



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Mistry V Naran Mulji & Co (Appeal E002 of 2022)
[2023] KEELRC 822 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 822 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E002 OF 2022
AK NZEI, J
FEBRUARY 9, 2023**

BETWEEN

MWAMLEU TSUMA ALI APPELLANT

AND

MISTRY V. NARAN MULJI & CO RESPONDENT

*(Appeal from the judgment of the Hon. G. Kiage, SRM, delivered on 17th
December 2021 in Mombasa Chief Magistrate's Court Case No. 231 of 2020)*

JUDGMENT

1. The Appellant herein was the Claimant in Mombasa CM ELR Cause No 231 of 20120 whereby he had sued the Respondent herein claiming:-
 - a. Salary underpayment calculated as follows:-
 - i. May 2010 – April 2011 (361-250 X364 days)
.....Ksh 40,000
 - ii. May 2011-April 2012 (406.10-250x365 days)
.....Ksh 56,976.50
 - iii. May 2012 – April 2013 (459.30-250x365 days)
.....Ksh 76,185.20
 - iv. May 2013 -December 2013 (523.60-250X244 days)....Ksh 66,758.40
 - v. January 2014-april 2015 (523.60-350x484 days)
.....Ksh 84,022.40



- vi. May 2015-April 2017 (586.40-572x350x730 days).....
Ksh 172,572
- vii. May 2017 – December 2017 (691.95 -350X244 days) Ksh
.....83,435.80
- viii. January 2018-April 2018
(691.95-500x119 days)ksh..... 22,841.05
- ix. May 2018-7/7/2019 (726.55-500
X432 days).....Ksh 97,869.95
Total....Ksh 700,701.95
- b. One month salary in lieu of notice Ksh 21,776.50
- c. Salary arrears for 1/9/2018-7/7/2019
(310x500).....ksh, 155,000
- d. Severance pay for years worked
(15 days x Ksh 726.55x1years).....Ksh 105,000
- e. Refund of unremitted NSSF deductions
(93x400).....Ksh 37,200
- f. Refund of unremitted NHIF deductions (120x500).....Ksh 60,000
- g. Overtime allowanceKsh 936,312.36
- h. Unpaid rest daysKsh 1,231,306.58
- i. Public holidays.....Ksh 269,289.60
Total Ksh 3,625,589.43

2. The Appellant pleaded that he was employed by the Respondent on April 4, 2009 as a casual security officer until July 7, 2019 when he was declared redundant. It was the Appellant’s pleading that he worked 7 days a week and was earning Ksh 500 per day at the time of his redundancy, an amount that was below the minimum amount prescribed by the law, hence the claim for underpayment during the period of employment.
3. It was the Appellant’s further pleading that on July 7, 2019, he was informed by the Respondent that his services had been terminated on account of redundancy due to low business; that he was not given any termination notice and that the Respondent did not comply with Section 40(1) of the Employment Act on seniority in time, skill, ability and reliability of the Appellant. That no genuine reason was given for termination of the Claimant’s employment, his terminal and contractual dues were not paid and due process was not followed in terminating the Claimant’s employment.
4. The Respondent defended the suit vide a Statement of Response dated June 5, 2020 and filed in Court on 16th June 2020. The Respondent denied the Appellant’s claim and further pleaded:-
 - a. that whereas the Respondent admitted that the Appellant was employed by the Respondent on casual basis as a Security Officer, the employment was not from April 4, 2009 to July 7,



2019. The Respondent further denied that the Appellant was earning Ksh 500 per day and that this amount was below the minimum prescribed by law.

- b. that the Respondent engaged the Appellant's services sometimes in February 2017 as a casual employee and that such engagement did not create employment contract but rather a causal employment because the Claimant did not work for one month continuously; and that there would be no unfair termination under the circumstances.
5. At the trial, the Appellant adopted his filed witness statement dated 5/12/2020, and produced in evidence documents listed on his filed list of documents dated 5/2/2020 and on a supplementary list of documents dated 3/12/2020. Documents produced in evidence by the Appellant included a list of the Respondent's guards and their dates of employment, extracts of *Regulations of Wages (General) (Amendment) Order* for the years 2010, 2011, 2012, 2013, 2015, 2017 and 2018, and the Claimant's NSSF statement for the period 01/02/2017 to 31/7/2019. Also included was the Respondent's letter to NSSF dated 8th February 2016 forwarding names of employees, who included the Appellant, for registration, among other documents.
6. It is worthy noting that the Respondent is not shown to have challenged the validity of any of the documents produced by the Appellant or objected to their production in evidence.
7. The Appellant further testified that he was employed by the Respondent on 4/9/2009 and worked daily as a night security guard until 6/7/2019 when his employment was terminated via a telephone call made to him by his superior by the name Peter on account of (alleged) redundancy. That he had been initially employed as a casual employee and worked on daily basis without fail.
8. The Appellant further testified that he was initially earning Ksh 250 per day until December 2013, then Ksh 350 per day from January 2014 upto December 2017 and then Ksh 500 per day from January 2018 until the date of his unfair termination. That he was paid weekly and signed on a voucher upon payment. The Appellant told the Court that all through, he worked from 6.00pm to 6.00am daily.
9. It was the Appellant's further evidence that initially, the Respondent did not deduct from his pay NSSF and NHIF contributions, but started doing so in the year 2017, but without remitting the same. That the applicant was terminated without notice and without adherence to Section 35, 40, 41, 45 and 49 of the *Employment Act*, and that the termination was unfair, unjust and unconstitutional.
10. The Appellant denied having resigned from his employment as alleged by the Respondent; and reiterated that he worked continuously on daily basis from 2009 upto the date of termination. That he worked six days a week from the date of employment upto August 2018, and thereafter worked seven days a week from 6.00pm upto 6.00am; with no leave and without notice.
11. The Appellant called one witness (PW2), who testified that he was employed by the Respondent in 2010 while the Appellant was employed earlier in 2009, and that both of them were stationed at Kiembeni Blue Estate. That his employment was terminated over the phone on 9/6/2019 by his supervisor, Peter Orina.
12. The Respondent called one witness, Peter Orina Ajulu (DW1), who told the Court that the Appellant had been a casual employee who was assigned to provide security services. That the Appellant's employment was temporary and depended on the Respondent company having tenders. DW1, who described himself as a supervisor in the Respondent company, further testified that the Appellant stopped reporting to work in January 2019, but NSSF payments (remittances) were made from January 2019 to July 2019 despite the fact that the Appellant had left employment. That being a casual, the Appellant was not entitled to the reliefs sought. That the Appellant was always paid.



13. It is worthy noting that DW-1's evidence that the Appellant's NSSF contributions were remitted by the Respondent until July 2019 corroborates, on a balance of probability, the Appellant's evidence that he worked until 6th July 2019 when his employment was terminated via a phone call by the Respondent (DW-1). It is further to be noted that although the Respondent testified that the Appellant worked as casual and only worked when the Respondent had tenders, the Respondent did not produce any records on when those tenders came through and when the Appellant worked or did not work.
14. As already stated in this judgment, the Appellant produced in evidence a list of the Respondent's security guards and their respective dates of employment whereon the Appellant is listed as No 21 and is shown to have been employed on 4th April 2009. The Respondent did not rebut or challenge the said evidence. The evidence of PW2 was also not rebutted.
15. The trial Court delivered its judgment on December 15, 2021 and rendered itself as follows:-

“from the evidence on record it is evident that the Claimant worked for a substantial period of time prior to his termination, according to him, he was employed by the 1st Respondent in the year 2009, while the Respondent insists that he was employed in 2017. Whatever the case, it is not in dispute that he had been with the Respondent for 2 years which is not a short period of time, as such I find that by virtue of Section 37 the Claimant was entitled to be deemed as one whose wages are paid monthly and Section 35(1)(c) is therefore applicable to him. The upshot of the foregoing is that the Respondent has failed to demonstrate that the Claimant's termination from employment was both substantively and procedurally fair. No evidence of a notice of termination a hearing prior thereto was presented. In the end, I find that the Claimant was unfairly and unlawfully terminated from employment by the Respondent.

Having found as above on the first question, the next issue is what relief is the Claimant entitled to:-

1. 1 month salary in lieu of notice.....Ksh 13,000
 2. Unpaid leave allowance (13,00x26x3 days)
.....Ksh 15,000
 3. Severance (6,500x1 ½) years.....Ksh 9,970
- Total Ksh 37,750

The Claimant did not lay basis or provide evidence for the rest of the reliefs and as such they fail. Judgment is therefore entered for the Claimant for the above sum together with costs of the suit.”

16. Aggrieved by the said judgment, the Appellant appealed to this Court and set forth the following grounds of appeal:-
 - a. that the trial Court erred in law and fact in failing to exercise discretion, without explanation, to award compensation for unfair termination having arrived at the correct finding that the Claimant was unfairly and unlawfully terminated from employment by the Respondent.
 - b. that the trial Court erred in law by disregarding, without explanation, the evidence of the Claimant thereby arriving at an erroneous finding that the Claimant failed to provide evidence that he was paid salary for 310 days that he had worked prior to his unfair termination.



- c. the trial Court erred in law and fact by disregarding, without explanation, the evidence of the Claimant that he was employed in 2009, which was not controverted, thereby wrongly awarding severance pay for only 1 ½ years.
 - d. that the trial Court erred in law and fact by disregarding, without explanation, the uncontroverted evidence of the Claimant and finding that the Claimant did not lay basis or provide evidence for the reliefs of underpayment, unremitted NSSF and NHIF deductions, overtime allowance, unpaid rest days and public holidays, thereby dismissing them.
 - e. that the trial Court misdirected itself by failing to fully appreciate and correctly analyse the pleadings and evidence before him.
17. I will address the five grounds of appeal together. This is a first appeal. A first appeal is by way of a re-trial.
 18. The duty Court of a first appellate Court is to re-evaluate, re-analyse and reconsider the evidence adduced in the trial Court; and to draw its own conclusion, bearing in mind that it did not see the witnesses testify, and therefore giving allowance for that. It was stated as follows in the case of *Mursal & Another v Manese* [2022] Eklr:-

“A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another v Associates Motor Boat Co. Ltd & Another* [1968] E.a. 123 And In *Peters v Sunday Post Ltd* [1958] E.a. page 424.”
 19. Having considered the pleadings filed and evidence adduced by both parties herein, issues that emerge for determination are as follows:-
 - a. whether the Appellant was employed by the Respondent as a casual in the year 2009.
 - b. whether the Appellant was a casual employee as at the time of termination of his employment.
 - c. whether the Appellant was unfairly terminated.
 - d. whether the reliefs sought by the Respondent in the trial Court were deserved.
 20. On the first issue, it is my finding that as stated in paragraphs 5 and 6 of this judgment, the Appellant proved, on a balance of probability, that he was employed by the Respondent on 4th April 2009 as a security guard on casual basis.
 21. On the second issue, it is my finding that the trial Court addressed itself correctly on the issue of conversion of the Appellant’s employment status from a casual employee to a term contract under Section 37 of the *Employment Act*, to which Section 35(1)(c) of the *Employment Act* applied. I however fault the trial Court for making a finding that the Appellant had been in the Respondent’s employment for two years (since 2017), when uncontroverted evidence presented by the Appellant showed that the Appellant had been in the Respondent’s employment since 4th April 2009. The Claimant was not a casual employee as at July 2019 when his employment was terminated by the Respondent.
 22. On the third issue, the trial Court correctly found that the Appellant’s employment had been unfairly terminated by the Respondent. It is not demonstrated by the Respondent that Section 35(1)(c)



and 41 of the Employment Act had been complied with. Section 40 of the Employment Act was also not shown to have been complied with, although there were peripheral mentions of the Appellant's employment having been terminated on account of redundancy. I hold and declare that termination of the Appellant's employment by the Respondent was unfair.

23. Before addressing the fourth issue, the issue of the Appellant's monthly salary as at the time of termination of his employment in 2019 must be addressed. The Appellant produced in evidence the Regulation of Wages (General) (Amendment) Order, 2018 which shows that monthly salary for a night watchman in Nairobi, Mombasa and Kisumu cities was Ksh 15,141.95. It is clear from the pleadings filed herein and evidence adduced by both parties that the services in issue were rendered by the Appellant in Mombasa.
24. Having said that, I now turn to the fourth issue, and having found that termination of the Appellant's employment was unfair, I award him the equivalent of six months' salary at the rate of Ksh 15,141.95 per month, being compensation for unfair termination of employment. That is $Ksh\ 15,141.95 \times 6 = Ksh\ 90,851$. I also award the Appellant Ksh 15,141.95 being one month salary in lieu of notice.
25. The claim for underpayment from May 2010 to July 2019 was elaborately demonstrated by the Appellant by production of Regulation of Wages (General) (Amendment) Orders for the years of the Appellant's employment (2010,2011,2012,2013,2015,2017 and 2018). The Respondent did not fault any of the Wage Orders produced by the Appellant in evidence, which set the minimum wages payable at different times during the period of employment. The Respondent did not question or rebut the calculations of underpayment as pleaded by the Appellant, and did not present a different calculation thereof. I allow the claim for salary underpayment, and award the Appellant Ksh 700,701.95 as prayed by him.
26. The claim for leave pay for the period of the Appellant's employment (10 years) was not controverted by the Respondent, and is allowed at Ksh 105,000 as prayed by the Appellant.
27. The claim for severance pay is not awardable as termination of the Appellant's employment was not shown to have been on account of redundancy, and is declined.
28. The claim for refund of unremitted NSSF and NHIF deductions are declined. I have, time and again, stated that once statutory deductions are effected on an employee's salary or earnings, money so deducted ceases to be the employee's entitlement. It becomes the entitlement of the particular statutory body for which the deduction was made. As stated in several of my decisions, such statutory bodies have elaborate legal mechanisms for recovery of unremitted deductions made by employers, and may have coercive powers, including prosecutorial powers against employers who may fail to make remittances as by law required.
29. The claim for overtime pay was not proved, though pleaded, and is declined. Claims for unpaid rest days and public holidays were similarly not proved, and are declined. Such claims are of the nature of special damages and must be both pleaded and proved, on a balance of probability.
30. Ultimately, and having considered written submissions filed on behalf of both parties, the appeal herein is allowed. The trial Court's judgment delivered on December 15, 2021 is hereby set aside, and is substituted with judgment for the Appellant against the Respondent as follows:-
 - a. the equivalent of six months' salary being compensation for unfair termination of employmentKsh 90,851.7
 - b. one month salary in lieu of notice.....ksh, 15,141.95
 - c. salary underpaymentKsh 700,701.95



d. unpaid leaveKsh 105,000

Total Ksh911,695.6

31. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).

32. The Appellant is awarded costs of this appeal and of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH FEBRUARY 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.

Appearance:

.....for Appellant

..... for Respondent

