



**Ochami v Maseno University (Appeal E045 of 2023)
[2024] KEELRC 1339 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1339 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E045 OF 2023**

S RADIDO, J

JUNE 5, 2024

BETWEEN

MOSES EGANZA OCHAMI APPELLANT

AND

MASENO UNIVERSITY RESPONDENT

(Being an Appeal from the judgment of Hon C. Yalwala, S. P.M. dated and delivered on the 5th day of July 2023 in E& LR Cause No. 1 of 2019, Moses Eganza Ochami v Maseno University)

JUDGMENT

1. Moses Eganza Ochami (the Appellant) sued Maseno University (the Respondent) before the Senior Principal Magistrates Court alleging unfair termination of employment and breach of contract.
2. In a judgment delivered on 5 July 2023, the Senior Principal Magistrate found that the Respondent had unfairly terminated the Appellant's employment and was in breach of contract with respect to leave.
3. The Senior Principal Magistrate awarded the Appellant accrued leave of Kshs 81,099/-, one-month salary in lieu of notice of Kshs 7,241/- and one-month compensation of Kshs 7,241/-.
4. The Appellant was aggrieved and he lodged a Memorandum of Appeal with this Court on 4 August 2023 contending:
 - i. That the Learned Magistrate erred in law and fact by finding that the Appellant was an employee of the Respondent while at the same time declining to award him damages as claimed in the Memorandum of Claim.
 - ii. That the Learned Magistrate erred in law and fact by issuing a declaration that the Appellant's termination of service was unprocedural, unlawful, and unfair and at the same time declining to award such benefits as would normally accrue to him.



- iii. That the Learned Magistrate erred in law and fact when he declined to award the Appellant overtime compensation contrary to evidence on record.
 - iv. That the Learned Magistrate erred in law and fact when he declined to award the Appellant maximum compensation of twelve (12) months gross pay contrary to law and available evidence.
 - v. That the Learned Magistrate erred in law and fact when he denied the Appellant 12 months' compensation for failure by counsel to file submissions. The Learned Magistrate was under a legal and/or constitutional obligation to award based on evidence not submissions and as a matter of course.
 - vi. That the Learned Magistrate failed to appreciate the law in his rejection of the Appellant's claims.
 - vii. That contrary to what the Learned Magistrate found and held, the Appellant is entitled to be paid severance pay at 15 days per year, for the 16 years. He did not state which special circumstances existed so as to deny the same.
 - viii. That the Learned Magistrate should have awarded unpaid overtime as claimed.
 - ix. That the Appellant's claims were by operation of the law upon evidence not submissions which is mere analysis of evidence adduced.
 - x. That the Learned Magistrate erred in law and fact when he held that where the Claimant worked Saturdays, Sundays and rest days he was duly paid for it without any evidence being availed by the Respondent to that effect.
 - xi. For any other relief, the Learned Magistrate should have taken judicial notice of the fact that the Appellant would have worked until the age of 60 years and compensated him for the remainder of the period.
5. The Record of Appeal was filed on 30 April 2024 and the Court gave directions on 7 May 2024.
 6. The Appellant filed his submissions on 29 May 2024 (should have been filed and served before 17 May 2024) and the Respondent on 29 May 2024.
 7. The Court has considered the Record of Appeal and submissions.

Role of the Court on a First Appeal

8. 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.
9. This Court will bear in mind the interdict on its role.

Award of compensation

10. The award of compensation after a finding of unfair termination of employment is an exercise of judicial discretion and the factors the Court should consider are outlined in section 49(4) of the [*Employment Act*, 2007](#).



11. In order to disturb such an exercise of judicial discretion, the aggrieved party should demonstrate that the trial Court failed to consider the applicable principles or exercised the discretion injudiciously or wrongly.
12. In awarding the equivalent of one-month salary as compensation, the Senior Principal Magistrate stated:

The Claimant did not lead any evidence to support his claim for maximum compensation of 12 months' gross pay. Indeed, it is not clear what the Claimant is claiming in that regard and the Claimant's counsel did not file submissions to justify the same.
13. Apart from pleading maximum compensation, the Appellant did not lay an evidential foundation for an award of maximum compensation in the written witness statement which was adopted as part of the evidence nor in the oral testimony.
14. The Appellant also failed to file submissions as directed by the trial Court. He could have used the opportunity to make a legal case for the award of maximum compensation, but he failed.
15. The Appellant was the cause of his complaint on the award of compensation.
16. Nevertheless, one of the factors the Court should consider in awarding compensation is the length of service. The evidence before the Senior Principal Magistrate was that the Appellant had served the Respondent for about 16 years.
17. The Senior Principal Magistrate should have considered the length of service. By failing to factor in the length of service, the Senior Principal Magistrate fell into an error of principle.
18. Considering the Appellant's length of service, this Court is of the view that compensation equivalent to 7 months' gross wages would be appropriate.

Overtime and rest days

19. The Appellant made a claim for overtime for the 16 years he worked for the Respondent. He calculated the overtime pay as Kshs 1,112,217 and unpaid rest days as Kshs 370,739/-.
20. In the witness statement which was adopted as part of the evidence, the Appellant testified that he worked more than 8 hours daily. He also testified that he worked on Saturdays and Sundays.
21. During cross-examination, the Appellant stated that he worked from 6.00 am to 6.00 pm and that the Respondent kept attendance records.
22. However, pressed, the Appellant admitted that an attendance record he produced in Court indicated that he reported on a particular day at 7.30 am and clocked out at 5.00 pm.
23. The Respondent's witness denied that the Appellant worked overtime without compensation. The witness admitted that attendance records kept by the Respondent had not been filed in Court.
24. While rejecting the heads of claim for overtime, the Senior Principal Magistrate reasoned thus:

For the claim for unpaid overtime, the Claimant stated that he used to work from 6.00 am to 6.00 pm. His own claim supporting documents comprising Casual Workers Attendance Form however indicates that he used to sign in at 7.30 am and sign out at 5.00 pm. That means that would get to work at 7.30 am and start work at 8.00 am up to 5.00 pm, which is the normal working hours. For that reason, therefore, no overtime is payable.



25. The general law of employment, the *Employment Act*, 2007 does not prescribe working hours. The issue is left to the agreement of the parties.
26. However, the *Labour Institutions Act* and the various Regulations made thereunder prescribe minimum working hours beyond which the employee is entitled to be paid overtime.
27. The Appellant did not lay an evidential foundation as to which particular Regulation of Wages Order applied in the sector the Respondent was operating within. His own records did not support the assertion for overtime pay.
28. The Court finds that the Senior Principal Magistrate did not fall into an error of law or fact in rejecting these heads of the claim.

Severance pay

29. The Appellant also faulted the Senior Principal Magistrate for declining to allow the claim for severance pay.
30. The Senior Principal Magistrate declined to allow the head of the claim on the ground that the dispute in question was not one involving redundancy.
31. The Appellant's cause was not pleaded as one involving redundancy. Severance pay is an entitlement in cases of redundancy.
32. The Senior Principal Magistrate reached the right finding in rejecting the relief for severance pay.

Lost income

33. The Appellant faulted the Senior Principal Magistrate for not awarding him the income he would have earned up to the age of retirement stated as 60 years.
34. The Appellant did not plead lost income as part of his claim. He was and the Court was also bound by the pleadings and the Senior Principal Magistrate did not err in not allowing a cause which was not pleaded.

Failure to file submissions

35. Submissions do not serve a cosmetic purpose. The Appellant did not explain to the Senior Principal Magistrate why he failed to file submissions. He has not explained to this Court why the submissions were not filed as agreed during the hearing (even before this Court the Appellant filed his submissions outside the agreed timelines without any explanation).
36. This Court finds that the Senior Principal Magistrate did not exercise his discretion improperly by considering the failure of the Appellant to comply with a Court direction on the filing of submissions.

Conclusion and Orders

37. Flowing from the above, the Court finds and declares that save for the award of compensation, the Senior Principal Magistrate did not fall into an error of law or fact.
38. Consequently, the judgment of the Senior Principal Magistrate is only set aside to the extent that the award of one-month compensation is substituted with an award of compensation of Kshs 50,687/-.
39. The Appellant has partially succeeded. He did not file/serve submissions within the agreed timelines and no explanation was offered.



40. The Court therefore orders each party to bear own costs of Appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 5TH DAY OF JUNE 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Obura-Obwatinya & Co. Advocates

For Respondent Odongo Okal & Co. Advocates

Court Assistant Chemwolo

