



**Chakaya v Meat Magic Enterprises Limited (Appeal E036 of 2024)
[2024] KEELRC 13451 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13451 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E036 OF 2024
M MBARÚ, J
DECEMBER 16, 2024**

BETWEEN

DANIEL MUWEYE CHAKAYA APPELLANT

AND

MEAT MAGIC ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. The appeal arises from the judgment delivered on 29 February 2024 in Mombasa MCELRC No.E600 of 2022. The appellant is seeking that the judgment be set aside and an order allowing the claimant to be issued with costs.
2. The background of the appeal is a claim filed by the appellant before the trial court on the basis that he was employed by the respondent as a salesperson from July 2017 until 31 May 2022 at a wage of Ksh.25, 000 per month. He resigned from his employment and requested to be paid terminal dues, including accrued leave days, overtime, public holidays and a certificate of service. For four and a half years, the appellant had not taken his annual leave, and during public holidays, he was at work without compensation. He worked 4 hours overtime. He claimed the following dues;
 - a. Service pay at 15 days for 5 years Ksh.50,000;
 - b. Unpaid leave for 4 years ksh.70,000;
 - c. Public holidays for 4 years ksh.73,333;
 - d. Salary arrears from April to August 2020 when salary was reduced by 20% Ksh.25,000;
 - e. Overtime of 4 hours each day Ksh.428,333;
 - f. Costs of the suit.



3. In response, the respondent admitted that the appellant resigned from his employment and the claims made are without merit. Statutory remittances were effected and service pay is not due. There was a contribution to a pension scheme. He took all accrued leave days. During COVID-19, the respondent reviewed its business and engaged the appellant on a needs basis for a 20% reduction as agreed upon. There was voluntary resignation and the claims made are not justified.
4. The trial court delivered judgment and held that employment was terminated fairly there was no prima facie case established against the respondent and the reliefs sought were without merit. The claim was dismissed with costs.

Aggrieved, the appellant has 4 grounds of appeal;

1. The learned magistrate erred in law and fact in finding that the appellant was not entitled to service pay where there was no evidence of statutory dues provided.
 2. The learned magistrate erred in law and fact in disregarding the appellant's evidence that he was not accorded leave.
 3. The learned magistrate erred in law in failing to consider the evidence that the appellant's salary arrear from April to August 2020 had been unpaid and remained outstanding.
 4. The learned magistrate erred in law and fact in failing to appreciate that no documentary evidence had been tendered by the respondent that discharged the burden of proof of payment of salary arrears and pending leave.
5. Both parties attended and agreed to address the appeal through written submissions.
 6. The appellant submitted that the trial court failed to award service pay because this was not proved. There is no evidence that the respondent complied with Section 35(5) and (6) of the *Employment Act*, and service pay is due at 15 days for every year worked. While the appellant was registered with the NSSF, there were no remittances by the respondent. No record of payment was submitted. In the case of *Elijah Kipkoros Tonui v Ngari Opticians t/a Bright Eyes Ltd* [2014] eKLR, the court held that registration with NSSF is insufficient proof of remittances to the fund. This case law is relevant because it establishes a precedent that mere registration with NSSF does not prove remittances, which is the crux of the appellant's argument.
 7. The leave claim was not challenged, and there were no work records to demonstrate that the appellant was allowed to take annual leave.
 8. The appellant worked overtime for 4 hours each day without pay. There were 44 public holidays worked without pay. No records were filed on overtime and public holidays payments as held in *Joseph Omollo v Board of Management Kisumu Boys High School Cause No.181 of 2015* (Kisumu).
 9. Salary arrears are due for work done but not paid for. A 20% reduction in wages is not justified.
 10. The respondent submitted that under Section 35(5) and (6) of the *Employment Act*, service pay is not due where the employee is a member of a pension fund, as held in *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] eKLR.
 11. On the claim for annual leave, Section 28 of the *Employment Act* does not allow leave to accrue beyond 18 months.
 12. The alleged salary arrears are not due because, following COVID-19, all employees had a wage reduction of 80% due to government restrictions. This force majeure allowed measures to sustain the



business as held in *Geoffrey Mworira v Water Resources Management Authority & 2 others* [2015] eKLR. 'Force majeure' is a legal term that refers to unforeseeable circumstances that prevent someone from fulfilling a contract. Under Section 10(5) of the *Employment Act*, parties are allowed to change terms and conditions of employment by agreement. The respondent argues that the wage reduction was a result of force majeure and therefore justified.

13. The appellant failed to discharge the burden of proof that there was an unfair termination of employment, that the remedies sought were justified, and that the claim was properly dismissed with costs.

Determination

14. This is a first appeal. As a first appeal court, the court must reassess and review the entire evidence tendered at trial and make a conclusion. However, the court must remember that the trial court had the opportunity to hear the witnesses.
15. It is not contested that the appellant resigned from his employment on 31st May 2022. This resignation is significant because it affects the appellant's entitlement to certain benefits and the respondent's obligations under the *Employment Act*.
16. Regardless of the reason for his termination, the appellant was entitled to terminal dues under his employment contract, in law, and for work done. This entitlement underscores the importance of upholding legal rights in employment matters.
17. The appellant's claim covered service pay, unpaid leave days, public holidays, salary arrears, overtime, and costs. This comprehensive claim underscores the weight of the appellant's case.
18. What comes out clearly from the records and proceedings before the trial court is that the respondent did not file any work records. The record for statutory payments, leave days, work hours, or the evidence of the agreements made for wage deductions due to the COVID-19 pandemic from April to August 2020. This contradicts Section 10(6) and (7) of the *Employment Act*. Upon being served with the claim, the respondent, as the employer, had to submit all work records.
19. In the cases of *Mbukha v CRJE (East Africa) Limited* [2022] KEELRC 4059 (KLR); *Hamisa v Karisa* [2023] KEELRC 3461 (KLR); and *Nyonga v China City Company Limited* [2024] KEELRC 1364 (KLR), the courts have held that failure and refusal to submit work records is an employment offence. This denies the court crucial records. This is a statutory requirement, and the employee's word is correct when the court is denied such records.
20. On the claim for service pay, the appellant's admission of his NSSF membership is significant. He admitted his membership, but the respondent did not remit his dues, a crucial point in the case.
21. This matter would have been resolved instantly by the respondent by submission of the payment statement together with proof of payments to the statutory body. Such is lacking, and despite the appellant being registered with NSSF, that is insufficient proof that there were monthly remittances for the appellant's benefit. Payment of statutory dues is placed upon the employer. Such deductions should be at the source, and remittances must have evidence.
22. The trial court erred in relying on the respondent's mere allegations that the appellant was a member of the fund without any proof.
23. Service pay is due based on the last wage paid for a minimum of 15 days for each full year worked. The appellant worked for four full years at 25,000 per month. The claimant of 50,000 in service pay is justified.



24. On the claim for unpaid leave, under Section 28 of the *Employment Act*, an employee has the right to annual leave for at least 21 days annually. However, this can be accumulated up to 18 months. No record was filed of the appellant taking any annual leave. He is entitled to 18 months' annual leave, which is 33 days. On the monthly wage of Ksh.25 000, annual leave pay is Ksh.27 500.
25. On the claim for work during public holidays and overtime work, public holidays are special days gazetted by the Minister. Each should be particularized by the employee, which is different here. On overtime, the basis is that the appellant worked for an hour overtime each week for 24 months. He filed a worksheet for a single day. The record is overwritten, hours manipulated, and not clean enough to justify the claims for overtime work for over 4 years.
26. For salary arrears, as correctly submitted by the respondent, parties can change work terms and conditions upon agreement under Section 10(5) of the *Employment Act*. However, such an agreement must be in writing. The employee must consent to a change of work terms and conditions, particularly to his detriment or disadvantage. In the case of *Terry Muigai v SKF Kenya Limited* [2021] eKLR, any employment terms change must be made with the employee's written consent. See *Dock Workers Union – Kenya v Kenya Ports Authority* [2024] KEELRC 2109 (KLR).
27. In *Joseph Irungu Kimani v Kensalt Limited* [2021] KEELRC 1290 (KLR), the Court held that a unilateral variation of terms of employment by an employer is an unfair labour practice, as contemplated under Article 41(1) of *the Constitution*. This position is reiterated in *Daniel Njuguna Mwangi v De La Rue Currency Security Print Limited* [2017] eKLR that an employer's unilateral decision to downgrade the employment terms of an employee is unlawful.
28. In this case, there is no evidence of the appellant's written consent to have his wage reduced. His claim for Ksh.25 000 is justified.
29. Regarding costs for the trial court and this appeal, the appeal is partially successful, and costs are due at 50%.
30. Accordingly, the judgment in Mombasa CMELRC No.E600 of 2022 is hereby reviewed in the following terms;
 1. The appellant is entitled to service pay ksh.50,000;
 2. Accrued leave Ksh.27,500;
 3. Unpaid salaries from April to August 2022 ksh.25,000;
 4. 50% of the costs of the suit before the trial court and for this appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

