



**Del Monte Kenya Limited v Kyengo (Appeal E007 of 2024)  
[2024] KEELRC 2603 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2603 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E007 OF 2024  
NJ ABUODHA, J  
OCTOBER 25, 2024**

**BETWEEN**

**DEL MONTE KENYA LIMITED ..... APPELLANT**

**AND**

**SAMUEL NGUI KYENGO ..... RESPONDENT**

*(Being an appeal arising from the Judgment of Honourable P. MUTUA (MR)  
(SPM) delivered on 13th December, 2023 at the Chief Magistrates Court of  
Kenya at Thika in Employment and Labour Relations Case No. E024 of 2022)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 9<sup>th</sup> January, 2024, the Appellant appeals against the Judgment of Honourable P. Mutua (MR) (SPM) delivered on 13<sup>th</sup> December, 2024.
2. The Appeal was based on the grounds that:
  - i. The Learned Trial Magistrate erred in law and fact when he although properly held that the Respondent/Claimant was not unfairly dismissed but nevertheless held that the Respondent/Claimant was entitled to salary arrears, gross salary, service pay for the period worked, leave days for each year worked, costs of the suit and interests.
  - ii. The Learned Trial Magistrate erred in law and fact when he confused summary dismissal with wrongful termination thus arriving at a wrong decision.
  - iii. The Learned Trial Magistrate erred in law and fact when he entered judgment for the Respondent/Claimant against the Appellant inclusive of costs of the suit and interests contradicting his findings that the Respondent did not prove the claim against the Appellant.



- iv. The Learned Trial Magistrate erred in law and fact when awarded the Respondent service pay for the days worked contrary to the provision of the [Employment Act](#) and collective Bargaining Agreement.
  - v. The Learned Trial Magistrate erred in law and fact when he awarded the Respondent salary arrears, service pay for the period worked, leave days for each year worked without evidence and proof tendered in court by the Respondent.
  - vi. The Learned Trial Magistrate erred in law and fact when he awarded costs and interests of the suit to the Respondent without legal basis.
  - vii. The Learned Trial Magistrate erred in law and fact when he failed to analyse and/or appreciate the legal materials including the Appellant's written submissions and evidence adduced before him thus arriving at a wrong decision.
3. The Appellant prayed that the Appeal be allowed and the lower court Judgment delivered on the 13<sup>th</sup> December 2023 be set aside, dismiss the lower court claim with costs for the lower court and this Appeal.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates Dola, Magani & Company Advocates filed written submissions dated 29<sup>th</sup> August, 2024. On the award of Service pay of Kshs 220,965.00/= counsel submitted that the trial magistrate concluded that the termination/dismissal was fair. That the court despite finding the dismissal fair proceeded to award the Respondent service pay without any legal basis as there was no provision for service in summary dismissal under section 44 of the [Employment Act](#) nor in the CBA. Counsel relied on section 8(h) of the CBA on gratuity which excluded one terminated on gross misconduct.
6. Counsel submitted that the Respondent was terminated for gross misconduct and was not entitled to service pay under the agreement or Section 35(b) and (d) of the [Employment Act](#). Counsel relied on the case of Monica Wanza v Roof Spec & Allied Works Co. Ltd(2021) eKLR on this assertion. That the Respondent was a member of a gratuity or service pay scheme and NSSF established under section 8(h) of the CBA.
7. On the award of unpaid Leave of Kshs 441,930/= Counsel submitted that other than seeking the prayer the Respondent did not elaborate on it. That the Respondent did not prove how many leave days were not paid. That the Respondent did not give evidence to prove this claim which was a mere speculation. Counsel relied on the above case where the court declined to award overtime putting the burden on the employee to prove the same.

### **Respondent's Submissions**

8. The Respondent's Advocates Mulinge & Ochieng & Company Advocates filed its submissions dated 31<sup>st</sup> July, 2024 and counsel submitted on the duty of the first Appellate court was to re-evaluate the evidence adduced in the lower both in law and facts and come up with its own findings. Counsel relied on the case of Peters v Sunday Post limited(1958) EA 424 and Selle & Another v Associated Motor Boat Co. Ltd & Another(1968)(EA 123)on the duty of the first appellate court.
9. On the issue of whether the trial court erred in awarding salary arrears, service pay and unpaid leave after finding dismissal was fair counsel on salary arrears of Kshs 44,193.00/= submitted that the Respondent



prayed for salary for the month of February 2021 which despite working for the Appellant in the said month of February, 2021 and he was dismissed on 3<sup>rd</sup> April, 2021 he was not paid. That the Appellant did not give evidence of the payment of the February 2021 salary. That the Respondent did not call any witness to illustrate that he was paid or he did not work on the month of February for him not to be paid. That the Appellant did not deny that he worked in the month of February.

10. Counsel submitted that the Appellant did not have evidence like pay slip for that month to prove payment. That the trial court properly found that he was entitled to salary arrears and the same should not be disturbed.
11. On the award of service pay for the period worked counsel submitted that the Respondent was entitled to the same having worked for the Appellant for over 10 years with exemplary service. That the Respondent was not a member to the CBA referred to by the Appellant.
12. On the award of the untaken leave and unpaid leave allowance counsel submitted that the Respondent worked for 10 years without leave and he was entitled to Kshs 44,193/- times 10 years which is Kshs 441,930/= as claimed, proved and was awarded. That the Appellant did not give evidence to the contrary.
13. On the issue of whether the trial court erred in awarding costs and interests counsel submitted that the court was guided by section 12(4) of the Employment & Labour Relations Court Act on the discretion of awarding costs as it deems just. That some of the prayers the Respondent sought were successful and costs follow the event. Counsel relied on section 27 of the *Civil Procedure Act* and the case of Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others (2013) eKLR on costs following the event.
14. Counsel submitted that there were no unique circumstances that could persuade the trial court to depart from the general and well-established path. That the Appeal lacked merit, was frivolous, unsubstantiated and thus undeserving of the courts time and should be dismissed with costs.

### **Determination**

15. The court has considered the pleadings and submissions filed by the parties herein and observes that the principles which guide the court in an appeal from a trial court are now well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
16. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent in the sum of Kshs 44,193/=-, one month's salary arrears, Kshs 220,965/= as service pay and Kshs 441,930/= as unpaid leave together with costs and interests.
17. The court finds that the issues placed by the parties for determination in the appeal are with regard to the awards by the trial court and the costs since the issue of unfairness of termination/dismissal is not among the grounds of appeal and the court frames the issue for determination as follows: -
  - a. Whether the trial learned Magistrate erred in awarding the Respondent one month's salary arrears, service pay and unpaid leave.



- b. Whether the trial Learned Magistrate erred in awarding costs and interests to the Respondent.

**Whether the trial learned Magistrate erred in awarding the Respondent one month's salary arrears, service pay and unpaid leave.**

18. The court agrees with the trial court finding on the one month salary arrears for the month of February, 2021 since no evidence was produced by the Appellant to show that the Respondent was paid for the month of February, 2021 yet he worked. The last pay slip attached by the Respondent was that for January, 2021 and burden was on the Appellate who was the custodian of employment records to illustrate by evidence of a pay slip or payment receipts that the Respondent was paid. This ground of appeal therefore fails.
19. On the award of service pay, the court notes that as per the pay slip of January, 2021 the Respondent was a member of NSSF hence was not entitled to the same as per section 35(6) (d) of the Employment Act. The CBA section 8(h) provided that the service pay would be paid to any employee except those dismissed for gross misconduct. Even though the Respondent alleged that he was not a member of the CBA, the court notes that his employment letter stated that he will be subject to the existing CBA and from his pay slip there is deduction for union dues. The court also notes that the CBA had a service pay scheme which was also an exception under section 36(5)(b) of the Employment Act. Further, the Respondent ought to have produced his NSSF statements to show if the deductions made were never remitted by the Appellant. The trial in this regard erred in making this award. This ground of appeal therefore succeeds.
20. On the award of unpaid leave, the court notes that the Respondent was entitled to leave as provided for in section 28 of the Employment Act as well as per the CBA section 9(a) and employment letter Clause 5.1. However, the Respondent could not wait for the 10 years to claim the same upon dismissal. This being an employment claim it is governed by Employment Act which under section 90 limits such claims to three years or one year in case of continuing injury.
21. The Appellant's assertions that the Respondent did not prove that he never went for leave is untenable since the appellant was the custodian of employment records by virtue of section 74 of the Employment Act. The Appellant should have produced the Respondent's leave applications forms or payments of the same to illustrate that he went on leave or he was paid for the same.
22. The court notes that the Respondent was dismissed on 3<sup>rd</sup> March, 2021 and filed the case in the lower court in February, 2022. This was within the limitation period given under the Act and was therefore entitled to leave three years from the date of filing of the suit in 2022 and not the whole 10 years. In the case of Charles Muthusi Mutua v Kathi No Kakoka Services Limited [2022] eKLR the court had this to say:-

Bearing in mind the provisions of Section 90 of the Employment Act, I can only grant untaken unpaid for leave days for the three years preceding the date of filing this claim. Not the five years sought by the claimant. Therefore, Kshs. 27,844.50. Leave to employees is a statutory entitlement, and an obligation on the employer to ensure that the right is realized, under section 28 of the Employment Act. Where an employee alleges that he did not enjoy this right during the currency of the employment fully or to a certain extent, then it behoves the employer to disabuse the allegation by tendering evidence before the trier. The Respondent as the employer didn't.

23. The court therefore disagrees with the trial court on the award of unpaid leave for the 10 years and substitutes it with an award for three years. This ground of appeal hereby succeeds to that extent.



**Whether the trial Learned Magistrate erred in awarding costs and interests to the Respondent.**

24. Section 27 of the Civil Procedure Act provides as follows: -

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

25. The court notes that from the above provision the general rule is that costs follow the event in civil cases. Section 12(4) of the Employment and Labour Relations Court Act allows the court to order costs as it deems fit. The trial court upon finding the Respondent was the successful party awarded him costs which this court does not fault or challenge the trial court's discretion in awarding the same. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR the court gave the considerations the court ought to take in awarding costs as follows: -

To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.

26. In this case since the suit was instituted when the Appellant did not pay the Respondent his salary arrears and other dues then the trial court was justified in awarding costs to the successful party, in which case the Respondent herein.

27. In the upshot the Appeal partially succeeds as follows; \_

- a. The award for service pay is hereby set aside.
- b. The award for leave untaken for 10 years is hereby reduced from 10 years to three years being Kshs. 132,579/-
- c. Costs and interests at lower court

28. The appeal being partially successful each party shall bear their own costs of this Appeal.

29. It is so ordered.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024 DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION.**

