



**Mohamed v Malelu (Appeal E093 of 2022)
[2024] KEELRC 454 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 454 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E093 OF 2022
DKN MARETE, J
FEBRUARY 21, 2024**

BETWEEN

ASHA NAJI MOHAMED APPELLANT

AND

HELLENAH KOKI MALELU RESPONDENT

JUDGMENT

This matter is originated by way of a memorandum of Appeal dated 12th June, 2023 it comes out as follows;

1. That the learned magistrate erred in law by granting the Respondent’s prayer for underpayment in the amount Kshs. 594,123.60 despite the fault that the Respondent did not substantiate the claim for underpayment with the relevant wage orders.
2. That the learned magistrate erred in law by awarding the respondent underpayment despite the fact that the respondent did not establish the actual leave of underpayment based on the application minimum wage and the salary paid over a specific period.
3. That the learned magistrate erred in law by presuming to apply the legal notice No. 2 on *regulation of wages (General) (Amendment) Order* 2018 in computation of the claim for underpayment despite the fact the Respondent in their pleadings and or submissions did not prove her claim with relevant legal notices nor did she show how underpayment is computed under such legal notices.
4. That the learned magistrate erred in law by failing to consider and be bound in her decision by the position of this honourable court and the court of appeal on the respondent’s responsibility to prove a claim of underpayment by providing the court with the relevant legal notices applicable and illustrating how the claim is computed under such legal notices.

Reasons Wherefore; it is proposed to as the court for orders that;

- a. The appeal be allowed.



- b. The order granting the respondent's prayer for underpayment in the decision of Hon. G. Omodho (Mrs.) (PM) dated 30th May 2023 in MCELRC No. 1568 of 2021 be set aside.
- c. That each party bear their costs.

The Respondent opposes the appeal vide her written submissions dated 20th August, 2023.

5. The Appellant in her written submission dated 15th August, 2023 raises issues with award for Kshs.594,123.60 as underpayment. It is a case and submission that the Respondent failed to substantiate the claim for underpayment by establishing a period of payment, providing the relevant legal notices and make orders application for the period in issue and accurately showing how the claim for underpayment if computed under the said relevant notices.
6. The learned magistrate applied the minimum wage for a house servant working in Nairobi as per Legal Notice No. 2 of 2018 i.e. Kshs.13, 572.90 uniformly across the entire duration of respondent's employment for 2013 to 2021. This computation was a misinterpretation of the law and erroneous.
7. The Appellant sought to rely on authorities of *Mohammed Ali Said v Simba Coach Limited* [2020] eKLR and *Geofrey Khisa Mukanda v El.Bari Security Services Limited* where the court addressed itself on this issue.
8. The Respondent on other hand submitted a case in opposition to the Appeal. It is a submission that under Section 3(6) of the *Employment Act*, 2007 and the regulation of wages (General Amendment) orders as espoused in the authority of *Catherine Mbithe Maingi v [Dilip] Shah* [2017] eKLR where it was held that failure of an employer to give written terms of employment to the employees gives the employees the Legal protections under the *Employment Act* and the *Regulation of Wages (General Amendment orders)*.

This is as follows;

“the Regulation of Wages (General Amendment) Orders are government orders setting out minimum wage increases and taking into account various policy issues and guidelines each year and for compliance of all employers. The wage Guidelines and regulations give meaning to the rights in the *Employment Act* and the *Labour Relations Act*.”

Further,

“the Respondent was obliged to honour the claimant's minimum statutory employment standards during her time in employment and on termination. There is sufficient evidence to show Mr. Shah did not meet these standards that were thrust upon him by the law. The most glaring standard which he failed to observe is the minimum wage. He paid the Claimant a shocking kshs. 2,000 per month from 2005. She seeks an order to enforce her rightful rate of remuneration as prescribed by the law.”

9. The Respondent in further opposition to the Appeal sought to rely on authority of *Jacob Ayiga Maruja and another v Simeon Obayo* 2005 eKLR C.A in *Joel Kiogora M'iringo v Gabriel Memia & another (Suing as legal representative of Esther Wambeti Memia)* [2020] eKLR where the held thus;

“if there is sufficient material on record on which the trial court can make a finding on earnings, it is entitled to draw its own conclusion. “...The court can rely on minimum wage guideline and regulations or give a global sum.”



10. I agree with the Respondent. This Court is at liberty to apply the wage guidelines or any other material available on record and get out of its way to do justice in the event of dispute like in the present case. We cannot sit and fault judicial officers forgetting out of their way to met out justice even in situation like we are faced with. Firstly, it is critical that the court looks at the situation on the ground. Who are the parties? What is the capacity and competency in effecting a glamorous case and meticulous case? In the circumstances of this case, the learned magistrate acted prudently in the determination of the underpayment. The decision was based on a material available on record.
11. It is also notable that paragraph 5 of the Memorandum of Claim raised a prayer for inter alia minimum wages. This was adequate material for such determination.

I am inclined to dismiss the appeal with orders that each party bears their costs of same.

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

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Kamau instructed by MAW Advocates LLP for the Appellant.

Mr Bizmana instructed by Bizman Associates Advocates for the Respondent.

