



**Wambu v Ebrahim Electronics Limited (Civil Appeal E017 of 2022)
[2024] KEELRC 945 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 945 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E017 OF 2022**

B ONGAYA, J

APRIL 8, 2024

BETWEEN

BONIFACE KASYOKI WAMBU APPELLANT

AND

EBRAHIM ELECTRONICS LIMITED RESPONDENT

*(Being an Appeal from the Judgement and Decree of HON. M. W.
MURAGE, Senior Resident Magistrate, given on the 16th December 2021)*

JUDGMENT

1. The appellant filed an amended memorandum of claim in the Lower Court dated 15.10.2019 through Mutuku Wambua & Associates Advocates. The appellant claimed against the respondent:
 - a. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of his terminal dues.
 - b. The sum of Kshs. 1,779,339.21 as set out in the claim.
 - c. Costs of this suit and interest at court rates from time of filing the suit until payment in full.
 - d. Any other further relief that the Honourable Court deems just and fit to grant.
2. The appellant set out his claim in the amended memorandum of claim as follows:
 - a. Salary for 17 days worked in July 2018 Kshs.13, 727.00.
 - b. One-month salary in lieu of notice Kshs.24, 224.00.
 - c. Utaken annual leave for 7 years and 0.5 months Kshs. 14, 995.81.



- d. Service pay at 15-days for each completed year of service Kshs. 84, 784.00.
 - e. House allowance for 7 years served at 15% wages Kshs.176, 200.40.
 - f. Compensation for unfair termination Kshs. 24, 224 x 12 months Kshs. 290, 668
 - g. Underpayment for 7 years 24, 224 – 10, 239 for 12 months x 7 years = Kshs. 1, 174, 740.00.
3. The appellant alleged that upon termination the respondent was willing to pay some of the claim upon the condition that the appellant indemnifies the respondent against any further claim.
 4. The respondent filed its response to claim dated 04.03.2019 through Murgor and Murgor Advocates. The respondent admitted that the appellant was its employee on a permanent basis earning a monthly remuneration of Kshs. 11,775/=, daily sustenance allowance of Kshs. 100/= and annual bonuses of Kshs. 5000/=.
 5. The respondent denied the allegations as pleaded in the claim and stated that it is the appellant who unlawfully and unilaterally terminated his employment by failing or refusing to report to work as from 18th July 2018.
 6. The respondent pleaded that the appellant is not entitled to any of the reliefs sought.
 7. The trial Court delivered judgment on 20.12.2021. The trial magistrate found that at the time of termination, there were no pending leave days hence did not award untaken leave as was claimed and prayed for the appellant. The Court also found that the amount paid was inclusive of house allowance and that since it was not a redundancy, no service pay was awarded. The Court awarded the appellant as follows:
 - a. One-month salary in lieu of notice, Kshs. 11,775/=
 - b. Compensation for unfair termination Kshs. 11,775 x 6 months = Kshs. 70,650/=.
 - c. Costs and interest of the suit to the appellant.
 8. The appellant brought this appeal vide a memorandum of appeal dated 10th February 2022 through Mutuku Wambua & Associate Advocates. The Appellant was dissatisfied with the judgement and decree of the trial Court upon the following grounds:
 - a. That the learned Magistrate erred in law and in fact by failing to consider the appellant's claim on underpayment.
 - b. That the learned Magistrate erred in law and in fact by failing to grant the appellant service pay.
 - c. That the learned Magistrate erred in law and in fact by ignoring the overwhelming evidence put forward by the appellant in support of his case.
 - d. That the learned Magistrate erred in law and in fact by ignoring the appellant's submissions.
 9. The appellant prayed for the following orders:
 - a. The judgement on liability of the Honourable M.W. Murage, Senior Resident Magistrate, given on the 16th December 2021 be set aside and the court herein be pleased to reassess the liability awarded to the Appellant.
 - b. Allow the appeal with costs.



- c. The Honourable Court be pleased to make such further and other orders as it may deem just in the circumstances of the case.
10. The appellant filed a record of appeal dated 29.05.2023 and a supplementary record of appeal dated 05.03.2024 which were both admitted on record.
 11. The parties filed their respective submissions. The court has considered the parties' respective cases and submissions and makes returns as follows.
 12. The 1st ground of appeal and issue for determination is whether the trial Court erred in failing to consider the claim on underpayment. The appellant claimed and prayed for Kshs.1,174,740.00 being underpayment for the 7 years served. The respondent pleaded in the statement of response that the appellant had not pleaded the particular provision of the law or regulation upon which he based the claim for salary of Kshs. 24,224.00 per month. The response to claim was dated 04.03.2010 and filed the same date. Without citing a regulatory provision or contractual provision, the appellant at paragraph 11 of the amended claim stated that consolidated minimum wage for a sales person effective May 1, 2017 (basic pay Kshs.24, 224) applied to him as at termination. He alleged at paragraph 3 thereof that he was employed as a sales person effective 01.03.2011 at monthly pay of Kshs.9, 000.00 for first three months and thereafter Kshs.11, 775 inclusive house allowance. In the witness statement, the appellant did not explain the claimed underpayment. The appellant did not offer any testimony on that claim at the hearing. The respondent's witness did not as well offer any testimony on the issue. The judgment is silent on the issue. The Court finds that the claim on the underpayment was in the nature of special or liquidated damages whose particulars needed to be pleaded and then strictly proved. The appellant failed to do meet that trite threshold. While the judgment was silent on the issue, it appears that the appellant had failed to establish the contractual or statutory base of the claim as had been pleaded for the respondent. The trial Court may not be faulted for failing to make an award or finding in that regard. That ground of appeal must therefore fail. The claimant never pleaded that he was relying on regulation of wage orders on minimum wages which he purports to invoke in the submissions. In any event, for the minimum wage orders to apply, the employee must plead and by evidence establish the designation or type of work performed to map it out with the wage order towards establishing the applicable pay. That was not done in the instant case. The claimant pleaded he was a salesperson while offering no evidence and the respondent's witness testified, he was a shop assistant. In such circumstances, the Court returns that the appellant failed to discharge the due evidential burden based on his pleaded case.
 13. The 2nd issue and ground of appeal is whether the trial Court erred in failing to award service pay. In declining to award service pay, the trial Court found that it was not available because there had been no redundancy situation. It is submitted for the appellant that section 35(5) of the *Employment Act* entitled the appellant to service pay for every year worked. Further, in the submissions the respondent had introduced a concept that the service pay was not due because the NSSF had been remitted. The Court finds that whereas the trial Court erred in declining the claim upon an assertion that redundancy had not occurred, the respondent's submission that service pay was not available because NSSF had been remitted is upheld. Section 35(6) of the *Employment Act* is clear that service pay is not due where the employee is a member of the NSSF.
 14. The two substantive grounds having been determined, the Court finds that the appeal must fail and the appellant will pay costs of the appeal.

In conclusion, the appeal is hereby dismissed with costs.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
MONDAY 8TH APRIL 2024.**

BYRAM ONGAYA

PRINCIPAL JUDGE

