



Board of Management - Milo Boys High School v Mabonga (Employment and Labour Relations Appeal E016 of 2023) [2024] KEELRC 1696 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1696 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E016 OF 2023**

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

**BETWEEN
BOARD OF MANAGEMENT - MILO BOYS HIGH SCHOOL APPELLANT
AND
MORRIS WAKHUNGU MABONGA RESPONDENT**

(An Appeal from the Judgment of the Honourable P.Y. Kulecho, PM delivered on 29/08/2022 in Webuye SPMC ELRC No. E004 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. E004 of 2021 Between Morris Wakhungu Mabonga 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. E004 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. 142,920 using a monthly salary of Kshs. 13,005 yet the Respondent’s



salary was Kshs. 7,000 and had no salary arrears at the time he 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 him Kshs. 172,000 for rest days yet the school had an alternate security guard who was alternating with the Respondent.
 - iii. The Learned trial magistrate erred in law and fact in awarding the Respondent Kshs. 82,384 as leave pay yet the Respondent during his employment, was never denied leave by the Appellant.
 - iv. The trial magistrate erred in law and fact in awarding the Respondent Kshs. 130,576 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.
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. E004 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. 989,690/-
 - 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.
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 26 of the Record).
6. The Appellant entered appearance on 31st January 2022 (Page 27 of the Record) and by a consent order of 6th February 2022, the Appellant on 25th February 2022 filed a Memorandum of Defence dated 13th January 2022 (Pages 28-30 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 an even date, and the Appellant/Respondent's documents (Pages 31-37 of the Record).
7. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with him as the only witness on the 21st of February 2023. Emmanuel Wekesa Wafula (DW1) testified in the Defence Case as the Defence Witness of fact on 30th of May 2023 (pages 39-42 of the Record).
8. The parties filed submissions in the lower Court after the closure of the defence. The Respondent/Claimant's submissions (pages 44-48 of the Record). The Appellant/Respondent filed written submissions (pages 49-52 of the Record).



9. The trial Court (P.Y. Kulecho, PM) delivered its judgment on the 29th of August 2023 (pages 53-56 of the Record) in favour of the Respondent/Claimant and awarded the Respondent/Claimant Salary arrears of Kshs. 142,920/-, rest days of Kshs. 172,000/=, overtime of Kshs. 130,576/- and leave of Kshs. 82,384/- totalling to Kshs. 527,880/- plus costs and interest as per the decree dated 29th August 2023 (Page 58 of the Record was the Judgment).

Determination

Issues for Determination.

10. The Appellant submitted on its grounds of appeal for determination in the appeal as follows: -
- a. The Learned Trial Magistrate erred in law and fact in awarding the Claimant salary arrears amounting to Kshs. 142,920 using a monthly salary of Kshs. 13,005 yet the Respondent's salary was Kshs. 7,000 and had no salary arrears at the time he 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 him Kshs. 172,000 for rest days yet the school had an alternate security guard who was alternating with the Respondent,
 - c. The Learned Trial Magistrate erred in law and fact in awarding the Respondent Kshs. 82,384 as leave pay yet the Respondent during his employment, was never denied leave by the Appellant.
 - d. The Trial Magistrate erred in law and fact in awarding the Respondent Kshs. 130,576 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 his 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 his leave days.
 - d. Whether the sum of Kshs. 130,576 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 or 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 Respondent

a). Whether the Respondent was underpaid during 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. 142,920 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 he left the school leading to miscarriage of justice.
15. The Claimant/ Respondent led evidence before the Trial Court that he was a cook and was paid less than fair wages, in that his salary was Ksh s. 7,000 contrary to the wages orders of 2018 (P-exh 8). The defence relied on the letter of appointment of the claimant dated 12/01/2017 (D-exh 1 page 35) in which the claimant was appointed as an unskilled cook at Kshs. 6,000 per month inclusive. His role was to prepare quality food for students and staff in liaison with the school matron / cateress.
16. The Appellant in the adopted witness statement of 13/01/2022 as evidence in chief of Emmanuel Wekesa Wafula stated that the claimant was employed as an unskilled cook. During cross-examination, DW admitted that according to the wage orders, a cook was entitled to Kshs. 12,000 minimum wages (Page 41 of the Record).
17. The Court finds that the defence of terms of the contract on salary could not hold water given 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 on application of more favorable terms as per regulations).
18. The Court holds that the Respondent's/claimant's employment was regulated under the minimum wages order due to a cook and he 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 relevant Regulation of Wages Order the Court holds that the Learned Magistrate did not err in upholding the minimum wage (pages 20-23 of the Record). The Court holds that the Respondent was underpaid during his service and consequently upholds the decision of the learned magistrate.

b). Whether the Learned Magistrate erred in law and fact in the award of the reliefs to the Respondent

19. The Respondent/ 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. 142,920.



Award of Overtime

21. It was a ground of appeal that the Trial Magistrate erred in law and fact in awarding the Respondent Kshs. 130,576 as overtime, a figure which is manifestly high and calculated based on a wrong salary leading to a miscarriage of justice.
22. The Respondent/claimant told the trial Court that he reported to work at 3.00 am to prepare breakfast and left work at 11.00 pm and was not paid overtime (page 40 of the Record).
23. The Appellant, through DW, on cross-examination told the Trial Court:- ‘ Breakfast is served at 6.30 am. The cook has to report by 5.00 am. He leaves at 5.30 pm. He never received overtime.’(Page 41 of the Record)
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 Learned Magistrate and hence no basis to disturb the award of overtime.

Award of 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 him Kshs. 172,000 for rest days yet the school had an alternate security guard who was alternating with the Respondent.
26. The claimant / Respondent in his testimony told the Court he worked daily 7 days of the week. During cross-examination of DW stated that the cooks have a day off.
27. Just like in the case of the cook in Appeal E015 of 2023 by the Appellant, the Court finds on a balance of probabilities that it was more probable than not the Respondent got his rest days as a cook. The claim for rest days ought to have failed. The appeal succeeds on the rest days award which is 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. 82,384 as leave pay yet the Respondent during his employment, was never denied leave by the Appellant.
29. The Respondent/Claimant stated that he did not take leave. The Appellant stated he took leave during the school holidays. During cross-examination, the claimant stated that the Appellant did not permit him to proceed on leave. During cross-examination of DW stated:- ‘The claimant would take leave during school holidays. I do not have the leave forms. He used to fill the leave forms’.(page 41 of the Record). The Learned Magistrate held that the Appellant did not substantiate their assertion. The Court in the absence of contrary evidence on a balance of probability finds that the Claimant was not accorded annual leave. The Appellant was the custodian of employee records. He said there were leave forms and did not produce the same in defence.
30. 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;” The Court holds that the Appellant failed to discharge its burden under section 74 of the *Employment Act*.



31. 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,

32. 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. E004 of 2021 Between Morris Wakhungu Mabonga 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. 142,920
- b. Overtime payment of Kshs. 130,576
- c. Leave pay in lieu of Kshs. 82382

The total award to the claimant of Kshs. 355,878 is payable with interest at Court rate until payment in full from the date of judgment plus costs of the suit.

33. Each party to bear its own costs in the appeal.

34. 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

For Appellant: Absent

For Respondent: Were Advocate

