



**Farm v Kituyi (Employment and Labour Relations Appeal  
E007 of 2022) [2024] KEELRC 573 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 573 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2022  
MA ONYANGO, J  
MARCH 7, 2024**

**BETWEEN**

**MAJI MAZURI FARM ..... APPELLANT**

**AND**

**ALFRED KITUYI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. R. Odenyo (Senior Principal Magistrate  
delivered on 3rd March 2022 in Eldoret CMC E&LR Cause No. 257 OF 2019)*

**JUDGMENT**

1. The Appellant who was the Respondent at the trial court, was sued by the Respondent herein vide a Statement of Claim dated 4<sup>th</sup> September 2019 seeking the following remedies:
  - a. A declaration that the termination of employment was malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant
  - b. Maximum compensation as per section 49(1)(c) of the *Employment Act*
  - c. An order that the Respondent pay the Claimant as per paragraph 16 of the Statement of Claim
  - d. A certificate of service as per section 51 of the *Employment Act*
  - e. Costs and interest of this suit
  - f. Any other further relief this Honorable Court deems fit and just to grant.
2. The Appellant filed a Response to the Statement of Claim on 15<sup>th</sup> October 2019 disputing that the Respondent was its employee and averred that the Claimant was contracted by the Respondent as a casual laborer from time to time whenever there was work to be done.



3. Upon hearing the parties, the Trial Magistrate Hon R. Odenyo SPM found that the Respondent's employment was unlawfully terminated by the Appellant and proceeded to make the following award in favour of the Respondent:
  - a. A declaration that the termination of employment of the Claimant was malicious, unlawful, unfair and unprocedural
  - b. The Respondent do pay the Claimant as follows;
    - Kshs 7,500 being one month in lieu of notice
    - Kshs 22,500 being compensation
    - Kshs 1,732,841.21 being underpayment of wages
  - c. A certificate of service do issue to the Claimant
  - d. Costs and Interest
4. The Appellant was aggrieved by the said judgment and filed a Memorandum of Appeal on the 4<sup>th</sup> March 2022 on the grounds that:
  - i. The learned trial magistrate erred in fact and in law by in finding that there was sufficient evidence and proceeding to hold that the Respondent had proved his case for unfair and/or unlawful termination on a balance of probability.
  - ii. The learned trial magistrate erred in fact and in law in finding that the Respondent had provided sufficient evidence to prove he was an employee despite Appellant's evidence that the Respondent was an Independent Contractor and not an employee.
  - iii. The learned trial magistrate erred in fact by finding that the Respondent herein was employed by the Appellant as a farm foreman despite no evidence being tendered in support of this claim by the Respondent.
  - iv. The learned trial magistrate erred in fact and in law in holding that the Respondent was employed by the Appellant from the year 1999 to 2016 and disregarding and/or failing to consider the Appellant's evidence that the Respondent served for only four years.
  - v. The learned trial magistrate misdirected himself by retrospectively applying the Regulation of Wages (Agricultural Industry) Order 2018 in arriving at his award of Kshs 1,732,841.25 for underpayment of wages yet the Respondent pleaded that he was terminated in the year 2016.
  - vi. The learned trial magistrate erred in law and in fact by failing to consider the entirety of the proceedings and by disregarding/discrediting the evidence of the Appellant
  - vii. The learned trial magistrate erred in fact and in law by not putting sufficient weight and consideration to the Appellant's evidence and submissions tendered hence arriving at a fundamentally flawed determination
  - viii. The learned trial magistrate erred in law and in principle in filling the gaps in the Respondent's case hence drawing his own inferences that were not supported by the evidence tendered during trial
  - ix. That the learned trial magistrate erred in law and fact in failing to determine the matter herein on merit having heard all the parties



- x. That the learned trial magistrate erred in law in totally misdirecting himself on the evidence presented before him during trial hence arriving at a flawed decision occasioning a miscarriage of justice
  - xi. That the learned trial magistrate erred in law and in fact by misapprehending the law, and using wrong principles of law in arriving at his decision.
5. Consequently, the Appellant seeks the following orders:
- i. That the appeal be allowed;
  - ii. That the Judgment of the learned magistrate together with all other consequential orders therefrom be set aside, varied and/or reviewed.
  - iii. That the costs of this Appeal and the trial court matter be awarded to the Appellant.
6. The appeal was disposed of by way of written submissions. The Appellant filed its written submissions on 14<sup>th</sup> August 2023 while the Respondent filed his submissions on 4<sup>th</sup> October 2023.

### **Analysis**

7. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
8. The Respondent in his Statement of Claim filed in court on 6<sup>th</sup> September 2019 accused the Appellant of unfairly terminating his employment. The Respondent averred that he was employed by the Appellant from the year 1999 to 2016 as a farm foreman but his contract of service was never reduced into writing.
9. According to the Respondent, he used to work from 7am to 6pm for day shift without lunch break and was subjected to work 7 days in a week without any rest days. He also maintained that he was not provided with reasonable accommodation and neither was he paid sufficient sum as rent to cater for his housing in addition to his monthly wages.
10. It was the Respondent's contention that the Appellant proceeded to purport to terminate his employment verbally at the end of 2016 without any reason and refused to pay him his dues.
11. The Respondent claimed for the following against the Appellant:
- a. One month pay *in lieu* of notice.....Kshs 7,500
  - b. House allowance.....Kshs 243,000
  - c. Unpaid overtime dues..... Kshs 657,500
  - d. Accrued leave not taken in 18 years.....Kshs 135,000
  - e. 12 months' compensation for unfair termination.....Kshs 90,000
  - f. Unpaid public holidays..... Kshs 97,000
  - g. Unpaid rest days..... Kshs 469,500
  - h. Underpayment..... Kshs 1,732,841.25



1. In the Appellant's Response to Statement of Claim dated 14<sup>th</sup> October 2019 it denied that it unlawfully terminated the Respondent from employment. It was the Appellant's case that the Respondent was not its employee but that he could work for the Appellant periodically as an independent contract.

### **The Evidence adduced**

13. At trial, the Respondent testified as CW 1. He stated that he was employed by the Appellant as a foreman in 1999. That he was earning Kshs 250 per day and worked all days of the week from 7am to 6pm including public holidays.
14. According to CW 1, he was called by his boss, one Mr. Henry, to the office on the 21<sup>st</sup> May 2016 where his employment was terminated verbally. He reported the matter to the labour office but the dispute was not resolved.
15. On cross examination, the Respondent maintained that he was not issued with any formal letter of appointment by the Respondent. He stated that he was not paid house allowance, and also, was never paid overtime.
16. The Appellant on its part called Hillary Kiptoo Bii, its farm manager who testified as RW 1. RW 1 told the court that the Respondent started working for the Appellant in 2016 as a casual laborer and that he used to work from 8am to 3pm.
17. According to RW 1, in June 2016, the Appellant wanted to formalize its engagements with all the workers. That it sent them home and asked that they come back after 30 days to sign employment contracts. RW 1 testified that the Respondent never came back and that it was presumed that he was not interested in formalizing his working arrangement with the Appellant. RW 1 denied that the Respondent's employment was terminated as alleged by him.
18. After hearing both parties, the trial court rendered its Judgment on 3<sup>rd</sup> March 2022 which judgment is now the subject of this appeal.

### **The Appeal**

#### **The Appellant's Submissions**

19. The Appellant in its submissions dated 14<sup>th</sup> August 2023 identified the issues for determination to be:
  - i. Whether the trial magistrate erred in law and in fact in finding that the Respondent had proved he was an employee as opposed to being an independent contractor;
  - ii. Whether the trial magistrate erred in law and in fact in finding that the Respondent had proved on a balance of probabilities the claim for underpayment and in the amount awarded;
  - iii. Who bears the costs of the appeal?
20. On that the first issue, it was submitted that the court erroneously found that the Respondent had provided sufficient evidence to prove that he was as employee and disregarding the Appellant's evidence that the Respondent was an independent contractor and not an employee of the Appellant.
21. According to the Appellant, the Respondent was not employed by the Appellant and as such, the relationship between the Respondent and the Appellant was that of a contract of service. It is the Appellant's submission that as an independent contractor, the Respondent was neither subject to the



- rules of the farm nor under the control of the farm. In support of this position, the Appellant relied on the decision in *Fredrick Byakika v Mutiso Menezes International* (2016) eKLR.
22. The Appellant further submitted that the Respondent admitted that his wages were not subjected to statutory deductions. According to the Appellant, this is clear proof that the Respondent was not subject to employment terms that apply to persons employed.
  23. Additionally, the Appellant submitted that the Respondent admitted at the hearing that he was paid on a daily basis depending on the amount of work done and that he completed working earlier than the other employees at the farm. This, according to the Appellant, demonstrates that the Respondent was not subjected to the timelines of the farm which applied to employees.
  24. The Appellant submitted that since the Respondent was not its employee, he cannot claim unfair termination.
  25. On the second issue, it is the Appellant's submission that the learned magistrate erred in law and in fact in awarding the Respondent the claim on underpayment by relying on the *Regulation of Wages (Agricultural Industry) (Amendment) Order* 2018 instead of applying the right remuneration being *Regulation of Wages (Agricultural Industry) (Amendment) Order* 2015 since the Respondent was allegedly terminated in the year 2016.
  26. According to the Appellant, the Respondent's claim for underpayment would be, for the three years period between 2013-2014, 2014-2015 and 2015-2016. To buttress this point, the Appellant cited the case of *Wycliffe Juma Ilukol v Board of Management Father Okodui Secondary School* (2022) eKLR where the court held that the claim for underpayment is limited to three years under section 90 of the *Employment Act*.
  27. It is submitted that the Respondent having been paid a daily wage of Kshs 250 for his services as a farm foreman instead of Kshs 414.50, the underpayment would be Kshs 164.50 per day and for one year period, it would be Kshs 164.50 per day X365 days=Kshs 60,042.50. For 3 years, the underpayment would be 60,042.50 x3 totaling to Kshs 180,127.50 and not Kshs 1,732,841.25 as awarded by the trial court.
  28. With regard to the issue on who should be awarded costs in this appeal, the Appellant urged the court to award it costs should the appeal succeed

### **The Respondents' Submissions**

29. The Respondent in his submissions dated 4<sup>th</sup> October 2023 framed the issues for determination to be:
  - i. Whether the Respondent was an employee of the Appellant or an independent contractor.
  - ii. Whether the Respondent was unlawfully terminated
  - iii. Whether the Respondent was entitled to the remedies given
30. On the first issue, the Respondent submits that he worked for the Appellant for a period of 18 years but the contract was never reduced into writing by the Appellant. The Respondent submitted that during his evidence in chief the Appellant's witness stated that he knew the Respondent who was their employee working as a casual and that he worked for a period of four years earning wages of Kshs 250 per day. It is submitted by the Respondent that the evidence of the Appellant's witness actually confirmed that the Respondent was an employee and not an independent contractor.
31. The Respondent submitted that the Appellant, being the custodian of employee records, did not produce any document to demonstrate that the Respondent was not one of its employees. The



Respondent cited the case of *Christine Adot Lopeyio v Wycliffe Mwathi Pere* (2013) eKLR in support of the position that from the evidence of the Appellant's witness, it was clear that the Appellant was the master giving instructions on how and when it wanted the work done and hence the Respondent was its employee.

32. As to the issue whether the Respondent was unlawfully terminated, the Respondent submitted that he testified at the trial court that he was terminated verbally and that is the reason the matter was referred to the Minister for Labour. It is submitted that the Respondent was never told the reason for his termination, no notice was given, there was no hearing conducted hence according to the Respondent, the termination was unlawful.
33. On the last issue with regard to whether the Respondent was entitled to the remedies given, it was the Respondent's submission that section 10 of the Employment Act sets out in detail what an employee is entitled to under a contract of service and gives the minimum frame of what is to be contained in a contract of service. That the section also sets out what an employee is entitled to be paid upon the termination of service. That the award of the trial magistrate to the Respondent was correct and lawful. That there was no miscalculation on the issue of underpayment and the amount of Kshs 1,732,841 as awarded by the court was correct.

### **Determination**

34. Having considered the record of appeal and the written submissions of the parties herein, I am of the considered view that the issues falling for determination are:
  - i. Whether the Respondent was an employee of the Appellant within the meaning of the Employment Act, or he was an independent contractor.
  - ii. Whether the trial court erred in holding that the Respondent was employed by the Appellant from the year 1999 to 2016.
  - iii. Whether the award by the trial court in favour of the Respondent on the claim for underpayment was erroneous.
  - iv. What orders should issue.
35. In determining whether a person is an employee or an independent contractor, courts have always looked at the terms of payment between the parties involved.
36. The Supreme Court of Nigeria in *Shena Security Co Ltd v Afropak (Nig.) Ltd & 2 Others* [2008] 18 NWLR laid down the factors that should guide courts in determining the nature of engagements between parties in disputes of this nature. It observed as follows:

“If payments are made by way of “wages” or “salaries” this is indicative that the contract is one of service. If it is a contract for service, the independent contractor gets his payment by way of “fees”. In like manner, where payment is by way of commission only or on the completion of the job, that indicates that the contract is for service.”
37. Section 2 of the *Employment Act* defines an employee as:

“...means a person employed for wages or a salary and includes an apprentice and indentured learner...”



38. The Appellant's witness RW 1 in his evidence stated that the Respondent was paid Kshs 250 per day which amount was paid fortnightly. This is therefore indicative that the Respondent was indeed an employee within the meaning of section 2 of the Employment Act.
39. The second issue, although raised by the Appellant as ground 4 in its Memorandum of Appeal, was not listed as one of the issues for determination in the Appellant's submissions and was therefore not submitted on. It is therefore my conclusion that this ground was abandoned.
40. On the third issue, the Appellant has faulted the trial court for relying on the *Regulation of Wages (Agricultural Industry) (Amendment) Order 2018* in awarding the Respondent the claim for underpayment at Kshs 1,732,841.25 instead of applying the correct remuneration order being *Regulation of Wages (Agricultural Industry) (Amendment) Order 2015*. The Respondent having left employment in May 2016, the correct wages order is the *Regulation of Wages (Agricultural Industry) (Amendment) Order* applicable for every year that the Respondent alleges to have been underpaid. I therefore agree with the Appellant that it was an error on the part of the learned trial magistrate to apply the wages order for 2018 instead of the one in force at the time material to this suit. In this case it would be several legal notices as minimum wages are revised periodically as published in the gazette.
41. It is further my finding that the Respondent did not adduce any evidence to prove the amount he alleged to have been earning over the years he alleges to have been underpaid. He further did not produce or refer to the Legal Notices indicating the correct wage which he should have been paid. It is the difference between what he was supposed to have been paid according to the statutory minimum wages as per relevant legal notices and what he was actually paid that would determine if he was underpaid. It is for this reason that I will limit the award on underpayments to 4 years based on the admission of DW1 who testified that the Respondent worked for the Appellant for about 4 years and was earning Kshs. 250 per day.
42. I am further not persuaded that the provisions of section 90 of the *Employment Act* limit payments of back pay or unpaid benefits to 3 years. My understanding of section 90 is that it only limits the filing of claims. The section does not refer to outcomes of such claims. This is reinforced by section 10(6) of the *Employment Act* which provides that an employer shall keep records for 5 years after termination of employment while subsection 10(7) provides that the burden of proof shall shift to an employer who fails to produce such records in any legal proceedings. Why would an employer be required to keep such records of not for purposes of defending itself against such claims under the Act?
43. It is my view that an employee who does not file suit while still in employment acquiesces to forego any demands the employee may have against the employer by not filing suit. I believe that a lot of employees do not file because they are afraid of losing their employment. I think that the issue of how far back an employee can claim depends on the nature of the Claim and that each case should be considered on its own merits.
44. Having stated as above, in instant case none of the parties produced the relevant legal notices. In my view it is the legal notices that would have given the correct underpayments.
45. The legal notices of relevance to the material time are Legal Notice No. 63 of 10<sup>th</sup> June 2011 which provided for minimum wage of 6792 per month or 287 per day for farm foreman; Legal Notice No. 70 of 2<sup>nd</sup> July 2012 provided for Kshs. 7681.75 and 324.60 per month and per day respectively; Legal Notice No. 196 of 30<sup>th</sup> August 2013 provided for Kshs. 8757.20 and 370.05 per month and per day respectively; and Legal Notice No. 116 of 26<sup>th</sup> June 2015 which provided for Kshs. 9808.10 and 414.50 per month and per day respectively. The statutory minimum wages under the *Regulation of Wages (Agricultural Industry) Order* are consolidated.



The Respondent was therefore underpaid as follows:

2012 – 2013 6792.00 (No underpayment)

2013 – 2014 7681.75 – 7500 x 12 = 2,181.00

2014 – 2015 8757.20 – 7500 x 12 = 15,086.40

2015 – 2016 9808.10 – 7500 x 12 = 27,697.20

Total underpayments Kshs. 44,964.60

46. The Respondent is therefore entitled to only Kshs. 44,964.60 as underpayments for 3 years per day worked multiplied by the difference between the rates paid and the rate due. To this extent, the Appeal is partially successful.
47. Consequently, the judgment of the trial court is upheld with the exception of the award of underpayment which is set aside and replaced with an award of Kshs. 44,964.60
48. The final award shall therefore be as follows:
  - i. The award of underpayment of Kshs 1,732,841.21 is set aside and substituted with an award of Kshs. 44,964.60
  - ii. The rest of the award remains undisturbed
  - iii. I will also not disturb the award of costs and interest by the trial court.
49. As the appeal has partially succeeded, each party shall bear its own costs of the appeal.
50. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**MAUREEN ONYANGO**

**JUDGE**

