



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna & 4 others v Marsh View Limited (Civil Appeal 7, 8, 9, 10 & 11 of 2019  
(Consolidated)) [2023] KECA 1650 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 1650 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 7, 8, 9, 10 & 11 OF 2019 (CONSOLIDATED)  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
JULY 21, 2023**

**BETWEEN**

**PETER NGUGI NJUGUNA ..... 1<sup>ST</sup> APPELLANT  
PAUL GITUA NGUI ..... 2<sup>ND</sup> APPELLANT  
MICHAEL WAMWEA KARANJA ..... 3<sup>RD</sup> APPELLANT  
MUTUA WAMBUA ..... 4<sup>TH</sup> APPELLANT  
MWANGANGI MUTUA ..... 5<sup>TH</sup> APPELLANT**

**AND**

**MARSH VIEW LIMITED ..... RESPONDENT**

*(An Appeal arising from the judgment and decree of the Employment  
and Labour Relations Court of Kenya sitting at Nyeri, (Makau, J.)  
dated 29th May, 2018 in ELRC Cause Nos. 78, 79, 80, 82 & 83 of 2017)*

**JUDGMENT**

1. The five consolidated appeals challenge the decision of Nzioka wa Makau, J. delivered on 29<sup>th</sup> May, 2018, sitting at the Employment and Labour Relations Court at Nyeri. The proceedings were instituted by the appellants, who were employed by the Respondent as night guards at the Respondent's premise located in Juja, Kiambu County seeking orders for payment of terminal dues and compensation for unfair dismissal from employment.
2. The appellants' case before the Employment and Labour Relations Court (ELRC) was that they had been employees of the Respondent for varying periods of time having been employed on different dates, and were each earning a monthly salary of Kshs. 7,500/= as at the time of their termination. The appellants stated that they did not sign any employment contracts with the Respondent. They provided bank statements for their respective bank accounts where their monthly salary was remitted.



It was their case that on 20<sup>th</sup> August 2016, the Respondent, without any justifiable cause, summarily dismissed them from employment, under the guise that they were to be redeployed to another site locate at Athi River. However, the said redeployment did not materialize. Instead, their employment was terminated. The appellants stated that their dismissal was done in total disregard of the procedure outlined in the Employment Act, and was ultimately unlawful and unjustified. The appellants therefore claimed accrued overtime payments, annual leave allowance, one month's salary in lieu of notice, unpaid house allowance, unpaid salaries for the month of August 2016, underpayment dues, and compensation amounting to 12 months' gross salary for unfair termination.

3. In response, the Respondent filed a statement of defence dated 26<sup>th</sup> May, 2017, essentially denying the appellants' claim that they had been unfairly dismissed from employment. Through the statement of the property manager, Simon Githae Karuri, the Respondent explained that the appellants were employed by the Respondent on varying dates as watchmen to guard the Respondent's premises at Juja. It was the Respondent's case that a series of robberies occurred at its said premises which were attributable to the appellants' negligence in their duties. The Respondent stated that the appellants failed to raise any alarm or inform the Respondent of the said thefts. The Respondent asserted that the appellants had each signed a certificate of settlement of all terminal dues, which was witnessed by Mrs. R. W. Kiiru, the Labour Officer based at the Thika Sub County Labour Office, and therefore no such dues were owing to the appellants from the Respondent. In rebuttal, it was the appellants' assertion that the certificate of payment only related to the payment of their salaries for the month of August 2016.
4. After hearing the parties, the trial Judge concluded that the appellants' dismissal from employment was unlawful, and that the Respondent had failed to establish fair reason(s) to justify summary dismissal of the appellants. It was the learned Judge's finding that the Respondent failed to sufficiently establish that the appellants were involved in the series of thefts that occurred at the Respondent's premises. He further found that even though the appellants' employment was terminated on the basis of the alleged theft, the appellants were entitled to the safeguards provided under Section 41 of the Employment Act.
5. With regard to the remedies claimed by the appellants, the learned Judge determined that the appellants had failed to prove their claim for underpayment as well as unpaid house allowance, overtime and leave allowance. In conclusion, the learned Judge found that the appellants were each entitled to one month's salary in lieu of notice, as well as compensatory damages for unfair dismissal equivalent to their two months' salary, the award totaling to the sum of Kshs. 22,500/= for each Appellant. The appellants were also awarded costs of the suit.
6. Aggrieved by this decision, each of the appellants filed a separate appeal before this court. By consent of the parties, the appeals were consolidated, and the following eight (8) grounds constitute a summary of the appellants' complaint:
  - i. The Learned Judge erred in law and in fact by shifting the burden of proving the terms of employment to the appellants, contrary to the provisions of Section 10 (7) of the Employment Act;
  - ii. The learned Judge failed to consider the evidence of each Appellant separately;
  - iii. The learned Judge failed to take Judicial Notice of the Regulation of Wages (Agricultural Industry) (Amendment) Order of 2015 in relation to underpayment;
  - iv. The learned Judge erred in law and fact by failing to award the appellants underpayment;
  - v. The learned Judge erred in law by failing to award the appellants unpaid housing and leave allowance dues;



- vi. The learned Judge erred in law and fact by failing to acknowledge that the Respondent did not satisfy the requirements of Section 45 2(c) of the Employment Act in terms of fair procedure while terminating the appellants' employment;
  - vii. The learned Judge did not consider the prolonged period of time the appellants had stayed unpaid since their termination in awarding compensatory damages, and thereby awarded too little compensatory damages in the circumstances of the case;
  - viii. The learned Judge erred in law and fact by failing to consider the submissions by the 5<sup>th</sup> Appellant to the effect that his name did not appear in the certificate of payment filed and relied on by the Respondent; and by consequently failing to award the 5<sup>th</sup> Appellant his unpaid salary for the month of August, 2016.
7. The Appeal was canvassed by way of written submissions, which were duly filed by the parties. Counsel for the appellants submitted that the burden of proving the terms of an employment contract, where the same was not reduced into writing, lay with the employer. He faulted the trial court for finding that the appellants failed to prove their claims for underpayment and unpaid house allowance, where the Respondent failed to adduce evidence to the contrary. Counsel faulted the learned Judge for failing to take into account The Regulation of Wages (Agricultural Industry) (Amendment) Order, 2015, which the appellants relied on to establish their claim for underpayment. Counsel explained that the said Order prescribes the minimum salary for a night watchman at Kshs. 11,300.10, while the appellants were paid a salary of Kshs. 7,500 per month. Counsel relied on the decision of this court in *Kartar Singh Construction Limited vs Jirmo* (Civil Appeal No. 265 of 2019) [2021] KLR and the decision of the Employment and Labour Relations Court in *John Enemai Bibilondo vs Lydia Wangare Kariuki Munene* [2019] eKLR, where counsel stated that the two courts took into account the prescribed minimum wages in making the award of underpayment. Counsel for the appellants submitted that the appellants testified that they worked 12 hour shifts from 6.00 am to 6.00 pm with one day off per week, and further that they never took leave days. He stated that this evidence was not rebutted by the Respondent, and as such, the appellants were entitled to unpaid overtime and leave allowance. Counsel faulted the trial court for awarding compensatory damages to the sum equivalent to 2 months' gross salary, as opposed to 12 months' salary claimed by the appellants, taking into account the Respondent's blatant disregard for the law and procedure in terminating the appellants' employment. He urged this court to allow the appeal as prayed.
8. In response, counsel for the Respondent submitted that pleadings were not evidence, and that the ELRC rightfully found that the appellants had failed to provide evidence to prove their claims for underpayment, unpaid house allowance, annual leave allowance and alleged overtimes dues. Learned counsel cited the decision of the Employment and Labour Relations Court in the case of *Peter Ngunjiri vs Board of Management Magomano Secondary School* [2022] eKLR. Counsel stated that the appellants adduced bank statements to prove underpayment, yet the said statements did not properly reflect the sums received in all the months they have been in employment. Counsel invited this court to dismiss the appeal with costs.
9. This being a first appeal, the role of the first appellate court was well settled in the case *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where this court stated that:
- “An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though



it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

10. Having evaluated the record of appeal as well as submissions by parties to the appeal, the issues arising for determination by this court are:
  - i. Whether the appellants have a right to appeal where the decree arising from the judgment of trial court has been executed;
  - ii. whether the appellants’ claim for house allowance, leave allowance, overtime and underpayment was merited; and
  - iii. whether the Superior court erred in awarding the appellants two months’ salary as compensation for wrongful termination of their services by the Respondent.
11. The Respondent filed a preliminary objection dated 24<sup>th</sup> January, 2023. The Respondent contends in its written submissions that the appellants, having already executed the decree arising from the decision of the ELRC, cannot therefore challenge the same decision on appeal, as the appellate court may not vary or set aside the said decree. The Respondent urged that by enforcing the decree, the appellants have accepted the decision of the ELRC and cannot therefore challenge the same before this Court. In rebuttal, counsel for the appellants cited Order 42 Rule 2 of the Civil Procedure Rules which grants an appellate court jurisdiction to pass any decree and make such order which ought to have been made, or make such further decree or order as the case may require.

Counsel for the appellants further submitted that an appeal does not operate as a stay of execution, and therefore an appeal cannot be defeated by execution of the decree from the primary suit.
12. It is our considered view that satisfaction or enforcement of a decree does not bar a dissatisfied party from filing an appeal. This court in *Machakos District Co-Operative Union Limited vs Philip Nzuki Kiilu* [1997] eKLR determined that payment of a decretal sum does not take away a party’s right of appeal. Similarly, this court in the case of *Seventh Day Adventist Church East Africa Ltd. & 2 Others vs Masosa Construction Company* [2006] eKLR observed that since the Respondent in that case had already recovered the decretal sum and costs attendant to the litigation, and the fact that the right of appeal is a strong right which is rivalled only to the right to enjoy the fruits of judgment, no prejudice would be caused to the Respondent if an opportunity was given to the Applicants to enjoy their right of appeal, even if it is on a matter of principle only.
13. In the circumstances, this court cannot deny the appellants a right to be heard simply because they have received the award decreed to them by the ELRC.
14. Turning to the claim of unpaid house allowance, leave allowance and overtime dues, it was the appellants’ contention that the trial Judge shifted the burden of proving the terms of employment from the Respondent, who was the employer, to the appellants. The learned Judge observed that the bank statements provided by the appellants did not properly reflect the total sums received by the appellants during the term of their service. The appellants submitted that since the Respondent did not provide any documentary evidence to disprove their claim for unpaid house allowance, leave allowance and overtime, then the ELRC ought to have awarded the same to the appellants as pleaded.
15. We have considered the issue and we find that the ELRC cannot be faulted in the manner it evaluated the evidence on record. The bank statements produced in evidence show fluctuating amounts paid to the appellants during the period of their employment by the Respondent. The appellants’ claim for overtime, house allowance and leave allowance was thrown to the court without the appellants laying any basis for the same. The claim before the court was by the appellants. They had the burden



to establish their case to the required standard of proof. The Respondent in its statement of response stated that the appellants were provided with weekly rest days and public holidays and that they were also paid overtime for any holiday they may have worked.

16. Other than mere allegations of non-payment, which in any event was denied by the Respondent, the appellants did not prove the said allegations. We are of the view that it was not enough for the appellants to provide the court with figures they allege were entitled to them; the appellants had a duty to prove their claim even if the Respondent failed to tender any documentary evidence to the contrary. The appellants did not tender any specific evidence to prove their claim, nor did they make an application prior to the hearing of the claim by the court that they wished to rely on any records which were in the possession or control of their employer to prove their case. On re-evaluation of the rival submission by the parties on this issue, we cannot disagree with the finding made by the trial Judge. We affirm the finding of the trial court that the appellants failed to properly establish their claim for overtime, house allowance and leave allowance.
17. The appellants faulted the trial court for failing to take into account The Regulation Of Wages (Agricultural Industry) (Amendment) Order, 2015 (Legal Notice number 116 of 2015) which prescribes a monthly salary for a night watchman at Kshs.11,330. The learned Judge observed that the appellants failed to prove that they were underpaid as the bank statements provided by the appellants did not properly reflect the sums received in all the months they were employed, and that the applicable minimum statutory wages were not teased out to show a nexus between the sums claimed and the wages actually paid. We note that Legal Notice No. 116 of 2015 cited by the appellants prescribes a basic minimum consolidated wage for a watchman at Kshs. 6,278.80, and not Kshs. 11,330 as cited by the appellants. The appellants stated that they earned a monthly salary of Kshs. 7,500. We agree with the learned Judge's finding in that regard, and it is our considered view that the appellants failed to demonstrate that they were underpaid. The court is aware that there is a Legal Notice No 117 Of 2015 which we think the Appellant sought to rely on but they did not cite the same before the trial court. We leave the issue at that.
18. The 5<sup>th</sup> Appellant contended that he was not paid his monthly salary for the month of August, 2016. We note that the 5<sup>th</sup> Appellant's name does not appear in the certificate of payment provided by the Respondent which shows details of payment of salary for the month of August 2016. The 5<sup>th</sup> Appellant is therefore entitled to payment of his salary for the month of August, 2016, for the twenty days he was on duty prior to his termination on 20<sup>th</sup> August, 2016.
19. Turning to the issue of the compensatory damages award, we note that from the record, the learned Judge determined that the termination of the appellants' employment was indeed unfair. The remedies for unfair termination are outlined under Section 49 of the Employment Act, 2007. Section 49(1)(c) in particular provides that the employer may be required to pay to the employee:

“The equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”
20. Section 49 (4) of the Employment Act sets out several factors which a Labour officer or a court has to take into account in deciding whether to award any of the remedies set out under Section 49(1). They are as follows:
  - a. the wishes of the employee;
  - b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and



- c. the practicability of recommending reinstatement or re-engagement;
  - d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
  - e. the employee's length of service with the employer;
  - f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
  - g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
  - h. the value of any severance payable by law;
  - i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
  - j. any expenses reasonably incurred by the employee as a consequence of the termination;
  - k. any conduct of the employee which to any extent caused or contributed to the termination;
  - l. any failure by the employee to reasonable mitigate the losses attributable to the unjustified termination; and
  - m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”
21. Section 50 of the Employment Act gives the Employment and Labour Relations Court power to make an award in line with section 49 aforementioned. The power to award the remedies provided for under Section 49 of the Act is therefore discretionary. Judicial discretion must however be exercised judiciously. This Court in the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR observed thus:
- “The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.”
22. The appellants have asked this Court to find that the compensatory damages awarded by the ELRC, equivalent to the appellants' two months' salary, was insufficient, considering the circumstances surrounding the appellants' termination. Counsel for the appellants submitted that the appellants were paid their salary for the month of August 2016 in December 2016, and that the salary was only paid after the appellants escalated the matter to the Labour office in Thika. Counsel explained that an award for 12 months' gross salary in compensation damages would sufficiently compensate the appellants for their unfair termination.
23. In this case, the trial Judge deemed the award of two month's salary, amounting to Kshs. 15,000/=, as adequate compensation to the appellants for their unfair termination. Taking into consideration the circumstances of the case and the fact that majority of the appellants' length of service was less than a year, we are not convinced that the appellants were entitled to twelve months' gross pay as compensation. In addition, the appellants' termination was based on allegations of being involved in theft or concealing theft at the Respondent's premises, albeit the procedure followed for their termination was flawed. We see no misdirection on the part of the trial Judge to justify interference with the damages awarded.



- 24. The upshot of the foregoing is that we find that the consolidated appeals herein lack merit and are hereby dismissed, save for the 5<sup>th</sup> Appellant’s appeal which only succeeds to the extent of the claim for his unpaid salary for the twenty days that he worked in the month of August, 2016.
- 25. The Respondent is hereby ordered to pay the 5<sup>th</sup> Appellant, Mwangangi Mutua, his salary for 20 days that he worked in the month of August, 2016.
- 26. Each party shall bear their own costs in this appeal.

**DATED AND DELIVERED AT NYERI THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

