



Kenya Agricultural and Livestock Research Organization v Kenya Scientific Research International Technical and Institution Workers Union (Civil Appeal 299 of 2019) [2024] KECA 1577 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1577 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 299 OF 2019
HM OKWENGU, HA OMONDI & PM GACHOKA, JJA
NOVEMBER 8, 2024**

BETWEEN

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION APPELLANT

AND

KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL AND INSTITUTION WORKERS UNION RESPONDENT

(An appeal against the judgement and decree of the Employment and Labour Relations Court at Kisumu (Onyango, J.) dated 26th April, 2019 and delivered on 20th May, 2019 by Nduma Nderi, J. in Cause No. 281 of 2016)

JUDGMENT

1. The respondent is a trade union registered under the repealed Trade Unions Act CAP 233 Laws of Kenya. Its establishment was designed to secure the interests of its members. In that regard, the respondent filed a memorandum of claim amended on 13th March 2017 in Kisumu ELRC Cause No. 281 of 2016. In it, the respondent sought to protect the interests of some 49 of its members who were allegedly terminated from the appellant's employ on account of redundancy.
2. The abridged facts giving rise to the dispute are that 49 members of the respondent had their contracts terminated by the appellant on account of redundancy on diverse dates between 2012 and 2014. This galvanized the respondent to write to the appellant vide its letters dated 22nd April 2014 and 4th June 2014 seeking to recover unpaid dues. In response, the appellant replied through its letter dated 20th June 2014. We will revisit this issue later in our judgment.
3. On 8th January 2015, the respondent lodged a formal trade dispute with the Cabinet Secretary of Labour concerning the termination of the affected employees. The Cabinet Secretary, on 8th February



2015, appointed Ms. Hellen Maneno, conciliator from the Kisumu County Labour Office, to hear and determine the dispute. She invited parties to a hearing vide her letter dated 10th March 2015.

4. Later on 26th March 2015, the appellant partly paid 36 grievants.

Dissatisfied, the respondent wrote to the appellant's Director General on 18th May 2015 regarding unpaid notice and other benefits. The letter was responded to on 3rd July 2015 in which the appellant contended that no outstanding sum remained due and owing to the grievants. On 4th September 2015, the respondent wrote to the conciliator requesting for a release of the certificate of disagreement. However, that did not take place.

5. In its memorandum of claim, the respondent cited the appellant for violating section 40 of the Employment Act on account of the following: notice pay and other accrued benefits had not been paid; and that the appellant failed to apply the redundancy procedure exposit by law. Whilst acknowledging that the respondent remitted severance pay, it lamented that accrued leave days paid was not an accurate reflection of the actual accrued leave days each of the terminated employees were entitled to.
6. The appellant sequentially listed all 49 grievants and enumerated their accrued benefits arising from notice pay, leave, housing allowance, underpaid wages, overtime and 12 months' salary as compensation for loss of employment on an individualistic basis. The respondent's claim thus prayed for the grant those benefits plus costs of the suit.
7. The matter then proceeded to hearing and in a judgment dated 26th April 2019, the learned judge (Onyango, J.) acknowledged that the affected employees had been terminated from employment on account of redundancy. Having distilled the evidence on record, her decision was that the grievants were neither given notice by the appellant nor paid in lieu thereof. Consequently, they were entitled to notice pay. In so holding, the learned judge said:

“In the instant case, the only notice that is evident is the notice to the labour office which was not copied to the affected employees. The labour office recommended that 2 weeks' notice would be sufficient which the Respondent did not seem to have given. The claim for notice pay therefore succeeds.

Although the Labour Office recommended notice of two weeks, Section 40 provides for a minimum of one month's notice.

The grievants are thus entitled to one month's pay in lieu notice as provided in Section 40 (1) (f) of the Act.”

8. Regarding housing allowance, the court held that the Regulation of Wages (General) Order provides for consolidated daily and hourly rates. For this reason, the employees were not entitled to house allowance. On overtime pay, the court relied on the record to state that: “the grievants worked for a maximum of 16 days a month. No evidence was adduced to the contrary.” Looking at the documents, she held that they were entitled to 16 days' overtime per month for 9 months as follows: 9 weeks × 20 hours totaling 780 hours for overtime limited to a year.
9. Regarding underpayments, the court applied the Regulation of Wages (General) (Amendment) Order 2013 to hold that they were entitled to an additional Kshs. 523.60 over and above what had already been paid. Finally, on leave and severance pay, the trial court found that since payments were based on the



2011 statutory minimum rates, they were entitled to an additional sum since the statutory minimum rate applicable was that of 2013. The court then gave the following orders:

“In view of the fact that payments were made based on the tabulation by the Labour Office, this file is referred back to the Labour Office to carry out on fresh tabulation based on the following –

1. All payments to be based on statutory minimum wages effective from May 2012.
2. All payments to be based on minimum rate of pay for night watchmen as the grievants worked both day and night shifts being Kshs.523.60 per day.
3. Overtime to be based on 780 hours being 20 hours per week.
4. Pay in lieu of notice to be on one month’s salary under Section 40 (1) (f).
5. Grievants to be paid a further one month’s salary in lieu of notification under Section 40 (1)(a) and (b).

Upon receipt of the tabulation of the Labour Office the court will render the final judgment. The Labour Office is given 30 days to complete the tabulation and file it in court. The court will set a return date at the time of delivery of this judgment.

Both the claimant and the respondent are directed to co-operate with the County Labour Office to ensure the tabulation sent to this court is made in consultation with them within the timelines given by this court.”

10. The appellant is aggrieved by those findings. It filed its notice of appeal dated 17th December 2019. Its memorandum of appeal dated 16th December 2019 raised 13 grounds impugning the findings of the learned judge. In summary, the appellant is dissatisfied for the following reasons: the amended memorandum of claim was filed without leave of court. For this reason, the suit was baseless rendering the pleading and the proceedings therein null and void; the respondent had no standing to sue; five grievants had parted with the appellant before the redundancy and were therefore not entitled to the orders sought; the claims for unpaid leave, underpayment, house allowance and overtime were statute barred by limitation of time. Be that as it may, they were not proved to the required standard; contrary to the learned judge’s findings, a notice of intended redundancy had been served; the learned judge erred in referring the case back to the Labour Office; the learned judge was in error when it delivered a partial judgment and thereafter directed a non-judicial office to consider fresh evidence; and the learned judge considered extraneous factors.
11. In view of the foregoing, the appellant prayed that the appeal be allowed by setting aside the findings of the trial court and the same be substituted with an order dismissing the respondent’s claim. The appellant further prayed for the costs of the suit at trial and in this appeal.
12. The appeal was heard virtually on 18th March 2024. Learned counsel Mr. Wafula appeared for the appellant while learned counsel for the respondent Mr. Wetaba was present.
13. The appellant filed its written submissions together with its case digest both dated 5th September 2023 and a supplementary case digest dated 5th February 2024. It submitted that since the amended memorandum of claim was filed without leave of the court, it was a non-starter, hopelessly incompetent and one for striking out. It argued that it was deplorable that the learned judge failed to address this fundamental issue that would have ultimately struck out the suit.



14. Furthermore, in the absence of a recognition agreement or a collective bargaining agreement between the parties, the respondent had no locus standi to institute suit. In the absence of any of those agreements, learned counsel submitted that it was incumbent upon the respondent to enforce the provisions of section 2, 54 (1) and (2) of the *Labour Relations Act*, which it did not. Coupled with the lack of proof of the respondent's members, the appellant argued that the suit could not be filed by the respondent.
15. In addressing its third ground of appeal, the appellant submitted that the following persons had their contracts terminated from the appellant on diverse dates before the redundancy procedure took place as follows: Dovina Achieng' Miruka (voluntarily left employment 7 months prior); Jackton Manyala Nyambok (summarily dismissed 8 months before); John Ombiri voluntarily left employment; Dick P. Okoth Anguto (voluntarily left a year before) and Dicken Okeyo who upon issued with a warning, never reported to work again. For this reason, they were not entitled to the reliefs sought.
16. The next issue addressed was whether the grievances sought were statute-barred. Learned counsel submitted in the affirmative. Citing section 90 of the *Employment Act*, the appellant advanced that the grievances sought dated as far back as 2003. Classifying those grievances as falling in the category of continuing injury, such claims could only have been lodged within 12 months.
17. Be that as it may, the award on overtime was not proved since the respondent failed to adduce evidence that it was not paid overtime. Furthermore, the muster payrolls relied upon could not be authenticated and did not establish the particulars of overtime. The appellant further faulted the trial court for relying on the Regulation of Wages (General) (Amendment) Order 2013 yet the relief of overpayment was hinged upon underpayments that dated back to 2003. For that reason, the 2010 Order applied. Either way, that the claim lacked any legal basis.
18. On whether the notice of intended redundancy was served upon the affected employees, the appellant submitted that it complied with section 40 (1) (b) of the *Employment Act* by issuing the said notice. For that reason, the trial court erred in holding otherwise. It relied on the internal memo dated 11th February 2014, the letter to the Labour Office dated 26th February 2014, the minutes of the meeting held on 11th February 2017 and the register confirming the attendance of the meeting of the grievants to support its argument. Since a prescribed form is not provided for in statute, it argued, it could not be found to not have complied as evidenced from the minutes and the internal memo.
19. Regarding whether the affected employees were entitled to leave and severance pay, the appellant submitted that the claim for severance pay was not pleaded. It was thus for dismissal. On leave, the same was a continuous injury and was thus statute barred. Nonetheless, the appellant submitted that the learned judge erred on relying on the 2013 minimum rates pay when it ought to have relied on those of 2011 since leave days claimed were computed from 2003. In addition, the respondent admitted in its pleadings that leave days had been paid and this was corroborated by the schedule for terminal dues dated 30th March 2014. Finally, the computation was wrongly done since it failed to disclose that some of the leave days had been taken by the grievants during the pendency of their employment.
20. Finally, the appellant submitted that the trial court misapplied the law when it referred the dispute back to the Labour Office. It was of the considered view that litigation must come to an end when a suit is lodged in court. That once a decision is made, the court becomes functus officio and cannot be heard to render a 'final judgment' at a later date when it has already pronounced itself comprehensively. For that reason, it urged this court to find that partial judgments are not known in our law and prayed that its appeal be allowed with costs.



21. The respondent filed its written submissions dated 7th February 2024. It submitted that the present appeal was inchoate as no final determination had been pronounced. It then submitted that the appellant could not strike out its claim or allege that it lacked locus standi at the stage of submissions. The absence of raising those issues in its pleading thus rendered the determination of those issues moot. It urged this court to disregard those issues.
22. On whether some claimants were not entitled to the reliefs sought, the respondent submitted that the record spoke for itself.

Since no cogent evidence rebutted those claims, it prayed that the said ground be dismissed. Speaking to the reliefs sought, the respondent submitted that contrary to the appellant's advancements, the reliefs were not statute barred. Be that as it may, the respondent invoked section 25 of the *Employment Act* and section 48 of the *Labour Institutions Act* to submit that its claim was meritorious having fallen within those precincts.
23. Regarding payments and overtime, learned counsel submitted that it provided sufficient evidence in the affirmative. In any event, the appellant failed to demonstrate that it was not entitled to those reliefs. For those reasons, the findings of the learned judge were proper and laudable. It submitted that the partial judgment was lawful and prayed that the appeal be dismissed with costs.
24. We have considered the record of appeal, the submissions and the authorities cited by the parties and the law. A first appellate court, this Court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent determination on whether or not to allow the appeal. This Court is in the circumstances invited to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. [See *Peters vs. Sunday Post Limited* [1958] E.A. 424.]
25. This appeal arises from a partial decision of the trial court. In its holding, the learned judge substantively determined whether the grievants were entitled to the reliefs sought in the memorandum of claim, filed on their behalf, by the respondent. She proceeded to jointly award others and reject some. Thereafter, the learned judge referred the matter to the Labour Office to calculate the reliefs that the members of the respondent was entitled to but pegged on the reasoning and guidance of the court's analysis. In her opinion, since payments were based on the tabulation by the Labour Office, it was well versed to carry out fresh tabulations. The question that arises for our determination thus is whether this was proper, lawful and procedural?
26. If we determine this issue affirmatively, then we shall proceed to determine the other issues raised by the parties sequentially. If, however, we find in the negative, the appeal shall be compromised wholly.
27. It is not denied that the affected members of the respondent were hitherto employed by the appellant. It is also not denied that the grievants were terminated from employment on account of redundancy.
28. Looking at the impugned judgment, we observe that the learned judge addressed several issues that arose from the pleadings. In particular, the learned judge made a determination as to whether the respondent's members were entitled to the following reliefs: notice pay, severance pay, house allowance, overtime, underpayments and accrued leave days. Noticeably however, the learned judge made a unanimous analysis and took a "one for all" approach. It is imperative to note that though the claim had been lodged by the respondent, there were 49 grievants before the court. The appellant had opposed each and every one of the claims by every grievant. It furthermore raised the allegation that some of the grievants were not in employment at the time of the dispute. It is common ground that though the heading of the claims was the same, each grievant had specific idiosyncratic prayers.



29. We find this approach by the learned judge improper for the following reasons: firstly, the 49 grievants, the subject of the redundancy, had individual contracts all running on their own terms. Secondly, the grievants, although by and large sought the same reliefs, enumerated their claims having calculated what they were entitled to. For those reasons, it was incorrect for the learned judge to apply that approach and instead ought to have looked at the circumstances of each grievant. That way, each contract would have been determined separately and distinctively akin to the existence and running of those contracts before they were terminated. In that regard, the learned judge would have first determined whether those claims were firstly merited before proceeding to give a base calculation of entitlement.
30. After determining what the grievants were entitled to, the learned judge then atypically directed parties to appear before the Labour Office under the pretext that it was best placed to assess the figures having done so initially. With due respect to the learned judge, such procedure is not known in law. The trial court was duty bound to make a determination on the reliefs sought without involving third parties.
31. Having made findings as encapsulated in her judgement, it was wrong for the learned judge to order that she would make further orders after the assessment by the Labour Office. If such assessment was necessary, the learned judge ought to have made such an order in the course of the hearing. Be that as it may, the Labour Office became functus officio once the suit had been filed. It was therefore incumbent on the learned judge to see to its logical conclusion the determination of the suit.
32. We therefore find that the learned judge implored an unlawful procedure occasioning a travesty of justice. This brings us to the next question on the appropriate orders to make. Each party to a hearing is entitled to a fair hearing as enshrined in Article 50 of *the Constitution*. We take note that all the 49 grievants were entitled to a fair hearing. The appellant was also entitled to a fair hearing and ought to have been given a chance to challenge each claim.
33. Laying emphasis on this inalienable right, the Court in *Mbaki & Others vs. Macharia & Another* (2005) 2 EA 206, stated thus:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”
34. The interests of justice in the circumstances edict that a retrial of the matter be done efficaciously. Having found so, making a determination on the merits or otherwise of the other issues would be premature and unnecessary. It is our considered view that this is an issue that ought to be retried before a judge other than the learned judge who heard and issued the impugned judgment.
35. This Court has power to order for a retrial. This is provided for in rule 33 (c) of this Court’s Rules. Where the dictates of justice dictate a retrial, this Court has not hesitated to order so. See the cases of *Daudi Kiptugen vs. Commissioner of Lands, Nairobi & 5 others* [2016] eKLR and *Meya Agri Traders Ltd vs. Elgon House (2010) Ltd* [2023] KECA 574 (KLR).
36. Consequently, the present appeal has merit. It is hereby allowed to the extent that the judgement and orders made on 26th April 2019 are hereby set aside. We further direct that the respondent’s memorandum of claim amended on 13th March 2017, shall be placed before a judge of the Employment and Labour Relations Court, other than Onyango, J. for its hearing and disposal. Since the appeal succeeds to this extent only, each party shall bear its own costs.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER 2024.



HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

