



REPUBLIC OF KENYA



KENYA LAW
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**Everflora Limited v Mogaka (Appeal E073 of 2022)
[2024] KEELRC 443 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 443 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E073 OF 2022
DKN MARETE, J
FEBRUARY 21, 2024**

BETWEEN

EVERFLORA LIMITED APPELLANT

AND

RODA NYANCHAMA MOGAKA RESPONDENT

JUDGMENT

1. This matter was originated by a memorandum of Appeal dated December 23, 2021. It comes out as follows;
 1. The Learned Magistrate erred in fact and in law in finding that there was unlawful termination of employment.
 2. Without prejudice to (i) above The Learned Magistrate gave an excessive award for unlawful termination in basing the calculations on the *General Wage Order* while the applicable one was the *Agricultural Sector Wage Order*. Had the Court based the award on the correct Order the amount under that head would have been Kshs 6,740x6= Kshs. 40,440=.
 3. The Learned Magistrate erred in law in awarding Kshs. 11,926.40 as one month pay in lieu of notice as none was available since the respondent resigned. Alternatively, the same should have been Kshs. 6,740= based on the *Agriculture Wage Order*.
 4. The Learned Magistrate erred in law and fact in awarding the respondent her claim of underpayment of Kshs. 280,065.60 for the reason that:
 - I. There was no underpayment going by the *Agricultural Sector Wage Order* which the respondent followed strictly and also offered housing.
 - II. The claim was partially time barred for the period in excess of 3 years. The entire sum of Kshs 280,065= was erroneously and unjustly granted.



5. The Learned Magistrate erred in fact and in Law in awarding Service Pay under section 35 (1) (c) of the *Employment Act*, yet the respondent was enrolled with NSSF and under Section 35 (6) (d) of the *Employment Act*, the respondent was not eligible for Service Pay. The sum of Kshs. 47,705.60 was therefore wrongly and unjustly awarded.

Filed on: 2022-06-15 12:58:19+03 - BY: J.N. Mbuthia & Co. Advocates - Reference: EZGX3xxx - Kshs. 1000.00

6. The Learned Magistrate erred in law in making an award on discrimination on the basis that one Lilian was treated differently. The court erred in law in finding that discrimination had been proved despite the respondent's failure to call the said Lilian or other colleagues who were involved hence a presumptions that their evidence would have been unfavorable. The award was based on mere and bare allegations contrary to the requirements in Section 108 of the *Evidence Act*.
7. The Learned Magistrate erred in Law in making a double compensation for wrongful termination under Section 49(c) and under the discretion of the court for discrimination whereas the facts the court relied on were the same. The court should not have awarded the Kshs 71,558.40 for unlawful termination and Kshs 200,000= damages for discrimination. The said awards being for the same thing but differently worded.
8. The learned Magistrate erred in principle in not referring to the appellants submissions even on matters of law.
9. The learned Magistrate in assessing evidence showed a bias in favour of the respondent by accepting her evidence verbatim even where the same fell far short of proof of her case.

Reasons wherefore the appeal be allowed and the appellant granted the following orders:

1. That the appeal be allowed
 2. The entire award of Kshs 611,256= be set aside.
 3. The appellant be awarded costs in this court and the court below.
2. The Respondent in a written submission dated June 23, 2023 opposes the Appeal and prays that it be dismissed with costs. She also prays for an award of her Cross Appeal dated June 30, 2022.
 3. The Appellant in her written submission dated June 9, 2023 reiterates her case that the Respondent resigned from employment as evidenced by document at page 27 of the record namely the letter of resignation and the employee's clearance form. These are a demonstration that the Respondent left employment on her own volition ostensibly to avoid disciplinary process.
 4. The Respondent at page 9, paragraph 6 and 7 of the record also admits that there was an incident in which an altercation at the work place. This was a serious breach of her terms of employment and could have lead to dismissal as provided for by Section 44(d) of the *Employment Act*, 2007.
 5. Again, no forensic examination of the documents to which the Respondent denied signing therefore the award of Kshs.71,558.40 for unlawful termination of employment should set aside.
 6. The Appellant further raises the issue of the Respondent as being an unskilled labourer whose wage was Kshs.6,736.30 or Kshs.282.90 per day. The work was outside the municipality and in the industrial industry. The learned magistrate's relied Legal Notice of 2017 and a figure Kshs.11,926.40 in her award to the Respondent is excessive and erroneous in that this is above all the categories cited in the order. The award of a salary under payment of Kshs. 280,065.60 should therefore be set aside altogether.



7. The Appellant again faults the award of one month's pay in lieu of notice bearing in mind that the Respondent has actually resigned from employment. Here she seeks to rely on the authority of *Kenneth Onialo v Majilis Resort Lamu t/a Majis Lamu Ltd* [2022] eKLR where this position was upheld by court. This also applied to the award of service pay in a situation where the Respondent was a member of Social Security Fund.
8. The Appellant in support of grounds 6 and 7 of Appeal further faults the learned magistrate findings and award to the Respondent on grounds of discrimination and submits that this was not proven to the required standards. And this, she seeks to rely on the authority of *Samson Gwer and 5 others v Kenya Medical Research Institute and 3 others* (2020) eKLR where the Supreme Court of Kenya while addressing the issue of discrimination laid emphasis on the need for the petitioner to adduce cogent evidence in support of the Claim. She therefore prays that the award of Kshs. 200,000.00 for discrimination should be set aside.
9. This also applies to the award on the allegations of the forgery which was not effectively proven by use of expert witness or at all. It would appear that the court accepted the Respondent evidence denied her signature without sound basis. It is therefore faulty and not acceptable as it is evidence of the court's inclination to believe the Respondent evidence whimsically.
10. The Respondent submits in opposition to the Appeal. She denies all the grounds of Appeal and asserts that she did not resign from employment but was summarily dismissed. She was called to the office of the Human Resource Officer and informed that her employment had been terminated with immediate effect.
11. The Respondent further denies that she was involved in the termination process and did not even sign the clearance forms adduced by the Respondent. It is her other case that a employment was terminated in total disregard of the provision of Sections 41, 43 and 45 of *Employment Act, 2007* in that no valid reasons were given for her termination of employment and neither was she awarded an opportunity to be heard on her misgiving through a disciplinary process by the Respondent.
12. She therefore uphold her case and submission and also reiterates her Cross Appeal.
13. A look at the respective cases of the parties tilts the Appeal in favour of the Respondent. This is because she has ably countered all the grounds of Appeal except the one of the award of severance pay. This is because the records clearly indicate that the Respondent was a member of NSSF and suffered deduction of Kshs.200.00 per month. She has not established a case of non remission of the amount deducted to the fund by the Respondent.
14. I therefore dismiss the Appeal and order relief as follows;
 - i. The award of Kshs. 611,256.00 be reduced by the amount of service pay to read Kshs.563,551.00.
 - ii. The Cross Appeal is allowed to the extends of (i) above.
 - iii. The Cross of Appeal and Cross Appeal shall be borne by the Appellant.

DELIVERED, DATED AND SIGNED THIS 21ST DAY OF FEBRUAY 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:



Mr. Mbuthia instructed by J.N Mbuthia & Co. Advocates for the Appellant.

Ms Kogoi instructed by Breda Kogoi & Co. Advocates for the Respondent.

