Obia v JRS Group Limited (Appeal E061 of 2024)
[2025] KEELRC 1216 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1216 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E061 OF 2024

JK GAKERI, J

APRIL 30, 2025

BETWEEN

GEORGE OTIENO OBIA ..... APPELLANT

AND

JRS GROUP LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment of Hon. E.A. Obina, S.P.M delivered on 16th September, 2024 in George Otieno Obia v JRS Group Limited.

2. Briefly, the appellant was an employee of the respondent from November 2014 to September 2021, when his employment was terminated. He alleged that no reason was provided and was not paid in *lieu* of notice.

3. The appellant prayed for overtime, underpayment, rest days, gratuity, leave allowance, salary in *lieu* of notice and compensation for unlawful termination of employment, Kshs.2,059,419.13, costs and interest.

4. The respondent's case was that appellant was its employee as a day guard and was dismissed for being a sloppy and sloven employee who admitted strangers to the workplace without alerting the client, which compromised security of the institution and the client lost faith in him.

5. The respondent stated that the appellant had been issued with notices to show cause and was lawfully terminated from employment and his claims were statute barred.

6. After considering the evidence placed before him and submissions by the parties, the learned trial Magistrate found that termination of the appellant's employment was fair but awarded the appellant Kshs.120,184.35 for underpayment for the period worked and Kshs.45,425.85 as leave allowance for 3 years total Kshs.165,610.20.

7. All other claims were dismissed save for certificate of service and costs.

8. This is the Judgment the appellant is appealing against.

9. The appellant faults the trial court on the grounds that it misdirected itself in:

    1. Concluding that the appellant was not entitled to salary in lieu of notice.

    2. Concluding that the appellant was lawfully terminated from employment.

    3. Computation of the claim for under payment from 2014.

    4. Failing to award rest days as there was no controverting evidence.

    5. The computation of the claim for leave allowance from 2014.

    6. Failing to award overtime since the respondent did not controvert the appellant's evidence.

Appellant's Submissions

10. Counsel submitted that the respondent adduced no evidence to prove that the appellant was not entitled to the reliefs sought and placed reliance on the sentiments of Mbaru J. in Abigael Jepkosgei Yator & Another v China Hanan International Co. Ltd [2018] eKLR on maintenance of records by the employer.

11. It was further submitted that the termination of employment did not comply with the provisions of Section 41 and 43(d) of the *Employment Act* as to the reason for termination of employment.

12. Counsel urged that since RWI testified that the appellant absconded duty, and the respondent availed no evidence of the steps it took to reach out to him, the termination was unfair.

13. Reliance was placed on the sentiments of the court in Mary Achieng Ouma v Salihihiya Co. Ltd [2016] eKLR on termination vide a positive step by the employer.

14. On under payment, counsel submitted that whereas the computation for 2018 – 2021 was correct, the period November 2014 to November 2018 was not included, Kshs.140,160.00.

15. On overtime, reliance was made on Regulation 7 of the Regulation of Wages (Protective Security Services) Orders 1998 to urge that the appellant was entitled to Kshs.504,688.8 for December 2018 to September 2021 and Kshs.699,148.8 for November 2014 to November 2018.

16. Reliance was placed on the sentiments of Mbaru J. in Abigael Jepkosgei Yator & Another (Supra).

17. As regards rest days, the appellant's counsel submitted that since the claimant worked 7 days a week he was entitled to payment Kshs.132,854.4 for the period 2014 – 2018 and Kshs.95,904.6 for 2018 to 2021.

18. Counsel made reference to ground 7 of the appeal which was not included on the Memorandum of Appeal to urge that the appellant ought to have been compensated for leave for the entire duration worked, Kshs.105,993.65.

Respondent's submissions

19. As to whether termination of the appellant's employment was unfair, counsel submitted that after the appellant was issued with a warning and/or reprimand, he absconded duty and never returned and did not know when his employment was terminated and failed to prove constructive dismissal having so alleged.

20. On reliefs, counsel submitted that since the alleged termination occurred in September 2021 and the claim was filed in July 2022, the claims for rest days, overtime, leave allowance and under payment were statue barred under Section 90 of the *Employment Act* as held in the German School Society Ltd v Helaga Ohany [2022] eKLR and the claim for underpayment was unproven as was the prayer for salary in lieu of notice.

21. Although the respondent's counsel submitted on gratuity, the finding of the trial court was not contested.

22. The appellant is contesting the trial court's finding on termination of employment and the reliefs, whether awarded or not, namely; salary in lieu of notice, underpayment, overtime, rest days and leave.

23. This being a first appeal, the duty of this court is as was explained by the Court of Appeal in Selle and Another v Associated Motor Boats Co. Ltd, [1968] EA 123 as follows:

> "... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 witness and should make due allowance in this respect..."

24. See also Peters v Sunday Post Ltd and Myrsal & Another v Manese (Suing as the Legal Administrator of Dalphine Kanini Manesa [2022] KEHC 282 KLR.

25. As regard termination of the appellant's employment, the learned trail Magistrate found that the same was fair having considered the many notices to show cause, suspension and warning letters, and hearing had been conducted.

26. While the appellants faults the finding on the ground of absence of a termination letter and reason for termination or steps taken if the appellant deserted the workplace, the respondent urges that the appellant failed to prove that he was constructively dismissed and was unaware of the date of termination of employment.

27. In his statement, the appellant stated that his employment was terminated "sometime" in September 2021. He added that he was constructively dismissed.

28. From the documentary evidence on record, the appellant was issued with a notice to show cause on 9th September, 2021 and received it at 10:22am, with 5 days to respond.

28. There is no evidence that he responded but was invited for a hearing on 14th September, 2021 at 8:00am with his guarantor or any other competent person.

29. Records reveal that show cause proceedings took place on 23rd September, 2021 and the appellant's remark was a an apology for the mistake.

30. The guarantor requested that the appellant be accorded another chance.

31. The management's remark was that the appellant had been problematic and not inclined to change despite previous notices to show cause and warning and was emphatic that he be discharged and the conclusion was that the appellant's employment be terminated and letter of termination to issue, with 7 days right of appeal.

32. The appellant signed the final conclusion and inserted his phone number 0757 930 353.

33. The appellant did not deny having signed the conclusion nor having been aware of the hearing or that he was a problematic employee.

34. The appellant signed the Company Code of Conduct on 18th September, 2014 and was issued with the 1st warning Order on 30th August 2015, a second on 21st July, 2016, a 3rd on 21st June, 2016, a fourth one on 28th November, 2016 and a fifth on 3rd March, 2020.

35. Relatedly, he was issued with a notice to show cause on 24th April, 2020, hearing took place on 28th April, 2021 and a final warning was issued on 29th July, 2021. The appellant admitted the mistake and apologised.

36. The last notice to show cause was issued on 9th September, 2021.

37. The appellant absconded duty and admitted having done so more than five (5) times and apologised and was found guilty of other offences and admitted the same.

38. As correctly submitted by the respondent's counsel, it behooved the appellant to establish that termination of his employment was unfair. His witness statement states that he was constructively dismissed from employment but is unsure of when it took place in September 2021.

39. The statement makes no reference as to the circumstances in which the alleged dismissal took place, the absence of a letter of termination notwithstanding.

    Section 107 of the *Evidence Act* states

    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Further Section 8 of the Act States:

40. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

    (See also East Produce (K) Ltd v Chrisptopher Astiado Osiro Civil Appeal No. 43 of 2000, Kiema Mutuku v Kenya Cargao Hauling Services Ltd [1991], Alice Wanjiru ruhiu v Messiac Assembly of Yahirch [2021] eKLR among others).

41. Needles to emphasize, it was incumbent upon the appellant to demonstrate that the employer terminated his employment and did so unfairly.

42. The documents availed by the respondent show that the respondent issued a notice to show cause and accorded the appellant 5 days to write down his statement and attend a hearing on 14th September, 2021, accompanied by a guarantor or other competent person and the offence was negligence and the committee's conclusion was that the appellant's employment be terminated.

43. Contrary to the submission that the respondent's witness stated that the appellant absconded duty, and no action was taken to reach out to him, the evidence on record is clear that the appellant signed the conclusion and/or judgment of the committee that his employment be terminated effective 23rd September, 2021 and was accorded 7 days to appeal.

44. The appellant tendered no evidence of having appealed.

45. It is trite law that for a termination of employment to pass the fairness test as prescribed by the provisions of the *Employment Act*, it must be proved that the employer had a valid and fair reason to do so and conducted the termination in accordance with a fair procedure.

46. Put in the alternative, as held in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR, there must have been a substantive justification for the termination of employment and a fair procedure.

47. Based on the documentary evidence on record, this court is in agreement with the finding of the trial court that the respondent had a substantive justification to terminate the appellant's employment and conducted the same in accordance with a fair procedure.

48. The appellant admitted in writing having violated various clauses of the respondent's Code of Conduct which was part of his employment contract.

49. He was notified of the charges and attended a hearing with a person of his choice and signed the conclusion, and was thus aware of the reason for termination and the date thereof and did not appeal the dismissal.

50. However, the appellant had certain accrued rights irrespective of the dismissal.

51. On the reliefs the court proceeds as follows;

    On underpayment, the appellant prayed for payment from November 2014 – September 2021, a duration of 7 years and 9 months.

52. The appellant adduced no evidence of having raised the issue of underpayment with the respondent at any time and agreed to the salary he was receiving. However, since the minimum wage is a prescription of law, the respondent was bound to observe the law but failed in this case.

53. However, the appellant can only recover the underpayment for 3 years only up to 23rd September, 2021 by dint of Section 90 of the *Employment Act*.

54. Contrary to the respondents argument, that the entire claim was statute barred, the court respectfully disagrees.

55. Under the Regulation of Wages (General) Amendment Order 2018 effective 1st May, 2019, the basic of salary of a day watchman, a fact the appellant admitted on cross-examination, was Kshs.13,572.90+2,036.00 as house allowance, total Kshs.15,609.00 less Kshs.11,500=Kshs.4109x12=Kshs.147,924.00 as opposed to Kshs.120,184.35.

56. The claim for overtime is difficult to sustain in that the appellant did not demonstrated when he worked overtime and was not paid or having demanded the same.

57. Equally, the claim is framed on the assumption that the appellant worked overtime every day 7 days a week even the days on which he absconded duty or was on suspension or training as dictated by the employer.

58. Had the appellant made these modifications, he would have had a stronger case as opposed to this instance where the court was being called upon to award figures unsupported by verifiable evidence.

59. The claim lacks supportive evidence and the court is in agreement with the finding of the trial court.

60. The foregoing equally applies on rest days as the appellant provided no verifiable evidence of having worked on rest days. RWI confirmed on cross-examination that the appellant worked for 6 days not seven.

61. The claim for rest days lacked supportive evidence and the court upholds the finding of the trial court.

62. The claim for gratuity lacked a factual and legal basis and the court is in agreement with the findings of the trial court for the simple reason that to be payable, gratuity ought to have a contractual basis either in the contract of employment or a collective agreement to which the employer is privy.

63. Being a gratuitous payment, it ought to be expressly provided for.

64. On leave allowance, while the appellant alleges that he did not proceed on leave at all, the respondent agrees but argues that he never applied for it.

65. The appellant adduced no evidence of having applied for annual leave and did not state so in his witness statement.

66. However, since annual leave is a statutory right of the employee and the respondent adduced no evidence of having provided for it, the appellant is entitled to payment for unutilized leave days for 3 years at 21 days per year, Kshs.32,778.00.

67. Having found that termination of the appellant's employment by the respondent was neither substantively nor procedurally unfair, the prayer for compensation is unsustainable as found by the learned trial Magistrate.

68. Finally, on pay in *lieu* of notice, the court is in agreement with the finding of the trial court that it was not merited as the dismissal was actuated by gross misconduct namely; negligence.

Section 44(1) of the *Employment Act* provides that:

69. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

70. Similarly, Section 44(4)(c) of the *Employment Act* wilful neglect to perform any work, or careless or improper performance of work by an employee fall under the ambit of gross misconduct.

71. As regards interference with a Judgment of a trial court the court is guided by the sentiments of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA and Hancox Ag JJA held:

> " A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusions".

72. In the instant case, the court is satisfied the appellant has not made a sustainable argument for the court to interfere with the findings of the trial court save on the computation of underpayment, leave pay and consequently the total award is as follows:

a. Underpayment Kshs.147,924.00

b. Leave pay Kshs.32,778.00

Total Kshs.180,702.00

All other awards by the trial court are upheld.

In the circumstance, parties shall bear own costs of this appeal.

DATED, SIGNED AND DELIvERED vIRTUALLY AT KISUMU ON THIS 30TH DAY OF APRIL, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COvID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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