



**Wanyonyi v Skyman Freighters Limited (Appeal E079 of 2021)
[2023] KEELRC 1261 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1261 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E079 OF 2021
M MBARÚ, J
APRIL 27, 2023**

BETWEEN

GIDION MUKHWANA WANYONYI APPELLANT

AND

SKYMAN FREIGHTERS LIMITED RESPONDENT

*(Being an appeal from the judgment delivered on 19th November,
2021 by Hon. G Kiage, SRM in Mombasa CMC ELRC No.37 of 2017)*

JUDGMENT

1. The background to the appeal is that on January 29, 2020 the appellant filed his claim before the lower court on the grounds that he had been employed by the respondent as a truck driver transporting goods from Mombasa to Kampala from January, 2012 at a wage of Kshs 14,000 and lastly earning Kshs 18,532 and Kshs 2,000 as Sacco payment. In November, 2019 the appellant was allowed to go on his annual leave and upon return on November 22, 2019 he was dismissed from his employment without notice or payment of his terminal dues. the appellant claimed for underpayment of his wages from May, 2018 to April, 2014 and service pay from January, 2012 to February, 2013; salary for 8 months, compensation and notice pay.
2. In response before the lower court, the respondent's case was that after resuming duty after taking annual leave, the claimant was called to address various complaints made against him ahead of a disciplinary hearing but the claimant declined to listen. The claimant was summarily dismissed following an invitation to attend but he declined. There was no underpayment as claimed, all salaries were paid and where the same was delayed it was due to prevailing economic turbulence and summary dismissal was justified after the appellant failed to report to work so as to account for fuel in truck KBT 247B, failure to account for a missing clutch servo from the vehicle assigned to him and that he was not entitled to the claims made.



3. In his judgment, the Learned trial magistrate made a finding that there was unfair termination of employment and awarded notice pay, service pay, and compensation and that other claims had not been proved.
4. Aggrieved by the findings, the appellant has faulted the trial magistrate on the grounds that the claims for 8 months' unpaid salary were without proof and hence not awarded, that the claim for underpayments was not proved despite evidence in the Minimum Wage Orders and that the trial court failed to take into account the evidence and submissions made.

The respondent did not take part in these proceedings.

5. The appellant has filed his written submissions and his case is that the trial court made a finding that he was unfairly dismissed by the respondent but failed to take into account that he was underpaid over the years and his 8 months' salaries remained unpaid. This court has jurisdiction to disturb the award of the trial court and assess the owing dues and make proper findings and award the underpayments since the burden to produce records vests upon the employer as held in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR that under Section 10(7) of the [Employment Act](#), the employer has the legal duty to produce work records. The trial court made an error of law by finding that the appellant had failed to prove his case in a matter where the respondent as the employer had a legal duty to file all work records.
6. On the record considered, the written submissions filed by the appellant and the law, this being a first appeal, the court recognises the duty to re-evaluate and evidence adduced before the Hon. Magistrate and make own conclusions.
7. The totality of the appeal, the issues for determination is the underpayment and 8 months' unpaid salaries. Without the respondent attending, the court is only left with the appellant's submissions which shall be assessed based on the submissions and the applicable law.
8. As outlined above, the appellant's claim before the lower court was for payment of;
9.
 - a. Notice pay;
 - b. Service pay;
 - c. 8 months' unpaid salaries;
 - d. Underpayments;
 - e. Compensation for wrongful termination.
10. The basis of the claim is that the appellant had been employed as a truck driver and there was summary dismissal following various misconduct.
11. The appellant filed various records including his bank statements to demonstrate what he was earning and deposits made by the respondent to his bank account.
12. The appellant filed a letter dated October 24, 2019 where the respondent informed him that he had failed to report to work, he had failed to explain loss of fuel in truck KBT 247B which was in his command, he failed to explain where a clutch servo for the same motor vehicle was and for these reasons, his employment was terminated with immediate effect.



13. There is no letter of employment filed by either party to address the terms and conditions of employment and particularly the kind of motor vehicle the appellant was driving save in the subject letter dated October 24, 2019 the appellant is noted as having been driving a truck. As the appellant has correctly submitted, the duty to file work records once suit is filed rests with the employer pursuant to Section 10(6) and (7) of the [Employment Act, 2007](#);
 - (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
 - (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
14. The appellant claimed for underpayment based on the Minimum Wage Orders (Agricultural Industry).
15. The respondent in the Memorandum of Claim is defined as a limited liability company operating transport business from Mombasa to Kampala which is not in the agricultural sector. The respondent did not file any work records pursuant to Section 10(7) of the [Act](#) but in the Witness statement of Wakoli Chesititi he avers that the appellant had been assigned motor vehicle No KBT 247B to ferry cargo to and from Kenya Ports Authority in Mombasa to various destinations in East Africa. The correct Wage Orders to therefore apply in the absence of any written contract of service are the Regulation of Wages (General) Orders.
16. A claim for underpayment once made by the employee, the burden of prove that the same was paid to the employee for the position held and based on the minimum wage or based on the written contract of service vests in the employer. The legal duty extends to the requirement that the employer should file such work records in court once suit is filed pursuant to Section 10(7) of the Act cited above.
17. The appellant claimed that he was underpaid as a truck driver. without any work records, the trial court ought and should have applied the rate under the Minimum Wage Orders to assess the claims.
Employment was from January, 2012 to November 21, 2019.
18. The [Regulation of Wages \(General\), \(Amendment\) Order, 2012](#) taking effect on May 1, 2012 a truck driver minimum wage was Kshs 19,360.50 and the appellant was being paid Kshs 14,371. The underpayment is Kshs 4,989.50.
19. The minimum wage for the period up to May 1, 2015 and for the period of 22 months, the appellant was underpaid by Kshs 109,769.
20. From May 1, 2015 to April 30, 2016 the minimum wage for a truck driver was Kshs 24,719.50 and from the pleadings, the appellant was earning a total of Kshs 20,147 an underpayment of Kshs 4,572.50 and for 12 months the underpayment is Kshs 54,870.
21. From May 1, 2016 to April 30, 2017 the minimum wage was Kshs 29,169 and the appellant continued to earn Kshs 20,147 an underpayment of Kshs 9,022 and total underpayment is Kshs 108,269.
22. For the period of May 1, 2017 to October, 2019 the minimum wage was Kshs 30,627.45 an underpayment of Kshs 10,480.45 and total underpayment for 30 months is Kshs 314,400.
Total underpayment assessed at Kshs 592,298.



23. Whatever reason(s) existed and leading to termination of employment, the appellant should have been paid for work done at the correct rate as required pursuant Section 18 of the Act. Section 18(4) of the Act directs that;
- (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
24. With regard to the claim for 8 months' unpaid salaries, the appellant's case was that his salaries would be delayed and the respondent's case is that there were delays in payment of salary due to economic hardships. The particulars for the specifics months that salaries were not paid were not given. A delay in payment of salaries is not similar to non-payment and in this regard, the trial court did not err.
25. The trial court also assessed and awarded service pay as claimed at Kshs 30,627 but no reasons are given as to why such an amount was awarded. Service pay is due where an employer fails to comply with the provisions of Section 35(5) of the Act or there is a written agreement between the parties allocating such a payment at the end of employment. without any evidence as to how such a benefit accrued to the appellant, there being no reasons for the award, such is not justified and not due.
26. On the analysis and findings above, the appeal is found with merit and the orders of the trial court in Mombasa CMC ELRC No 37 of 2020 set aside and the computation of the underpayment of wages awarded at Kshs 592,298; compensation confirmed at Kshs 60,000; notice pay Kshs 20,000; which shall be paid less Kshs 30,627 erroneously awarded as service pay. Each party shall bear own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF APRIL, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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