



**Onchiri v Kenya Achievas Sacco Ltd (Appeal E013 of 2023)  
[2024] KEELRC 690 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 690 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E013 OF 2023  
CN BAARI, J  
MARCH 19, 2024**

**BETWEEN**

**EVERLYNE ONCHIRI ..... APPELLANT**

**AND**

**KENYA ACHIEVAS SACCO LTD ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon C.A. Ocharo SPM Kisii  
delivered on 24th January 2023 in Kisii CMELRC CAUSE NO. 22 OF 2020)*

**JUDGMENT**

1. The Appellant brought an action against the Respondent at the Kisii Magistrate's Court seeking the following orders; -
  - i. Reinstatement to position of micro-finance supervisor job group 4 without loss of salary, perks and/or emoluments.
  - ii. Payment of salary in lieu of notice, service pay, severance pay, terminal benefits and gratuity.
  - iii. Outstanding leave days.
  - iv. Interests at Court rates (14%) from the date of filing suit until payment in full.
  - v. Costs of the suit.
2. In a Judgment rendered on 24<sup>th</sup> January, 2023, the Court found the Claimant's termination unfair, and proceeded to award her the equivalent of 12 months' salary as compensation, less statutory deductions plus costs of the suit and interests thereon.
3. The Appellant being aggrieved with the judgment of the lower court, lodged a memorandum of appeal on 21<sup>st</sup> February, 2023, premised on the following grounds: -



- i. The Learned Trial Magistrate erred in law and in fact by failing to properly analyse the evidence on record as pertains to the claim of salary in lieu of notice, service, severance pay, terminal benefits.
  - ii. The Learned Trial Magistrate misdirected herself by failing to evaluate the evidence presented by the Appellant clearly demonstrating that she had not been paid her terminal dues on one hand but she cleared nonetheless with the Respondent upon termination of her services.
  - iii. The Learned Trial Magistrate erred in law and in fact by disregarding the import and tenor of a pertinent evidence namely DEXH 16 (erroneously dubbed as DEXH 21 in the judgment) which document entailed the tabulations of terminal benefits the Appellant is entitled to, and the glaring evidence that same was not acknowledged and/or received by the Appellant upon termination due to lack of Appellant's signature on the said document.
  - iv. In finding and holding that the Appellant admitted that she had received her terminal benefits from the Respondent, the Learned Trial Magistrate failed to appreciate the probative value of PEXH 20 and/or DEXH 16 (erroneously dubbed as DEXH 21 in the judgment) which document proved that the Appellant was entitled to her terminal dues.
  - v. Having correctly found and/or held that the termination of the Appellant's contract of employment was unlawful, unfair and unjust the Learned Magistrate failed to issue an order of payment of salary in lieu of notice, bearing in mind the unfortunate circumstances upon which the Appellant's employment was terminated i.e failing exams undertaken by the Respondent's appointed training institution.
  - vi. The Magistrate failed to appreciate the evidence adduced by the Appellant in regards to her gross salaries and thus arrived at a wrong computation of what the Appellant was entitled to.
  - vii. The Magistrate failed to properly evaluate, appraise and/or analyse the entire evidence on record and thereby failed to decipher the salient features of the Appellant's case and thereby arrived at a conclusion contrary to the weight of the evidence on record.
  - viii. The Magistrate failed to properly evaluate, appraise and/or analyse the submissions and/or authorities advanced by and/or on behalf of the Appellant, and thereby mistook and/or misconceived the crux of the Appellant's case and hence the magistrate arrived at a slanted decision or judgment.
  - ix. The Magistrate erred by making a finding that the Appellant had failed to prove her case against the Respondent on the limb of entitlement to terminal benefits contrary to the evidence presented before her.
4. Parties canvassed the appeal through written submissions, and both parties filed submissions.

### **Appellant's Submissions**

5. It is the Appellant's submission that she was employed by the Respondent on or about 14<sup>th</sup> August, 2001 as a Savings Clerk. She contends that at the time the Respondent was known as Bobasi Growers Tea Sacco Ltd. It later changed its name to Irianyi Tea Sacco Ltd, before settling on its current name of Kenya Achievas Sacco Ltd.
6. It is her submission that she rose through the ranks to the position of Micro Finance Supervisor with effect from 1<sup>st</sup> June, 2017. She submits that she served with diligence and without any complaints until 27<sup>th</sup> July, 2020, when she was issued with a termination letter.



7. According to her, the termination was irregular as she was not afforded an opportunity to be heard, nor was she served with a termination notice.
8. The Appellant submits that the Trial Court erred in not awarding her salary in lieu of notice despite finding the termination unfair. She sought to rely in the case of John Jaoko Othino vs Intrahealth International [2022] eKLR for the holding that denying an employee notice pay in a case of wrongful summary dismissal was tantamount to the employer benefitting from wrongdoing.
9. It is the Appellant's further submission that the Magistrate was wrong in denying her terminal benefits. It is her assertion that the computation of terminal dues produced as DEXH 16 was an indication of the amount owed, and not confirmation of payment. In any case it is her submission that the document does not bear her signature.
10. The Appellant further submits that the Magistrate was wrong in disregarding her testimony to the effect that she did not receive anything. Furthermore, she avers that the Respondent never provided any proof of payment.
11. In support of the claim for terminal dues, the Appellant submits that the Magistrate was wrong in construing her clearance from the work place as a sign of payment of terminal dues. She contends that the clearance was necessitated by the sensitive nature of the dockets she was handling which involved cash, hence the need for expeditiousness. She placed reliance in the case of James Muniu V National bank of Kenya Limited [2019] eKLR where the Court of Appeal reiterated that the standard of proof in civil cases was on a balance of probability and that courts will make a finding based on which party's version was more believable.
12. The Appellant lauds the Magistrate for rightfully finding that she was entitled to 12 months salary as compensation for unlawful termination, but avers that the computation of the amount was wrong. She buttresses this position by averring that her gross salary for the month of June 2020 was Kshs 49,775/= while that of July the same year was 51,562/=. This disparity she states entitles her to Kshs 618,744/= and not the Kshs 541,620/= awarded by the trial court.

### **The Respondent's Submissions**

13. In its submissions of 2<sup>nd</sup> October, 2023, the Respondent reiterates the role of a first appellate court as enunciated in the celebrated case of Selle & another vs Associated Motor Boat Co. ltd & others. [1968] EA 123. It urges this Court to consider their submissions in the Magistrate Court to the effect that it was the Appellant who had refused to collect her dues.
14. It contends that its cheque towards the settlement of the judgment was declined by the Appellant.
15. It further submits that the Appellant has not demonstrated that the Trial Court applied the wrong principles, awarded inordinately low damages, considered matters she ought not to have considered, did not take into consideration matters she ought to have considered and thereby arriving at a wrong decision.
16. The Appellant sought reliance in Mbogo vs Shah [1968] EA 93 for the holding that an Appellate Court will only interfere with a lower court's exercise of discretion if satisfied that the decision was clearly wrong, it misdirected itself, it acted on matters that it ought not to have acted on or failed to consider things it should have considered thus arriving at a wrong conclusion.



## **Analysis and Determination**

17. I have considered the memorandum of appeal, the record and the submissions by both parties. The grounds of appeal coalesce into the following three grounds: -
  - i. The Learned Trial Magistrate erred in law and in fact by failing to properly analyse the evidence on record as pertains to the claim of salary in lieu of notice, service, severance pay, terminal benefits.
  - ii. The Magistrate failed to appreciate the evidence adduced by the Appellant in regards to her gross salaries and thus arrived at a wrong computation of what the Appellant was entitled to.
18. The duty of a first Appellate Court has been settled as being to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, giving due allowance to the fact that that it did not see the witnesses testifying. (See *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123).
19. On the first ground of appeal, the Respondent contends that the Appellant has not demonstrated any misdirection on the part of the Trial Court, while she (the Appellant) asserts that the lower court was wrong in denying her terminal benefits, and salary in lieu of notice.
20. I will proceed to analyse each of the contested claims and reach my own conclusion on whether or not the decision should stand.

### **Salary in lieu of notice.**

21. The Appellant was issued a termination letter and which also expressly stated that it served as notice of termination on 27<sup>th</sup> July, 2020. The clearance form further indicates that she undertook the clearance process in August, 2020, meaning that she continued in the service of Respondent for the period of the notice, being the month of August, 2020.
22. The computation of her terminal dues was completed in September, 2020, going by the letter notifying her of the said computation dated 1<sup>st</sup> September, 2020.
23. The chronology of events indicates that the Appellant was issued termination notice, and the fact that the Trial Court arrived at a finding of an unfair termination and which is not challenged, does not entitle the Appellant to pay in lieu of notice.
24. Pay in lieu of notice for the avoidance of doubt is only payable where notice is not issued. In this case, notice was issued and the Appellant served for the period of the notice, and presumably received salary for the month of August, 2020, since no claim in this regard has been made.
25. The claim fails and the finding of the trial court in this respect is upheld.

### **Payment of terminal dues**

26. As correctly held by the Trial Court, the Respondent dismissed the Appellant unfairly. The Appellant is therefore entitled to her terminal benefits and unpaid dues which she alleges not to have received on grounds that she did not sign the tabulation form.
27. The Appellant in her testimony before the Trial Court, admitted during cross-examination that she indeed received the benefits and in fact proceeded to clear with the Company.



28. Under this appeal, the Appellant contends that she was not paid her terminal dues and that this is evidenced by her failure to append her signature on the letter sent to her for the release of the terminal dues.
29. The Respondent is a financial institution. It produced bank statements to demonstrate that it paid fees for the Appellant to attend a management course. It however did not deem it necessary to produce a statement to confirm that the computed terminal benefits were remitted to the Appellant.
30. In its submission, the Respondent averred that the Appellant did not clear, and hence the reason the benefits were not paid. To the contrary, the record shows that the Appellant cleared, but nothing shows that the terminal benefits were remitted despite being computed.
31. Additionally, in its submissions before the Trial Court at paragraph 24, the Respondent clearly indicates that the Appellant had without justification refused to collect her duly computed dues.
32. It is also not disputed that the letter on the computation of the terminal dues which required that it be accepted, has not been signed by the Appellant.
33. I conclude by holding that on the strength of the evidence adduced, the Appellant was not paid terminal dues. The Learned Magistrate therefore erred in her finding in this respect.
34. Turning to the issue of computation of the terminal benefits, the Appellant submitted that she refused to sign the computation form because there was no proof of the Kshs 46,000/= advance salary and the loan of Kshs 230,425.43/=.
35. The issue of the salary advance and loan was not raised or canvassed before the Trial Court. I therefore have no basis upon which to evaluate this new allegation and I, instead let it rest.
36. In view of the foregoing, I do award the Appellant terminal benefits in accordance with the computation dated 1/9/2020, being the sum of Kshs. 1,745,450.85/-.

### **Compensation.**

37. Under this head the Appellant submitted that the Magistrate arrived at an erroneous amount based on his June 2020 salary of Kshs 49,775/- instead of her July salary of Kshs 51,562/-. The Magistrate in his judgment stated as follows: -

“The respondent do pay the claimant damages for wrongful termination amounting to Kshs. 541,620/= being the claimants 12 months' gross salary as at July, 2020 less statutory deductions within a period of 30 days.”
38. The Appellant avers that she is entitled to Kshs 618,744 as evidenced by her payslips.
39. In the Court of Appeal case of Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR it was stated that:

“The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.”
40. The award of Kshs 12 months salary as compensation is well within the purview of Section 49 of [Employment Act](#). The termination letter shows that the Appellant was dismissed on 27/3/2020. This



explains why the magistrate relied on the June payslip. In this regard the Magistrate was not wrong in his exercise of discretion, I therefore decline to disturb the award under this head.

### **Disposition**

41. In whole, I make orders as follows: -
- a. That the Appellant is awarded terminal dues as per the Respondent's computation at Kshs. 1,745,450.85/-.
  - b. The Appellant's claim for 1 month's pay in lieu of notice is declined, and the finding of the Trial Court upheld.
  - c. The award of 12 months' salary as compensation for unfair termination is upheld at Kshs.541,620/=
  - d. The award of costs before the lower court is upheld.
  - e. The Respondent shall bear the cost of this appeal.
42. It is so ordered.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19<sup>TH</sup> DAY OF MARCH, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Mulisa present for the Appellant

N/A present for the Respondent

Arwin Ongor- C/A

