Maranga v BOG Cheptoroi Secondary School (Civil Appeal E186 of 2019) [2023] KECA 1121 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1121 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E186 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

SEPTEMBER 22, 2023

BETWEEN

ENOCK MARANGA ..... APPELLANT

AND

BOG CHEPTOROI SECONDARY SCHOOL ..... RESPONDENT

(Being an appeal from the judgment/ decree of Mbaru. J delivered on 7th February, 2019 in Nakuru ELRC No. 500 of 2014)

JUDGMENT

1. This is the first appeal of Enock Maranga (the appellant) against the judgment of Employment and Labour Relations Court (ELRC) at Nakuru (Mbaru J), delivered on February 7, 2019. B.O.G. Cheptoroi Secondary School is the respondent.

2. The backdrop of this appeal is a Memorandum of Claim dated September 8, 2014 that was filed by the appellant in the ELRC. In it, the appellant pleaded that at all material times to the claim, he was employed by the respondent as a watchman-cum-night guard. That he worked as a causal labourer in the year 2000 until 2002 when he was employed as a permanent employee.

3. He prayed for judgment against the respondent for unpaid dues from 2005 being: unpaid overtime amounting to ksh.1,225,296/, paternity leave allowance for three children he had during his employment, unpaid leave allowance of Ksh.267,120/-, compensation for working during holidays and Sundays being Kshs. 94,309.14/- and underpayment of kshs.1,673,280/-.

4. The respondents filed a Response to the Memorandum of Claim and denied all the allegations raised by the appellant. They averred that they paid the appellant an overtime allowance of Kshs.700/- per month and leave allowance of Kshs.500/- per month and that the appellant's claim on leave allowance is exorbitant and misleading to the court. Further, that the appellant never at any time applied for, or

requested for paternity leave and lastly, that the appellant had been severally requested to provide his CPE certificate in order to facilitate his salary review but he failed to do so.

5. During the hearing the appellant testified that the respondent has in employment, two watchmen cum night guards and that he reports to work at 6.00 p.m. and leaves at 7.00 a.m. every day (including weekends). That he works during public holidays and weekends and had not gone on annual leave from the year 2000 to 2005, nor did he go on paternity leave when his children were born. He claimed that he should be paid as a government officer, since he is employed by a school board.

6. The respondent's witness Emily Rop, refuted the appellant's allegation, stating that the appellant's salary was reviewed in 2002, 2008 and 2009 respectively, despite the fact that he failed to submit his CPE certificate to assist in wage review. It was her testimony that the appellant had taken extended leave with extra allowance of Kshs.500/-, and Kshs.700/- overtime pay and any work done during public holidays was compensated. She also told the court that the appellant did not inform the respondent of the delivery of any children to him, nor did he make an application for paternity leave. Lastly, that the appellant is paid in full for housing, medical, National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) allowances respectively.

7. Upon considering the case before her, the learned judge found no merit in the appellants claim, and dismissed it with costs to the respondent assessed at Kshs.10,000/-.

8. Dissatisfied with the judgment of the court, the appellant filed the instant appeal anchored on three grounds. In his grounds he alleges that the learned judge erred and misdirected herself in law:

    a. by failing to find that the appellant had proved his case to the required standard,

    b. by dismissing the appellant's claim with costs, and

    c. by failing to apply the principles applicable to the appellant's claim, resulting in a wrong decision.

9. The appeal was canvased by way of written submissions that were orally highlighted during plenary in the virtual hearing.

10. The Court Registry served a Hearing Notice by email on February 9, 2023 to the firm of M/S Gekonga & Co. Advocates and the Office of the Attorney General, the respective representatives of the appellant and the respondent. The email indicated that this appeal would be heard on March 7, 2023. When the matter came up for hearing the firm of Gekonga & Co. advocates were present for the appellant and had filed their written submissions dated 15th February, 2023. There was however, no representation for the respondent, neither had they filed their written submissions.

11. It was submitted on behalf of appellant that after the pre-trial this matter was referred for conciliation and subsequently, the respondent admitted via a letter, that they owe the appellant kshs.100,829/90 in respect of the claim for off duty days, overtime and leave. That, the respondent was willing to pay the appellant that amount but the appellant did not agree with the calculations. The appellant urges that the trial court ought to have calculated the amounts due to the appellant, since the conciliation had narrowed down the agreed issues. Further, that in its decision, the trial court did not give sound reason why it departed from the findings arrived at during conciliation.

12. The appellant also submits that the conciliation process is a legitimate dispute resolution mechanism, although its findings are not binding on the court. That the trial court ought to have been guided by the findings based on the fact that issues for determination had been narrowed down. The appellant relied on the decision of this Court in *Cavine Ouma Were v Pioneer Plumbers Limited* (2020) eKLR

which cited the case of *Kenya Union of Commercial and Allied Workers (KUCFAW) v Mombasa Water Supply & Sanitation Company & Coast Water Services Board (*2013) eKLR where it was held as follows:

> "the position in law is that whereas it is commendable for the trial court to take the conciliator's finding into account, this is not mandatory".

13. The appellant urges that the trial court relied on the wrong principle to dismiss his claim, yet the law is clear that when parties disagree with the Labour officer's computation, they have the leeway to revert back to the Labour officer for clarity on the computation.

14. On the computation of damages, the appellant submits that in 2005 he was paid a gross salary of Kshs.4,895/- per month, while the minimum Wage Regulation Order for 2005 -2006 was kshs.5,796/-. In 2009 he was paid Kshs.7,368/- against the minimum wage of kshs.6,839/-. He was also paid 15% house allowance to bring it to ksh.7,864/85. In the year 2011 he was paid ksh.5,833/- (sic), while the minimum wage for a night guard was Kshs.7,523/-. Together with 15% house allowance it came to ksh.8551/45. In March 2014, he was paid a basic salary of ksh.8020/-, while the minimum wage in the period 2012 - 2014 was between ksh.9,571/50 and ksh.10,911/70. It was therefore contended that from this computation the appellant is entitled to underpayment of Kshs.59,539/85.

15. Accordingly, it was submitted that the appellant is entitled to the award of damages and that it has been proved. He therefore, prays for compensatory damages as follows;

> Underpayment Kshs. 59,539.85,
>
> Leave allowance Kshs. 267,120,
>
> Overtime.....Kshs. 2,088,253.44 &
>
> Paternity leave.....kshs.13,944.
>
> Total.....kshs.2,428,857.29.

16. This being a first appeal, our duty as the first appellate Court is to subject the whole evidence to a fresh and exhaustive scrutiny and make our own conclusions. As we do so, we bear in mind that we did not have the opportunity to see and hear the witnesses first hand and give allowance thereof.

17. The role of the Court on first appeal has been stated in the decisions of this Court time and again. In *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212 the Court stated as follows:

> "On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

18. We considered the record of appeal, the contending arguments in the submissions and the applicable law and distilled the issues for our consideration as follows:

    a. whether the trial court erred in not considering the proceedings before the conciliator, and

    b. whether the trial court applied the wrong principles in determining the appellant's claim.

19. On the first issue it appears from the record of appeal that there was an attempt to settle this dispute through a conciliator. There is on record an undated letter from the Labour Officer to the Deputy

Registrar ELRC, and another letter dated April 3, 2017 from the respondent to the Labour Officer. The latter letter was in response to a meeting that both parties attended before the Labour Officer and were instructed to settle the claims on off duty days, overtime and leave claims. This is the letter that the appellant relied on in his pleadings.

20. The law that governs conciliation proceedings is provided under Section 68 and 69 of the *Labour Relation Act* as follows:

> 68.
>
> (1) If a trade dispute is settled in conciliation the terms of the agreement shall be—
>
> a. recorded in writing; and
>
> b. signed by the parties and the conciliator.
>
> (2) A signed copy of the agreement shall be lodged with the Minister as soon as it is practicable.
>
> 69.
>
> (1) A trade dispute is deemed to be unresolved after conciliation if the—
>
> a. conciliator issues a certificate that the dispute has not been resolved by conciliation; or
>
> b. thirty-day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

21. The appellant faults the trial judge for not awarding him the damages that the respondent conceded to. He relies on the correspondence from the respondent to the Labour Officer, where the respondent agreed to settle the appellant's claim for off duty days, overtime and leave at Kshs.100,829/90

22. The record of appeal does not contain the certificate as required under section 69 1(a) of the *Labour Relation Act*. However, we note that at paragraph 7 of the appellant's Memorandum of Claim, it is averred that: "the conciliation efforts between the claimant and the respondent have not been successful". It is therefore evident that the parties did not reach an agreement during the conciliation process. Without delving any further into the conciliation proceedings, it is apparent that there was nothing for the trial court to take into consideration, there being no agreement that was reached. We therefore find no fault, on the part of the judge.

23. On whether the trial court applied the wrong principles in determining the appellant's claim, the appellant first faulted the trial court for dismissing his claim on the grounds that it was statute barred according to section 90 of the *Employment Act*. He pointed out that the court having earlier dismissed the respondent's Preliminary Objection that was premised on the same grounds before referring the matter for conciliation, it could not use the same ground to dismiss his claim.

24. Section 90 of the *Employment Act* gives the timeline within which civil action or proceedings based, or arising out of this *Act*, or a contract of service in general shall may be instituted. Section 90 provides as follows;

> " Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this *Act* or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect

or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

25. The appellant contends that he was paid under the minimum wage in 2005, 2008, 2009, 2011 and 2014 and that in 2000 to 2005 he did not go on leave and was not paid leave allowance.

He also states that for the 14 years he worked with the respondent he worked during holidays and Sundays, and was not compensated. Further, that he did not go on paternity leave when he had his three children.

26. The learned judge considered the evidence and held as follows concerning the appellant's claims:

> " The respondent submits that the claimant is still in the employment of the respondent as a watchman. The claims for underpayment are general without stating the job group yet there were constant salary reviews over time and when the claimant was required to submit his school certificate to facilitate the same, he failed to oblige. The claims made in this regard are time barred by application of section 90 of the *Employment Act*, 2007.
>
> On the claims for overtime pay the claimant has been compensated with a monthly allowance in this regard. There was no application for paternity leave to justify the claims made. The claimant took his annual leave and was on full pay and an allowance. The claims made for the years 2002 to 2005 are out of time.
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> .....Where the claimant took annual leave, time off, was allowed sick off and had a monthly provision for an overtime pay, such has adequately addressed any over hours worked.
>
> On the claims for paternity leave for 3 children born to the claimant during his employment with the respondent, such leave is a right under the provisions of section 29(8) of the *Act*... The production of the certificate of birth for the child/children born during such leave period would be an important support document for a male employee seeking or allowed paternity leave. This is not the case for the claimant. He never applied nor submits any certification of birth for any child born to him.....The right under section 29(8) of the *Act* cannot be claimed in an empty space. There must exist a birth and such must relate to the subject employee.
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> ..... The claim for work during holidays and Sundays for 14 years is general. The claimant as a night guard for the respondent, being in subsisting employment testified that he alternates his work duty with Raymond Langat. With the payment of a monthly overtime without stoppage when on leave or away due to any other matter, to claim for work over public holidays and Sundays as a separate item is to seek unjust enrichment where such is not justified.
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> On the claim for underpayment, the work records filed by the respondent, a random pick for November, 2014 indicate the following payments to the claimant;
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> Ksh.700.00 overtime pay per month; Ksh.9, 420.00 basic pay;
>
> Ksh.1, 500.00 house allowance; Ksh.357.00 medical allowance; Ksh.720.00 NSSF- 5%
>
> Gross wage Ksh.12, 715
>
> The payments noted above and the applicable Wage orders for the position held by the claimant are a generous payment taking into account he was also with the benefit of NSSF

and NHIF contributions to his advantage. Such well compensates the claimant for the position held with the respondent."

27. This suit was instituted on September 8, 2014. We therefore, examined the record to establish whether the claim was within time or it was time barred under Section 90 of the *Employment Act*. In the case of *Attorney General & another v Andrew Maina Githinji & another* (2016) eKLR, this Court, while upholding a Preliminary Objection based on section 90 of the *Employment Act* held that:

> " ...The respondents had a clear cause of action against the employer when they received their letters of dismissal on October 2, 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on June 16, 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold."

We have considered the record and agree with the learned trial judge that the claim for under-payment for the period covering 2005, 2008 and 2009 and the claim for leave for the period 2000 to 2005 are statute barred in accordance with section 90 of the *Employment Act*.

28. In regard to the claim for underpayment that arose in 2011 and 2014 we are guided by Section 48 of the *Labour Institutions Act* 2007. The section provides that the minimum rates of remuneration established in a Wages Order, constitute a term of employment of any employee to whom the Wages Order applies. Also, that if the contract of employment provides for payments lower than the minimum rates, the minimum rates under the Wages Order substitute the inferior terms. Therefore, under the law, any employer paying below the minimum wage commits an offence.

29. We have therefore considered the record to establish whether any of the payments fell below the minimum wage under the Wages Order.

30. In 2011 the minimum wage for the night watchman exclusive of the house allowance was Kshs.8,463/- according to the *Labour Institution Act (Regulation of Wages (General) (Amendment) Order*, 2011. In 2014, the minimum wage for a night watchman was Kshs.10,911/- exclusive of the house allowance, according to *Regulation of wages (General) (Amendment) Order*, 2013. We do not have the appellant's pay slips for the year 2011 on record, to establish whether the appellant was underpaid as he claims. The appellant furnished the court with only one pay slip for March 2014, which showed that he was paid as follows:

> Basic salary – ksh.8020/- House allowance – ksh.1500/- Medical allowance – ksh.375/- OT/ Arrears – ksh.700/-
>
> NSSF 5%– - ksh.200/-
>
> Gross Salary – ksh.10795/-

The respondent furnished the court with the appellant's numerous pay slips. For our purpose (the year 2011 and 2014), the only legible one is for the month of November, 2014. It is also the one which was used as an example by the trial judge in the judgment to analyze the claim.

31. The minimum wage applicable in the year 2013 – 2014 was Kshs.10,911/- exclusive of house allowance. In March 2014, the appellant was paid kshs.10,795/- including house allowance of kshs.1500/- and other arrears of kshs.700/-. We deducted the house allowance and the arrears to find that the appellant was paid kshs.8,595/-. That is kshs.2,316/- less than the minimum wage.

32. We applied the same arithmetic on the payment made to the appellant in the month of November 2014. That is, we deducted the house allowance and overtime payment, and what was left as the appellant's pay was kshs.10,515/-. That is Kshs.396/- less than the minimum wage for that period. Based on the foregoing, we respectfully disagree with the trial judge that the appellant was paid above the applicable wage order in his position.

33. The appellant also contends that for the 14 years that he was employed by the respondent he worked during public holidays and Sundays and he was not compensated for it. As stated earlier, the appellant can only claim for matters that arose 3 years leading to September 8, 2014. Ms. Rop for the respondent in her submissions, told the court that the appellant was compensated whenever he worked over the holidays or Sundays. Looking at the record before us, there is no documentary evidence indicating whether he was compensated or not. The duty was on the appellant to prove that he was not paid. This being a court of record, we are of the view that the appellant has not proved this claim to the required standard.

34. Turning to paternity leave and the overtime dues, we agree that the respondent had no way of knowing that the appellant had babies, without the appellant bringing this to the respondent's attention. There is nothing on the record to demonstrate that this was done or that he applied for and was denied paternity leave. We therefore agree with the learned judge and find that this claim was not proved.

35. On overtime dues, the respondent provided the court with sheets of payments done in different years and dates. The sheets contained names of different employees and the overtime pay that they received. We note that the appellant's name was one of them and he did not contest the presence of his name in those documents, that were produced to demonstrate that he was paid overtime.

36. Ultimately this appeal succeeds only in regard to the claim for underpayment to the extent that the appellant was underpaid in the months of March and November, 2014. We therefore set aside the order by the Superior Court and instead order that the respondent pay the appellant Kshs. 2,712/- for the underpayment. The respondent shall pay cost of this suit.

DATED AND DELIVERED IN NAKURU THIS 22ND DAY OF SEPTEMBER, 2023

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR