



**Odida v Owano (Appeal E039 of 2022) [2024] KEELRC 1543 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1543 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL E039 OF 2022**

**CN BAARI, J**

**JUNE 20, 2024**

**BETWEEN**

**CHARLES ONYANGO ODIDA ..... APPELLANT**

**AND**

**PAUL OSIALA OWANO ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. Kennedy Cheruiyot (SPM)  
delivered on 11th October, 2022 in Kisumu CMELRC CAUSE NO. 46 OF 2021)*

**JUDGMENT**

1. Paul Osiala Owano, the Respondent herein, sued the Appellant before Kisumu Chief Magistrate's Court claiming unlawful termination, an order for pay in lieu of notice, gratuity, overtime, house allowance, and salary underpayment amongst others, all amounting to Kshs. 450,802/-
2. In a judgment delivered by Hon. Kenneth Cheruiyot on 11<sup>th</sup> October, 2022, the Court found in favour of the Respondent and awarded him all the prayers in his statement of claim.
3. The Appellant being dissatisfied with the decision of the Trial court, lodged the instant appeal on 31<sup>st</sup> October, 2022, premised on the grounds THAT: -
  - i. The learned Magistrate erred in law and fact by failing to determine the case on the basis of the law and the facts made available to him.
  - ii. In holding that there was an employer-employee relationship between the Appellant and Respondent the learned Magistrate applied wrong and inaccurate principles, and instead, considered erroneous, irrelevant, and extraneous factors, thereby unlawfully making a holding that failed to distil and dismiss off the false allegation of an employer-employee relationship in the cause;



- iii. The learned Magistrate erred in law and in fact in using his discretion to unlawfully award the Respondent Ksh. 450,802/= whereas there was utterly no evidence adduced before him on the basis of which such an award could be found.
  - iv. The learned Magistrate misdirected himself by failing to appreciate that the Respondent herein never demonstrated any employment history worth reaching a reasonable calculation of quantum
  - v. The learned Magistrate erred in law and in fact in awarding the Respondent herein costs without reason or justification.
4. The Appellant prays that the appeal be allowed and the Judgment and the entire orders of the Trial Magistrate be set aside, together with all consequential orders and decrees flowing from the judgment.
  5. The appeal was canvassed by way of written submissions. Submissions were filed for both parties.

### **The Appellant's Submissions**

6. The Appellant submits that the Respondent is out to reap where he did not sow having not been in the employment of the Appellant at all, a fact of employment which he alleged, but failed to prove as required by Section 107 of the Evidence Act, CAP 80 and section 2 of the Employment Act, 2007.
7. It is the contention of the Appellant that the Respondent was an independent contractor. The Appellant placed reliance in Justice Njagi's decision in *Anthony Njuguna v Afri-Cina International Co. Ltd & another* [2022] eKLR, where a macadamia farm manager absconded duty only to return with a claim against the Respondents for unfair termination of employment. The Judge cited the authority provided in the case of *Fredrick Byakika v Mutiso Menezes International Limited* (2016) eKLR, for the holding that:

“Such I find to be just some of the defending characteristics of a consultant/independent contractor. The Claimant was under such a contract. His hours of work were not fixed and were subject to the work to be undertaken; was required to invoice his dues to the Respondent so as to be paid each month which he did so in July and August 2014; he was subject to withholding tax at 15%; when he got sick he did not apply for sick leave/time off and does not claim for a refund of costs for treatment he underwent while he suffered malaria and diabetes; and the contract between the parties recognise the Claimant as a Consultant.”
8. The Appellant submits that in awarding the Respondent grants of the various payments, no evidence was presented to the Trial Court on what informed the calculation of the salary/wage/compensation of the Claimant. As such, the view that he was on a monthly salary was to say the least unsubstantiated and blatantly untrue.
9. It is further submitted that there was no consolidated salary therefore making up a basic salary at all. That the evidence on record showed that the Respondent received money intermittently, sometimes multiple times a day from the Appellant as well as others; he received varying sums of money with no consistency as to amounts or periods, many times much less than Kshs. 2000/= and had different persons, for whom he worked, sending funds to him.
10. Regarding the quantum awards, on overtime, as compensation for extra time worked was granted at Kshs. 79,525.60 calculated at Kshs.64.55 per day multiplied by 2 hours worked multiplied with 7 days for 4 weeks. It is submitted that at trial, the hours of primary work, if at all, had not been established to



- be standard or anything predictable. The Respondent had told the court that he could visit the farm early in the morning, or any other time, even after 9.00 am.
11. The Claimant's mpesa foot print showed that he would severally be out of the area of his supposed work (and even the county), exetera. There were no documents at all to back the overtime claims, no idea of what was the set working time or things done in the overtime or in the holidays.
  12. The Appellant submits that the award of Kshs. 22,757.30 in house allowance to the Respondent was uncalled for. He lived at home, not so far from the farm, with his wife and children and was not entitled at all to this relief – being as it is that he was only providing the farm security service – meaning he could take a walk to the farm any time of the day to defray any animal interference with the farm.
  13. It is further submitted that the Respondent conceded that he was also working for one Mr. Dixon Obungu who severally sent him money via mpesa according to the same statements filed in court
  14. It is submitted that gratuity pay is a compensation recognised in law as a one-off gratuitous payment for services rendered. He submits that it is not a mandatory payment, and that Courts have held that it is paid to an employee at the end of a contract or upon resignation or retirement, or upon the death of the employee, as a lump sum amount at the discretion of an employer if the contract of employment provides for it. He sought to rely in the decisions of this Court in the cases of Anthony Yamo Ihito v Basco Products (Kenya) Limited [2022] eKLR as well as Kenya Kazi Services Ltd v Dickson Onjwaya Wasike & 42 others [2021] eKLR) to buttress this position.
  15. The Appellant submits that the Respondent was awarded gratuity for 11 years without any reason, which he finds to be both illogical and unlawful.
  16. He submits that it is settled law that even where a court of law awards a grievant relief for unfair termination, such must not automatically be to the tune of a year's salary. He had reliance in [Hatari Security Gurads Ltd v Odongo \(Appeal E012 of 2022\)](#) [2023] KEELRC 2812 (KLR) (9 November 2023), and Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR, where the Court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that a trial Judge must justify or explain why a claimant is entitled to the maximum award.
  17. It is submitted that the award of Kshs. 86.891.40 to the Respondent herein is excessive, unjust and unwarranted just as too the salary mark placed at Kshs. 7,240/= is without basis at all since it was never averred or defended at all during trial.
  18. It is the submission of the Appellant that the decision of the lower court was reached in error and unlawfully.
  19. He submits that the Respondent was at all material times under duty to discharge his burden of proof in the claim as far as the alleged employment and infractions are concerned in line with the [Evidence Act](#), but the facts of his arguments and documents could not just do so, and that the true position of the matter is that he was neither in the employment of the Appellant nor had terms of service that would bring him under the protection of the [Employment Act](#), 2007.
  20. The Appellant finally pleads that the court considers his submissions and uphold the grounds of the appeal.

### **The Respondent's Submissions**

21. It is the Respondent's submission that the learned Magistrate correctly made a finding that the Respondent was employed by the Appellant as a security guard, and was not an independent contractor. That for the Appellant to prove that the Respondent was an independent contractor,



- which was not the case, he needed to put in a contract stipulating the terms of engagement. Reliance was on Mombasa Industrial Court Cause No. 229 Of 2013 Kenya Hotels & Allied Workers Union V Alfajiri Villas (Magufa Ltd) [2014] eKLR to support this position.
22. It is submitted that the Respondent never worked for any other party as alluded in the submissions. He submits that the Respondent testified that he could be sent lunch by one Dixon Obungu and from the Mpesa statement provided, the said payment was not a regular payment as compared to the Appellant's payments which were regular on a monthly basis. The Appellant never gave the time frame the Respondent was to work.
  23. The Respondent further submits that the Appellant only focused on the issue of employee – employer relationship, and failed to challenge the aspects on unlawful termination, gratuity, notice, house allowance, underpayment, rest days, leave and unpaid salary as was pleaded by the respondent.
  24. He contends that the Appellant in the memorandum of appeal never challenged the award on unlawful termination, notice, leave, house allowance, rest days & underpayment. He had reliance in Nairobi Court of Appeal Civil Appeal No. 219 Of 2013 Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others [2014] EKLK to buttress this position.
  25. The Respondent submits that under Sections 41 & 43 of the *Employment Act*, the Appellant needed to prove that he issued a notice to the Respondent, had a valid reason to terminate and held a disciplinary hearing to determine validity of the reason before terminating the respondent.
  26. That the Appellant confirmed that there was no notice and neither did he allege any reason for terminating the Respondent. That the Respondent had worked for over 12 years and thus he was entitled to the maximum compensation for unlawful termination together with payment in lieu of notice.
  27. It is the Respondent's submission that the Appellant never brought any document to prove that he ever went on leave, he was paying house allowance and/or had rest days each week worked. He submits that Under Section 74 of the *Employment Act*, it is the duty of the Appellant to avail documents to dispute the claim by the Respondent, but the Appellant never disputed the claims in the memorandum of claim except the issue of employment.
  28. It is submitted that the Appellant underpaid the Respondent as per the Wage Regulations and which he produced to demonstrate the same, and which claim was never disputed. He submits further that having worked for more than five years, he is entitled to payment of gratuity.
  29. The Respondent prays that the appeal be dismissed with costs.

### **Analysis and Determination**

30. Having considered the memorandum and record of appeal together with the rival submissions, the 5 grounds of appeal coalesce into the following three issues: -
  - i. Whether the Respondent was an employee of the Appellant.
  - ii. Whether the Respondent was unfairly terminated.
  - iii. Whether the Respondent deserves the awards by the trial court.



31. In the case of *Okeno v Republic* [1972] EA, 32, the then East African Court of Appeal had this to say on first appeals: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] EA 336) and for the appellate court to make its own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”

### **Whether the Respondent was an employee of the Appellant**

32. The Trial Court held that the Respondent was an employee of the Appellant. The Appellant disputes that finding, and avers instead, that the Respondent was an independent contractor.
33. Section 2 of the *Employment Act*, 2007 defines an employee as a person employed for wages or salary and includes an apprentice and an indentured learner. The Act does not define and neither does it apply to independent contractors.
34. In *Ready Mixed Concrete (South East) Limited v. Minister of Pension and National Assurance* (1968) 2 QB497, it was held that to establish existence or otherwise of a contract of service, a court is bound to examine the rights conferred and duties imposed by contract. It is irrelevant that parties declared the contract to be something else.
35. Further in *Stanley Mungai Muchai v. National Oil Corporation of Kenya* (2012) eKLR, the court spelt out the following tests which have come to be known as the irreducible minimums used in determining existence of a contract of service. First, is the control test that recognises a servant as a person who is subject to the control of a master as to the manner he/she shall do the work. Secondly, the integration test in which the worker is subject to the employer's rules and procedures rather than personal command, thirdly, is the test of economic or business reality which takes into account whether the worker is in business in his/her own account as an entrepreneur or works for another person who takes the risk of loss or chance of profit, and lastly, is the mutuality of obligation test, where parties make a commitment to maintain the employment relationship over a period of time.
36. The question then, is whether the relationship between the parties herein, falls within the irreducible minimums enumerated above.
37. The Appellant's evidence before the Trial Court was that he assigned the Respondent work to plant and take care of his sugarcane farm by weeding, harvesting, spraying and fertilizer application. It was his testimony that this work was continuous throughout the year.
38. At one point, the Appellant told court that he never had a farm guard and does not have one to date. On yet another, he admits having engaged the Respondent to patrol his farm and keep off animals and that he had no evidence of such an engagement.
39. The Appellant further told the trial court that he paid the Respondent monthly by Mpesa to a number registered in the name of one Millicent Osiala- the Respondent's wife.



40. The Mpesa statement produced in evidence further confirms that the Respondent sent money regularly to the number, and the said Millicent Osiala testified that the Respondent who is her husband, registered the number in her name.
41. DW2, one John Oduor Odera further confirmed to court that indeed, the Respondent worked for the Appellant as a casual labourer. It was his evidence that the Respondent used to take care of the Appellant's farm though he had no letter of employment. He further confirmed that sugar cane takes 18 months' to mature.
42. By the foregoing analysis of the evidence before court, it is clear as day that there was in existence an oral agreement that the Respondent guards the Appellant's farm. Secondly, there was provision of a service in the form of guarding services as well as planting and taking care of the sugarcane farm by weeding, harvesting, spraying and fertilizer application and lastly, there was payment of wages, the Appellant having admitted sending the Respondent money monthly for the services rendered.
43. The *Employment Act*, 2007 recognizes both oral and written contracts of service, and further places the obligation to issue an employee a written contract on the employer's door step.
44. I concluded by finding that there was an employer-employee relationship between the Appellant and the Respondent, and thus uphold the holding of the Trial Court in this respect.

#### **Whether the Respondent was unfairly terminated**

45. On whether the Respondent was unfairly terminated, the Appellant did not at all alleged to have taken any steps to fairly separate with the Respondent. His only defence was that he never employed the Respondent.
46. Having found that the Respondent was an employee of the Appellant, and the Appellant not having taken him through any form of disciplinary process, nor given reasons for the termination, renders the termination unfair.
47. In the premise, the finding of the trial court in this regard, is similarly upheld.

#### **Whether the Respondent deserves the awards by the trial court**

48. Upon arriving on a finding of an unfair termination, the trial court proceeded to award the Respondent as per his claim, without assigning reasons for the awards made.
49. I have said time without number that a finding of an unfair termination/dismissal does not as a matter of course entitle an employee to all the reliefs sought. It is my view that each remedy sought must be specifically proven. Prayers in a Claimant's claim are a mere wish list before they are proven.

#### **Unlawful termination & payment in lieu of notice**

50. The finding of an unfair termination does entitle the Respondent to an award of compensation. Going by the number of years the Respondent served the Appellant, I find and hold that the Respondent has made a case for a maximum award, and is hereby awarded 12 months' salary as compensation for the unfair termination.
51. In the same breath, and for reason that the Respondent was unfairly terminated, he is entitled to the statutory one month salary in lieu of notice.



52. The Respondent's evidence is that his salary had risen to Kshs. 6,500/- as at the time of termination. The Minimum Wage Regulation applicable at the time he was terminated was not produced in evidence, hence the amount applicable to the awards herein is Kshs. 6,500/- per month.

### **Overtime, House Allowance and Rest Days**

53. The Respondent did not lead any evidence to show that he worked overtime. The claim is dismissed and the award by the trial court is set aside. The claims for house allowance due and owing was equally not proven, similar to the claim for rest days. They all fail and the awards by the trial court in this respect are set aside.

### **Leave**

54. Under Section 74 of the *Employment Act*, it is the duty of the Appellant/employer to avail documents to dispute a claim by the Respondent. A claim for leave is one an employer can disapprove through production of leave forms which the Appellant did not do.
55. In the premise, I do uphold the award on account of leave.

### **Underpayment**

56. The Respondent had the duty of proving his case to the required standard. He did not produce the relevant wage orders he relies on and the relevant period of underpayment. This prayer is lacking in particularity and is therefore not proven. The trial Court's award on this account is set aside.

### **Gratuity**

57. Payment of gratuity is only payable where it forms part of the contract between the parties. The Respondent did not lead any evidence to show this to have been the case. (See Anthony Yamo Ihito v Basco Products (Kenya) Limited [2022] eKLR as well as Kenya Kazi Services Ltd v Dickson Onjwaya Wasike & 42 others [2021] eKLR),
58. In the final analysis, the appeal partly succeeds and I make the following orders: -
- a. The award on account of underpayment is set aside in its entirety.
  - b. The award of 12 months' salary for unfair termination is upheld at Kshs. 78,000/-
  - c. The award of one-month salary in lieu of notice is upheld at Kshs. 6,500/-
  - d. Payment on account of leave is equally upheld at Kshs. 6500/-
  - e. The Appeal having partly succeeded, parties are ordered to bear their own costs of both the appeal and the claim before the lower court.

59. Judgment of the Court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 20<sup>TH</sup> DAY OF JUNE, 2024.

**C. N. BAARI**

**JUDGE**

### **Appearance:**

Mr. Aluoka present for the Appellant



Mr. Bagada Present for the Respondent

Ms. Anjeline & Debra - C/As.

Page 5 | 5 Appeal No. E039 of 2022 - Judgment

