



Board of Management Milo Boys High School v Wakhungu (Employment and Labour Relations Appeal E015 of 2023) [2024] KEELRC 1685 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1685 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E015 OF 2023**

**JW KELI, J
JUNE 26, 2024**

**BETWEEN
BOARD OF MANAGEMENT MILO BOYS HIGH SCHOOL APPELLANT
AND
MARGARET NAFULA WAKHUNGU RESPONDENT**

(An Appeal from the Judgment of the Honourable P.Y. Kulecho, PM delivered on 29/08/2022 in Webuye SPMC ELRC No. E005 of 2021)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment of the Honourable P.Y. Kulecho, PM delivered on 29/08/2022 in Webuye SPMC ELRC No E005 of 2021 Between Margaret Nafula Wakhungu versus BOM Milo Friends Boys High School, filed the Memorandum of Appeal dated 25th September 2023 and Record of Appeal dated 3rd April 2024 and received in Court on the 5th April 2024, seeking the following orders: -
 - a. The Entire Judgement in Webuye Senior Principal Magistrate’s Court ELRC No E005 of 2021 be set aside and a proper finding be made by this Honourable court.
 - b. This Honourable Court do make such further orders as may be just and expedient in the interest of justice.
 - c. The Appeal be allowed with costs.
2. The Appeal was premised on the following grounds: -
 - i. The Learned trial Magistrate erred in law and fact in awarding the Claimant salary arrears amounting to Kshs 219,709 calculated based on a salary of Kshs 13,005 yet the Respondent’s



salary was Kshs 7,000 and had no arrears at the time she left the school leading to miscarriage of justice.

- ii. The Learned Trial Magistrate erred in law and fact in holding that the Respondent was never granted rest while working and thus awarding her Kshs 124,848 for rest days yet the school had several cooks who could alternate and during school holidays and breaks, the entire school would be closed. Leading to a miscarriage of justice.
 - iii. The Learned Trial Magistrate erred in law and fact in awarding the Respondent Kshs 42,016 as leave pay yet the Respondent took all her leave allowance during the holidays when the school had closed.
 - iv. The Trial Magistrate erred in law and fact in awarding the Respondent Kshs 196,635 as overtime, a figure which is manifestly high and calculated based on a wrong salary leading to a miscarriage of justice.
 - v. The Learned Trial Magistrate erred in law and in fact for failing to appreciate that the respondent did not prove his case on a balance of probability as per the requirement of the law.
(Pages 1-2 of the Record)
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Makokha Wattang'a & Luyali Associates Advocates were dated 25th April 2024 and received in Court on 28th April 2024. The Respondent's written submissions drawn by Were Lukoko & Co. Advocates were dated 5th April 2024 and received in Court on 6th April 2024.

Background to the appeal

4. The Respondent filed a suit Webuye PMELR Cause No E005 of 2021 against the Appellant for terminal benefits and arrears. Through the Statement of Claim dated 3rd December 2021 and filed on 8th December 2021, the Respondent/Claimant sought the following reliefs: -
 - a. Payment of the sum of money claimed under paragraph 6 above as terminal benefits and arrears amounting to Kshs 846,509/-
 - b. Costs and interest on this claim.
 - c. Any other and/or further relief this Honourable Court may deem fit and/or just to grant. (pages 3-5 of the record was the Respondent's claim).
5. The Statement of Claim had been supported by the Verifying Affidavit sworn by the Respondent on 3rd December 2021 and accompanied by the Respondent's list of witnesses dated on an even date, the Respondent's Witness statement dated 3rd December 2021, the Respondent's list and copies of documents of even date and the Respondent's documents (Page 6 to 24 of the Record).
6. The Appellant entered appearance on 31st January 2022(Pg.25) and by a consent order of 6th February 2022, the Appellant on 25th February 2022 filed a Memorandum of Defence dated 13th January 2022 (pg. 26-28 of the Record). The Defence was accompanied by the Appellant's List of Witnesses dated 13th January 2022, the statement of Emmanuel Wekesa Wafula dated an even date, the Appellant's List of Documents dated on an even date, and the Appellant/Respondent's documents (Pg. 29-35 of the Record).
7. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with her as the only witness of fact on the 21st of February 2023. The Defence adopted by consent the testimony of



Emmanuel Wekesa Wafula (DW1) in ELRC No E004 of 2021 and adopted two exhibits as D-Exh-1 & 2 (pages 37-39 of the record).

8. The parties filed submissions in the lower Court after the closure of the defence. The Respondent/Claimant's submissions (pages 41-45 of the Record). The Appellant/Respondent filed written submissions (pages 46-49 of the Record).
9. The trial Court (P.Y. Kulecho, PM) delivered its judgment on the 29th of August 2023 (pages 50-53) in favour of the Respondent/Claimant and awarded the Respondent/Claimant Salary arrears of Kshs 219,709/-, rest days of Kshs 124,848/=-, overtime of Kshs 196,635/- and leave of Kshs 42,016/-, totalling to Kshs 583,208/- plus costs and interest as per the decree dated 29th August 2023(Pg. 55 of the Record).

Determination

Issues for determination.

10. The Appellant in its submissions submitted on its grounds of appeal for determination in the appeal: -
 - a. The Learned Trial Magistrate erred in law and fact in awarding the Claimant salary arrears amounting to Kshs 219,709 calculated based on a salary of Kshs 13,005 yet the Respondent's salary was Kshs 7,000 and had no arrears at the time she left the school leading to miscarriage of justice.
 - b. The Learned Trial Magistrate erred in law and fact in holding that the Respondent was never granted rest while working and thus awarding her Kshs 124,848 for rest days yet the school had several cooks who could alternate and during school holidays and breaks, the entire school would be closed. Leading to a miscarriage of justice.
 - c. The Learned Trial Magistrate erred in law and fact in awarding the Respondent Kshs 42,016 as leave pay yet the Respondent took all her leave allowance during the holidays when the school had closed.
 - d. The Trial Magistrate erred in law and fact in awarding the Respondent Kshs 196,635 as overtime, a figure which is manifestly high and calculated based on a wrong salary leading to a miscarriage of justice.
 - e. The Learned Trial Magistrate erred in law and in fact for failing to appreciate that the respondent did not prove his case on a balance of probability as per the requirement of the law.
11. The Respondent in her submissions identified the following issues for determination in the appeal: -
 - a. Whether the Claimant was owed salary arrears and if the answer is in the affirmative, how much is owed.
 - b. Whether the respondent was granted rest days.
 - c. Whether the Respondent attended her leave days.
 - d. Whether the sum of Kshs 196,635 awarded as overtime is manifestly high and calculated based on a wrong salary.
12. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither



seen nor heard the witnesses and should make allowance for that fact. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1948) EA123.

13. The Court guided by Selle's decision, that the Court sitting at first appeal has to evaluate the facts and evidence before the trial Court while making allowance of not having seen the witnesses to reach their conclusion, finds the issues for determination in the appeal are as follows: -
 - a. Whether the Respondent was underpaid during the employment with the Appellant
 - b. Whether the Learned Magistrate erred in law and fact in the award of the reliefs to the Appellant

a). Whether the Respondent was underpaid during the employment with the Appellant.

14. The Appellant stated as a ground of appeal that the Learned Trial Magistrate erred in law and fact in awarding the Claimant salary arrears amounting to Kshs 219,709 calculated based on a salary of Kshs 13,005 yet the Respondent's salary was Kshs 7,000 and had no arrears at the time she left the school leading to miscarriage of justice.
15. The Appellant led evidence before the trial Court that she was a cook and was paid less than what was in the Regulation of Wages Order. During cross-examination, the claimant told the Court that she earned a salary of Kshs 7,000 contrary to the Regulation of Wages Order of 2018 (P-exh 2.) The Appellant relied on the letter of appointment of the claimant dated 12/01/2017 (D-exh 1) in which the claimant was appointed as kitchen hand at Kshs 6,000 per month inclusive. Her role was to prepare quality food for students and staff in liaison with the school matron / cateress. At the trial, the claimant told the lower Court that she was a cook.
16. The Appellant adopted the witness statement of Emmanuel Wekesa Wafula as their evidence in chief(pages 30-31 of the Record) stating the claimant was initially taken on board on humanitarian grounds as an untrained kitchen hand and not a cateress.
17. There was evidence before the trial Court that the claimant was a cook. He was paid a monthly all-inclusive salary of Kshs 7000.
18. The Court finds that the defence of contract on salary could not hold water in view of the provisions of section 26 of the Employment Act to wit:-

'26. Basic minimum conditions of employment

- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
- (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."(emphasis given of the application of the more favorable terms as per regulations). The claimant's employment was regulated under the minimum wage order due to a cook and she was entitled to the more favourable terms. The regulated wages are basic minimum terms and conditions of service that the contract of employment cannot override. The employer was based in Webuye Municipality and having evaluated the 2018 Wages Order the Court holds that the Learned Magistrate



did not err in awarding the minimum wages as held. The Court upholds the decision of the Learned Trial Magistrate that the Respondent was underpaid.

b). Whether the learned magistrate erred in law and fact in the award of the reliefs to the Appellant

19. The claimant was awarded under various items in the judgment whose merit the Court proceeded to re-evaluate.

Award of underpayment.

20. The Court upheld the finding on underpayment. Consequently, the Court upholds the 3 years underpayment award as held by the Learned Magistrate of Kshs 219, 709/-

Overtime

21. It was a ground of appeal that the Trial Magistrate erred in law and fact in awarding the Respondent Kshs 196,635 as overtime, a figure which was manifestly high and calculated based on a wrong salary leading to a miscarriage of justice.
22. The Respondent/claimant informed the trial Court that she reported to work at 5.00 am and left at 8.00 pm and was not paid overtime (page 38 of the Record).
23. The Appellant at trial relied on the testimony in Webuye E004 of 2021(see page 39 of the Record). It was recorded DW(page 41 of the record in Appeal E016 OF 2023) on cross-examination told the court, “The cook has to report by 5.00 am. He leaves at 5.30 pm. He never received overtime.”
24. The Court finds that the Appellant admitted to the Respondent having worked overtime and not paid. Consequently, the Court holds that there was no misapprehension of the evidence by the trial Court and hence no basis to disturb the award of overtime.

Rest days

25. It was a ground of appeal that the Learned Trial Magistrate erred in law and fact in holding that the Respondent was never granted rest while working and thus awarding her Kshs 124,848 for rest days yet the school had several cooks who could alternate and during school holidays and breaks, the entire school would be closed leading to a miscarriage of justice.
26. The claimant / Respondent in her testimony told the Court she worked 7 days a week. During cross-examination, she stated that she demanded overtime to no avail. The Appellant relied on DW’s testimony in Webuye PM ELRC No E004 OF 2021 (page 41 of the record in Appeal E016 OF 2023) where it was recorded DW told the Court that the school had 5 cooks and a cateress. That theirs was a boarding school. It was recorded: “The cooks have a day off. He did not have the schedule in court.” In submissions, the Appellant submitted that the respondent had pleaded he was a cateress contrary to her evidence of being a cook(page 44). That being a cateress she was expected to work every day.
27. The Court finds that since the evidence before the trial Court, the claimant was not a cateress but a cook, her claim that she was expected to work all days as a cateress was thus unfounded. The Court holds on a balance of probabilities, that it was more probable than not, that the Respondent got her rest days as a cook. The claim for rest days ought to have failed. The appeal succeeds on the rest days award which is hereby set aside.



Leave in lieu

28. It was a ground of appeal that the Learned Trial Magistrate erred in law and fact in awarding the Respondent Kshs 42,016 as leave pay yet the Respondent took all her leave allowance during the holidays when the school had closed.
29. The claimant stated that she did not take leave. The Appellant stated she took leave during the school holidays. During cross-examination, the claimant stated that the Appellant did not permit her to take leave. During cross-examination of DW (evidence adopted in Webuye PMELRC E004 of 2021 (page 41 of ELRC Appeal No E016 OF 2023) concerning leave stated: ‘the claimant would take leave during school holidays. I do not have the leave forms. He used to fill the leave forms’. The trial Court held that the Appellant did not substantiate their assertion. The Court in the absence of contrary evidence on a balance of probability finds the Respondent was not accorded annual leave. The Appellant is the custodian of employee records. DW said there were leave forms and did not produce the same in defense. Section 74 of the *Employment Act* states:-‘(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—(f) of an employee’s annual leave entitlement, days taken and days due specified in section 28;’ Section 28 provides for annual leave to wit:- ‘(1) An employee shall be entitled — (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;’
30. Consequently, the Court upholds the holding of the trial Court on the leave. There was no basis for the Court to disturb the award.

Conclusion and disposition,

31. The appeal was successful only on the award of rest days. Consequently, the Judgment of the Honourable P.Y. Kulecho, PM delivered on 29/08/2022 in Webuye SPMC ELRC No E005 of 2021 Between Margaret Nafula Wakhungu versus BOM Milo Friends Boys High School is set aside and substituted as follows:- The Court enters judgment for the Claimant as against the Respondent as follows:-
 - a. Salary arrears payment of Kshs 219,709
 - b. Overtime payment of Kshs 196,635
 - c. Leave pay in lieu of Kshs 42,016/-The total award to the claimant of Kshs 458,360 is payable with interest at the Court rate until payment in full from the date of judgment plus costs of the suit.
32. Each party is to bear its costs in the appeal.
33. It is so ordered.

DATED, SIGNED, AND DELIVERED ON THE 26TH DAY OF JUNE 2024 IN OPEN COURT AT BUNGOMA.

J.W. KELI,

JUDGE

In the presence of:-

C/A Brenda Wesonga



For Appellant: Absent

For Respondent: Were

