



**Kartar Singh Construction Limited v Jirmo (Civil Appeal  
265 of 2019) [2021] KECA 293 (KLR) (3 December 2021) (Judgment)**

Neutral citation: [2021] KECA 293 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 265 OF 2019  
HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**KARTAR SINGH CONSTRUCTION LIMITED ..... APPELLANT**

**AND**

**GODANA JILO JIRMO ..... RESPONDENT**

*(Being an appeal against the judgment of the Employment and Labour Relations Court at Nairobi (Byram Ongaya, J) dated 19th October, 2018 in ELRC CAUSE NO. 1339 OF 2010)*

**JUDGMENT**

1. The appellant, Kartar Singh Construction Limited was an employer of Godana Jilo Jirmo. The said relationship was terminated on 19<sup>th</sup> June, 2010 when it was alleged that the appellant had dismissed the respondent on the basis of tribal discrimination. In the respondent's memorandum of Claim dated 28<sup>th</sup> October, 2010, he contended that he was underpaid; that he was not given 2 months' notice, he was not paid for annual leave, severance pay and overtime; that he was not given weekly resting days for 5 years and neither was he paid for working during public holidays. He sought the following prayers:
  - (i) A declaration that the termination of the claimant's employment on 19<sup>th</sup> June, 2010 was unlawful and unfair;
  - (ii) An order that the respondent do issue a certificate of employment to the claimant;
  - (iii) An order that the respondent do pay the claimant Kshs 768,892.35 being his dues under Section 49 of the *Employment Act* 2017 and underpayment under Legal Notice No. 42 of 1<sup>st</sup> May, 2005, Legal Notice No. 38 of 1<sup>st</sup> May, 2006, Legal Notice No. 70 of 1<sup>st</sup> May, 2009 and legal Notice No. 98 of 1<sup>st</sup> May, 2010;



- (iv) Interest from 19<sup>th</sup> June, 2010 till payment in full;
- (v) Costs.”

2. In its defence dated 29<sup>th</sup> April, 2011, the appellant denied the averments in the respondent’s statement of claim and put him to strict proof thereof. In a further amended defence dated 15<sup>th</sup> September, 2011, the appellant contended that contrary to the respondent’s assertions, it is the respondent who left the appellant’s employment and that the respondent had been employed as a “store watchman”.
3. On 31<sup>st</sup> October, 2017, the matter proceeded to hearing, initially before Mbaru, J who heard the respondent’s evidence. The respondent relied on his witness statement dated 26<sup>th</sup> June, 2018 in which he stated that he was entitled to a monthly salary of Kshs. 6,457.10 yet he used to earn Kshs. 6000.00 per month (an underpayment of Kshs. 83,160.90); that on 19<sup>th</sup> June, 2010, he was unlawfully terminated on “tribal basis”; that he worked for the appellant on overtime basis for a total of 93 hours, thus he was entitled to Kshs. 290,677.20 for the overtime; that he is entitled to Kshs. 173,280.00 as he worked on his weekly rest days and Kshs. 33,212 for working during public holidays.
4. In his testimony on 28<sup>th</sup> June, 2018 before Ongaya, J. who had taken over the matter from Mbaru, J, Mr. Singh, the appellant’s director told the trial court that the respondent was employed as a day guard; that he used to work from 8.00 am to 4.00 p.m. on Monday to Friday; that on Saturdays, he worked upto 1.00 p.m. and that Sunday was his rest day; that the appellant housed him at the site; that the respondent was not terminated but the construction work came to an end; that the respondent was given a loan of Kshs. 40,000.00 which was not repaid. In cross-examination, Mr. Singh admitted that the respondent did not take annual leave.
5. In his judgment, Ongaya, J found in fvaour of the respondent in the following terms:
  - “ 1). The declaration that the termination of the claimant’s employment by the respondent on 19.06.2010 was unfair and unlawful.
  - 2). The respondent to pay the claimant a sum of Kshs 768,892.35 by 15.12.2018 failing interest to be payable thereon from the date of the judgment till full payment.
  - 3). The respondent to deliver a certificate of service by 15.11.2018.
  - 4). The respondent to pay the claimant’s costs of the suit.”
6. The appellant was aggrieved by the said outcome, hence this appeal.
7. In the Memorandum of Appeal dated 7<sup>th</sup> June, 2018, the appellant faulted the trial court’s judgment on the basis that its evidence and submissions were disregarded; that there was no evidence of unfair and unlawful termination; that there was no basis for the order of payment of the unsubstantiated sum of Kshs. 768,892.35 as this sum is not supported by legal notices pertaining to Regulation of wages and finally, that in particular, the evidence of the appellant’s director was disregarded.
8. In its written submissions dated 9<sup>th</sup> July, 2020, the appellant submitted that it had employed the respondent as a night guard between the years 2005 and 2010; that the minimum wage in 2005 and 2006 was Kshs. 5,796 under Legal Notice No. 38 being the Regulation of Wages (General Amendment Order) 2006; that there was no review of the minimum wage in 2007 and 2008; that in 2009, the minimum wage was increased to Kshs. 6,839 per month, thus an underpayment of Kshs. 839 p.m. for the year 2009 working out to a total of Kshs. 10,068; that in 2010, vide Legal Notice No. 98 of 2010, the minimum wage was increased to Kshs. 7,523, thus, an underpayment of Kshs. 1,523 p.m. bringing the total underpayments in 2010 to Kshs. 28,276; that the respondent’s employment came



to an end as the construction works were completed; that the allegation of tribalism is untrue; that the respondent was overpaid in the years 2005 and 2006 to the tune of Kshs. 16,644 and this together with the loan of Kshs. 40,000 advanced to the respondent should be used to off-set the underpayment; that the respondent was not entitled to two month's salary in lieu of notice; that at the time of termination, the minimum wage for a watchman was Kshs. 7,523 p.m.. The appellant denied owing the respondent leave days; that the respondent stayed and lived on the construction site and finally that the respondent did not work overtime.

9. The respondent's brief written submissions filed by Kwengu & Co. Advocates are dated 19<sup>th</sup> May, 2021. It was contended for the respondent that his termination was unfair and without justification, the appellant being a going concern and hence it was immaterial that it had wound up business in one of its sites. Further, that the respondent proved that he worked overtime and during holidays; that he is entitled to damages for unlawful termination together with compensation for not being given notice of cessation of employment.
10. On 25<sup>th</sup> January, 2021, this appeal came up before us for hearing. Learned counsel, Miss Mbulu appeared for the appellant whilst learned counsel Mr. Kwengu appeared for the respondent.
11. In urging the appeal, Miss Mbulu submitted that the respondent's employment came to an end when the appellant's construction work also came to an end; that the allegation of discrimination based on tribe is unfounded; that the claims of overtime are baseless as the respondent chose to live at the appellant's construction site. She urged us to refer the matter to the trial court for re-trial for reasons that were unclear to us.
12. In opposing the appeal, Mr. Kwengu pointed out that whilst in its response to the claim the appellant averred that the respondent left the construction site on his own accord, during the hearing, its witness contended that the construction works had come to an end. He urged us to dismiss the appeal. He did not think that the prayer for an order of a retrial was merited.
13. We have considered the entire record, the grounds of appeal, the respective written and oral submissions made before us and the law.
14. The appeal before us is a first appeal. Our duty as a 1<sup>st</sup> appellate court is to re-analyze, re-assess and re-evaluate the record in light of the rival submissions set out above and reach our own findings and conclusions thereon. See *Selle Vs. Associated Motor Boat Company [1968] E.A. 123* for the holding inter alia, that:

“An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally as above.”
15. It is not in dispute that the respondent was employed by the appellant as a watchman, although in its statement of defence, the appellant indicated that the respondent was employed as a store man. Later, the appellant contended that the respondent was a day watchman. It is therefore not clear whether the respondent was a night or day watchman or a watchman at all. However, whether he was a day or night watchman, the fact of the matter is that he resided at the construction site owned by the appellant. It is also not in dispute that the appellant's construction works came to an end and according to the appellant, the site having closed, it needed not the services of the respondent. Be that as it may, the appellant did not serve a redundancy notice thus, entitling the respondent to a month's salary in lieu of notice, as his salary was paid on a monthly basis.



16. As regards the contention that he worked on public holidays, did not take leave and that he worked overtime. We note that apart from the mere allegations of non-payment, which in any event were denied by the appellant, the respondent did not prove the said allegations. We note further that the appellant testified as to having loaned the respondent a sum of Kshs. 40,000.00. The respondent did not deny or controvert this assertion. The appellant was of the view that any sums owed to the respondent be off-set from the sum of Kshs. 40,000.00 loaned to the respondent. We however note that the appellant did not at any time plead a counterclaim and set-off. This argument is therefore not available to the appellant. Again, and although the appellant prayed for this matter to be referred to the trial court for a re-trial for reasons that were unclear to us, we see no reason to do so. Admittedly, the appellant acknowledged Kshs. 38,344.00 underpayment of the respondent in 2009 and 2010, a sum of Kshs. 10,068.00 and Kshs. 28,276.00 respectively. The respondent is entitled to this amount.
17. As for discrimination based on tribe, we find no substance in this allegation. The respondent, apparently was a Borana and the appellant's director was a Sikh. Why would a Sikh discriminate against a Borana? In its submissions, the appellant stated that it had employed the respondent for more than five (5) years and that their relationship came to an end as construction works came to an end on the site where the respondent used to work. We also note in the written & oral submissions made before us that the respondent was silent on this issue.
18. Accordingly, we partially allow the appeal to the extent that we set aside the award of Kshs 768,892.35 and in lieu thereof enter judgment for the respondent as follows:
- (i) One month's salary in lieu of notice
  - (ii) Damages equivalent to 3 months' pay Kshs. 7,523.00 Kshs. 22,569.00
  - (iii) Underpayment of Kshs. 10,068.00 and Kshs 28,276.00 for the years 2009 and 2010, totaling to TOTAL KSHS.68,436.00
  - (iv) We shall not disturb the trial court's order to the effect that the appellant avails a certificate of service to the respondent.
19. As this appeal is partially successful, we make no order of costs.
20. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*



*Signed*

**DEPUTY REGISTRAR**

