



REPUBLIC OF KENYA



Anvi Emporium Ltd v Amol (Employment and Labour Relations Appeal E011 of 2021) [2023] KEELRC 356 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 356 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E011 OF 2021
S RADIDO, J
FEBRUARY 15, 2023**

BETWEEN

ANVI EMPORIUM LTD APPELLANT

AND

JOEL OTIENO AMOL RESPONDENT

(An appeal from the judgment and decree in Kisumu CMC LRC No. 429 of 2019 dated 8th March 2021 before Hon R.K. Ondieki SPM)

JUDGMENT

1. In a judgment delivered on March 8, 2021, the Senior Principal Magistrate found that Anvi Emporium Ltd (the Appellant) had unfairly terminated the employment of Joel Otieno Amol (the Respondent) and awarded the Respondent all the pleaded prayers.
2. The Appellant was aggrieved, and it filed a Memorandum of Appeals with this Court on April 7, 2021 contending that:
 - (1) The learned trial Magistrate erred in law and fact in holding that the Claimant had proved underpayment while no proof was produced by the Claimant.
 - (2) The trial Magistrate erred in law and fact in awarding the Respondent service pay while evidence on record showed payment of National Social Security Fund by the Appellant.
 - (3) The trial Magistrate erred in law and fact by awarding 12 months' wages for unlawful termination while the Respondent had worked for barely 3 years.
 - (4) The trial Magistrate erred in law and fact in finding that the Respondent was wrongfully terminated without proof.



- (5) The trial Magistrate erred in law and fact in allowing the Respondent's claim as prayed without evidence and sufficient proof.
- (6) The trial Magistrate decision is against the weight of evidence.
3. The Appellant filed a Record of Appeal on January 13, 2023, and the Court gave directions on January 19, 2023.
4. As a result, the Appellant filed its submissions on January 26, 2023 and the Respondent on February 1, 2023.
5. The Court has considered the record and the submissions.

Role of the Court on first appeal

6. This being a first appeal, the Court is enjoined to re-evaluate the evidence before the trial Court and make its own findings on the evidence and facts but conscious that it did not see the witnesses.

Unfair termination of employment

7. In finding that the Appellant unfairly terminated the Respondent's contract, the trial Court considered that the Appellant had not demonstrated that it followed due process upon forming the opinion that the Respondent had deserted duty.
8. Desertion of duty is a misconduct which warrants summary dismissal but after due process. It is also a repudiation of contract on the part of the employee.
9. The Appellant did not demonstrate before the trial Court that it attempted to find the whereabouts of the Respondent or that it made efforts to ask him to show cause for his alleged absence. It cannot be that the Appellant did not have the contacts of the Respondent.
10. In terms of repudiation of contract, the case law from comparative jurisdiction has held that the employer as the innocent party to a repudiated contract should signify its acceptance of the repudiation (see *Geys v Societe Generale (2013) 1 AC 523*).
11. The Appellant herein did not indicate whether and how it accepted the repudiation of the contract by the Respondent.
12. Consequently, this Court agrees with the trial Court that the Appellant did not discharge the burden imposed on it by sections 47(5), 43 and 45 of the *Employment Act, 2007*.

Maximum compensation

13. The trial Court awarded the Respondent the maximum compensation allowed by section 49 of the *Employment Act, 2007*.
14. However, the trial Court did not give reasons for awarding the maximum compensation as envisaged by section 49(4) of the *Employment Act, 2007*. That was an error of both law and fact.
15. The Respondent served the Appellant for about 2 years, and in the view of this Court, the equivalent of 2 months' gross salary as compensation would have been appropriate and fair (the prescribed daily wage was Kshs 470/- multiplied by twenty-two to get the monthly earnings).



Underpayments

16. The Respondent pleaded before the trial Court that the Appellant had paid him below the gazetted minimum wages. The Respondent contended that the Appellant was paying him a daily rate Kshs 300/- instead of the prescribed Kshs 470/- for a general worker.
17. The Respondent further asserted that from November 2014 to April 2015, he was getting a daily wage of Kshs 350/- instead of Kshs 470/- and that from December 2015 to February 2016, he was earning Kshs 450/- instead of Kshs 710/-.
18. Still on underpayments, the Respondent claimed he was getting Kshs 500/- from March 2016 to October 2016 while the daily wage was Kshs 710/-. He also claimed underpayments for November and December 2016 in the sum of Kshs 7,704/-.
19. In total, the Respondent prayed for Kshs 149,324/- which the trial Court awarded.
20. The Respondent testified that he was employed as a general worker but was promoted to a Printing Machine Operator in May 2015.
21. The Appellant's witness denied that the Respondent was promoted from general worker to Printing Machine Operator.
22. In allowing the head of claim for underpayments, the trial Court considered that the Appellant had not denied that the wage paid to the Respondent was below the gazetted minimum wages.
23. The Appellant and the Respondent did not lay a legal basis for the head of the claim for underpayments since none of them disclosed the particular Regulations of Wages Order, which applied to the sector the Appellant operated in.
24. The trial Court, therefore fell into an error when it allowed the head of the claim without reference or disclosure of the operating Regulation of Wages Order.
25. In 2014, the operative Regulations Wages Order was gazetted through Legal Notice No 197. The prescribed minimum daily wage for a general labourer in Kisumu was Kshs 470/-. The Wage Order was only amended in 2017.
26. The copies of the salary vouchers produced before the trial Court indicated that the Respondent only started earning a daily wage of Kshs 550/- in October 2016. Before then, he was earning Kshs 2,300/- weekly translating to daily wage of Kshs 418/-, which was below the prescribed daily wage.
27. This Court, therefore, finds that the Respondent was underpaid from January 2014 to September 2016.
28. Since this Court is unable to ascertain the exact underpayments, the Appellant should compute the same.

Service pay

29. The trial Court allowed the head of the claim for service pay. The evidence placed before the trial Court established that the Respondent was contributing to the National Social Security Fund.
30. By dint of section 35(5) & (6) of the *Employment Act*, 2007, the Respondent was not entitled to service pay.
31. The trial Court fell into an error of both law and fact in allowing this head of the claim.



Leave

32. The trial Court granted the Respondent's claim for Kshs 39,723/- on account of accrued leave.
33. A Salary voucher placed before the trial Court indicated that the Appellant paid the Respondent in lieu of leave on December 17, 2016. Apart from the voucher, the Appellant as the custodian of employment records did not place before the trial Court records to show the Respondent went on leave.
34. The Court will, therefore, not disturb the award for accrued leave.

Conclusion and Orders

35. In consideration of the above the Appeal succeeds only to the extent that:
 - i. The award of compensation is set aside and substituted with an award of Kshs 20,680/-.
 - ii. The award for service pay is set aside.
 - iii. The award for underpayments is set aside.
 - iv. The Appellant to compute and file with the Court on or before February 28, 2023, the underpayments due to the Respondent in terms of this judgment.
 - v. The Appeal to be mentioned on a date to be agreed upon after this Judgment for further orders.
36. The Each party to bear own costs of the Appeal.
37. The Respondent to have costs before the trial Court which should be assessed afresh.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF FEBRUARY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Ko'Winoh & Co. Advocates

For Respondent ALP Kenya Advocates

Court Assistant Chrispo Aura

