# Eregwa v Wameer Wholesellers and Distributors Ltd (Employment and Labour Relations Appeal 30 of 2022) [2024] KEELRC 6 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 6 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL 30 OF 2022**

**HS WASILWA, J**

**JANUARY 23, 2024**

**BETWEEN**

**JULIUS EREGWA ........................................................................... APPELLANT**

**AND**

**WAMEER WHOLESELLERS AND DISTRIBUTORS LTD ............ RESPONDENT**

## JUDGMENT

1. This appeal arose from the judgement and decree of the of Hon. Y.I Khatambi(PM) delivered on November 18, 2022 in Nakuru Chief Magistrate's Court under case number CMERLC Cause No. E90 of 2021. The grounds of Appeal are as follows; -
    1. That the learned magistrate erred in law and in fact in finding the appellant was not an employee of the respondent ever or at all.
    2. That the learned magistrate erred in law and in fact in finding the appellant had not proved her case against the respondent on a balance of probabilities yet there was overwhelming evidence to demonstrate the appellant was employed as a guard by the respondent.
    3. That the learned magistrate's judgement was unreasonable and untenable.
    4. That the learned Magistrate's judgement was against the weight of evidence and not in accordance with the legal principles.
2. The appellant sought for the following reliefs; -
    a. That the proceedings and judgement together with the resultant decree of the trial magistrate be set aside, reviewed and or revised and or substituted with the judgement of this Honourable Court.
    b. That this Honourable Court do make such further orders as it deems fit.

c. That this Appeal be allowed with costs to the appellant.

**Backgrounds of facts.**

3. The summary of the trial's case is that, the appellant herein was verbally employed by the respondent in June, 2013 as a night watchman working from 6pm to 6am and earning a monthly salary of Kshs 8,000, which was increased to Kshs 11,000 from November, 2013.

4. In September, 2020, the appellant was re-designated and began working as a general worker clocking in at 6am to 1pm. That he worked in this position until his separation from the company.

5. The appellant stated that he fell ill and was unable to carry out his duties and requested the respondent to retire him on medical grounds, which the respondent relieved him of his duties but refused to pay him all his terminal dues.

6. In the claim, the appellant, sought to be paid underpayments, normal overtime, unpaid salaries, off duties, public holidays and costs of suit.

7. In response to the claim, the respondent stated that the appellant was employed by one Shamshudin Abdul Musa(Deceased), one of the former director of the respondent, to serve as a guard in his private residence, as such the claim had be raised against a wrong party. Further that all his emoluments were paid by the said Shamshudin.

8. It is averred that sometime in June, 2020, the said Mr. Shamshudin passed away and the appellant herein wrote a letter to Mr. Shamshudin's son, asking to be paid his terminal dues and to resign from employment as he was ill.

9. Consequently, the respondent's director who is the son of the deceased director wrote a letter dated November 4, 2020 to NSSF to release the respondent's dues, however NSSF declined on the basis that the respondent was not the employer of the appellant. Noting this, the respondent's director, wrote another letter dated November 13, 2020 bearing the name of the late Shamshudin Abdul Musa, which letter was acknowledged by NSSF and the said pension dues were released to the claimant.

10. The respondent stated that the appellant was not an employee of the respondent, a fact that was confirmed by NSSF records, which showed the late Shamsudin as the appellant's employer.

11. After analysing the facts herein, the trial Court dismissed the entire suit on the basis that the appellant herein was not an employee of the respondent but an employee of the late Shamsudin Abdul Musa.

12. Directions were taken for the Appeal to be canvassed by written submissions with the appellant filling on October 16, 2023 and the respondent filed on December 18, 2023.

**Appellant's Submissions.**

13. On employment relationship between the appellant and the respondent, the appellant submitted that it had indicated to the trial Court that he was employed verbally by the respondent, which employment was confirmed by the respondent's letter dated November 4, 2020, addressed to NSSF requesting for the payment of his pension. It was argued further that the company used to store its beverages in the deceased home and the sole reason, he was asked to guard the deceased property was to safeguard the beverages belonging to the respondent, a further indication that he was employed by the respondent and not the deceased.

14. It was argued further that the respondent alleged that it had outsourced security from Rokvy Security Agency, however that it only produced evidence of contract for the year 2018,2019 and 2020 but never

produced for the one from 2013 to 2017, when the appellant herein was in its employ as such that he was hired as the security guard for the respondent.

15. Having argued as such, the appellant submitted that it was grossly overworked by the respondent as, he was required to report to work at 6 p.m. and leave at 6 a.m. when serving as a night guard and from September, 2020 he worked as a general worker, clocking in at 7a.m to 6 p.m. working several hours' worth of overtime but that he was never paid the said overtime. He thus urged this Court to finds that he was entitled to overtime and award him Kshs 586,020.05 .

16. On the claim for underpayment, the appellant submitted that he earned Kshs 8,000 from June, 2013 to October, 2013, when the salary was increased to Kshs 11,000 from November, 2013 till September, 2020, when he resigned, as such that he was underpaid throughput his employment and prayed for under payment pay of Kshs. 314,206.20.

17. The appellant submitted that the claim herein is not time barred because it is a continuous injury as was held in the case of *Kathra Hussein Noor & Another Vs Kaderdina Hajee Essak Limited* [2016]eKLR where the Court quoted the Industrial Court at Nairobi, Cause Number 1813 of 2011 between *David Wanjau Muhoro v. Ol Pajeta Ranching Limited* [2014] e-KLR where the Court held that;-

> "where the salary of an Employee remains in arrears, or remains underpaid, recovery of the arrears or the underpayments, is not to be defeated by limitation under Section 90 of the *Employment Act*; all accrued benefits must be paid to the employee on termination; arrears of salary and underpayments of salary involve a default of a continuing nature by the Employer, and time would only start running from the date of cessation of the continuous default; every month there is a default, the time for accrual of the cause of action resets with regard to the cumulative obligations; and so long as the whole Claim is not time-barred, there is no reason to bar claims for arrears of salary, salary discrimination and underpayments, occurring during the period in employment. The underpayments to the Claimant were carried over from the year 2010. Every time the correct rate was not applied, the accrual date reset. At the time of termination there were underpayments, accrued from 2010. It is not disputed that the main Claim was filed within the time prescribed under Section 90 of the *Employment Act*. Accrued benefits stretching back beyond a period of 3 years, are not to be severed and treated as having gone stale. As correctly submitted by the Claimant, Section 48 of the *Labour Institutions Act* 2007 requires 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. If the contract of employment provides for payments below the minimum rates, the minimum rates under the Wages Order are inserted in the contract in substitution of those inferior terms. An Employer found guilty of paying below the minimum wage commits an offence, and may in addition to any other penalty pay the employee the difference between what is paid and what ought to have been paid. It cannot be the intention of Parliament in enacting Section 90 of the *Employment Act* that, Employees are inhibited in recovery of wage arrears and underpayments, while there are no inhibitions in making such recovery in a criminal process, under Section 48 of the *Labour Institutions Act* 2007. The objection by the respondent on the period of computation of underpayments is rejected. The claimant's adoption of the year 2010 as the first year of underpayment is accepted."

18. On whether the appellant is entitled to off days, it was submitted that the appellant was not granted off days for the duration he was serving the respondent, a fact which the respondent did not challenge,

therefore that since he was entitled to 4 off days in a week, he ought to be compensation and urged this Court to award him off days of Kshs. 520,906.70.

19. Similar submission, where made with regard to public holidays pay and argued that the respondent worked every day of the week including on public holidays as such he is entitled to payment for working on all the public holidays from June, 2013 till September, 2020, all amounting to Kshs. 128.016.25.

20. The appellant submitted also that from June, 2013 to August, 2020, he used to work overnight as a guard and then from 7am to 1pm, he used to serve the respondent as a general worker, however that he was not paid for this work, which he urged this Court to order the respondent to pay him Kshs 1,404,160.80

21. On costs, the appellant submitted that costs are awarded on discretion of the Court and relied on the case of *Republic Vs Rosemary Wairimu Munene,Ex parte Applicant and Ihururu Dairy Farmers for Co-operative Society ltd* , where the court held;-

> "Judicial Review Application No. 6 of 2004 Mativo J. held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another* [2016] eKLR."

**Respondent's Submissions.**

22. The respondent submitted from the onset on whether the appellant was employed by the respondent and argued that the appellant was employed by Mr. Shamshudin Abdul Musa AKA Hasard as a guard in his residence and maintained employer-employee relationship as indicated at paragraph 20 of the Record of Appeal and affirmed by the NSSF records at page 64 of the record of Appeal that showed the said Mr. Shamshudin as the appellant's Employer.

23. It was submitted that contrary to the allegation that the letter by the respondent dated 4/11/2020 addressed to NSSF was evidence of employment relationship, the said letter was rejected by the NSSF on the basis that the author was not the appellant's employer, forcing Mr. Hasard's son, who is the director of the respondent to author another letter dated 13/11/2020 under the address of his father that caused the release of the appellant's pension to him. Additionally, that the NSSF statement at page 62 of the record of Appeal, does not have the name of the appellant as one of its employees, a further affirmation that the appellant was not its employee.

24. It was argued further that the said Hasard authored the letter dated June 28, 2013, ascertaining that the appellant was his domestic employee together with one other employee. This position was further corroborated by the appellant during cross examination as he admitted to receiving salary from the said Hasard and working at Mr. Hasard's residence. Also, that the appellant indicated that he used to work as a shamba Boy and since the respondent did not have any piece of land to require services of a Shamba Boy, the employment was clearly by the said Hasard and not by the respondent.

25. To support the dismissal of the Appeal herein for lack of employment relationship between the appellant and respondent, the respondent cited the case of *Jacinta Mwenga Nyamai V Trace wood Limited* [2021] eklr where the Justice Nzioki wa Makau while dismissing the suit noted that the claimant stated that she worked for Mangula Vikana who was a Director of the respondent and that she would also do household chores for her, a confirmation that she was the directors employee and not the company employee.

26. They also relied on the case of *John Matete Abayo v Digital Imaging Systems Limited* [2018] eKLR, where the Court held that;-

> "The Claimant acknowledged that he was to be paid a retainer and commissions as a sales man which work required him to contact customers and get business from persons in the printing field. The relationship between the parties did not create a contract of service under Section 2 of the *Employment Act*.I find that there is no proof that the Claimant was an employee of the respondent as he was not employed under a contract of service. The two documents produced by the claimant are not sufficient to establish an employer-employee relationship between the parties."

27. Based on the foregoing, the respondent submitted that it is evident that it was not the employer of the respondent rather that the appellant was employed by one of its directors Mr Shamshudin also known as Hasard, as such the claim was without basis and the trial court was justified in dismissing the claim.

28. On the whether the Remedies should be granted, the respondent submitted that since there was no employer-employee relationship the remedies sought cannot be granted and thus the Appeal is not merited.

29. On costs, it was submitted that costs follow event and urge this Court to dismiss the Appeal and award them costs of the Appeal.

30. I have examined all the evidence and submissions of the parties herein.

31. This being a 1st appeal from the lower court to this court, this court is obligated to analyse the facts of the case afresh and make its findings.

32. From the evidence of the claimant herein, he was employed by the respondent herein on diverse dates from 2013 to 2020 when he retired from work. He produced his NSSF statement showing that he was employed by one Shamshudin Abdul Musa. He indicated that it is on this basis that he was paid his NSSF benefits.

33. He filed his case in the lower court against the respondent seeking to be paid salary underpayments, unpaid salaries, overtime, offduty and public holidays.

34. The trial court considered evidence adduced before it and found that the appellant was not an employee of the respondent and therefore the claim was dismissed accordingly.

35. The respondents had also submitted that the claim for underpayment for the period between 2013 and 2017 was time barred and defeated by limitation under Section 90 of the *Employment Act*.

36. In the judgment from the lower court the trial court made a finding that indeed the claimant was not an employee of the respondent.

37. I have reconsidered the evidence on record. From the records, from the NSSF, the appellants employee was one Shamshundin Abdul Musa.

38. This position was confirmed accordingly by NSSF.

39. It is on this basis that the lower court disallowed the claim against the appellant.

40. There is no any other evidence to the contrary concerning the employment status of the appellant linking him to the respondent. Indeed he who alleges must prove and this onus lies on the appellant linking him to the respondent.

41. In the absence of any evidence that the respondents were the employees of the respondent, I find that the trial court was able to analyse the facts carefully and make a proper finding on the issue of the employment relationship between the claimant and respondent and therefore there is no error established in the judgment that would warrant interference with the judgment of the lower court.

42. I find this appeal lacks merit and I dismiss it accordingly with costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF JANUARY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Muriithi for respondent – present

Kairo for appellant – present