



**Okeyo v Highway Centre Limited (Appeal O40 of 2021)
[2024] KEELRC 458 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 458 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL O40 OF 2021
DKN MARETE, J
FEBRUARY 21, 2024**

BETWEEN

DAVID WILLIAM OKEYO APPELLANT

AND

HIGHWAY CENTRE LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by a way of memorandum of appeal dated 7th April, 2021. It comes out as follows;
 1. The learned Trial Magistrate erred in law and in fact as she did by failing to appreciate the Appellant’s case as presented in the pleadings and the evidence in support thereof.
 2. The learned Trial Magistrate erred in law and in fact as she did by holding that the Appellant’s suit was an afterthought and/or that the Appellant went to court “after one year”.
 3. The learned Trial Magistrate erred in law and in fact by making her findings and decision based on extraneous matters that were not part of the pleadings evidence and/or submissions on record.
 4. The Learned Trial Magistrate erred in law and in fact as she did by finding as she did that the Claimant was not entitled to the reliefs sought even after finding that the Appellant’s dismissal was unlawful.

It Is Proposed To As The Court For Orders That;

1. This Appeal herein be and is hereby allowed and the judgement and decree of the Learned Trial Magistrate in Milimani CM ELRC CC No. 1043 of 2020 dismissing the Appeal ant’s claim be set aside and substituted with an order warding the Appellants-



- a. Damages for Unlawful termination Kshs.360,000.00
 - b. Unpaid salary for February to July 2017 Kshs.30,000.00
 - c. Severance pay Kshs.45,000.00
 - d. Payment in Lieu of leave days not taken kshs.120,000.00
 - e. Overtime payment Kshs.2,400.000.00
- Total Claim Kshs.2.955,000.00.

- 2. The Appellant be granted the costs of this Appeal and the costs of the proceedings Milimani CM ELRC CC No. 1043 of 2020.
- 3. That this Honourable Court be pleased to make any further order and directions that it may deem fit and just in the circumstance of the case.

- 2. The Respondent in her Respondent written submissions dated 5th October, 2023, opposes the appeal and prays that it be dismissed with costs.
- 3. The Appellant in his written submission dated 7th July, 2023 opened by citing the authority of Apex Steel Limited v Onesmus Mutuku Komu [2020] eKLR where the court laid out the requirement of the court in a first appeal as that of re-evaluation of the entire case and come up with his own findings as enunciated in the case of Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126.
- 4. The Appellant went on to recite his employment record since 2004 all the way to the time of termination. It is on this footing that she faults the learned magistrate findings of lawful termination and finality of award occasioned by his acknowledgement assigning of the terms of termination. Again, the Appellant also faults the learned magistrate findings that the suit was an afterthought for being brought out one year down the line of termination of employment.
- 5. The Appellant again faults and disputes the evidence of the Respondent witness that he was awarded leave days yet he did not display any record to show that the Appellant took leave. It is the duty of employer to keep records as is provided for under Section 74(1) (f) of the Employment Act, 2007. He sought to rely on authority of Milano Electronics Limited v Dickson Nyasi Muhaso [2021] eKLR, where the court sought refuge in the authority of Ndiema Samburi Soti v Evis Kimtai Chepkeses [2010] eKLR and upheld this position.
- 6. The Appellant therefore submitted that he had proved his claim to the required standard and is therefore is entitled to orders sought by this Appeal.
- 7. The Respondent submits on a written submission dated 5th October, 2020 submits that the Appeal lacks merit. This is because the Appellant had failed to table evidence that he was really an employee as suppose to employment on a consultative bassesas is the case of the Respondent from the onset of the relationship in 2014. He did not controvert the two tire employment relationship of May 2014 as a consultant and July 2016 when he was engaged as formal employee.
- 7. The Appellant also failed to prove and corroborate his allegations of overtime and accumulated leave days. This was his onus as is set out in the authority of Rogoli Ole Manadiegi v General Cargo Services Limited [2016] eKLR. No evidence was tabled by the Appellant to support his claims of overtime and leave whereby he alleges that he never went on leave for four years and worked seven days a week from 8.00 am to 9.00 pm every day including Sundays and holidays and this included the two years he



was engaged as consultant. No oral or other evidence was adduced in support of such presumptuous allegations.

8. He who alleges must prove. The learned magistrate elaborately analysed the cases of the parties and came up with a conclusion that the claimant was adequately compensated and signed in acknowledgment of his terminal dues on redundancy. This was the bone of contention and prayer in his claim. The learned magistrate also rightly partially found in favour of the Appellant to the extent of issue of a certificate of service as prayed. There were therefore no balances or omissions in the award of the lower court.
9. I am therefore inclined to dismiss the appeal with orders that each bears their costs of the same.

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

D. K. NJAGI MARETE

JUDGE

Appearances:

- 1. Mr. Kennedy Ochieng instructed by Ochieng' K. & Associates Advocates for the Appellant.**
- 2. Ms Wanja instructed by N.K MUGO & Company Advocates for the Respondent.**

