



**Lupra Manpower and Human Resource Services Ltd v Orina & another
(Appeal 3 of 2022) [2023] KEELRC 885 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 885 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 3 OF 2022**

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

BETWEEN

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

AND

**DANIEL MISIANI ORINA 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. 23 of 2020 between Daniel Misiani Orina v Basco Products (Kenya) Ltd & Lupra Manpower & Human Resource Services Ltd)

JUDGMENT

1. Daniel Misiani Orina (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 October 7, 2022, the Senior Principal Magistrate held that the termination of the 1st respondent's employment was unfair and awarded him Kshs 483,711/- (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 November 4, 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 121,737/- 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 208,692/- 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 25,752/- 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 February 20, 2023, and consequently, the appellant filed its submissions on March 17, 2023.
 5. The 1st respondent filed his submissions on April 13, 2023 (should have been filed and served before April 6, 2023).
 6. The court has considered the record of appeal and the submissions.

Role Of The Court On First Appeal

7. 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.

Salary in lieu of notice

8. The 1st respondent's contractual relationship with the appellant started on or around 2017.
9. On or around August 26, 2019, the 1st respondent entered into a 9-months' contract with the appellant (the contract was to end on May 31, 2020).
10. 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*.
11. 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.
12. The Senior Principal Magistrate awarded the 1st respondent the equivalent of 2 months' salary *in lieu* of notice.
13. 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 instead of the awarding the equivalent of 1-month salary in lieu of notice as set out in law.



Lost Income

14. The Senior Principal Magistrate granted the 1st respondent's plea for lost income to end of contract.
15. 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 on premature separation.
16. In supporting the award, the 1st respondent drew the court's attention to [Josephine Mwende 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 Ninos de Afrika-Kenya](#) [2013] eKLR.
17. It is correct that the courts in the *Mwende*, *Myagah* and *Jamii Bora* cases awarded the claimants the income they would have earned up to the end of their contracts.
18. However, in the *Jamii Bora* case (it went on appeal), the appellant was awarded lost income because the contract expressly provided for such payment.
19. In the other two cases, the courts made the awards on the basis of the doctrine of legitimate expectation.
20. 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.
21. 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 instead of the compensation contemplated by section 49(1)(c) of the [Employment Act, 2007](#).
22. 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.

23. 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.
24. 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

25. The 1st respondent claimed severance pay of Kshs 78,300/- and the head of the claim was allowed.
26. The Senior Principal Magistrate fell into error of law by allowing the relief when the case before her was not one of redundancy. Severance pay becomes due only in cases of redundancy under section 40 of the [Employment Act, 2007](#).



Earned wages for October 2019

27. 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 12,334/- (before deductions).
28. During oral testimony, the 1st respondent did not testify that he was not paid earned wages for October 2019.
29. The trial court, therefore erred in allowing the head of the claim.

Service pay

30. Copies of the 1st respondent's pay slips produced in court show that he was a contributor to the National Social Security Fund.
31. 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.
32. 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.
33. 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

34. 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.
35. The appellant contended that the assessment was wrong because the 1st respondent had contributed to his dismissal.
36. Section 49(4) of the [Employment Act](#), 2007 has outlined the factors the court should consider in assessing compensation.
37. The 1st respondent started his contractual relationship with the appellant in 2017, and the relationship ended in 2019, after about 2 years.
38. The 1st respondent was summarily dismissed.
39. 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.
40. Considering the 1st respondent's length of service and the appellant's failure to accord the 1st respondent an oral hearing, the award of maximum compensation was not fair, and the court is of the view that the equivalent of 2 months' gross wages as compensation would have been appropriate (gross wage according to the September 2019 was Kshs 25,044/-).

Conclusion and Orders

41. 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 208,692/- compensation.
 - (v) Award of October 2019 wages.
 - (vi) Award of service pay.
42. 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 17,391/-
 - {ii) Compensation Kshs 50,088/-
- TotalKshs 67,479/-
43. 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, MCI Arb

JUDGE

Appearances

For Appellant Akolo Wanyanga & Co. Advocates

For Respondent Ouma & Ouma Associates

Court Assistant Chrispo Aura

