



REPUBLIC OF KENYA



KENYA LAW
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**Oduori v JRS Group Ltd (Appeal E050 of 2023)
[2024] KEELRC 10 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 10 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E050 OF 2023
S RADIDO, J
JANUARY 24, 2024**

BETWEEN

CHRISTOPHER ONYANGO ODUORI APPELLANT

AND

JRS GROUP LTD RESPONDENT

(Being an appeal arising from the judgment and decree of the Senior Principal Magistrates Court at Winam by Honourable F.M. Rashid (PM) delivered on 25th July 2023 in the original Winam Principal Magistrates Court ELRC Cause No. E047 of 2022)

JUDGMENT

1. Christopher Onyango Oduor (the Appellant) sued JRS Group Ltd (the Respondent) before the Senior Principal Magistrates Court Winam on 11 November 2022, alleging unfair termination of employment and breach of contract.
2. In a judgment delivered on 25 July 2023, the Senior Principal Magistrate found that the Appellant had voluntarily retired and, therefore, the case was not one of unfair termination of employment. The Cause was dismissed.
3. The Appellant was aggrieved and he lodged a Memorandum of Appeal with the Court on 24 August 2023, contending that:
 - (i) The Learned Trial Magistrate erred in law and fact in making a finding that the Court did not have jurisdiction on deciding on retirement benefits to the Claimant.
 - (ii) The Learned Trial Magistrate erred in law and fact in failing to take into consideration the documents produced by the Claimant to award underpayment, gratuity, rest days, overtime and leave allowance.
 - (ii) The Learned Trial Magistrate erred in law in law and fact in dismissing the suit.



- (iv) The Learned Trial Magistrate erred in law and fact in failing to appreciate provisions of sections (26) (27) and (28) of the Employment Act 2007.
 - (v) The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and therefore arrived at a decision unsustainable in law.
4. The Record of Appeal was filed on 13 October 2023 and the Court gave directions on 13 October 2023, as a result of which the Appellant filed his submissions on 8 November 2023 and the Respondent on 29 December 2023.
 5. The Court has considered the Record of Appeal and the submissions.

Role of the Court on a First Appeal

6. In Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

7. This Court will keep the interdict in mind.

Unfair termination or retirement?

8. While finding that the Appellant had failed to prove that an unfair termination of employment had occurred, the Senior Principal Magistrate noted:

In this case, the Claimant testified that he voluntarily retired from the Respondent's company. He informed the Court that he is 60 years old. The Respondent availed to the Court a letter dated 13/5/22 written by the Claimant and addressed to the Respondent indicating that he voluntarily wanted to retire from the company. The Claimant therefore voluntarily retired from employment. I therefore hold that the said Claimant was not unlawfully terminated from employment.

9. This court has re-evaluated the evidence placed before the Senior Principal Magistrate and agrees with her that the Appellant voluntarily retired, and his case was not one of unfair termination of employment.

Breach of contract

10. Apart from an action for unfair termination of employment, the Appellant alleged breach of contract in that the Respondent had failed to pay him terminal dues.

11. The Senior Principal Magistrate threw out the plea for breach of contract by stating:

In view of the finding above that the Claimant was not dismissed from employment, the Claimant is not entitled to the awards that flow from unlawful dismissal. From the evidence on record, the Claimant's issues arises from non-payment of his retirement benefits which issue this Court does not have jurisdiction to delve into at first instance.



12. The Senior Principal Magistrate did not give any explicit reasons for reaching the conclusion that she did not have jurisdiction.
13. The Appellant had advanced distinct causes of action, unfair termination of employment and breach of contract (underpayments, overtime, gratuity, leave allowance, house allowance, and rest days) before the Senior Principal Magistrate.
14. The Senior Principal Magistrates Court has jurisdiction over such causes of action where the employee was earning less than Kshs 80,000/- per month. There was no assertion that the Appellant was earning more than Kshs 80,000/- per month.
15. The Senior Principal Magistrate, therefore fell into an error of law and fact in declining jurisdiction.
16. The Court will consequently examine each of the distinct heads of claim alleging breach of contract.

Underpayments

17. The Appellant asserted that he was being paid below the prescribed minimum wages from September 2016 to December 2018. He claimed underpayments totaling Kshs 225,262/-.
18. The Respondent's General Manager who testified on its behalf admitted during cross-examination that he was aware of the Regulation of Wages (Amendment) Orders 2016, 2017 and 2018, and that the Appellant's wage was not adjusted to reflect the prescribed minimum wages.
19. The witness indicated that the Appellant was earning Kshs 9,000/- which was below the prescribed minimum wage.
20. The Respondent did not test the veracity of the tabulations by the Appellant nor produce payroll records for the Appellant as contemplated by sections 10(7) and 20 of the [Employment Act](#), 2007.
21. The Court, therefore finds that the Appellant was underpaid and awards him Kshs 225,262/-.

Overtime/rest days

22. With regard to overtime and rest days, the Appellant sought a cumulative total of Kshs 1,196,858/- on account of overtime and rest days worked but not paid from September 2016 to December 2018.
23. The Appellant was a security guard. It is a notorious fact that the Court can and takes judicial notice that security guards work 12-hour shifts. He testified that he worked seven days a week including during public holidays.
24. Regulation 6 of the Regulation of Wages (Protective Security Services) Order, 1998 provides for 52 hours of work spread over 6 days of the week, and Regulation 7 sets out the formula for calculating overtime pay while Regulation 8 provides for 1 rest day each week.
25. Again, the Respondent did not controvert the Appellant's case on overtime/rest days nor produce the records envisaged under section 10(3) of the [Employment Act](#), 2007, and the Court will allow this head of the claim.

Gratuity

26. The Appellant separated from the Respondent after about 6 years of service. Under Regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1998, an employee under the sector who has served for more than 5 years is entitled to the payment of gratuity and by dint of the said Regulation, the Appellant was not only eligible but entitled to gratuity.



27. The Court will allow the claim in the sum of Kshs 42,425/-.

Leave allowance

28. Leave allowance is not a benefit prescribed by the general law of employment, the *Employment Act*, 2007.
29. Despite seeking Kshs 75,709/- as leave allowance (distinct from leave on full pay), the Appellant did not provide any evidential or legal foundation to this head of the claim.
30. Before addressing the next issue, the court notes that the breach of contract assertions by the appellant constituted continuing injury as contemplated by section 90 of the *Employment Act*, 2007 and as set out by the Court of Appeal in the *German School Society & Ar v Ohany & Ar* (2023) KECA 894 (KLR).

Certificate of Service

31. A Certificate of Service is a statutory entitlement of all employees and the respondent should issue one to the appellant.

Conclusion and Orders

32. Flowing from the above, the court vacates and sets aside the order dismissing the Cause, and judgment is entered for the Appellant as follows:
- (i) Underpayments Kshs 225,262/-
 - (ii) Overtime Kshs 1,196,858/-
 - (iii) Gratuity Kshs 42,425/-
- Total Kshs 1,464,545/-
33. The awards to attract interest at court rates from today.
34. Respondent to issue a Certificate of Service within 30 days.
35. The Appellant to have costs of the Appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF JANUARY 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances:

For Appellant Misiga & Co. Advocates

For Respondent Hussein Indimuli Advocates

Court Assistant Chrispo Aura

