



**Lupra Manpower and Human Resource Services Ltd v Mogeni & another
(Appeal 2 of 2022) [2023] KEELRC 889 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 889 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 2 OF 2022**

**S RADIDO, J
APRIL 19, 2023**

BETWEEN

**LUPRA MANPOWER AND HUMAN RESOURCE SERVICES
LTD APPELLANT**

AND

WYCLIFF ATAMBO MOGENI 1ST RESPONDENT

BASCO PRODUCTS (KENYA) LTD 2ND RESPONDENT

(Being an Appeal against the judgment of the Hon C.A. Ocharo, Senior Principal Magistrate at the Chief Magistrates Court at Kisii delivered on the 7th day of October 2022 in ELRC Case No. 24 of 2020 between Wycliff Atambo Mogeni v Basco Products (Kenya) Ltd & Lupra Manpower & Human Resource Services Ltd)

JUDGMENT

1. Wycliff Atambo Mogeni (the 1st Respondent) sued Basco Products (Kenya) Ltd and Lupra Manpower & Human Resources Services Ltd (the Appellant) before the Senior Principal Magistrates Court, Kisii alleging unfair termination of employment and breach of contract.
2. In a judgment delivered on 7 October 2022, the Senior Principal Magistrate held that the termination of the 1st Respondent's employment was unfair and awarded him Kshs 424,808/- (salary in lieu of notice, lost income to remainder of contract, severance pay, compensation and earned wages).
3. The Appellant was aggrieved and it lodged a Memorandum of Appeal with the Court on 4 November 2022, contending that:
 - (1) The learned trial Magistrate erred in law and in fact in awarding the first Respondent two months' pay in lieu of notice yet the contract of employment provided for a 7-days' notice.



- (2) The learned trial Magistrate erred in law and fact when she awarded the 1st Respondent Kshs 43,974/- being payment for the remainder of the contract yet the Claimant never provided any services to the Appellant and the 2nd Respondent.
 - (3) The learned trial Magistrate erred in law and fact when she awarded the 1st Respondent severance pay when there was evidence to show that the contributions to NSSF were being paid.
 - (4) The learned trial Magistrate erred in law and fact when she awarded the 1st Respondent compensation for unfair termination in the amount of Kshs 175,896/- when there was evidence to show that the 1st Respondent contributed to his dismissal.
 - (5) The learned trial Magistrate erred in law and fact when she awarded the 1st Respondent pay for the 14 days worked in October 2019 when there was evidence to show that the Claimant had been paid for work done in October 2019.
 - (6) The learned trial Magistrate erred in law and fact when she awarded the 1st Respondent service benefits of Kshs 36,645/- as this is not provided for in law and is a repletion of the severance pay.
 - (7) The learned trial Magistrate erred in law and fact when she disregarded the Appellant's evidence and documents.
4. The Court gave directions on 20 February 2023 and consequently, the Appellant filed its submissions on 17 March 2023.
 5. On the same day, the Appellant filed an Amended Memorandum of Appeal (the amendments were not preceded by leave and the Court will ignore them).
 6. The 1st Respondent filed his submissions on 13 April 2023 (should have been filed and served by 6 April 2023).
 7. The Court has considered the Record of Appeal and the submissions.

Role of the Court on first appeal

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

Award of salary in lieu of notice

9. The 1st Respondent's contractual relationship with the Appellant started on or around 2015.
10. On or around 25 September 2019, the 1st Respondent entered into a 4-months' contract with the Appellant and it was to end on 22 January 2020.
11. The contract also provided for a monthly wage as well as 7-days' notice of termination or the payment of 7-days salary in lieu of notice.
12. Considering that the 1st Respondent was on a monthly wage, the provision for 7-days' notice stood invalidated by section 35(1)(c) of the *Employment Act*, 2007 which prescribes a minimum notice period of 28 days where the employee is paid by the month.
13. The Senior Principal Magistrate awarded the equivalent of 2 months' salary in lieu of notice.



14. The award was not anchored in the contract or the law and, therefore, the Senior Principal Magistrate fell into error of law and fact when she awarded the equivalent of 2 months' salary in lieu of notice instead of the awarding the equivalent of 1-month salary in lieu of notice as set out in law.

Lost income

15. The Senior Principal Magistrate granted the 1st Respondent's plea for lost income to end of contract.
16. However, the 1st Respondent did not provide any legal anchor to this head of the claim. The contract did not prescribe the payment of wages after premature separation.
17. In supporting the award, the 1st Respondent drew the Court's attention to Josephine Mwendu v University of Nairobi (2021) eKLR, Jackson Kaningia Myagah v University of Nairobi (2022) eKLR, Jamii Bora Bank Ltd v Minnie Mbue (2021) eKLR and Mary Mutanu Mwendwa v Ayuda Ninosa de Afrika-Kenya (2013) eKLR.
18. It is correct that the Courts in the Mwendu, Myagah and Jamii Bora cases awarded the Claimants the income that would have earned up to the end of their contracts.
19. However, in the Jamii Bora case (it went on appeal), the Appellant was awarded lost income because the contract expressly provided for such payment.
20. In the other two cases, the Courts made the awards on the basis of the doctrine of legitimate expectation.
21. Although the general law of employment (the *Employment Act*, 2007) has not explicitly addressed the question of loss of income upon premature termination of contract, case law suggests inconsistent positions by the Courts.
22. From the record, the 1st Respondent did not lay a foundation for a breach of legitimate expectation or any other legal breach to warrant the award of lost income to end of the contract.
23. In *D. K. Njagi Marete v Teachers Service Commission* (2020) eKLR, the Court of Appeal stated as follows:

Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgement of the trial court on these terms.

24. In the case of *Bank of Uganda v Tinkamanyire* (2008) UGSC, the Supreme Court of Uganda held that: the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.
25. This Court endorses the legal proposition in the aforesaid decisions and finds that the Senior Principal Magistrate erred in allowing the head of the claim.

Severance pay

26. The 1st Respondent claimed severance pay of Kshs 126,000/- and the head of the claim was allowed.
27. The Senior Principal Magistrate fell into error of law by allowing the relief. Severance pay becomes due only in cases of redundancy under section 40 of the *Employment Act*, 2007.



Earned wages for October 2019

28. The Appellant placed before the Senior Principal Magistrate a copy of the 1st Respondent's pay slip for October 2019 indicating he was paid Kshs 9,037/-.
29. During oral testimony, the 1st Respondent did not testify that he was not paid earned wages for October 2019.
30. The trial Court, therefore erred in allowing the head of the claim.

Service pay

31. Copies of the 1st Respondent's pay slips produced in Court show that he was a contributor to the National Social Security Fund.
32. The 1st Respondent asserted before this Court that he was entitled to service pay because the Appellant did not submit to the Fund contributions it deducted from his salary.
33. The Court has looked at the record. The 1st Respondent did not produce any member statement from the Fund to buttress the testimony that the Appellant did not submit the contributions.
34. By dint of section 35(5) & (6) of the [Employment Act](#), 2007, the 1st Respondent was not entitled to service pay, and the trial Court fell into error by allowing the claim.

Compensation

35. The Appellant has not challenged the finding that the termination of the 1st Respondent's contract was unfair. The challenge is in regard to the assessment of compensation.
36. The Appellant contended that the assessment was wrong because the 1st Respondent had contributed to his dismissal.
37. Section 49(4) of the [Employment Act](#), 2007 has outlined the factors the Court should consider in assessing compensation.
38. The 1st Respondent started his contractual relationship with the Appellant in 2015, and the relationship ended in 2019, after about 4 years.
39. The 1st Respondent was summarily dismissed.
40. The record does not indicate whether the Appellant afforded the 1st Respondent an opportunity to make representations as envisaged by section 41(2) of the [Employment Act](#), 2007.
41. Considering the length of service of the 1st Respondent, and the Appellant's failure to accord the him an oral hearing, the award of maximum compensation was not fair, and the Court is of the view that the equivalent of 4 months' gross wages as compensation would have been appropriate (gross wage according to the clearance form/pay slip for September 2019 was Kshs 16,546/-).

Conclusion and Orders

42. Flowing from the above, the Appeal succeeds to the extent that the following orders of the Senior Principal Magistrate are set aside and vacated:
 - i. Award of 2 months' salary in lieu of notice.
 - ii. Award of severance pay.



- iii. Award of lost income.
 - iv. Award of Kshs 175,896/- compensation.
 - v. Award of October 2019 wages.
 - vi. Award of service pay.
43. The awards are substituted with the following awards and the Appellant is directed to pay the 1st Respondent:
- i. Pay in lieu of notice Kshs 14,388/-
 - ii. Compensation Kshs 66,184/-
- Total Kshs 80,572/-
44. The Appellant to have costs of the Appeal, while the 1st Respondent to have costs before the trial Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 19TH DAY OF APRIL 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Akolo Wanyanga & Co. Advocates

For Respondent Ouma & Ouma Associates

Court Assistant Chrispo Aura

