



**Fayaz Bakers Limited v Mcharo (Appeal 23 of 2022)
[2023] KEELRC 3280 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3280 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 23 OF 2022
AK NZEI, J
DECEMBER 7, 2023**

BETWEEN

FAYAZ BAKERS LIMITED APPELLANT

AND

MOHAMMED USHURU MCHARO RESPONDENT

*(Being an appeal against the entire judgment of Hon. C. N. Ndegwa
- SPM in MSA ELRC No. 789/2019 delivered on 21st March 2022)*

JUDGMENT

1. The Respondent herein was the Claimant in Mombasa Chief Magistrate’s Court CM ELR Case No. 789 of 2019 whereby he had sued the Appellant vide a memorandum of claim dated 22/8/2019 and pleaded:-
 - a. that the Respondent had been employed by the Appellant on 10/2/2001 as a driver and salesman, earning ksh. 700 per day as at the time of termination.
 - b. that on 5/6/2019, the Respondent was terminated from employment without any justifiable reason, and without following laid down procedures as contemplated in Sections 35, 41, 43 and 45 of the *Employment Act* 2007.
 - c. that there was no genuine reason to terminate the Respondent’s employment, and that the Appellant failed to pay the Respondent’s terminal and contractual dues, contrary to Sections 18,35 and 49 of the *Employment Act*.
2. The Respondent set out his claim against the Appellant as follows:-
 - a. 1 month salary in lieu of notice.....ksh. 30,627.40
 - b. Unpaid leave



- i. 2001-2012 (kshs. 932.10x21 days) x 11 years.....ksh. 215,315.10
 - ii. 2013-2014 (ksh. 1062.60X21 days) x 2 yearsksh. 44,629.20
 - iii. 2015-2016 (ksh. 1,190.10x21 days) x 2 yearsksh. 49,984.20
 - iv. 2017 (ksh. 1,404.30x21 days).....ksh. 29,490.30
 - v. 2018-2019 (ksh. 1,474.50x21 days) X 2 years.....ksh. 6,929.00
- c. Unpaid holidays
- i. 2001-2012 (ksh. 932.10x19 days) x 11 yearsksh. 389,617.80
 - ii. 2013-2014 (ksh. 1062.60x11 days) x 2 years x 2ksh. 46,754.40
 - iii. 2015 (1,190.10x12 daysx2).....ksh. 28,562.40
 - iv. 2016 (ksh. 1,404.30X12 days0X2ksh. 33,703.20
 - v. 2017 (ksh. 1,404.30X16 days0 x2ksh. 44,937.60
 - vi. 2018 (ksh. 1,474x13 days0 x 2.....ksh. 38,337
- d. Service pay (ksh. 1,474.50X15 days) x 18 yearsksh. 398,115
- e. Compensation for unfair termination of employment (ksh. 30,627.40 X 12 months)ksh. 367,525.80
- f. A declaration that termination of Claimant’s employment was unfair, unjust and wrongful.
- g. Costs of the suit and interest at Court rates.
3. Documents filed by the Respondent alongside the memorandum of claim included the Respondent’s affidavit in verification of the claim, the Respondent’s written witness statement dated 22/8/2019 and an evenly dated list of documents listing four documents. The listed documents included a copy of a warning letter issued to the Respondent by the Appellant dated 22/2/2018, a copy of a demand letter dated 29/5/2019, a copy of reply to the demand letter dated 3/7/2019 and a copy of the Respondent’s Identity Card.
4. The Appellant defended the suit vide a Response to claim dated 13/9/2019 and filed in Court on 24/9/2019; denying the Respondent’s claim. The Appellant further pleaded:-
- a. that the Respondent had never been employed by the Appellant, and that the Appellant had not terminated his employment as pleaded by him. The Appellant put the Respondent to strict proof of his allegations.
 - b. that the Appellant denied that a demand letter had been issued.
 - c. that the Respondent was not entitled to the alleged terminal dues as particularized in the memorandum of claim.



5. Documents filed by the Appellant alongside the Response to claim included a witness statement of one Swaleh Awadh Hemed dated 28/11/2019 and a list of documents dated 12/3/2020, listing six documents which included a bundle of various letters of appointment and confirmation letters issued by the Appellant on various dates to different employees, a bundle of various termination letter issued by the Appellant, NHIF inspection certificate (dated 5/9/2019) and correspondence between the Appellant and the Labour Office.
6. Trial is shown to have opened 1/2/2021 when the Respondent adopted his witness statement and adopted his filed witness statement, which I have noted replicated the averments made in the memorandum of claim, as his testimony. The Respondent further testified that he was employed on 10/2/2001 and worked from 6.00am to 6pm every day, earning kh. 700 per day. He also produced in evidence the documents referred to in paragraph 3 of this judgment. He testified that he was not given any contract, was not issued with payslip. The Respondent further testified that the letter dated 25/2/2018 (his exhibit) was a warning letter issued to him by the Appellant's Manager. It was the Respondent's further evidence that the Appellant was not paying his NSSF and NHIF contributions, and that he (the Respondent) was not a member of any union.
7. Cross-examined, the Respondent testified that he was orally employed as a driver, and was (also) a salesman. That he used to work on public holidays though he had not specified any public holidays in his statement; and that he was being paid in cash.
8. The Appellant called one witness, Swaleh Awadh (RW-1), who adopted his written witness statement as his testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. RW-1 denied knowing the Respondent, and stated that the Respondent did not appear on the Appellant's payroll.
9. Cross-examined, RW-1 testified that he had worked with the Appellant since 2018, and that the Appellant at times gave verbal warnings to employees, and that the payroll produced in evidence by the Appellant was for the years 2017, 2018 and 2019. RW-1 denied knowledge of the letter dated 25/2/2018 (produced in evidence by the Respodnent).
10. Parties are shown to have filed written submissions on the trial Court's directions in that regard. The trial Court delivered its judgment on 21/3/2022 and awarded the Respondent:-
 - a. Payment in lieu of noticeksh. 21,000
 - b. Service pay.....ksh. 189,000
 - c. Ten (10) months' salary as compensation for unfair termination of employmentksh. 210,000
 - d. Leave pay.....ksh. 14,700
 - e. Costs of the claim
11. Aggrieved by the trial Court's said judgment, the Appellant preferred the appeal herein, and set forth the following grounds of appeal:-
 - a. the learned magistrate erred in law and fact in finding that the Claimant was employed by the Respondent from 2001 to 2019.
 - b. the learned magistrate erred in law and fact by completely disregarding the Appellant's evidence on record.



- c. the learned magistrate erred in law and fact by shifting the burden of proof from the Respondent to the Appellant.
 - d. the trial Court erred in law and fact by holding that the Respondent's daily wage was 700 per day and proceeded to find that his monthly earning was ksh. 21,000.
 - e. the learned magistrate erred in law and fact in awarding the Respondent ksh. 21,000 as salary in lieu of notice.
 - f. the learned magistrate erred in law and fact in converting daily wage contract into a term contract.
 - g. the learned magistrate erred in law and fact in awarding service pay for the entire period of nineteen years.
 - h. the learned magistrate erred in law and fact in awarding the Claimant ten (10) months' salary for unfair termination, noting that the Claimant's employment was challenged.
12. The Appellant herein seeks the following reliefs:-
- a. that the whole of the learned magistrate's decision be set aside.
 - b. that the appeal be allowed.
 - c. that the Appellant be awarded costs.
13. This is a first appeal. The duty of a first appellate Court has long been settled. As stated in *Selle & Another -vs- Associated Motor Boat Company Ltd & Another* [1968] E.A. 123 and in *Peters -vs- Sunday Post Ltd* [1958] E.A. 424, a first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment, and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusion about it, bearing in mind that it did not have the opportunity of seeing and hearing the witness first hand.
14. I will handle all the grounds of appeal together, and having considered the pleadings filed and evidence tendered in the trial Court, issues that fall for determination, in my view, are as follows:-
- a. whether the Respondent was employed by the Appellant as pleaded in the trial Court.
 - b. whether termination of the Respondent's employment was unfair.
 - c. whether the Respondent was entitled to the reliefs sought.
15. On the first issue, the Respondent pleaded that he was employed by the Appellant from 10/2/2001 to 5/6/2019, and that his contract of employment was oral. He stated in his witness statement, which he adopted at the trial as his testimony, that he reported to work as usual on 5/6/2019 and the manager called him and told him that his employment services had been terminated because his sales performance was too low.
16. The Appellant's attempt to allude that the Respondent was never its employee must, in my view, hit a legal brick wall. The Respondent produced in evidence a warning letter issued to him by the Appellant's manager on 22/2/2018. The said letter is duly signed by the said manager and is stamped with the Appellant's stamp. The Appellant's witness (RW-1) admitted in evidence that the said stamp resembles that of the Appellant. The warning letter was on the Appellant's letter head, the validity of which was not challenged by the Appellant.



17. It is worthy noting that although RW-1 testified that he joined the Appellant as a Human Resource Manager in 2018, he did not state the date of his employment. Further, the Respondent did not produce its employees' records from the year 2001 to 2019, and particularly employee's daily attendance registers and/or clock-in records to show that the Respondent we never employed by it.
18. Under Section 8 of the [Employment Act](#), a contract of employment under the Act may be either written or oral. An employee cannot be disadvantaged simply because the employer opted not to give him a written contract, as long as the evidence on record demonstrates, on a balance of probability, that an employer/employee relationship existed between the parties. Section, 9(2) of the [Employment Act](#) obligates an employer to cause the contract to be drawn up; stating particulars of employment, and to have the same consented to by the employee.
19. Section 9(7) states as follows:-
 - “(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.”
20. The upshot of the foregoing statutory provision is that an employer who fails to issue a written contract of employment to an employee setting out terms and conditions of the same cannot be seen to complain that the burden of proof is being shifted from the employee to the employer.
21. I find and hold that the Respondent was an employee of the Appellant, and do uphold the trial Court's finding in that regard.
22. On the second issue, the Appellant is not shown to have complied with Sections 35(1) (c) and 41 of the [Employment Act](#) in terminating the Respondent's employment. Section 41 sets out a mandatory procedure that must be adhered to by any employer contemplating termination of an employee's employment on grounds of misconduct, poor performance or physical incapacity. The Respondent testified that his employment was terminated on grounds of alleged poor performance (low sales).
23. Further, the validity of the said allegation of poor sales was not demonstrated and/or proved pursuant to Section 45(2) (a) of the [Employment Act](#). I find and hold that termination of the Respondent's employment was substantively and procedurally unfair, and I so declare.
24. On the third issue, and having found that termination of the Respondent's employment was unfair, I uphold the trial Court's award of ten months' salary (ksh. 210,000) being compensation for unfair termination of employment. I have taken into account the circumstances and the manner in which the employment was terminated.
25. I uphold the trial Court's award of ksh. 21,000 being one month salary in lieu of notice pursuant to Section 35(1) (c) of the [Employment Act](#).
26. I uphold the award of ksh. 14,700 being 21 days leave pay. I would have awarded more if the Respondent had filed a cross-appeal on the issue. The Appellant is obligated, under Section 74(f) of the [Employment Act](#), to keep records of each employee's annual leave entitlement, days taken and days due. No such records were produced by the Appellant in the trial Court.
27. The claim for unpaid holidays was never proved, and cannot be allowed. Such claims are in the nature of special damages and falling within the purview of continuing injury as contemplated in Section 90 of the [Employment Act](#). Action regarding such claims must be brought within twelve months of cessation



thereof, and they must be strictly proved. In the present case, the Respondent did not plead particulars of the public holidays on which he allegedly worked, and particulars of the particular minimum wage guidelines (gazette notices) on which the claims were based. I disallow the claim.

28. On the claim, for service pay, section 35(1) (5) provides as follows:-

“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.”

29. For service pay to be awardable, it must be provided for either in a contract of employment or in a Collective Bargaining Agreement (CBA). Those are the only two situations in which fixing of service pay can be done, as an agreed term. Section 35(6) of the Act sets out situations in which service pay will not be fixed/paid. Having said that, and there having been no contract or a CBA fixing the terms of payment of service, I fault the trial Court’s award of ksh. 189,000 as service pay. The same is hereby set aside.

30. The appeal partly succeeds, and the trial Court’s judgment dated 21/3/2022 is hereby set aside to the extend of the foregoing findings.

31. Ultimately, and having considered written submissions filed by Counsel for parties herein, judgment is hereby entered for the Respondent against the Appellant as follows:-

- a. One month salary in lieu of notice.....ksh. 21,000
 - b. Unpaid leave.....ksh. 14,700
 - c. Compensation for unfair termination of employment.....ksh. 210,000
- Total ksh. 245,700

32. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.

33. Each party shall bear their own costs of the appeal, but the Respondent will have costs of the proceedings in the Court below, plus interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DECEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

