



Gichuru v Emmanuel Trading Company Limited (Employment and Labour Relations Appeal E023 of 2023) [2024] KEELRC 2758 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2758 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E023 OF 2023
ON MAKAU, J
NOVEMBER 8, 2024**

BETWEEN

BENARD KANJA GICHURU APPELLANT

AND

EMMANUEL TRADING COMPANY LIMITED RESPONDENT

JUDGMENT

Background

1. By a Statement of Claim dated 28th March 2023 the appellant alleged that he was employed by the Respondent on 17th November 2017 as a commercial Driver. His monthly salary was Kshs. 15,000/= and he worked for a five-year term. The salary was below the gazetted minimum wage and he was never paid house allowance. He used to work from 6.am to 7pm every day including public holidays culminating to 56 hours per week but no compensation was paid for the extra hours. He never went for any annual leave for the five years served. His statutory deductions were never remitted in accordance with the law.
2. He was dismissed on 30th January 2023 orally without notice or reasons and he was not accorded a hearing. Therefore, he contended that his dismissal was unfair and prayed for compensation, salary underpayment, house allowance, accrued leave of 21 days for each year served and service pay.
3. The Respondent filed a response dated 17th May 2023 admitting that it employed the appellant as a Medium Size Commercial lorry driver but his daily wage was inclusive of reasonable housing allowance, overtime, public holidays, annual leave and rest days. It admitted that it summarily dismissed the Appellant due to gross misconduct, which fundamentally breached his obligations under the contract of employment. Therefore, it averred that the Appellant was not entitled to the reliefs sought since he contributed to his dismissal and prayed for the suit to be dismissed with costs.



4. At the trial, the Appellant relied on his testimony and produced a bundle of documents. The Respondent relied on the evidence of one witness. After considering the evidence, the trial court entered judgement in favour of the Appellant whereby it found that the claim for unfair termination was proved and awarded one month's salary in lieu of termination plus six month's salary for unlawful termination, certificate of service, costs and interest. However, the Court dismissed the claim for underpayment, overtime, public holidays, leave days, and housing allowance for being time barred. It also dismissed the claim for service pay because the respondent regularly contributed NSSF for the appellant as required by the law.
5. The Appellant was aggrieved by the said decision and preferred this Appeal on the following grounds of appeal that:
 - a. The learned trial magistrate erred in law and in fact by holding that the claim for underpayment was a continuing injury and the claim should have been instituted not later than 17th November 2018, one year after employment whereas the same is a right.
 - b. The learned trial magistrate erred and was wrong by entirely dismissing the claim for overtime on account that the it was time barred by virtue of section 90 of the Employment Act despite the Respondent acknowledging working on overtime.
 - c. The learned trial magistrate erred and was wrong by entirely dismissing the claim for leave days salary of 21 days on account that the it was time barred by virtue of section 90 of the Employment Act and that it should have been instituted one year after the Appellant's employment.
 - d. The learned trial magistrate erred and misdirected herself by dismissing the claim for housing allowance on account that the same is a continuing injury which should have been instituted within one year of the Appellant's employment.
 - e. The learned trial magistrate erred and was wrong by entirely dismissing the claim for public holidays on account that the same is a continuing injury which should have been instituted within one year of the Appellant's employment.
 - f. The learned trial magistrate erred and was wrong by failing to calculate the damages of wrongful dismissal using the Regulation of Wages (Amendment) Order 2022 which dictates that a commercial driver is entitled to a salary of Kshs. 30,266.80 per month as against the sum of Kshs. 15,000/= which was used.
 - g. The learned trial magistrate erred and was wrong by awarding the Appellant one month's pay of Kshs. 15,000/= as against Regulation of Wages (Amendment) Order 2022 which dictates that a commercial driver which dictates that sum should be Kshs. 30,266.80.
 - h. The learned trial magistrate erred and misdirected herself by misapplying and misapprehending the law on Limitations and continuing injuries and thus arriving at a wrong decisions and conclusion on continuing injury claims.
 - i. The learned trial magistrate erred in law and in fact by failing to consider even adequately adopt and appreciate the Appellant's evidence the written submissions of the Appellant on record, the authorities annexed and cited therein and the statutes in support of the Appellant's case hence arriving at a wrong decision.
 - j. The learned trial magistrate misdirected herself by arriving at a decision that was obviously against the weight of the evidence tendered at trial.



Submissions by the appellant

6. It was submitted for the appellant that the claim for salary underpayment, overtime, leave, public holidays worked and housing allowance were not statute barred since section 90 of the *Employment Act* provides for the three years limitation period. For emphasis, the reliance was placed on Charles Ogola & two others v Mansion Kart Kenya Limited [2019] eKLR where the Court held that underpayment of salary is a right and therefore it is not a continuing injury.
7. Further reliance was placed on G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR where the court held that unpaid terminal dues do not constitute continuing injury under section 90 of the *Employment Act*.
8. In view of the above precedents, it was submitted that the appellant is entitled to the underpaid salary for three years before the date of termination. Accordingly, it was submitted that the applicable Wage Orders are those gazetted in 2018 and 2022 which entitles the appellant to a total of Kshs. 462,047.85.
9. In the alternative to the foregoing it was submitted that even if the claims were continuing injury under section 90, the termination of the appellant's employment occurred on 30th January 2023 and the suit was filed on 13th April 2023, just four months after the date when the cause of action arose. Reliance was placed on Michael Olewe & 37 others v Hatari Security Guards Limited [2022] eKLR where Radido J held that the claim for underpayment, house allowance, leave allowance, overtime and underpayment and unremitted statutory deductions accrues at the end of every month and therefore they constitute continuing injury and it ought to be filed in court within 12 months from the date of cessation.
10. Accordingly, it was submitted that the appellant is entitled to compensation for overtime, public holidays, leave and house allowance for one year. The claim was computed thus, overtime pay at the rate of four hours per day equaling to Kshs. 238,790.68, eleven public holidays for one year equaling to Kshs11,0978.82, 21 leave days equaling to 21,186.76 and house allowance of Kshs. 54,489.24.
11. Finally, it was submitted that the respondent admitted that the business collapsed and was closed indefinitely. Accordingly, it was argued that the appellant did not contribute to the termination of his employment and therefore the award of six months salary compensation should be enhanced to the statutory maximum twelve months' salary.
12. In view of the above matters, the court was urged to allow the appeal with costs.

Submissions by the respondent

13. On the other hand, it was submitted for the respondent that the claim for salary underpayment, overtime, leave, public holidays worked and housing allowance were statute barred since section 90 of the *Employment Act* because they are in the nature of continuing injury and suit ought to have been commenced within 12 months from the date of cessation. Consequently, it was submitted that the suit ought to have been commenced on 13th April 2023.
14. To fortify the foregoing submission, reliance was placed on several decisions of the court including G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR, and Obatta v Radar Limited [Appeal E001 of 2021] [2024] KEELRC 64 (KLR) where it was held that claim for salary underpayment, overtime, leave, public holidays worked and housing allowance are continuing injuries for purposes of limitation of actions.
15. It was further submitted that the appellant's daily wages were inclusive of house allowance while the claim for overtime was exaggerated. As regards salary underpayment, it was submitted that the



appellant was driving a medium size commercial vehicle and as such the salary he was receiving was appropriate. Consequently, it was submitted that the trial court fully considered the evidence and submissions presented and neither erred in assessing the award of compensation for unlawful termination nor in dismissing the other claims for being statute barred.

Analysis and determination

16. The jurisdiction of the Court as a first appellate Court is well settled. In the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212, the Court held that:

“On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

17. Having considered the evidence that was tendered during the trial and the submissions made in this appeal, the followings issues fell for determination:

- a. Whether or not the appellants claim for salary underpayment, overtime, leave, public holidays worked and housing allowance were statute barred.
- b. Whether or not the award of compensation for unlawful termination should be interfered with.
- c. Who should bear the costs of the appeal?

Statute barred claims

18. Section 90 of the [Employment Act](#) provides as follows:

“90. Limitations

Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#) (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

19. The forgoing provision limits the period within which a suit founded on employment contract should be commenced. The first category involves any claim other than continuing injury which are to be commenced within three years from the date when the cause of action arose. The second category involves continuing injuries which are to be commenced within 12 months from the time when the injury ceases.

20. The blacks Law Dictionary defines continuing injury as:

“a harm or damage that is on-going and not a one-time event. It can be caused by a criminal action, such as assault, or civil action such as defamation.

Continuing damages are damages that accrue from the same injury or from the repetition of similar acts between two specified periods of time.”



21. The several precedents cited above including *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR, and *Obatta v Radar Limited* [Appeal E001 of 2021] [2024] KEELRC 64 (KLR), the court held that the claim for salary underpayment, overtime, leave, public holidays worked and housing allowance were continuing injuries for purposes of limitation of actions and ought to have been commenced within twelve months from the time of cessation.
22. In the present case, the appellant filed suit within four months after the termination of his employment. It follows that the claim for salary underpayment, overtime, leave, public holidays worked and housing allowance were not statute barred under section 90 of the *Employment Act*. Therefore, I find and hold that the trial court erred in dismissing the said claims contrary to the evidence presented.
23. Having found that the trial court erred in dismissing the claim for salary underpayment, overtime, leave, public holidays worked and housing allowance on account of limitation of actions under section 90 of the *Employment Act*, I proceed to determine whether the appellant was entitled to the said claims. The claim for underpayment is straight forward. By the written submissions, the appellant prayed for underpaid salary for 36 months from 30th January 2020 to 30th January 2023 totalling to Kshs. 462,047.85. The basis of the claim is the Regulation of Wages (General)(Amendment) Order of 2018 and 2022 which took effect on 1st May 2018 and May 2022 respectively.
24. Under the 2018 Wage Order, the monthly basic salary for a medium commercial vehicle driver outside cities and municipalities, like in this case, was Kshs.18,881.21. The appellant was receiving Kshs. 15,000 amounting to a monthly underpayment of Kshs. 3,881.21 x 27 months = Kshs. 104,792.67 for the period from January 2020 to April 2022. Under the 2022 Wage Order, the monthly basic salary was Kshs. 21147 less paid Kshs.15,000 representing a monthly underpayment of Kshs. 6,147 x 9 months = Kshs. 55,323 for the period from May 2022 to January 2023. Consequently, the appellant is entitled to Kshs. 160,115.67 as underpaid salary.
25. As regards housing allowance, the Appellant urged the court to award house allowance for 12 months. He is entitled to more but I will only award what he has submitted for, based on the 2022 Wage Order. Hence his monthly house allowance is assessed at Kshs. 21147 x15% = 3,172.05 totalling to Kshs. 38,064.60.
26. The appellant further urged the court to award leave for one year which is below his entitlement. Never the less I award him 21 leave days under section 28 of the *Employment Act* equalling to Kshs. 21147 x 21/30 = Kshs. 14,802.90.
27. The claimant also urged the court to award him 11 public holidays in a period of one year. No particulars of the public holidays were pleaded and the court cannot ascertain which of the many public holidays in Kenya did the appellant work. I say so because of late there have been many public holidays declared for one reason or another. Consequently, I decline to grant the claim for public holidays worked.
28. As regards the claim for overtime, the appellant alleged that he used to work from 5Am to 5PM equalling to 12 hours per day which translated to 4 hours overtime work. However, the respondent averred that the work was starting at 8.00AM and the vehicles started at 9.00AM but the closing depended on the driver and the nature of work. The appellant did not prove that he routinely reported to work at 5AM, but he confirmed that he was ending at 5 PM. He further did not rebut the evidence by the respondent that the business was closed on Sundays. Consequently, I also decline to award the claim for overtime for lack of particulars and supporting evidence.



29. Finally, the appellant admitted that the employer remitted NSSF contributions for him and therefore the claim for service pay must fail because under section 35(6) of the *Employment Act*, the said claim is disqualified in the circumstances of this case. The subsection disqualifies employees from service pay in the following terms:

- “(6) This section shall not apply where an employee is a member of-
- a. a registered pension or provident fund scheme under the *Retirement Benefits Act*;
 - b. a gratuity or service pay scheme established under a collective agreement;
 - c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - d. the National Social Security Fund.

Quantum of compensation for unlawful termination

30. On the second issue, the Appellant’s claim was that he was entitled to maximum compensation as he had worked for over 5 years and did not contribute to the termination as the Respondent confirmed that it had closed business. The second ground cited upon which the quantum awarded was faulted, is that the trial court used lower salary than the minimum amount prescribed by the law.

31. In exercising discretion to grant compensation for unlawful termination, the court is required to seek guidance from section 49 (4) of the *Employment Act*. In the instant case, the relevant factors for consideration are in subsection (4) b, e, f and g which provide for need to evaluate:

- “(b) the circumstances in which the termination took place, including the extent if any, to which the employee caused or contributed to the termination;
- (e) the employee’s length of service with the employer;
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;”

32. The Court of Appeal, in *Oi Pejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR, emphasized the need for a court to be guided by sound judicial principles when exercising discretion, thus:

“The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months’ pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the



trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention.”

33. In awarding the compensation of six months’ salary for unlawful termination, the trial court stated as follows:

“Section 49(1)(c) of the Act caps the maximum compensation for wrongful dismissal or unfair termination at twelve months gross salary subject to statutory deductions. Further section 49(4) provides for the factors that this court should consider when making an award under this head. I note that the Claimant worked for 5 years, he did not contribute in any way to his dismissal. As such I award him six months salary as compensation for wrongful dismissal which amounts to (Kshs.15000.00*6) = Kshs. 90,000.”

34. Guided by section 49(4) above and the precedent by said the Court of Appeal, I am satisfied that the trial court gave justification for her discretion on award. The court considered relevant factors before arriving at the award. However, the court did not compute the award based on the appellant’s correct gross salary as provided under section 49(1)(c) of the Act. As a result, the award was manifestly erroneous and below the correct amount.

35. In the *Postal Corporation of Kenya v Andrew K Tanui* [2019] KECA 489 (KLR) (Civ) (19 July 2019) Judgment the Court of Appeal held that gross salary comprises the basic salary plus allowances. In this case, the appellant was receiving a basic salary of Kshs. 15,000 but the appellant pleaded Kshs. 30,266.80 as his gross salary being the minimum salary under the General Wage Order published in May 2022.

36. The trial court dismissed the claim for house allowance and underpayment on account of limitation of actions but that did not entitle the court to omit the same from the computation of compensation for the unlawful termination. I have already made a finding of fact that the said dismissal of the claim for house allowance and underpayment was an error.

37. Respondent admitted that the appellant was employed as a medium size commercial vehicle driver and as such, under the General Wage Order 2022, the appellant’s basic salary was Kshs. 21147 and a house allowance of 15% of the same being Kshs.3,172.05. Therefore, his correct monthly gross salary was Kshs. 24,319.05 and multiplying it by six months, the correct award is Kshs. 145,914.05.

38. In *Butt v Khan* [1978] eKLR the Court of Appeal held that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

39. In the instant case the trial court failed to apply the correct principles of law and also misapprehended the evidence, when he decided to use Kshs. 15,000 as the appellant’s gross salary instead of ascertaining the correct gross salary and thereby arrived at a figure that was entirely erroneous and inordinately low quantum of compensation. Consequently, I am entitled to interfere with the discretionary award given by the trial court to the extent highlighted above. Likewise, the award of one-month salary in lieu of notice is due for interference in this appeal.



Conclusion

40. I have found that the appellant's claim for salary underpayment, overtime, leave, public holidays worked and housing allowance were not statute barred under section 90 of the *Employment Act*. I have further found that the discretionary award of damages by the trial court was erroneous and fit for interference on appeal. I have also assessed the proper quantum of damages payable to the appellant. Consequently, the appeal is allowed and the lower court judgment set aside and replaced with the following order in favour of the appellant:

- a. One-month salary in lieu of notice Kshs. 24,319.05
- b. Six months' compensation Kshs.145,914.05
- c. Salary underpayment Kshs.160,115.67
- d. House allowance Kshs. 38,064.60
- e. Leave Kshs. 14,802.90
Total Kshs. 383,216.27
- f. The award is subject to statutory deductions but the appellant is awarded costs of the appeal and the court below plus interests at court rates from the date of lower court judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH NOVEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

