



**Exotic Penina Fields Group Limited (F.T.A Carnation Plants Limited) v Mose
(Appeal 27 of 2022) [2024] KEELRC 1299 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1299 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 27 OF 2022**

**B ONGAYA, J
MAY 29, 2024**

BETWEEN

**EXOTIC PENINA FIELDS GROUP LIMITED (F.T.A CARNATION PLANTS
LIMITED) APPELLANT**

AND

EVANS SIMON MOSE RESPONDENT

*(Being a partial appeal from the Judgement and Decree of Honourable
L.L Gicheba, CM (Mrs) delivered on 3rd November 2022 in Kajiado Chief
Magistrate's Court Employment Cause No. E014 of 2021; Evans Simion
Mose Vs Exotic Penina Fields Group Ltd, F.T.A Carnation Plants Limited))*

JUDGMENT

1. The respondent herein filed a statement of claim in the lower Court dated 24.02.2021 through Ngigi Njuguna & Co. Advocates. The respondent (claimant) claimed against the appellant for:
 - a. A declaration that the claimant's termination was unfair and unlawful.
 - b. Kshs. 9,496 .77/= as one month's gross salary in lieu of notice.
 - c. Kshs. 47, 104/= as service pay.
 - d. Kshs. 115, 561/= as unpaid overtime.
 - e. Kshs. 65, 229.83/= as unpaid public holidays.
 - f. Kshs. 113, 011.44/= as unpaid night shift allowance.
 - g. Kshs. 331, 022.10/= being for salary underpayment.



- h. Kshs. 113, 961. 24/= being compensation for wrongful dismissal at the rate of 12 months' gross salary in terms of section 49 (1) (c) of the employment act laws of Kenya.
 - i. Cost of this suit and interest.
2. The appellant filed its statement of defence dated 18.03.2021 through Michuki & Michuki Advocates. The appellant only admitted the jurisdiction of the Court and denied all the allegations as set out in the statement of claim.
3. The trial magistrate entered judgement on 03.11.2022 as follows:
 - a. A declaration that the services of the claimant were unlawfully terminated.
 - b. One month's notice of Kshs. 9, 494.77/=.
 - c. Salary for March and April of 2020 Kshs.18,993.54/= (Kshs.28,490.30)
 - d. Costs and interest.
4. The appellant brought this appeal vide a memorandum of appeal dated 01.12.2022 through Michuki & Michuki Advocates being and dissatisfied with the Judgement and decree of the lower Court on the following grounds:
 - a. That the learned trial Magistrate erred in law and in fact in finding that, the appellant had unlawfully terminated the employment of the respondent.
 - b. That the learned trial Magistrate erred in law and in fact awarding the claimant one month's salary in lieu of notice as well as salary for the months of March and April 2020.
5. The appellant prayed for the following orders:
 - a. The whole of the judgement be set aside.
 - b. The Honourable Court be pleased to order that the suit against the appellant be dismissed with costs.
 - c. The costs of the lower court cause as well as costs of this appeal be awarded to the appellant
6. The respondent did not file submissions. The appellant filed submissions. The court has reconsidered all material on record and returns as follows:
 - a. The Court finds that the trial Court erred in finding that the respondent was unfairly terminated. The evidence was that as per the respondent's submission and evidence, it was during the COVID crisis. The respondent exhibited a separation agreement being exhibit 7. It stated that upon consultation with the appellant the respondent agreed voluntarily to elect to proceed on unpaid leave from 02.04.2020 until further notice. He signed that he knew the employer would take him back at the end of the crisis. He also would be available to receive the call to resume work. The evidence was that the respondent received a text message recalling him back to work but he failed to resume duty. He stated it came after he had filed suit on 24.02.2021. The Court finds that the appellant honoured the terms of the temporary separation during the COVID situation while the respondent rushed to file suit. In view of the evidence, the Court finds for the appellant that there was no unfair termination established. The respondent elected not to return to work as had been agreed with the appellant. The respondent confirmed they would be recalled and the appellant's witness relied on exhibit 15, the screen shot of the short message recalling the respondent back to work. The trial court



found the filing of the suit prompted the appellant to recall the respondent. But the message had been send on 22.02.2022 but the trial Court erred in failing to consider that the respondent had served no notice to sue. It is not said the COVID situation or crisis had ended as at time the suit was filed. Thus, there was no bad faith on the part of the appellant and the trial Court erred to infer bad faith against the appellant. The claimant did not explain failing to resume duty after the recall, even if it was after filing the suit.

- b. The one-month's pay in lieu of termination was not due as there was no termination established.
- c. The respondent signed to go on unpaid leave on 02.04.2020. The claim for April salary was contrary to the agreement. The agreement did not allude to unpaid Mach 2020 salary. The Court finds the awards were contrary to the evidence and arrangement of unpaid leave during COVID situation.
- d. In view of the circumstances of COVID pandemic, each party to bear own costs. In conclusion, the appeal will succeed with orders:
 1. The trial Court's award of Kshs.28,490.30, costs and interest is set aside and replaced with dismissal of the suit with no costs.
 2. Each party to bear own costs of the appeal.
 3. The Deputy Registrar to return file to Machakos sub-registry forthwith.

Signed, dated and delivered by video-link and in court at Nairobi

this Wednesday 29th May 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

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