



REPUBLIC OF KENYA



**Nyairo v Maasai Flowers Limited A.T. A Sian Roses (Appeal  
E114 of 2021) [2023] KEELRC 579 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 579 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E114 OF 2021  
B ONGAYA, J  
MARCH 10, 2023**

**BETWEEN**

**JAMES ABURI NYAIRO ..... APPELLANT**

**AND**

**MAASAI FLOWERS LIMITED A.T. A SIAN ROSES ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kajiado before Hon. Irene Marcia Kabuya, PM (Ms.) delivered on 22.09.2021 in Kajiado CMELR Cause No. E021 of 2021, James Aburi Nyairo-Versus- Maasai Flowers Ltd A.T.A Sian Roses)*

**JUDGMENT**

1. The appellant filed the memorandum of appeal on October 7, 2021 through Ngigi Njuguna & Company Advocates. The appellant appealed against the whole judgment of the trial Court upon the grounds that the trial Court erred in law and fact by:
  - a. Taking into account irrelevant issues and arriving at a wrong conclusion.
  - b. Canvassing issues not before the Court and arriving at a wrong conclusion.
  - c. Failing to consider all the pleadings on record.
  - d. Failing to find that the plaintiffs had proved their case on a balance of probability.
  - e. Failing to take into account all relevant factors in awarding quantum and therefore arrived at a wrong figure.
  - f. Failing to take into account and apply principles of employment law and procedure.
  - g. Failing to take into account the appellant's submissions.
2. The appellant prayed for orders:



- a. That the entire of the judgment and decree of the trial Court at Kajiado written and delivered by Hon. Irene Marcia Kahuya on September 22, 2021 in Kajiado CMEL Cause No. E021 of 2021 *James Aburi Nyairo –Versus- Maasai Flowers Ltd ata Sian Roses* against the appellants be discharged and set aside.
  - b. That the Honourable Court makes an appropriate judgment on unfair dismissal, reliefs sought and determines the said suit finally.
  - c. That the appeal be allowed with costs to the appellants.
3. The appellant filed in the trial Court a statement of claim on March 9, 2021. He alleged as follows. He was employed by the respondent from April 1, 2016 on permanent basis per letter of employment. He worked 6 days a week from 7.30 am to 8.00 pm without payment of overtime. He worked on public holidays without payment. He worked without break for 3 years and 8 months with a clean record. On December 28, 2019 it was alleged he neglected to harvest flowers yet the flowers in issue were not even in his assigned section or care. He was told to go home and wait for a phone call but which he never received. He was not paid salary for 18.12.2019 to December 29, 2019. it was his case that the termination was unlawful and unfair because the reason was not valid, the reason was not explained or a hearing granted per section 41 of the *Employment Act*, and no terminal dues were paid.
4. The appellant claimed and prayed for:
- a. A declaration the termination was unfair and unlawful.
  - b. Kshs.11, 415.00 one month pay in lieu of notice.
  - c. Kshs.4, 829.00 unpaid December salary.
  - d. Kshs.20, 947.00 service pay due.
  - e. Kshs.463, 320.00 unpaid overtime.
  - f. Kshs.29, 003.00 unpaid public holidays.
  - g. Kshs.136, 980.00 12 months' salaries compensation for unfair termination per section 49(1) (c) of the *Act*
  - h. Costs of the suit and interest.
5. The appellant particularised the claims and prayers in the statement of claim.
6. The respondent filed the memorandum of defence dated June 2, 2021 through the Agricultural Employers' Association. The respondent pleaded as follows. It employed the claimant on April 1, 2016 as a semi-skilled worker at Kshs.5, 400.00 being salary. Overtime was worked was duly paid for at 1,5 daily rate per exhibited pay slips. He was paid above minimum statutory wages and per the collective bargaining agreement between the Agricultural Employers' Association and the Kenya Plantation & Agricultural Workers Union. Whenever he worked on public holidays he was paid at double daily rate per the pay slips exhibited. During the service he received several verbal warnings.
7. On the circumstances of separation, the respondent pleaded as follows. On December 28, 2019 the appellant and 3 other employees were found harvesting and disposing exportable flowers to waste pits against company procedures. A production team leader discovered their said activity. The production manager made an inquiry and the appellant replied that the flowers were short and not exportable. The manager measured the flowers and they were 50cm to 60cm and were exportable. The three employees and the appellant were given letters to show cause but the appellant refused to fill the show cause



letter before the manager and the chief shop steward and, who recorded statements on the turn of events. The appellant stated that he did not want any letter to show cause or disciplinary process or the job. He handed over the protective gear and left the premises. He was invited for a disciplinary hearing on December 30, 2019 through a letter dated December 28, 2019 delivered to him by the chief shop steward but he refused to acknowledge even after an explanation was made. On December 30, 2019 a disciplinary hearing meeting was convened but the appellant failed to show up. The committee resolved to forgive the three other involved employees after taking their explanation. Thereafter the appellant never went back to clear and to take his final dues. The appellant was never dismissed but he decided to leave before he was subjected to the disciplinary process. All his December 2019 salary was paid per exhibit MF 8. He was a member of NSSF and service pay was not due. The respondent prayed that the suit be dismissed with costs.

8. The trial Court considered the evidence and found that RW2 being the union leader confirmed to have reached out to the appellant to participate in the disciplinary process but it was in vain. The trial Court found that the appellant had willingly absconded duty after his misconduct and shut all avenues for amicable solution. Thus the trial Court was satisfied that due process was followed by the respondent and the declaratory relief as was prayed for was declined. The trial Court found that the pay slips showed that overtime had been paid and claim for pay on public holidays as claimed had not been proved as was declined. The trial Court dismissed the suit with costs in the judgment delivered on September 22, 2021.
9. The appellant filed submissions on the appeal and the respondent did not file submissions at all.
10. As submitted for the appellant, it is a first appeal and the court will review the evidence and make its own conclusions bearing in mind that the Court did not by itself have opportunity of seeing and hearing the witnesses first hand as was held in *Faith Mutindi –versus Safepark* Limited [2019]eKLR.
11. It is submitted that the trial Court found that the appellant absconded duty without elaborating the basis of the finding. However, the Court returns that the trial Court was elaborate that the appellant refused to participate in the disciplinary process and as was confirmed by his union leader, the chief shop steward being RW2. Further, it was submitted that the trial Court failed to require the respondent to show the reason for termination, yet, in this Court's findings, the trial Court had found it was the appellant who deserted and not that he had been terminated. The Court has revisited the evidence and the trial Court's findings are consistent with the evidence on record. The appellant was not terminated but he deserted and refused to subject himself to the disciplinary process. There being no termination, a declaration that termination was unfair and unlawful is obviously not available.
12. On reliefs, one month pay in lieu of termination notice is not available for the appellant who had not been terminated but had deserted voluntarily. Service pay was abandoned in the submissions as not due. On a balance of probability, the trial Court cannot be faulted in declining award of overtime as pay slips exhibited showed that the same had been paid. In any event, separation had been on 28.12.2019 and suit was filed belatedly on 09.03.2021 after lapse of 12 months' time of limitation for continuing injuries under section 90 of the *Employment Act, 2007*. Claims for payment of overtime and work on holidays were continuing and time barred as well, no established grievance was on record as reported while the contract of service subsisted. The Court finds that the trial Court's conclusion denying the claims in that regard cannot be interfered with.
13. The appellant exhibited his bank salary account statement to show December 2019 salary was not credited as alleged for the respondent. The trial Court erred by not granting that claim and now awarded at Kshs.4, 829.00 as was claimed.



14. In view of the marginal success, each party to bear own costs of the appeal and award of costs to the respondent by the trial Court will be set aside.

In conclusion the appeal is hereby determined with orders:

- a. Trial Court's judgment and decree is upheld save to the extent that the respondent to pay the appellant Kshs.4, 829.00 by May 1, 2023 failing interest at trial Court's rates be payable thereon until full payment, and, each party to bear own costs of the proceedings before the trial Court.
- b. The parties to bear own costs of the appeal.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 10<sup>TH</sup> MARCH, 2023**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

