



**Otwane v Trakana Mombasa Limited (Appeal E048 of 2023)
[2024] KEELRC 2309 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2309 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E048 OF 2023
AK NZEI, J
SEPTEMBER 26, 2024**

BETWEEN

GEORGE DINDI OTWANE APPELLANT

AND

TRAKANA MOMBASA LIMITED RESPONDENT

*(Being an Appeal from the judgment of Hon. M.M. Wachira –
PM in MCELRC No. E837/2021 delivered on 12th May 2023)*

JUDGMENT

1. The Appellant herein was the Claimant in Mombasa CMC ELR Case No. 837 of 2021 where he had sued the Respondent vide a Memorandum of Claim dated 17th December, 2021 and filed in Court on the even date, seeking the following reliefs:-
 - a. A declaration that termination of the Appellant’s employment was unlawful and unfair.
 - b. Damages for unlawful termination of employment (14,658.85 X 12) Kshs. 175,906.20.
 - c. Payment in lieu of notice.....Kshs. 14,658.85.
 - d. Underpayment of the Appellant’s salary:-
 - i. October 2017 to April 2018 (13,960.80 – 12,000 x 7 months)Kshs. 13,725.25.
 - ii. May 2018 to January 2021 (14,658.85 – 12,000 x 33 months)Kshs. 87,742.05.
 - e. Issuance of a Certificate of Service.
 - f. Costs of the suit and interest.



- g. Any other relief that the Court may deem fit to grant
2. The Appellant had pleaded that he started working for the Respondent as a turn boy on 18th September 2017, earning a monthly salary of Kshs. 12,000. That while in the course of his employment on 21st August 2020, the Appellant was involved in a road traffic accident along Nakuru – Eldoret Road as a result of which he sustained injuries and could not, as a result, report back to work immediately.
 3. That while recuperating at home, the Appellant was paid his salary upto, and including January 2021, and no communication on the status of his employment was made, and neither was he served with a formal notice of termination of employment nor paid in lieu thereof. That the Appellant was not issued with a certificate of service.
 4. It was the Appellant’s further pleading that during the period of employment, the Respondent paid him a basic salary that was below the minimum in that from October 2017 to April, 2018 he was paid Kshs. 12,000 instead of Kshs. 13,960.80 as prescribed under Regulation of Wages (General) (Amendment) Order 2015 while from May 2018 to January 2021 he was paid Kshs. 12,000 instead of Kshs. 14,658.85 as prescribed under Regulation of Wages (General) (Amendment) Order 2017.
 5. Documents filed alongside the Appellant’s said Statement of Claim included the Appellant’s written witness statement dated 17th December 2021 and an evenly dated list of documents listing 2 documents. The listed documents were the Appellant’s NSSF statement and a demand letter dated 3rd December 2021.
 6. The Respondent entered appearance and filed response to the Appellant’s claim, admitting having employed the Appellant on 18th September 2017 but denying the allegations that the Appellant was employed as a turn boy, and that he was earning a monthly salary of Kshs. 12,000.
 7. That the Respondent had been employed as a cleaner, and that he was earning a salary of Kshs. 11,000.
 8. Further, the Respondent admitted the Appellant’s pleading that he was on 21st August 2020 involved in a road traffic accident while in the course of employment, as a result of which he sustained injuries and could not report to work immediately; and that the Appellant was, while recuperating at home, paid his salary upto and including January 2021.
 9. The Respondent further pleaded:-
 - a. that the Appellant catered for the Appellant’s medical bills after the accident as he was insured against occupational injuries, and was set to be compensated by the Respondent’s insurer for the injuries sustained.
 - b. that the Appellant was out of work from 21st August 2021 (2020) upto January 2021; despite the Respondent having contacted him in November, December and January asking him to visit a doctor of the Respondent’s choice to establish if the Appellant was fit to return back to work.
 - c. that a letter was on 3rd March 2021 taken to the Appellant’s premises by a representative of the Respondent, asking him to avail himself at work for purposes of being referred to a doctor, and to also explain his six month’s absence.
 - d. that the Appellant never responded to the said letter despite having received the same, and never reported back to work; thus deserting duty. That the Appellant and the Labour Officer were notified of the desertion.
 - e. that the Appellant was paid in accordance with his contract.



- f. that the Appellant could not have been issued with a Certificate of Service as he was never terminated, but deserted duty without notice; and that he is not entitled to compensation.
10. Documents filed alongside the Respondent's response were a witness statements of Rajab Nzaka Munga (dated 26th January 2022) and Maureen Makio (dated 25th October 2022).
 11. The Appellant filed reply to the Respondent's response on 15th February 2022, and therefore joined issues with the Respondent.
 12. On 25th October 2022, the Respondent filed a list of documents dated 25th October 2022, listing 5 documents. The listed documents were copies of an appointment letter dated 18th September, 2017, letter to the Appellant dated 1st March 2021, letter to Mombasa County Labour Office, copies of pharmacy receipts and salary vouchers.
 13. At the trial, the Appellant adopted his filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 5 of this Judgment. The Appellant further testified that he received a letter dated 1st March 2021 requiring him to explain why he was not working. It was the Appellant's further testimony that he was not paid February 2021 salary, was not paid regarding the injuries sustained by him, and that he had not received any termination letter. That he was working as a turn boy at the time of the accident.
 14. Cross examined, the Appellant admitted having signed the letter of appointment exhibited by the Respondent at the trial which stated that he had been employed as a cleaner. He however denied having worked as a cleaner. The Appellant further testified that after the accident, he was hospitalized at Molo Hospital. That the employer (Respondent) later took him to Mombasa but never took him to hospital. That the Appellant had not healed and that this was why he had not gone back to work. That he was going for treatment on his own. That he had been paid his salary until January 2021. That he was not able to work even at the time of the trial.
 15. The Respondent called 2 witnesses. DW-1 (Rajab Nzaka Munga) adopted his filed witness statement as his testimony. He testified that he on 3rd March 2021, he took to the Appellant the Respondent's letter dated 1st March 2021, which the Appellant received. That the Appellant returned the said letter to the Respondent's office the following day (on 4th March 2021) through a boda boda rider, which the witness (DW-1) received at the gate.
 16. DW-2 (Maureen Makio Mnyeshi) adopted her filed witness statement and produced in evidence the Respondent's documents referred to in paragraph 10 of this Judgment. The witness further testified that the Appellant was working as a cleaner and was later promoted to turn man [2017 – 2018]. That the Appellant had an accident and did not go back to work. That the Respondent stopped paying his salary as from February 2021. That the Appellant was being paid a monthly gross salary of Kshs. 12,000 and that his employment was not terminated by the Respondent.
 17. Cross examined, DW-2 testified that the Respondent had communicated to the Appellant on the duration he was to be in hospital but the Respondent did not have any evidence in that regard. That the Appellant was injured in the course of his employment, and that the issue was being dealt with by OSHA regarding compensation. That the Appellant had not reported to work, and that his February 2021 had not been paid as a result.



18. The trial Court delivered its Judgment on 12th May 2023 and dismissed the Appellant's suit with costs; having made a finding that the Appellant's employment had not terminated. The trial Court rendered itself as follows:

- “ 8. The Claimant did not produce any document to show that the Respondent has terminated his employment. The Respondent's witness said that the claimant has not shown a medical document from a doctor showing he cannot work. In his testimony, the claimant said he had not healed, and that is why he had not returned to work. The Respondent produced a letter dated 1/3/2021 which was served on the claimant by DW-1. The claimant was required to avail himself to be taken to a doctor and also explain why he was absent from duty for the last six months. Claimant did not respond to the letter, rather he returned it to the Respondent the following day. The said letter informed him that his salary would be withheld until he availed himself to a doctor ...
9. Having found that the claimant's employment was not terminated, it follows then that the next issue of whether the termination was unlawful or unfair does not arise ...”

19. It is to be noted that the Appellant, who was the claimant in the primary suit, admitted in evidence to having received the Respondent's letter to him dated 1st March 2021. He did not deny and/or rebut the Respondent's evidence that he returned it to the Respondent, and did not either respond to the same or avail himself for examination by a doctor.

20. Aggrieved by the trial Court's said Judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-

That the learned trial Magistrate erred in law and in fact:-

- a. in holding that the Appellant's claim was pre-mature.
- b. in holding that the Appellant had failed to prove that the Respondent had terminated his employment.
- c. in holding that the Appellant had failed to prove his case against the Respondent and thus consequently dismissing the Appellant's case with costs.
- d. in holding that the Appellant had absconded work.
- e. in holding that the Appellant was not entitled to the reliefs sought in his claim.
- f. by delivering a Judgment in total disregard of the provisions of law.

21. The Appellant is seeking the following reliefs on appeal:-

- a. that the appeal be allowed, the Judgment delivered on 12th May 2023 be set aside, the Appellant's case in the primary suit be upheld, and the prayers sought therein be granted to the Appellant herein.
- b. that costs of the appeal be borne by the Respondent.

22. This is a first appeal. The duty of a first appellate Court has long been settled by the Courts in various judicial decisions which include *Selle & Another v Associated Motor Boat Co. LTD & Another* [1968]



EA 123 and Peter v Sunday Post LTD [1958] EA 424 among many others. This duty was restated in Mursal & Another v Manesa [2022] eKLR where the Court stated:-

“ A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

23. Having considered the pleadings filed in the trial Court and the evidence adduced thereon, issues that fall for determination in my view, are as follows:
 - a. whether the Appellant was employed by the Respondent as a turn boy, and whether there was salary underpayment by the Respondent.
 - b. whether the Appellant’s employment was terminated by the Respondent, and if so, whether the termination was unfair.
 - c. whether the Appellant is entitled to the reliefs or any of the reliefs sought in the primary suit.
24. On the first issue, the Appellant’s letter of appointment dated 18th September 2017 states that the Appellant had been employed as a cleaner with a gross salary of Kshs. 11,000. The Appellant testified that he signed the said letter, but denied having worked as a cleaner. He pleaded and testified that he was employed and worked as a turn boy and earned a monthly salary of Kshs. 12,000.
25. On the other hand, the Respondent (DW-2) testified that the Appellant was employed as a cleaner and was later promoted (to a turn boy). No evidence, however, was tendered by the Respondent on when the alleged promotion was effected. Further, no evidence of change in job description or variation was adduced by the Respondent. Further, the Respondent’s letter dated 1st March 2021 and 23rd March 2021, produced in evidence by DW-2, clearly indicated that the Appellant was employed as a turn man (turn boy). Copies of salary vouchers exhibited by DW-2 also indicated that the Appellant was earning a gross salary of Kshs 12,000, the amount that the Appellant pleaded and testified that he earned monthly as a turn boy.
26. Although clause 3 of the Appellant’s contract of employment/letter of employment stated that the Respondent’s management reserved the right to transfer the Appellant to any other section within its departments, employing the Appellant as a cleaner and deploying him to work as a turn man (turn boy) without a formal variation of his job description and/or designation was an unfair labour practice on the part of the Respondent. The Appellant denied having worked as a cleaner, and the Respondent did not demonstrate that he did.
27. The Appellant pleaded and testified that there was underpayment of his salary as a turn boy; and relied on the 2015 and 2017 Regulation of Wages (General) (Amendment) Orders. The Respondent did not address that issue in evidence, despite having demonstrated by evidence that the Appellant had all along worked as a turn man (turn boy) earning a monthly gross salary of Kshs. 12,000. The trial Court did not address and/or determine the issue of the alleged salary underpayment; and fell into error by failing to do so.
28. In view of all the foregoing, I find and hold that the Appellant’s claim based on salary under-payment was proved, on a balance of probability. Salary under-payment occurring from one month to another is in the nature of a continuing injury as contemplated in Section 89 (formerly Section 90) of the



- Employment Act. The Appellant’s primary suit was filed within 12 months from February 2021 when payment of the Appellant’s salary ceased.
29. On the second issue, it is clear from the evidence on record that the Respondent did not terminate the Appellant’s employment. It was a common ground that the Appellant sustained injuries as a result of an occupational accident which occurred on 21/8/2020, and that the Claimant as a result stayed away from work until January 2021, and received his monthly salary during this period. The trial Court was not told, however, whether the Respondent complied with the provisions of the Work Injury Benefits Act (WIBA) by reporting the said accident to the Director Occupational Safety and Health Services to facilitate assessment of the Appellant’s degree of disablement (if any), and the time he was expected to be away from work.
30. On 1/3/2021, the Respondent wrote a letter to the Appellant and addressed him as follows:-
- “..In order to abide with the law, we have requested you severally to avail yourself so that we can take you to a doctor in a level 3 hospital and you seem not to welcome (sic) this move.....
- It is for the above reasons that we shall hold your February 2021 salary until when you shall avail yourself to be taken to a doctor...”
31. The Appellant admitted in evidence that he received the aforesaid letter on 3/3/2021. He did not respond to the said letter, and he did not avail himself for examination by a doctor as requested by his employer. Instead of complying with his employer’s request, the Appellant returned the said letter back to his employer. The Respondent did not terminate the Appellant’s employment, despite the foregoing disobedience/misconduct. His salary, however, remained withheld as per the said letter.
32. I uphold the trial Court’s finding that the Appellant’s employment was never terminated by the Respondent, but set aside the finding that the Appellant absconded duty. The Respondent cannot be allowed to benefit from its non-compliance with the provisions of the Work Injury Benefits Act (WIBA).
33. On the third issue, I uphold the trial Court’s refusal to award damages/compensation for unfair termination of employment as there was no termination of employment, in the first place. The claim for payment in lieu of notice was properly declined by the trial Court, as there was no termination of employment. I uphold the trial Court’s finding in that regard.
34. Having allowed the Appellant’s claim based on salary underpayment, I award the Appellant kshs. 13,725.60 being salary underpayment for the period October 2017 to April 2018, and kshs. 87,742.05 being salary underpayment for the period May 2018 to January 2021 as claimed, a total of kshs. 100,867.65.
35. In sum, the Appellant’s appeal partly succeeds, and judgment is hereby entered for the Appellant against the Respondent for kshs. 100,867.65. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
36. The Appellant is awarded costs of the appeal, to be taxed at the lower scale, and costs of proceedings in the Court below.
37. The Appellant is also awarded interest on the awarded sum, to be calculated at Court rates from the date of the trial Court’s judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH SEPTEMBER 2024

AGNES KITIKU NZEI



JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

