



**Moriema Cottages Limited v Manjewa (Appeal E016 of 2023)
[2024] KEELRC 1490 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1490 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E016 OF 2023**

**M MBARŪ, J
MAY 23, 2024**

BETWEEN

MORIEMA COTTAGES LIMITED APPELLANT

AND

OBADIAH ANGUS NYANJE MANJEW A RESPONDENT

*(Being an appeal and Cross-Appeal from the judgment of Hon. James
Ongondo delivered on 29 August 2023 in Malindi CMELRC No.7 of 2021)*

JUDGMENT

1. This appeal originates from the judgment and decree of the lower court delivered on 29 August 2023 in Malindi CMELRC No.7 of 2021. The appellant is seeking to review the judgment and the awards be set aside. The respondent in the Cross-Appeal is seeking that the judgment be reviewed and the claims pleaded in the Memorandum of Claim be awarded.
2. The background to this appeal is a claim filed by the respondent before the trial court. His case was that on 25 August 2006, he was employed by the appellant as the manager/accountant earning a wage of Ksh.39, 350 per month. Due to illness, he asked for early retirement through a letter dated 19 February 2018. During his employment he did not take annual leave and was never registered with NSSF or NHIF. He claimed his terminal dues as follows;
 - a. Annual leave from the year 2006 to 2018 Ksh.472,200;
 - b. Unpaid rest days for 4 days per month Ksh.734,066;
 - c. Severance pay at 15 days worked for each year Ksh.2, 752,750.
3. In response, the appellant's case was that there was no letter of appointment filed as evidence of employment as a manager or provision of any pay slip or payment voucher to support the claims. There were no documentary records or educational certificates to qualify for appointment in a managerial

capacity. The respondent was never in permanent employment of the appellant but was a casual worker who imposed himself as a manager without an appointment and therefore did not deserve any annual leave, rest days or service pay as claimed. The allegations that the respondent faced severe medical conditions or ailments were without proof. Having been a casual employee, the respondent did not deserve or qualify for registration with NHIF or NSSF and his claims should be dismissed.

4. The trial court analyzed the evidence and held that;
 1. I therefore find that the claimant was an employee of the respondent whose employment status was converted as per section 37 of the act to a term contract of permanent employment.
 2. It follows that the claimant is entitled to the reliefs sought, save for the claim for leave and rest days. There was no proof that the claimant applied for the leave and/or rest and was denied.
 3. The claim which I find tenable and commend for award is service pay which the claimant confuses with severance pay which is paid upon redundancy. The service pay works out thus: $KES\ 39,350/30 = 1,312/=$ per day x 1.8 years x 15 days each year = KES 232,224. ...
5. Aggrieved by the judgment, the appellant filed the appeal and the respondent filed his Cross-Appeal.
6. The grounds of the appeal are that;
 1. The learned magistrate erred in law and in fact in holding that the claimant [respondent] confused service pay with severance pay because the same is tantamount to being on the bench and the bar at the same time.
 2. The learned magistrate erred in law and in fact, by holding that the claimant was an employee of the respondent year the claimant failed to produce the appointment letter and Certificate of Service upon resigning.
 3. The learned magistrate erred in law and fact in awarding the claimant service pay of Ksh.232,224 only yet the claimant did not prove that he was an employee of the respondent.
 4. The learned magistrate erred in law and in fact in awarding the claimant service pay which was not prayed for in the claim.
 5. The computation of the service pay is excessive in view of the fact that the claimant did not prove that he was earning a salary of Ksh.39,350 for the 11 years that he worked for the respondent because the revised staff salary chit-produced by the claimant was dated 1st March 2015 and signed by an unidentified person on the 18th March 2015.
 6. The award for service pay was unjustified because the claimant's calculations were actually based on the severance pay rate but not service pay.
7. Aggrieved by the same judgment, the respondent filed his Cross-Appeal on the grounds that;
 1. The learned magistrate erred in law and fact by finding that the appellant was not entitled to leave pay;
 2. The learned magistrate erred in law and in fact by finding that the appellant was not entitled to rest days.
 3. The learned magistrate erred in law and fact by entering judgment against the respondent for payment of only the service pay and not the entire amount so prayed for.
8. Both parties attended and agreed to address the appeal and cross-appeal by way of written submissions.

9. The appellant submitted the trial court awarded service pay which had not been pleaded. The Memorandum of Claim was amended and the respondent's claim related to severance pay cannot be substituted with a claim for service pay. He was represented by his advocates and his pleadings are binding.
10. The appellant filed a Notice of Preliminary Objections to strike out the claim for being incompetent, it was incumbent upon the respondent as the claimant to amend his pleadings accordingly but failed to do so.
11. The judgment and award for service pay should be set aside.
12. There are no submissions with regard to the Cross-Appeal.
13. The respondent submitted that he established there was an employment relationship between the parties as he worked for 11 years for the appellant hence protected under the provisions of Section 37 of the Employment Act. The appellant paid for his NHIF dues when he was admitted in hospital which fact confirms there was employment.
14. The respondent submitted that there was no confusion with regard to payment of service pay for severance pay for Ksh.232, 224. In the case of *Martin Ireri Ndwiga v Olerai Management Company* [2017] eKLR the court held that service pay is due to an employee who has not enjoyed statutory deductions covered under Section 35(5) and (6) of the Employment Act which requires payment for 15 days for each full year worked. Severance pay is due under Section 40(1) where there is a redundancy and the employee should be paid for 15 days for each full year worked.
15. The trial court in calculating both service and severance pay was guided by the principle of allocating 15 days for each year worked. This principle was applied in the case of *Kenya Women Finance Trust v Square Deal Kenya Limited Civil Appeal 36 of 2021* that parties are bound by their pleadings and a determination will not extend to an issue not pleaded. In this case, the issue of service pay was pleaded and should be assessed and awarded.
16. On the claim for leave and rest days, the respondent submitted that these are part of employment rights protected under Sections 27 and 28 of the Employment Act and upon pleadings and evidence should be awarded as held in *James Muriithi Njiru v Omega Risk Management Limited* [2019] eKLR.

Determination

17. Being the first appeal, this court has a duty to examine the entire record of the lower court and make its independent findings. I have read the record and noted that the issues for determination in the appeal and Cross-Appeal are the award of service pay, the accrued leave days and rest days. These will address the entire appeal and cross-appeal.
18. The respondent filed his Memorandum of Claim on 2 March 2021. He also filed an Amended Memorandum of Claim on 14 April 2023.

His claims related to the following;

- a. Annual leave from the year 2006 to 2018 Ksh.472,200;
- b. Unpaid rest days for 4 days per month Ksh.734,066;
- c. Severance pay at 15 days worked for each year Ksh.2, 752,750.

19. The learned magistrate analyzed the employment records and made a finding that there was employment and the respondent was protected under the provisions of Section 37 of the Employment Act, 2007 (the Act). He acquired rights and benefits under the Act.
20. The learned magistrate however departed from his findings and placed the burden to prove the claims for leave and rest days on the respondent and employee and that there was no proof that the claimant applied for the leave and/or rest and was denied.
21. In employment relations, the duty to keep work records rests on the employer. Upon an employee filing his claim, Section 10(7) of the Act directs the employer to submit work records as held in Yaa v SGA Security Solutions Limited ELRCA No. E002 of 2022 (Malindi).
22. In addressing a similar matter, the court in Atege v Monda (Appeal E007 of 2022) [2023] KEELRC 2816 (KLR) (9 November 2023) (Judgment) held that the burden of producing and keeping employment records of the employee is mandatory under the provisions of Section 73, 74 and 10 (7) of the Act. In the case of Kamau v Delta Point Distributors Limited t/a Milele Lounge (Appeal E045 of 2022) [2023] KEELRC 1161 (KLR) (5 May 2023) (Judgment) the court also affirmed this position and held that;

Concerning other heads of claim, the thrust of the Appellant's contention has taken on the provisions of Sections 9, 10 and Section 74 of the Employment Act. Section 9 requires employment contracts for a period exceeding three months to be in writing. While Section 10 provides for employment particulars. Section 74 places the responsibility of keeping employment records on the employer. Section 10(7) provides that in any legal proceedings where an employer fails to produce a written contract or the written particulars prescribed under Section 10(1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. [Underline added].
23. Therefore, upon the respondent's claims to accrued annual leave and rest days, the appellant should and ought to have filed the work records to disprove such matter. Upon his claim, the respondent discharged his burden under Section 47(5) of the Act. Then, the appellant as the employer was required to justify its position and that indeed the respondent was allocated his rights under sections 28 and 27 with regard to taking annual leave and rest days respectively.
24. Without such evidence being produced, these claims should have been analyzed and awarded accordingly.
25. Taking annual leave is a right under Section 28 of the Act. The employee should proceed for annual leave and Section 28(2) of the Act requires the employer to ensure that every employee takes annual leave. However, where no leave is taken, this being a continuing injury, the employee should assert this right because Section 28(4) of the Act does not allow accumulation of rest for beyond 18 months. The purpose of taking annual leave is lost. Unless the employee can demonstrate that he applied for annual leave and the employer declined to allocate or approve carrying the same forward, the cut-off claim stands at 18 months.
26. In any given year, where there is no contract of employment, the employee is entitled to 21 leave days under Section 28 of the Act. In this regard, for the 18 months due, the respondent is only entitled to 33 days of annual leave based on his last basic wage.
27. The wage paid was not desegregated. I take it, this was the total payable at Ksh. 39,350 per month. For 33 accrued leave days, this is assessed at ksh.43, 285.

28. Taking rest days is a right under Section 27 of the Act. For every week worked, an employee is entitled to a day of rest with full pay. The provisions of Section 27 of the Act unlike Section 28 therefore are specific. It addresses the hours of work as follows:
- (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.
 - (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.
29. Without any records to support how the appellant secured this right, the same is due at the end of employment. See City *Centre Cabs Limited v Nyange (Civil Appeal 627 of 2019)* [2023] KECA 1116 (KLR) (22 September 2023) (Judgment).
30. The claim for Ksh.734, 066 for rest days worked is hereby allowed.
31. On the claim for severance pay, the learned magistrate well established that this was not a redundancy case. The award of service pay instead was not pleaded and should and ought not to have been converted. Parties are bound by their pleadings. Particularly where parties enjoy legal representation and are allowed to amend pleadings, a claim for severance pay is well regulated under Section 40 of the Act while a claim for service pay is regulated under Section 35 of the Act. These relate to different regimes of employment and cannot be applied interchangeably. To do so would be to negate the purpose of the law.
32. Cases must be decided on matters as pleaded as held in *World Explorers Safaris Limited v Cosmopolitan Travel Limited & another* [2021] eKLR. The record presented in court should be accounted for. Unless there is an apparent issue of the law, parties are bound by their pleadings. In the case of *Muchiri v Boresha Maisha Self Help Group (Civil Appeal 48 of 2022)* [2024] KEHC 2488 (KLR) (11 March 2024) (Judgment), the court held that;
- ... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which do not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.
- ... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation
33. The Supreme Court of Kenya in its ruling in the case of *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR in addressing the essence of pleadings held that;
34. In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.
35. In this case, the award of service pay was in error.
36. On the question of costs, in employment claims, costs are discretionary. When awarded, there should be reasons and justified based on judicially acceptable principles and in adherence to the provisions of Sections 3 and 12 of the *Employment and Labour Relations Court Act*, 2011. Costs do not follow the

cause in this regard. The issue where justified. No reasons are assigned in this case with regard to the awarded costs and interests. These are hereby set aside.

37. Accordingly, the judgment in Malindi CMELRC No. 7 of 2021 is hereby reviewed, the appeal and Cross-Appeal analyzed and the following orders issued;
- a. Accrued leave awarded at Ksh.43,285;
 - b. Rest days awarded at Ksh.734,066;
 - c. For the appeal and Cross-Appeal and proceedings before the trial court, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 23 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... **and**