



REPUBLIC OF KENYA



KENYA LAW

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**Wanyama v West Kenya Sugar Company (Civil Appeal E008 of 2024)
[2025] KEELRC 1314 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1314 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CIVIL APPEAL E008 OF 2024**

DN NDERITU, J

MAY 8, 2025

BETWEEN

JOSEPH MECHUMO WANYAMA APPELLANT

AND

WEST KENYA SUGAR COMPANY RESPONDENT

(Being an appeal from the judgment and decree in Kakamega Chief Magistrate's Court ELRC Cause No. 89 of 2021 by Hon. J. R. Ndururi (SPM) dated and delivered on 14th March, 2024)

JUDGMENT

I. Introduction.

1. In a judgment delivered on 14th March, 2024 the lower trial court entered judgment in favour of the appellant in the sum of Kshs49,518/= being annual leave for the years 2017 to 2020. Each party was ordered to meet own costs of the cause. All the other prayers were denied – see the details of the pleadings and reliefs sought in the analysis below.
2. Dissatisfied with the above judgment the appellant through Onyango Otunga & Company Advocates commenced this appeal by way of a memorandum of appeal dated 12th April, 2024 raising the following grounds of appeal –
 1. That the Learned Magistrate erred in Law and in fact when he dismissed the Appellant's claim of underpayment.
 2. That the Learned Magistrate erred in law and in fact by failing to find that the Appellant was one of the employees that benefited from the Ruling of Mathew N. Nduma J. ruling in Kisumu ELRC NO. 258 OF 2018.
 3. That the Learned Magistrate erred in law and in fact by misapprehending the evidence tendered by the Appellant and failing to consider the said evidence.



4. That the judgment of the Learned Magistrate is against the law and weight of the evidence on record.
3. The appellant is seeking for the following reliefs –
 - a. This appeal be allowed and the judgment by the Honourable J. R. Ndururi (SPM) dated 14th March 2024 and the same be set aside save for the unpaid leave award granted.
 - b. Costs of this Appeal be awarded to the Appellant.
 - c. Such further orders or reliefs as the Honourable court may deem fit to grant.
4. The respondent opposed the appeal through O & M LLP Advocates.
5. The appeal was canvassed by way of written submissions. Counsel for the appellant, Miss Onyango, filed written submissions dated 15th November, 2024 and Miss Kahiu for the respondent filed written submissions dated 3rd March, 2025.

II. Submissions By Counsel.

6. Counsel for the appellant submitted that the lower trial court erred in failing to find that the appellant was one of the employees who benefited from the ruling of Nduma J. in ELRC Kisumu Cause No. 258 of 2018 which allegedly raised the minimum wage payable to employees in his cadre, UG 7, following a collective bargaining agreement (CBA) that was allegedly duly registered.
7. It is submitted that based on the above the appellant, who was at the material time on a fixed term contract with the respondent, was entitled to underpayments claimed based on the CBA alluded to above. It is further submitted that the underpayments claimed by the appellant were based on the CBA and not on the minimum wage regulations. It is submitted that the total arrears payable to the appellant in underpayments amounted to Kshs620,464/=. The court is urged to overturn the finding and holding of the lower trial court in that regard and apply the CBA that came into effect on 1st May, 2017, a copy thereof was produced as an exhibit by the appellant during the trial.
8. The court is urged to be persuaded by the decisions of Nduma J. and Onyango J. cited above as adopted by Keli J. in *West Kenya Sugar Company Limited V Lihungu (2023) KEELRC 1354 (KLR) (30th May, 2023)*.
9. The court is urged to overturn the decision of the lower trial court and enter judgment in favour of the appellant as prayed in the memorandum of claim as restated in memorandum of appeal.
10. On the other hand, counsel for the respondent identified the following issues for determination –
 - a. Whether the instant suit presents similar facts to those in Kisumu ELRC Number 258 of 2018, thus making the Ruling of Mathew N. Nduma J therein, applicable herein;
 - b. Whether the Appellant was underpaid by the Respondent;
 - c. Whether the Learned Magistrate at the trial court failed to consider the Appellant’s evidence; and
 - d. Whether this appeal is merited.
11. In regard to the first issue it is submitted that the ruling by Nduma J. in ELRC Kisumu Cause No. 258 of 2018 did not apply to the appellant. It is submitted that the appellant was a casual employee who converted to fixed term employee by operation of Section 37(1) of the *Employment Act*. It is further



submitted that the circumstances, evidence, and facts in the appellant's case are distinguishable from those that prevailed to those who were favoured by the above ruling.

12. In regard to the second issue, it is submitted that the appellant was paid and received the minimum payable wage as guided by Regulation of Wages (General) (Amendment) Order 2017 that was in force during the material period. It is thus submitted that the lower trial court arrived at the right decision in applying the impugned minimum wage guidelines as opposed to the CBA as the same did not apply to the appellant.
13. In regard to the third issue, it is submitted that the lower trial court properly considered and evaluated the evidence from both sides in making the findings and holdings that it arrived at. It is further submitted that the appellant was on a fixed term contract that expired through effluxion of time. In that regard the court is urged to follow the reasoning of the Court of Appeal in *Transparency International V Carol Omondi* (2023) KECA 174 (KLR).
14. Further, the court is urged to apply *Protus Wanjala Mukite V Anglo African Properties T/A Jambo Mutara Lodge Laikipia* (2021) eKLR and find that the appellant failed to prove his case during the trial.
15. The court is urged to dismiss the appeal in its entirety for lack of merits.

III. Issues For Determination.

16. The court has perused the record of appeal, the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, the following issues commend themselves to the court for determination –
 - a. What was the nature, terms, and conditions of the employment relationship between the appellant and the respondent?
 - b. Was the respondent terminated or how did the employment relationship, if any, terminate?
 - c. If the respondent was terminated, was the termination unfair and unlawful?
 - d. Did the lower trial court arrive at the correct decision in regard to the above issues and the reliefs awarded?
 - e. What are the appropriate orders for this court to make in regard to the above issues and on costs?

IV. Employment & Termination.

17. As the first appellate court, this court is obligated to evaluate the evidence and arrive at its own conclusions but bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle V & Another V Associated Motor Boat Co. Ltd & Others*.
18. As per his pleadings and evidence in the lower trial court, the appellant's case is that he was engaged by the respondent as a casual labourer in 2009 and worked as such until 30th June, 2016 when he was placed on annual renewable contracts as a tractor-mechanic until 30th June, 2020 when he was terminated. He alleged that he was denied leave, house allowance, and was underpaid.
19. The appellant had pleaded that he was denied due process as he was only issued with a notice of termination dated 29th June, 2020. His last salary was stated to have been Kshs15,720/=.
20. It was further pleaded that the appellant was a beneficiary of the judgment in Kisumu ELRC No. 258 of 2018 which entitled him and others to enjoy benefits from a CBA registered between the Kenya



Union of Sugar Plantation & Allied Workers and the respondent that was registered under RCA No. 29 of 2019. It was pleaded that one of the terms of the CBA was that appellant and others were to enjoy an increased salary from 1st May, 2017 but the respondent failed, refused, and or neglected to enforce and honour the CBA.

21. The appellant prayed for the following orders in the lower trial court –
 - a. Declaration that the claimant was terminated unfairly and unlawfully by the Respondent.
 - b. Claim for compensation, that is payment in lieu of notice, unlawful unfair termination, salary underpayments, overtime, lunch, leave allowance and overtime, all totaling to the sum of Ksh. /- as per paragraph 18 above.
 - c. Compensation for Leave days earned but not taken during the pendency of employment.
 - d. Certificate of service.
 - e. Costs of the suit.
 - f. Interest on (a) above.
 - g. Any other further relief that the court may deem just and fit to grant.
22. The claim was denied and in the filed statement of defence the respondent pleaded that the appellant worked on several fixed term contracts of one year each from 1st July, 2016 to 30th June, 2020 at a consolidated monthly salary of Kshs15,720/=.
23. The respondent further pleaded that on 29th June, 2020 the appellant was issued and served with a notice to the effect that his contract was not to be renewed upon lapse on 30th June, 2020. It was further pleaded that thereafter the dues payable to the appellant were calculated but the appellant failed and or refused to collect the same.
24. In regard to the judgment in Kisumu ELRC No. 258 of 2018 that was rendered and delivered on 16th April, 2020, it was pleaded that the said judgment was stayed on 11th January, 2021 pending the hearing and determination of an appeal arising therefrom.
25. It was pleaded that the appellant was not terminated but the contract between the parties came to a natural end through effluxion of time. The claim was denied in its entirety.
26. In a ruling by the lower trial court dated and delivered on 27th July, 2023 it was held that the issue as to whether the dismissal or termination of the appellant on 30th June, 2020 was unfair and or unlawful was the subject matter in Kisumu ELRC No. 47 of 2020 and as such the court held that it did not have jurisdiction over that issue. However, the lower trial court held that it had the jurisdiction to hear and determine the other prayers in the claim.
27. During the hearing the appellant (then claimant) testified in line with his foregoing pleadings as per his filed statement and he produced the documents filed as exhibits.
28. The respondent called one witness, Duncan Abwawo, the human resources manager of the respondent, whose testimony was based on his filed statement and the filed statement of defence and he on behalf of the respondent denied the claim in total.
29. As stated in the introductory part above, in a judgment dated and delivered on 14th March, 2024 the lower trial court awarded to the appellant a sum of Kshs49,518/= for unpaid leave but dismissed all the other prayers. Each party was ordered to meet own costs for the proceedings. It is this judgment that is now the subject matter of this appeal.



30. As noted above, the lower trial court did pronounce itself in a ruling that it was not seized of the jurisdiction to determine the unfairness and or unlawfulness, or otherwise, of the alleged termination of the appellant. As far as the record shows, that ruling was not appealed and does not form part of the subject matter of this appeal.
31. Further, the record shows that Kisumu ELRC No. 47 of 2020 was subsequently transferred to and referenced Bungoma ELRC No. 54 of 2021 and that the same was settled as per the consent order of Keli J dated and issued on 14th December, 2021. However, the terms of the said settlement have not been disclosed by either party. Likewise, the allegation by the respondent that the matter is still pending in the Court of Appeal has neither been supported, substantiated, nor proved.
32. It is not in dispute that the appellant was a tractor-driver as at the time he left employment of the respondent on 30th June, 2020 and that he had been in such employment since 1st July, 2016 on periodic annual contracts renewed each year upon expiry, for the entire period. It is also not in dispute that his last monthly salary was consolidated at Kshs15,720/=.
33. As stated in the introductory part of this judgment, the appellant wishes to have the entire decision of the lower trial court set aside, except for the awarded amount of Kshs49,518/= in unpaid leave as alluded to above, and that judgment be entered in his favour as was pleaded in the memorandum of claim filed in the lower trial court.
34. To directly answer the question on the nature and the terms of employment between the appellant and the respondent as at the time of the termination of the relationship, the appellant was on a fixed one-year contract that expired on 30th June, 2020 at an agreed consolidated monthly salary of Kshs15,720/=.

III. Remedies.

35. On the second and third issues, the court noted above that the issue of the unfairness and unlawfulness, or otherwise, of the termination of the employment relationship between the appellant and the respondent was the subject matter of the cause alluded to above that started in ELRC Kisumu but was concluded in ELRC Bungoma. In any event, the trial lower court, as noted elsewhere in this judgment, ruled that this issue was not the subject matter of the trial in view of the cause that was pending in the ELRC as alluded to above.
36. Either way, the court presumes, and rightly so, that in view of the foregoing, the issue of unfairness or lawfulness of the termination was adequately and conclusively dealt with in the said ELRC cause. This court shall not sit on appeal on that issue as if I did so this court shall be acting ultra vires and without jurisdiction.
37. The issue of whether the appellant was entitled to a notice before termination and or compensation in lieu thereof is closely related to the unfairness and unlawfulness, or otherwise, of the termination. As stated in another part of this judgment, neither of the parties informed this court the finding and holding in the cause the concluded in Bungoma ELRC. In those circumstances this court cannot pronounce itself on the issue.
38. On the issue of compensation for overtime, lunch, leave and overtime allowances, the court agrees with the trial lower court that the appellant did not prove that he was entitled to any of such allowances or compensation. Moreover, the appellant was compensated for leave earned but not taken in the sum of Kshs49,518/=. This award shall not be disturbed and the court upholds the same. In any event, no cross-appeal was filed by the respondent against the same.



39. The main issue in contest during the trial was and still is the claim for underpayments in the sum of Kshs620,464/= which claim was denied by the lower trial court. The gist of the matter is whether the appellant was to benefit from the ruling of Nduma J in Kisumu ELRC No. 258 of 2018 wherein the Judge stated as follows in paragraphs 18 and 19 –
18. Therefore, it is the finding by the court that all employees who had been employed as casuals initially, and had served the respondent for a continuous period of two months are entitled to the negotiated terms of the CBA and in particular, the salary increment under clause 34 of the CBA for the period 2017-2018. The respondent is directed to increase the salary of all employees under the stated category accordingly.
19. In the final analysis, judgment is entered in favour of the claimant as against the respondent with no order as to costs. The salary increment to all employees left out who fall under the defined converted status, and had served for continuous period of two months be paid arrear salary in terms of increment under clause 34 of the CBA within 30 days.
40. The court poses the following rhetorical questions – If the appellant was a beneficiary of the above pronouncements by Nduma J on underpayments, why did he not pursue the same to its logical conclusion in that cause alongside the other grievants? Was the issue not res judicata as filed and presented before the lower trial court?
41. The above questions are germane in that if the respondent failed and or refused to pay the underpayments within 30 days as ordered in the impugned ruling the remedy available was for the appellant and the other grievants to pursue the respondent in the same forum. It was thus irregular and un-procedural for the appellant to file and or pursue a new cause before the lower trial court in enforcement of the ruling and order of the Judge.
42. Furthermore, underpayments are in the category of continuing injury as envisaged under Section 89 of the *Employment Act* (the Act) for which action shall be filed within one year of termination or cessation of the injury. The facts as pleaded by the claimant is that he left employment of the respondent on 30th June, 2020 and hence 12 months were to expire by or about 1st July, 2021. However, the record shows that the appellant filed his claim in the lower court on 23rd December, 2021. That was over six months after the expiry of the 12 months allowed for the filing of a claim based on continuing injury.
43. In the alternative, and without prejudice to the foregoing, the appellant ought to have lodged his claim on the underpayments within 12 months of the ruling by Nduma J which was delivered on 16th April, 2020. The said period expired on or about 17th April, 2021 yet the appellant filed his claim in the lower court on 23rd December, 2021 about eight months out of time.
44. The lower trial court found and held that the consolidated monthly salary of Kshs15,740/= paid to the appellant from 2016 to June, 2020 was within the recommended rates as per the applicable regulation of wages guidelines, a fact that has not been challenged by the appellant. Further, the lower trial court found and held that the appellant was duly paid as per the terms and conditions agreed by and between the parties and as such he deserved no more.
45. The appellant has neither suggested nor argued that the said pay was below the minimum wage payable. His argument is rather that he was entitled to benefit from the terms of the CBA in line with the ruling by Nduma J cited above. The court has found and established above that even if the appellant was so entitled, he did not present his claim within the stipulated time of 12 months. There is also no explanation offered as to why the appellant did not pursue his said claim in the same cause where Nduma J issued the said order.



46. The court has this far said enough in demonstrating that the claim for underpayments was rightly dismissed and the court has spelt out that even if the appellant was entitled to such underpayments he filed his claim way out of time and the same was therefore statutorily time-barred.
47. As for the claim for a certificate of service the lower trial court made no finding at all on the same. In the proceedings in the lower trial court the respondent displayed a certificate of service in the name of the appellant but it was stated that the appellant had failed and or refused to clear with the respondent so as to collect the said certificate and other benefits. The court now orders that the said certificate be unconditionally delivered to the appellant's counsel within 30 days of this judgment as the same is a right to the appellant under Section 51 of the Act.
48. For clarity and avoidance of doubt, it is over four years since the appellant left the employ of the respondent and there is absolutely nothing for him to clear after such a lengthy period of time.

V. Costs.

49. The lower trial court ordered each party to bear own costs for the proceedings therein. While the award or denial of costs is at the discretion of the court, I take the view and hold that since the appellant partially succeeded in his claim and was even awarded a sum of Kshs49,518/= in leave pay, the court ought to have awarded him costs to some extent.
50. Likewise, this appeal has nominally and partially succeeded as noted above but failed in many other aspects.
51. In my considered view the lower trial court ought to have awarded half costs of the proceedings thereat and the court hereby orders so.
52. As to the costs for this appeal the court takes the view that each party shall meet own costs.

VI. Orders.

53. Flowing from the foregoing, the court makes the following orders –
 - a. The appeal shall succeed to the extent that the award of Kshs49,518/= to the appellant is upheld.
 - b. The appellant is entitled to an appropriate certificate of service under Section 51 of the [Employment Act](#) and the respondent is hereby ordered to deliver the same the appellant's counsel within 30 days of this judgment.
 - c. The appellant is awarded one half (1/2) costs for the trial in the lower court.
 - d. Each party shall meet own costs for this appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 8TH DAY OF MAY 2025.

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DAVID NDERITU
JUDGE

