Employment Act, 2007;
And;
 - f. The dues above shall be paid less Kshs. 21,400 owed to the respondent in unaccounted for funds at the end of employment.
 - g. For the appeal and proceedings before the trial court, each party will bear own costs; and
 - h. The dues owed to the respondent shall be paid within 45 days after which interests shall accrue at court rates from this date and until paid in full.

DELIVERED IN OPEN COURT AT MOMBASA THIS 9TH DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine



..... and

