



**Ngongodi v Yellowline Logistics Limited (Employment and Labour Relations Appeal E016 of 2022) [2023] KEELRC 224 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 224 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E016 OF 2022**

**AK NZEI, J  
JANUARY 26, 2023**

**BETWEEN**

**AYUB MWALULUNGO NGONGODI ..... APPELLANT**

**AND**

**YELLOWLINE LOGISTICS LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Hon. Mr. C.N. Ndegwa, Senior Principal Magistrate at Mombasa made on 8th February 2022 in MSA ELR MCC Cause No. 682 of 2019)*

**JUDGMENT**

1. The Appellant was the claimant in Mombasa CMC ELR Case No 682 of 2019 Whereby he had sued the Respondent claiming,
  - a. Notice pay - Kshs 29,160
  - b. Unpaid leave (21 days) - Kshs 27,085
  - c. Overtime worked (2 hours per day x30) X 12 = 720 hours - Kshs 928,633.84
  - d. Unpaid salaries for April and July 2018 - Kshs 67,068
  - e. Compensation for unfair/unlawful termination - Kshs 402,408
  - f. Salary underpayment inclusive of house allowance (33,534-2900)X12 - Kshs 54,408
  - g. Public holidays (11) - Kshs 28,374
2. The Appellant had pleaded:-



- a. That he was employed by the Respondent as a heavy commercial driver on March 22, 2018, earning a gross monthly salary of Kshs 29000, and worked until March 13, 2019 when his employment was terminated by the Respondent without notice.
  - b. That on March 12, 2019, the claimant was issued with a show cause letter requiring him to show cause on an issue of delayed departure, to which he responded; but was on March 14, 2019 told by his superior not to report to work awaiting official communication from the Respondent (the employer).
  - c. That the Respondent did not receive any communication from the employer, and that when he visited the Respondent's Yard on March 21, 2019, he was informed by security that he could not be allowed into the premises as he was no longer an employee of the Respondent.
  - d. That the Appellant was not subjected to any disciplinary proceeding before termination.
3. It was the Appellant's pleading that no reason was given for his termination and no notice was issued to him, and that his termination was arbitrary, malicious and in contravention of the principles of natural justice, unprocedural, unlawful and unfair.
  4. The Appellant had further pleaded that the Respondent had refused to compute and to pay the Appellant's terminal benefits, which the Appellant claimed in the suit.
  5. The Respondent defended the suit and admitted to having employed the Appellant as a heavy commercial driver on April 24, 2018, but not March 22, 2018 as pleaded by the Appellant. The Respondent further pleaded:-
    - a. That the Appellant was informed of his gross misconduct and was, vide a notice to show cause dated March 13, 2019, given an opportunity to respond and to defend himself.
    - b. That the Appellant was informed of the reason for his termination, and that termination was not unfair as due process was followed.
    - c. That the Respondent computed the Appellant's final dues and prepared his certificate of service, but the Appellant failed to collect the same.
  6. The Respondent denied the Appellant's claim as set out in paragraph 1 of this judgment, and further pleaded:-
    - a. That the Appellant was earning a gross salary of Kshs 34,416 which was inclusive of house allowance.
    - b. That the Appellant did not complete a year in service, and was only entitled to pro-rated leave days, and was also not entitled to any overtime pay.
    - c. That the Appellant was not entitled to compensation for unfair termination as he did not complete a full year in employment.
  7. Upon taking evidence from parties, the trial Court delivered its judgment on 8<sup>th</sup> February and awarded the Appellant Kshs 34,162, made up of payment for days worked in March 2019 and pro-rata leave pay, less payable tax. The rest of the Appellant's claim was dismissed by the trial Court.
  8. Dissatisfied with the trial Court's judgment, the Appellant has appealed to this Court and raised ten grounds of appeal, which I summarize as follows:-



- a. The Court erred in law by dismissing the Appellant's claim and failing to make a finding on the illegal, unjustified and unfair termination of the Appellant.
- b. The trial Court erred by failing to award notice pay, considering that no hearing was conducted prior to issuance of the summary dismissal letter, and that the Appellant's natural right to be heard was breached.
- c. The trial Court erred in law by dismissing the Appellant's claim for compensation for unfair termination without legal justification.
- d. The trial Court erred in law and fact by dismissing the Appellant's claim for house allowance, yet no contract was shown stating that the Appellant's salary was consolidated, and no payslips were produced.
- e. The trial Court erred in failing to award unpaid salaries, and yet no payslip or proof of payment was furnished by the employer (the Respondent).
- f. The trial Court erred by making a finding that the Appellant was only entitled to Kshs 34,162 in terminal dues, and that the Appellant had failed to collect the same.

9. I will address the grounds of appeal together. This is a first appeal. As stated In *Mursal & Another - vs- Manese [2022] eKLR:-*

' A First appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing, both on questions of fact and law.

A first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full fair and independent consideration of the evidence at the appellate stage. Anything less is unjust.

The first appeal has to be decided on facts as well as on law.'

10. As stated by the Court in the Mursal case (supra), the duty of a first appellate Court was also stated in *Selle & Another -vs- Associates Motor Boat Co Ltd & Another [1968] EA 123* and in *Peters -vs- Sunday Post LTD [1958] EA* page 424.

11. Issues for determination in the Appellant's appeal are, in my view, as follows:-

- a. Whether the Appellant was entitled to plead unfair termination of employment and to claim compensation for unfair termination of employment.
- b. Whether the Appellant was entitled to the reliefs sought.

12. On the first issue, the Appellant pleaded that he was employed by the Respondent on March 22, 2018 and that his employment was terminated on March 13, 2019. The Respondent, on the other hand, pleaded that it employed the Appellant on April 24, 2018, and did not deny having terminated his employment on March 13, 2019. Both parties were, therefore, in agreement that the Appellant worked for the Respondent for a period that was less than one year. Section 45(3) of the *Employment Act* provides as follows:-

' An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.'



13. The legal import of the foregoing statutory provision is that an employee who has not been in continuous employment by his employer for a period of thirteen months immediately before termination cannot complain that he has been unfairly terminated, and cannot claim compensation for unfair termination of employment. The Respondent may not have followed the procedure as set out in Section 41 of the *Employment Act* in terminating the Appellant's employment, but the Appellant is barred by Section 45(3) of the same Act from alleging unfair termination and seeking compensation thereon as he had been employed by the Respondent for less than thirteen months as at the time of termination.
14. While not faulting the trial Court's failure to award the Appellant compensation for unfair termination, I must state that the Court should have stated the legal basis for failing to make the award.
15. On whether the Appellant was entitled to the other reliefs sought, I will proceed to consider each of these reliefs separately. Before doing so, however, I will address the issue of the Appellant's monthly earnings. The Appellant pleaded that he earned a gross salary of Kshs 29,000 per month, while the Respondent pleaded that the Appellant earned a gross salary of Kshs 34,416, which was inclusive of house allowance. At the trial, the Respondent (RW-1) produced in evidence some nine (9) documents which included the Respondent's payroll for July 2018. The Appellant did not dispute the validity of any of the documents produced by the Respondent.
16. According to the Respondent's said payroll for July 2018, the Appellant, and indeed all other heavy commercial drivers employed by the Respondent (twenty four of them) earned a gross salary of Kshs 34,416, which was inclusive of Kshs 5,612 house allowance. On the basis of this, the Appellant's claim for unpaid house allowance could not, and cannot stand. The same is declined.
17. On the claim for notice pay, the Appellant was on a term contract whereby wages and/or salary was payable monthly. He was entitled to one month notice before termination of employment or one month salary in lieu of notice, I award him Kshs 34,416 being one month salary in lieu of notice.
18. On the claim for twenty one (21) unpaid leave days, the Respondent did not produce any leave forms/ records, of which it was the custodian pursuant to Section 74(f) of the *Employment Act*, to show that the Appellant had taken any leave during his period of employment. The Respondent's witness (RW-1) appeared to agree that the Appellant had not taken any leave when he told the trial Court that the Appellant was not entitled to leave as he had not worked for a year. The Appellant pleaded that he worked from March 22, 2018 to March 13, 2019, while according to the Respondent, the Appellant worked from April 24, 2018 to March 13, 2019. Whichever way, it is clear that the Appellant worked for over eleven (11) months. Section 28(1) of the *Employment Act* provides as follows:-
  - ' (1) Any employee shall be entitled:-
    - a. After every twelve consecutive months of service with his employer to not less than twenty one working days with full pay;
    - b. Where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave earning period, to not less than one and three quarter days of leave with full pay; in respect of each completed month of service in that period to be taken consecutively.'
19. As already stated in this Judgment, the Appellant's employment was terminated after the completion of eleven consecutive months of service. He had accrued 19.25 leave days, and was entitled to be paid 22,083.6 in that regard, I award the Appellant the said sum of Kshs 22,083.6



20. The claim for overtime worked was not particularized in the Appellant's pleadings and was not proved, and is declined. Unpaid salaries, allowances and overtime payments are in the nature of special damages and must be specifically pleaded and proved.
21. The claim for unpaid salaries for April and July 2018 was not proved. The Appellant did not mention that claim at the trial, either in his filed witness statement which he adopted as his testimony, or in his oral evidence in Court. the claim is declined.
22. The claim for underpayment was not proved. The claimant pleaded that he was being paid Kshs 29,000 per month instead of Kshs 33,534, but did not demonstrate the basis of that claim. Further, the Respondent produced in evidence a copy of its payroll and demonstrated that the Appellant was being paid Kshs 34,416 per month, a sum higher than what the Appellant pleaded ought to have been his salary. The claim for underpayment is therefore declined.
23. The claim based on alleged public holidays worked was not proved. This claim was not particularized in the Appellant's pleadings and was not proved by evidence. The Appellant did not specify the particular public holidays worked, and how much was payable for each. Pleading a global number of alleged public holidays worked and claiming a global sum of money thereon is a frivolous practice that must stop. The claim is declined. It was stated as follows in [Rogoli Ole Manadiegi -vs- General Cargo Services Limited \[2016\] eKLR](#):

' The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial Court when he put in excess hours, when he served on public holidays or even rest days. The evidence on record does not even separate normal overtime from overtime on rest days and public holidays. The rates of compensation are different. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulation of Wages (Protective Security Services) Order 1998. He correctly argues on application of the Order, but gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of Kshs 222,350 claimed as the overall overtime.'

24. The claim for issuance of a Certificate of Service is merited, and is allowed. Section 51(1) of the [Employment Act](#) enjoins an employer to issue an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks. In the present case, the Appellant's employment continued for over eleven months.
25. Ultimately, and upon considering submissions filed on behalf of both parties, the trial Court's judgment delivered on February 8, 2022 is hereby set aside, and is substituted with a Judgment for the Appellant against the Respondent in the following terms:-
  - a. One month salary in lieu of notice - Kshs 34,416
  - b. Accrued leave days Kshs 22,083.6Total Kshs 56,499.6
26. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
27. The Respondent shall issue the Appellant with a certificate of service within thirty days of this judgment.



28. The Appellant is awarded costs of this appeal and of the suit in the Court below; and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

Mr. Mukaya. for Appellant

Ms. Amina Respondent

