



Moi University v Soga & 22 others (Appeal E010 of 2024)
[2024] KEELRC 1387 (KLR) (12 June 2024) (Ruling)
 Neutral citation: [2024] KEELRC 1387 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E010 OF 2024

S RADIDO, J
JUNE 12, 2024

BETWEEN

MOI UNIVERSITY APPELLANT

AND

JACOB OTIENO SOGA 1ST RESPONDENT
NANCY AKINYI AMASA 2ND RESPONDENT
WYCLIFFE OCHIENG OMINDE 3RD RESPONDENT
MILLICENT ONONO 4TH RESPONDENT
ROSE ADHIAMBO OKUMU 5TH RESPONDENT
LUCY A MUDHUNE 6TH RESPONDENT
DANIEL SIANGLA 7TH RESPONDENT
ISHMAEL OCHORO 8TH RESPONDENT
JOHN WANAMBISI 9TH RESPONDENT
NANCY ACHIENG ALUOCH 10TH RESPONDENT
BEATRICE WESONGA 11TH RESPONDENT
GEORGE OUMA ODHIAMBO 12TH RESPONDENT
PHELESIA KUYA OSORE 13TH RESPONDENT
MAUREEN ATIENO OKOTH 14TH RESPONDENT
SYLVIA A OCHUNG 15TH RESPONDENT
WLLIS ODERA 16TH RESPONDENT
SIMON OCHIENG OGOL 17TH RESPONDENT



SCHOLASTICA ODUOR	18 TH RESPONDENT
DINAH OUMA	19 TH RESPONDENT
GEOFFREY OMONDI	20 TH RESPONDENT
JOAB OGUTU CHARLES	21 ST RESPONDENT
SYLVIA AGWANG OCHIENG	22 ND RESPONDENT
PAUL WILIS OCHOLLA ODONGO	23 RD RESPONDENT

(Being an Appeal arising from the judgment of Honourable Margaret Wambani delivered on 19th October 2023 in Siaya MELRC No. 19 of 2019, Jacob Soga & 22 Ors v Moi University)

RULING

1. The 23 Respondents sued Moi University (the Appellant) before the Chief Magistrates Court in Siaya alleging unfair termination of employment and breach of contract.
2. In a judgment delivered on 19 October 2023, the Chief Magistrate found for the Respondents and ordered the Appellant to pay them terminal dues (accrued leave days, salary arrears from March 2018 to September 2019, severance pay and compensation) pension and issue Certificates of Service.
3. The Appellant was dissatisfied and it lodged a Memorandum of Appeal with the Court on 27 March 2024, contending:
 - i. The Learned Trial Magistrate erred in allowing the Claimants' case against the Respondent without any legal basis.
 - ii. The Learned Trial Magistrate erred in failing to appreciate the overwhelming evidence in favour of the Appellant.
 - iii. The Learned Trial Magistrate erred in failing to appreciate the Respondent's/ Appellant's written submissions.
 - iv. The Learned Trial Magistrate erred in focusing on the Claimants' submissions in the entire judgment.
 - v. The Learned Trial Magistrate erred both in law and in fact in failing to find in favour of the Appellant.
 - vi. The Learned Trial Magistrate erred in being biased against the Respondent in her entire judgment.
 - vii. The Learned Trial Magistrate erred in failing to hold that the Claimants had not proved their case on a balance of probability.
 - viii. The Learned Trial Magistrate erred in granting the Claimants compensation for unfair termination without any basis in law.
 - ix. The Learned Trial Magistrate erred in awarding the Claimants salary arrears, unpaid leave days, severance pay and compensation for unfair terminations of Kshs. 11,861,397/- without any basis in law and in fact.



- x. The Learned Trial Magistrate erred in failing to hold that the Respondent had rebutted the Claimants' case.
 - xi. The Learned Trial Magistrate erred in failing to rely on and/or misconstruing the provisions of the *Employment Act*, 2007.
 - xii. The Learned Trial Magistrate erred both in law and in fact in failing to find in favour of the Appellant.
4. The Record of Appeal was filed on 25 April 2024, and the Court gave directions on 8 May 2024.
 5. The Appellant filed its submissions on 31 May 2024 (should have been filed and served before 22 May 2024) while the Respondents had filed their submissions on 30 May 2024.
 6. The Court has considered the Record of Appeal and submissions.

Role of the Court on a First Appeal

7. The role of a first appellate Court on appeal was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
8. This Court will bear in mind the interdict on its role.

asual or Contract employment?

9. The parties made much before the Chief Magistrate of the question whether the Respondents were casual employees or contract employees.
10. The Appellant gave the Respondents written fixed-term contracts (of 6-months) and therefore, they were not casual employees despite the fact that their wages were computed daily and paid at the end of the month. A casual employee is one who is paid at the end of each day and each day's work is a distinct contract.
11. The Respondents were not paid at the end of the day. They were on daily rates of pay cumulated and paid at the end of the month. They were not casual employees.

Unfair termination of employment

12. It is not in dispute that the Appellant declared the Respondents' positions redundant through notices dated 20 August 2019, and the last date of service was given as 27 September 2019. The notices informed the Respondents that they would be paid the equivalent of 28 days' pay in lieu of notice.
13. In the Statement of Claim, the Respondents did not seek any order or relief anchored on a cause of action for unfair termination of employment.
14. The Chief Magistrate did not explicitly or clearly determine whether the Appellant unfairly terminated the Respondents' contracts.



15. The closest mention of the issue by the Chief Magistrate is in the part of the judgment where she stated:

There is evidence on record by the Claimants and DW1 that the Respondent terminated the Claimants' jobs.

Though DW 1 testified that the Claimants' employment was properly terminated by the Respondent, but this Court has found out from DW 1's evidence that there is no evidence showing that the Respondent paid the Claimants their final dues. That being the position, this Court shall proceed to hold that the Respondent should pay the Claimants their final dues as prayed by each Claimant herein.

The Court has further considered the Claimants' evidence on the one hand and the Respondent's evidence on the one hand regarding prayers (a) and (b) of the Claimants' claim and this Court is of the considered finding that the said prayers are not meritorious on the ground that DW 1 told the Court that the Claimants jobs were terminated on the ground of redundancy.

16. Among the final dues the Chief Magistrate awarded was the equivalent of 12 months' compensation. The compensation is only awardable where the Court makes a finding of unfair termination of employment.

17. The Chief Magistrate fell into an error of law in awarding compensation without making a finding that there was unfair termination of employment.

18. Considering the role of this Court on a first appeal, the Court is required to examine whether the Respondents proved that an unfair termination on account of redundancy occurred.

19. The Respondents presented one witness before the Chief Magistrate. The witness stated in his written witness statement which was adopted as part of the evidence:

That the termination was unfair. I was never paid my dues which I claim as follows.

20. Apart from that general statement, the Respondents did not provide any evidence to demonstrate how the termination of their contracts was unfair.

21. In terms of section 47(5) of the *Employment Act*, the Respondents should have at the first instance met the low threshold burden of showing that an unfair termination of employment occurred, they did not.

22. The Chief Magistrate therefore erred in awarding a relief not pleaded and without giving clear reasons for the award.

Accrued leave

23. Upon termination of employment on grounds of redundancy, section 40(1)(e) of the *Employment Act* requires the employer to pay in cash any accrued leave.

24. The Respondents asserted before the Chief Magistrate that the Appellant had not paid their accrued leave while the Appellant insisted that the Respondents exhausted all accrued leave days, and records were available.

25. The Respondents' contracts provided for 2 leave days per month during the duration of the contracts. The Respondents' witness admitted that they used to get off days, and also that they used to apply for leave and the Appellant kept the records.



26. The Appellant produced attendance records in an endeavour to prove that the Respondents took their leave days.
27. Section 28 of the *Employment Act* contemplates annual leave on full pay. It appears that the Respondents took their leave days but in instalments. They were entitled to full payment for these days.
28. The Appellant did not produce any records to show that the Respondents were paid any salaries for the leave/off days taken.
29. The Court finds that based on the records and evidence before the Subordinate Court, the Chief Magistrate did not err in law or fact in allowing this head of the claim.

Salary arrears

30. The Respondents claimed salary arrears from March 2018 to September 2019. The Respondents' witness admitted during cross-examination that the Appellant did not owe them any salary arrears. The witness repeated the admission on re-examination.
31. With the admission by the Respondents' witness, the Chief Magistrate fell into error of both fact and law by not appreciating the evidence from the Respondents' witness that there were no outstanding salary arrears.

Severance pay

32. The Respondents lost their contracts on account of redundancy and under section 40(1)(g) of the *Employment Act*, 2007, they were entitled to severance pay.
33. The Chief Magistrate made a finding that the Appellant had not produced any records or evidence to show that the Respondents were paid all their final dues.
34. The Appellant has not pointed out to this Court any particular record that was placed before the Chief Magistrate as proof of payment of severance pay.
35. The Court finds that the Chief Magistrate did not err in allowing this head of the claim.

Conclusion and Orders

36. Flowing from the above the Court finds:
 - i. The Chief Magistrate erred in law and fact in awarding compensation without a finding whether there was an unfair termination of employment.
 - ii. The Respondents did not discharge the burden imposed on them by section 47(5) of the *Employment Act*, 2007 to show an unfair termination of employment occurred.
 - iii. The Chief Magistrate did not err in awarding accrued leave.
 - iv. The Chief Magistrate erred in awarding salary arrears when the Respondents' witness disowned the claim.
 - v. The Chief Magistrate did not err in allowing severance pay.
37. In light of the above, the judgment of the Chief Magistrate awarding compensation, and salary arrears are set aside/vacated and substituted with an order disallowing these heads of claim.
38. For clarity, the awards of accrued leave and severance pay are upheld.



39. The Appellant has partly succeeded. The Court orders each party to bear own costs of the Appeal. The Respondents to have costs before the Subordinate Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 12TH DAY OF JUNE 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Z.K. Yego Law Offices

For Respondent Maxwell O. Ogonda & Associate Advocates

Court Assistant Chemwolo

