



**DPL Festive Limited v Nyachae (Appeal E057 of 2023)
[2024] KEELRC 483 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 483 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E057 OF 2023
S RADIDO, J
MARCH 6, 2024**

BETWEEN

DPL FESTIVE LIMITED APPELLANT

AND

GEOFFREY MAGATI NYACHAE RESPONDENT

(Being an Appeal from the judgment and decree of the Chief Magistrates Court of Kenya at Kisumu by Hon K. Cheruiyot, SPM delivered on 11th May 2023 in KSM MCELRC NO. E100 of 2021 – Geoffrey Magati Nyachae v DPL Festive Ltd)

JUDGMENT

1. Geoffrey Magati Nyachae (the Respondent) sued DPL Festive Ltd (the Appellant) before the Senior Principal Magistrates Court on 26 May 2021, alleging breach of contract.
2. In a judgment delivered on 11 May 2023, the Senior Principal Magistrate found that the Appellant was in breach of contract and awarded the Respondent a total of Kshs 905,586/-.
3. The Appellant was aggrieved and it lodged a Memorandum of Appeal with the Court on 18 October 2023, contending that:
 - i. The Learned Trial Magistrate erred in fact and law in failing to find from the evidence on record that the collective bargaining agreement between the Appellant and BACOFOMAWU (K) could not apply to the Respondent as he had not been promoted to the position of supervisor.
 - ii. The Learned Trial Magistrate erred in fact and in law by totally ignoring the effect of the contract of service as the document to give effect to in construing the terms and conditions of service.
 - iii. The Learned Trial Magistrate erred in fact and in law by failing to take into account the terms and conditions of service with specific reference to overtime.



- iv. The Learned Trial Magistrate erred in law by relying on extraneous considerations to award overtime and acting allowance.
 - v. The Learned Trial Magistrate erred in law in the evaluation of evidence and the effect of the principle of the balance of probability in relation to managing contract of service.
 - vi. The Learned Trial Magistrate erred in fact and law by failing to appreciate the evidence tendered by both the Appellant and the Respondent and analyse and apply the correct law thereby arriving at erroneous conclusion that is not premised on evidence and the law in respect to construing service contract.
4. The Record of Appeal was filed on 7 December 2023, and a Supplementary Record on 21 December 2023.
 5. The Court gave directions on 5 December 2023, 11 December 2023 and 29 January 2024.
 6. Consequently, the Appellant filed its submissions on 6 February 2024, and the Respondent on 23 February 2024.
 7. The Court has considered the Record of Appeal and the submissions.

Role of the Court in a First Appeal

8. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
9. This Court will abide by the interdict on its role as a first appellate Court.

Applicability of the Collective Bargaining Agreement

10. The first ground of appeal advanced by the Appellant was that the Senior Principal Magistrate erred by holding that the collective bargaining agreement between it and BACOFOMAWU applied to the Respondent when the Respondent was a supervisor and, therefore, not covered or capable of enjoying the terms therein.
11. Article 36 of *the Constitution* assures every person of the right to freedom of association while Article 41(2)(c) thereof gives every worker the right to join and participate in the activities of a trade union.
12. The copies of the collective bargaining agreement produced in Court did not have any clause excluding any category of worker with the Appellant from joining a trade union or from enjoying the benefits of the agreement (ordinarily excluded workers are set out in the Industrial Relations Charter or recognition agreement, which were not put before the Court).
13. Indeed, copies of the Respondent's pay slips placed before the Senior Principal Magistrate indicated that the Appellant was deducting and remitting monthly union subscriptions on behalf of the Respondent.
14. This Court, therefore, finds that the Respondent was entitled to enjoy the terms and conditions of service outlined in the collective bargaining agreement. The finding is buttressed by section 59(3) of the *Labour Relations Act* which incorporates the terms of a collective bargaining agreement into the contract of all unionisable employees of the particular employer. -



Breach of contract

Appointment to act as Supervisor and acting allowance

15. The Respondent alleged before the Senior Principal Magistrate that he was appointed to act as a Supervisor from June 2017 to 24 May 2019, and that though he was not issued with a written contract, his pay slips and Production Assessment Forms indicated that he was a Supervisor.
16. The Respondent's pay slips for March 2018, May 2018, June 2018, July 2018 and August 2018 all show the designation of the Respondent as an Oven-man (other copies are not legible).
17. The copies of the Production Assessment Forms for 11 May 2018 and 16 May 2018 produced by the Respondent were not signed and their evidential veracity is doubtful.
18. The Court says so because Clause 12(b)(ii) of the collective bargaining agreement clearly indicated that acting appointments would be in writing. The Respondent did not produce any written contract appointing him to act as a Supervisor.
19. In this Court's view, the Respondent failed to prove that he was appointed to act and, therefore, deserved an acting allowance.
20. The Senior Principal Magistrate fell into error of both law and fact in allowing this head of the claim for an acting allowance.

Overtime

21. Clause 7 of the collective bargaining agreement provided for hours of work during the week (48 hours spread over 6 days but in shifts) and clause 10 outlined the rate of payment of overtime.
22. The Respondent pleaded that he used to work 4 hours overtime every day and he claimed a total of Kshs 519,168/-.
23. The Respondent's witness statement which was adopted as part of the evidence did not lay out or make any reference to overtime work.
24. However, during cross-examination, the Respondent testified that he used to work 12-hour shifts instead of 8 hours and that he was not compensated for the overtime.
25. The Appellant did not plead in response to the Respondent's claim for overtime nor did its witness testify or respond to the Respondent's testimony on the working hours or payment of overtime. There was also no explanation of what the item in the pay slip called extra days' pay meant.
26. On the state of the record and in consideration of section 10(3) of the *Employment Act*, 2007, this Court would not fault the Senior Principal Magistrate for allowing this head of the claim.
Damages for failure to comply with clause 12(b)(i)(ii) of the collective bargaining agreement
27. The Respondent sought damages before the Senior Principal Magistrate on the basis that the Appellant had breached clause 12(b)(i) and (ii) of the collective bargaining agreement by failing to pay him an acting allowance.
28. The Senior Principal Magistrate allowed the head of the claim in the sum of Kshs 177,618/- without giving any explanation or justification for the award.



29. The Court has found that the Respondent did not prove to the requisite standard that he had been appointed to act as a supervisor. The question of damages should not have arisen in the circumstances.
30. The Senior Principal Magistrate fell into an error of law in awarding a relief whose evidential foundation had not been provided.

Conclusion and Orders

31. Flowing from the above the Appeal partly succeeds in the following terms:
 - i. Award of acting allowance is vacated and or set aside.
 - ii. Award of damages is vacated and or set aside
32. For clarity, the award of overtime pay is confirmed.
33. Since the Appeal has only succeeded partly, each party to bear costs of the Appeal, the Respondent to have costs before the Senior Principal Magistrates Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 6TH DAY OF MARCH 2024.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Mr Ouma Dickens, Advocate, Federation of Kenya Employers

For Respondent Hussein B. Indimuli Advocate

Court Assistant Chrispo/Chemwolo

