



**Omondi v Kenya Kazi Services Limited (Appeal E086 of 2021)
[2023] KEELRC 196 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 196 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E086 OF 2021
J RIKA, J
JANUARY 31, 2023**

BETWEEN

LINUS OCHIENG' OMONDI APPELLANT

AND

KENYA KAZI SERVICES LIMITED RESPONDENT

*(An Appeal from the Judgment of the Chief Magistrate's Court
at Nairobi [Hon. L. Gicheha, delivered on 23rd July 2021)*

JUDGMENT

1. The Appellant moved the Trial Court to declare that he was unfairly dismissed by the Respondent, and to grant him compensation for unfair dismissal, and terminal benefits.
2. Upon hearing the Appellant, and Senior Security Officer Wilberforce Munoko for the Respondent, the Trial Court dismissed the Appellant's case with costs.
3. He filed this Appeal, outlining the following grounds: -
 - a. The Trial Court did not analyse evidence.
 - b. The Trial Court introduced alien concepts unknown to employment law.
 - c. The Trial Court did not consider the prayer for overtime, in accordance with the Wage Orders.
 - d. The Trial Court erred by declining the prayer for annual leave.
 - e. The Trial Court erred by not making reference to the [Regulations of Wages \[Protective Security Services\] Order 1998](#) on gratuity.
 - f. The Trial Court erred in failing to award terminal benefits that were not rebutted by employment records.



- g. The Trial Court erred by placing the burden of proof of terminal benefits on the Appellant, while the Respondent was the custodian of employment records.
 - h. The Trial Court erred in failing to decide on the unfairness of termination, holding that the Appellant ought to have filed an Appeal before the Respondent.
 - i. The Trial Court did not consider the Claimant's submissions.
4. Parties agreed that the Appeal is considered and determined on the strength of the Record of Appeal, and Closing Submissions. They confirmed filing of Submissions at the last mention on October 7, 2022.

The court finds: -

5. The evidence presented at the Trial Court was sufficient to show that termination of the Appellant's contract, was based on valid reason and carried out fairly.
6. He was involved in a confrontation with his Supervisor. In his evidence he told the Trial Court that he was accused of yelling at the Human Resource Manager. He was issued a letter to show cause, which he opted not to respond to. He was invited to a disciplinary hearing. He attended the hearing, in the presence of his trade union representative. A decision to dismiss him was made and communicated to the Appellant. The Appellant did not complain that he was denied a right of appeal, or that his contract and labour instruments in place, granted him such a right which he was denied. The Trial Court stated in passing, that the Appellant did not appeal dismissal decision. This does not in any way show, that the Trial Court abdicated its responsibility to determine unfairness of termination, as urged in the Grounds of Appeal. The Trial Court looked into the procedural, as well as substantive aspects of termination, and relying on decisions of superior jurisdiction, determined that termination was fair.
7. The Appellant had grievances concerning his salary, but this did not justify the manner of his approach to his Seniors. An Employee is not allowed to go yelling at his Seniors, simply because he has a grievance. There are grievance procedures, chains of command, and acceptable communication channels, in workplaces.
8. The ground relating to overtime is without merit. The Appellant testified on cross-examination that he was paid overtime as indicated in his pay slips on various months. It was paid at the rate of 1.5% and 2% of his basic salary. The Trial Court considered this evidence from the Appellant. It was a correct appreciation of the facts that, having conceded he was paid overtime, the Appellant had the burden of establishing, on which other months, overtime was not paid. There is evidence from the pay slips exhibited before the Trial Court that overtime was paid. If there is a period over which it was not, or if the incorrect formula was adopted in reaching what was paid, it was for the Appellant to establish this. It cannot be said that the Trial Court shifted the burden of proof on the Appellant.
9. On leave, the Appellant told the Court that annual leave had been calculated at Kshs 15,880. He was paid this amount on September 25, 2019, through his bank account, and the Trial Court did not err, in concluding that the Appellant was not entitled to more than was paid.
10. The Court does not think it was very kind of the Appellant's Advocates to submit that the Trial court introduced alien concepts unknown to employment law, in arriving at its Judgment. Judicial Officers make errors of law or fact, but this does not warrant attacks from litigants, such as contained in the Appellant's Grounds of Appeal. As Lawyers, we are not averse to disagreeing on interpretation of the law, but we must disagree respectfully. The Appellant does not in any event, specify what the alien concepts were introduced to employment law by the Trial Court.



11. The last ground relates to gratuity under the *Regulation of Wages [Protective Security Services] Order, 1998*. Regulation 17 states that: -

‘After 5 years of service with an Employer, the Employee shall be entitled to 18 days’ pay for every completed year of service by way of gratuity based on the Employee’s wage, at the time of termination of service.’
12. The Trial Court declined the prayer for gratuity on the ground that the Appellant was registered with the NSSF. The Trial Court cited Section 35 of the *Employment Act*.
13. The Court does not think that Section 35 of the *Employment Act*, has the effect of nullifying the Wage Order on gratuity. The Wage Order is an independent legal instrument, conferring a benefit on particular Employees in a specified industry. Gratuity under the Wage Order, is not stated to be subject to the requirements of the *Employment Act*. In the view of the Court, it can only be interpreted as an additional benefit, available to the Employee. From the perspective of Section 35, the Claimant would not be entitled to claim service pay. The Court does not think however, that this means he cannot claim gratuity under Regulation 17. Regulation 17 of the Wage Order, has not been rendered inapplicable, by Section 35 of the *Employment Act*. Employees on contracts granting them gratuity, are not barred from receiving the benefit, on account of their subscription to the N.S.S.F. The intention in Section 35 of the *Employment Act* is to ensure that all Employees have social security, rather than limit the different forms of social security tools, available to Employees through their contracts, laws and labour instruments.
14. The Court is aware that different Courts have given different interpretation to gratuity under Wage Orders, vis-à-vis Section 35 of the *Employment Act*. In interpreting employment contracts and laws, in the face of ambiguities, the Court has an obligation to give an interpretation which confers a more favourable outcome upon the Employee.
15. The Court would conclude that the Appellant merited gratuity under Regulation 17 of the *Wage Order* which was incorporated to his contract of employment. It was a benefit which accrued to him, by dint of his years of service.
16. The Appellant worked slightly over 5 years, and is entitled to gratuity at Kshs. 54,031.

In sum, it is ordered: -

- a. The Appeal is allowed in part, on the prayer for gratuity.
- b. The Appellant shall be paid gratuity at Kshs. 54,031.
- c. No order on the cost of the Appeal.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.

JAMES RIKA

JUDGE

