



**P J Petroleum Equipment Ltd v Agina (Appeal E041 of 2022)
[2024] KEELRC 1091 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1091 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E041 OF 2022**

**S RADIDO, J
MAY 15, 2024**

BETWEEN

P J PETROLEUM EQUIPMENT LTD APPELLANT

AND

ELIZABETH ANYANGO AGINA RESPONDENT

(Being an Appeal from the judgment of Hon Stella Telewa Senior Resident Magistrate in the Kisumu ELRC No. 129 of 2021 delivered on the 19th October 2022)

JUDGMENT

1. Elizabeth Anyango Agina (the Respondent) sued P J Petroleum Equipment Ltd (the Appellant) before the Senior Resident Magistrates Court alleging unfair termination of employment and breach of contract.
2. In a judgment delivered on 19 October 2022, the Senior Resident Magistrate found for the Respondent and awarded her maximum compensation, house allowance, gratuity and accrued leave.
3. The Appellant was aggrieved and it lodged a Memorandum of Appeal with this Court on 3 November 2022, contending:
 - i. The Learned Trial Magistrate erred in law and fact in awarding the Claimant the maximum compensation of 12 months' salary without assigning any reason for awarding the maximum compensation.
 - ii. The Learned Trial Magistrate erred in law and fact in awarding the Claimant house allowance of Kshs 108,000/- and ignored evidence and submissions tendered by the Respondent to prove that the house allowance was included in the Claimant's salary.
 - iii. The Learned Trial Magistrate erred in law and fact in awarding the Claimant gratuity of Kshs 60,000/- without any legal or factual basis.



- iv. The Learned Magistrate erred in law and fact in awarding the Claimant leave days of Kshs 60,000/-.
 - v. The Learned Magistrate erred in law and fact by failing to consider the evidence and submissions tendered by the Respondent.
4. The Record of Appeal was filed on 4 March 2024, and the Court gave directions on 11 April 2024.
 5. The Appellant filed its submissions on 23 April 2024, and the Respondent on 3 May 2024.
 6. The Court has given due consideration to the Record of Appeal and submissions.

Role of the Court of First Appeal

7. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
8. This Court will keep the interdict in mind.

Award of maximum compensation

9. The Senior Resident Magistrate awarded the Respondent maximum compensation as pleaded but did not give any reasons for the award.
10. The award of compensation where unfair termination of employment has been found is an exercise of discretion that should be exercised judiciously, and the factors the Court ought to consider in exercising the discretion are set out in section 49(4) of the *Employment Act*, 2007.
11. By failing to set out the factors she considered in awarding the compensation, the Senior Resident Magistrate fell into error of both law and fact.
12. The Respondent served the Appellant for about 3 years and she was earning a monthly wage of Kshs 20,000/-.
13. Based on the length of service, this Court is of the view that compensation equivalent to 4 months' gross wages of Kshs 80,000/- would be appropriate.

House allowance

14. The Senior Resident Magistrate awarded the Respondent Kshs 108,000/- as house allowance.
15. The Respondent asserted that her wage did not include a house allowance but the Appellant took the position that the wage included a house allowance of Kshs 2,500/-.
16. The Appellant produced before the Senior Resident Magistrate copies of the Respondent's pay slips and the same indicated that the Respondent was getting Kshs 2,500/- as house allowance.
17. The Senior Resident Magistrate did not consider the evidential value of the pay slips and this was an error of both law and fact as a pay slip is a requirement under section 20 of the *Employment Act*, 2007.
18. The Court will set aside this award.



Gratuity

19. The Respondent's claim for gratuity was allowed in the sum of Kshs 60,000/-.
20. The Record of Appeal filed in Court does not have a pleading seeking payment of gratuity.
21. Further, gratuity is ordinarily a payment agreed to in a contract as it is not provided for in the employment law of general application, the [Employment Act](#), 2007.
22. The Respondent did not lay an evidential or legal foundation to the award of this head of the claim and the Court finds that the Senior Resident Magistrate fell into error of both law and fact in allowing the relief.

Leave

23. The Respondent contended before the Magistrates Court that she was never allowed to go on annual leave during the period of employment.
24. The Senior Resident Magistrate agreed with her and allowed the claim in the sum of Kshs 60,000/-.
25. The Record of Appeal has evidence indicating that the Respondent was granted 18 leave days during the course of employment.
26. Section 28 of the [Employment Act](#) requires an employer to grant an employee at least 21 days' annual leave on full pay.
27. Since the Respondent only took 18 leave days out of the expected 63 leave days, she had accumulated leave days of 45 days which the Appellant should have commuted.
28. To get the commuted amount, the Court will use the customary formula of dividing the monthly salary by 22 to get the daily rate which multiplied by 45 days gives a sum of Kshs 40,909/-.

Conclusion and Orders

29. The Court having considered the Appeal finds that the Senior Resident Magistrate fell into errors of both law and fact in awarding compensation, gratuity, house allowance, and accrued leave, and the judgment is set aside and substituted with judgment as follows:
 - (i) Compensation Kshs 80,000/-
 - (ii) Leave Kshs 40,909/-Total Kshs 120,909/-
30. For clarity, the awards for house allowance and gratuity are set aside in entirety.
31. The Appellant has partly succeeded. Each party to bear own costs of the Appeal. The Respondent to have costs before the Senior Resident Magistrates Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF MAY 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances



For Appellant Ochwo & Co Advocates
For Respondent P.D. Onyango & Co. Advocates
Court Assistant Chemwolo
3| 8 Page Kisumu Appeal No. E041 of 2022

