



**West Kenya Sugar Company Limited v Lihungu (Employment and Labour Relations Appeal E001 of 2023) [2023] KEELRC 1354 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1354 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023**

**JW KELI, J**

**MAY 30, 2023**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT**

**AND**

**LEONARD NGARIA LIHUNGU ..... RESPONDENT**

*(Appeal against the entire judgment of Hon. J.R. Ndururu (PM) delivered on the 23rd June 2022 at Kakamega C MELRC No. E035 of 2021)*

**JUDGMENT**

1. The Appellant being dissatisfied by Judgement of Hon. J.R. Ndururu (PM) delivered on the 23<sup>rd</sup> June 2022 at Kakamega C MELRC No. E035 of 2021 filed Memorandum of Appeal dated 10<sup>th</sup> January 2023 against the entire decision seeking that the appeal be allowed and the judgment and consequential decree of the lower court dated and delivered on 23<sup>rd</sup> June 2022 Kakamega C MELRC No. E035 of 2021 Leonard Ngairia Lihungu be set aside with costs at appeal and in the suit be awarded to the Appellant.
2. The appeal was premised on the following grounds:-
  1. That the Learned Magistrate erred in law and fact in failing to appreciate the principle of freedom of contract between the parties which terms of the employment contract between the appellant and the respondent was executed with the knowledge of both parties prior to the respondent commencing his employment with the respondent.
  2. That the Learned Magistrate erred in law and fact in failing to consider and appreciate the fact that Clause 2(d) of the Collective Bargaining Agreement between the appellant and the Kenya Union of Sugar Plantation and Allied Workers provided that no employee shall be compelled



to join the union which right of freedom was exercised by the respondent in line with Section 4(1) of the Labour Relations Act.

3. That the Learned Magistrate erred in law and fact in making a finding that the respondent / claimant was underpaid and making a consequent erroneous award of Kshs. 289,618.00 as the cumulative under paid dues.
4. That the Learned Magistrate erred in law and fact by failing to consider and appreciate the fact that as a matter of outstanding leave days not taken, the claimant during the period of his employment with the Respondent, the claimant had taken 20 days of leave as per the leave status and application form on record.
5. That the Learned Magistrate erred in law and fact in awarding the claimant payment in lieu of leave days not taken summing up 23 days amounting to Kshs. 27,858.00 which was included in the decretal sum.
6. That the Learned Magistrate erred in law and fact in disregarding the evidence tendered by the Appellant and /or failing to consider the said evidence in its totality.
7. That the Learned Magistrate erred in law and fact by failing to appreciate the significance of the documentary evidence tendered in support of the appellant's case.
8. That the Learned Magistrate erred in law and fact by failing to consider the applicant's submissions which were duly filed.
9. That the Learned Magistrate erred in law and fact by failing in, appreciating and considering the respondents submissions only to the prejudice and detriment of the appellant.
10. That the Learned Magistrate erred in law and fact in misapprehending the evidence on record.
11. That the Learned Magistrate erred in law and fact by failing to properly and exhaustively evaluate the evidence on record.
12. That the Learned Magistrate erred in law and fact in arriving at conclusions and inference which are not supported by evidence and /or based on any documentation.
13. Other grounds and reasons to be adduced at the hearing hereof.

### **Background to the Appeal**

3. The Respondent/Claimant sought vide statement of claim dated 27<sup>th</sup> April 2021 before the magistrate court the following reliefs:-
  - a. A declaration that the dismissal was unfair, unlawful and without any valid reason.
  - b. An order for maximum compensation of 12 months gross salary based on the actual CBA salary for wrongful dismissal. Calculated as 12 months x 36,216 = Kshs 434,592/=.
  - c. An order for the respondent to pay him all his salary arrears arising from salary underpayment in line with the CBA as from the date of employment calculated as Kshs. 31,491-9756 x 19 months = Kshs 412,984/-
  - d. An order for the respondent to pay him house allowance as from date of employment as in line with the law and the CBA calculated as Kshs 4724x19 months = Kshs. 89756/-



- e. An order for the respondent to pay him all his leave balance being 23 days and accrued leave days after his first contract. Calculated as per CBA formula in Claus 12 Kshs 31492x12/2496x 8 hours x 23 days =Kshs 27858/-
  - f. An order for the respondent to pay him leave travelling allowance in accordance with the CBA clause 17 which is Kshs 2,850/-
  - g. An order for the respondent to pay him pay notice pay of one month gross salary which is Kshs. 36,216/-
  - h. An order for the respondent to issue Certificate of service
4. The trial magistrate the Hon.J.R. Ndururu(PM) on the 23<sup>rd</sup> June 2022 entered judgment in the suit for the claimant against the respondent / appellants in the following terms:-
- a. Underpaid wages /salaries total Kshs 2892618
  - b. Unpaid House allowance(15% basic pay) total sum kshs. 78280.95/-
  - c. Payment in liue of leave days not taken (23days) = Kshs 27,858/-
  - d. Unpaid leave travel allowance = Kshs. 2,850/-
- Total Kshs 328,154.95 payable subject to statutory deductions.
- e. Costs of the claim.

### **Hearing**

5. The court directed that the appeal be canvassed by way of written submissions. The Appellants' written submission's drawn by O&M LAW LLP were dated 16<sup>th</sup> March , 2023 and received in court on the 17<sup>th</sup> March 2023. The Respondent's written submission's drawn in person 17<sup>th</sup> April 2023 and received in court on the 18<sup>th</sup> April 2023.

### **Decision**

6. The principles which guide this court in an appeal from a trial court are settled In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

### **Issues for determination**

- 7.



- a. Whether learnt trial magistrate erred in law and fact by finding that the respondent was discriminated by the Appellant for being paid less than terms in the CBA between Appellant and Kenya Union of Sugar Plantation & Allied Workers
- b. Whether learnt trial magistrate erred in law and fact by finding Respondent was under paid.
- c. Whether learnt trial magistrate erred in law and fact on in awarding untaken Leave days.

**Issues (a) Whether learnt trial magistrate erred in law and fact by finding that the respondent was discriminated by the Appellant for being paid less than terms in the CBA between Appellant and Kenya Union of Sugar Plantation & Allied Workers**

8. The learnt trial magistrate court found that the Respondent/Claimant was not a member of the union. That he had a contract of service with terms inferior than those of his counterparts who were members of the union. That the CBA between the Appellant and the union had superior terms. The court held the claimant was discriminated against contrary to the provisions of *the Constitution* Article 41 on labour rights and Article 27 right not to be discriminated against and Section 5(3) (b) of the *Employment Act* to wit :-“(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee— (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”(page 161)
9. The learnt magistrate trial court applied the decision of the Court of Appeal in *OI Pejeta Ranching Limited -vs- David Wanjau Muhoro (2017) eKLR* on principle of equal work for similar work done” and held: “further fairness requires that people doing similar work should receive equal pay.” At page 161 of the Record of appeal the Learned Magistrate held:-.. “ I am therefore satisfied that the Respondent did discriminate against the Claimant by providing him with terms and conditions of employment in the fixed term contract that were significantly inferior to those it provided for unionized employees”.
10. In the instant case, by contract of one year dated 24<sup>th</sup> July, 2017 the claimant had fixed monthly salary pay of Kshs.9756/- basic pay and variable ministry pay of Kshs.6504/- depending on performance. The Claimant’s case was that his job was under UG03 category under the CBA between the appellant and the Kenya Sugar Plantation and Allied Workers (the union). At page 39 of the record was the CBA which the court finds provided for Field Assistant job Basic Salary of Kshs.29,993.00/- from 1<sup>st</sup> May 2017 and effective 1<sup>st</sup> May 2018 increase to Kshs.31,492.00.
11. The Appellant submits that the learned Magistrate erred in law by failing to appreciate the principle of freedom of contract between the parties which terms of employment were executed by the parties before commencement of employment. Secondly for failing to consider and appreciate the fact that clause 2 (d) of the Collective Bargaining Agreement between the Appellant and the union provided that no employee shall be compelled to join the union which right of freedom is exercised consistent with section (4) (1) of the *Labour Relations Act*. In challenging the finding of discrimination the Appellant relied on the decision of the Court of Appeal in defining what discrimination in employment signifies in the case of *Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others (2018)e KLR* where the court defined employment discrimination to be inter alia; ‘A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”.



12. The Appellant submits that there was no discrimination as the difference in salaries was not based on unlawful reason and relied on among other holding of Court of Appeal in *Ol pejeta Ranching Limited -vs- David Wanjau Muhoro (2017) e KLR* where the court held:- “ in claims of this nature, where the Respondent invokes the Principle of equal pay for equal work the respondent must establish that the unequal pay is caused by the employer discriminating on unlawful grounds....”. The Appellant further relied on decision in *Obware Georgiadis Ochieng & 61 Others -vs- Kenya Wildlife Service ( 2016) e KLR* where in the case of claimants on less terms and conditions than permanent employees the court held:- “I find, the Claimants were employed under set contracts of employment that were fixed, the terms were agreed and acknowledged by the Claimants and for the Claimants to compare themselves with other employees enjoying different contracts and terms is not an appropriate comparison to cite discrimination against them as in discrimination, the party engaging in such must be ought to defeat the cause of justice.”
13. The appellant submits that whereas it was undisputed the claimant was unionisable employee, the claimant respondent exercised his right not to join the trade union under section 4 of the *Labour Relations Act*, his colleagues were deducted union dues ( pages 175 of record of appeal) the proceedings were to effect that the Respondent dispute being unionisable did not join the union. Further the Claimant never followed procedure to complain on his salary. The Appellant submits the claimant having not joined the union was not entitled to benefits under the Collective Bargaining Agreement and to buttress this submission relied on the decision in *Christopher O. Omolo -vs Severin Sea Lodge 2016) e KLR* held “ There is also no dispute that the Respondent did not join the union or pay subscription changing term of office..... That he also never paid any agency fee to the union during the period because he was not a member of the union. He was therefore not legally entitled to enjoy the benefits negotiated by the union under the CBA ..... although under section 59 (1) (a) and (3) of LRA provides that the terms of CBA shall be incorporated into the contract of employment of every employee who is employed by the party to the CBA and who is covered by the CBA, the said broad presumption is fettered by section 49 (1) and 51 of the Act which require that for unionizable employee to benefit from a CBA , he must be a paid up union member or he must pay agency fee”.
14. The appellant submits from the foregoing that it did not discriminate against the employment as it did not treat the respondent differently from those similar situation.

#### **Respondent’s submissions.**

15. The Respondent submits that under Section 9 (2) of the *Employment Act* the legal obligation to draw the contract was vested in the employer. That under Section 10 (3) of the *Employment Act* requires disclosure of CBA at initial stage of employment to wit ‘10(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of— (a) any terms and conditions relating to any of the following— (e) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the person by whom they were made;” That Section 59 (3) of the *Labour Relations Act* obliged the appellant, the contract drawer, to include all CBA provision in his individual contract at that particular time. That on discovering he was on inferior times he raised issue with Human Resource Manager who at trial indicated the Claimant did not follow proper procedure and further the Claimant/Respondent submits he was never availed the procedure. The Respondent submits in failing to disclose CBA and procedural policies governing his employment terms the Appellant obtained his consent fraudulently and relied on the case of *Omondi Justus Rang’anga & 28 Others -vs- KCB Bank Kenya Limited Cause No. 618 of 2021* where Hon. Mr Rubaru stated:-“ 68.... The legal duty to disclose the existing CBA in the



contracting process vests on the employer, pursuant to Section 14 of the *Employment Act*. Where the employer then proceeds to issue fixed term contracts and blind side the employee on the terms and conditions under the CBA for that cadre of employees and despite any consent given by the employee placed under such circumstances such is direct fraud, it is misrepresentation of facts of existence of the CBA regulating employment and this being contrary to the law regulating the basic terms and conditions of employment is illegal. Such invalidates the term contract issued by the Respondent to the Claimant. The lack of knowledge of existing CBA negates the consent given at the point of signing each contract and the respondent with the knowledge failed to disclose favourable terms and conditions of employment resulting in engaging in unfair labour practice outlawed under bill of rights for being constitutional pursuant to Article 4 of *the Constitution*".

16. The respondent submits that the Appellant did not disclose to him that field staff was a permanent job where his colleagues were serving on permanent terms in the CBA and was put on a fixed contract with inferior terms. The respondent submits that the effect of CBA under section 57 and 59 as read together with Clause 2 (a) and 2 € of the Recognition agreement an clause 2 of the CBA there was no doubt the CBA applied to all unionsable employees with no discrimination at it.
17. That there was no condition in the CBA that terms and benefits was restricted to union membership as clause 2 (a) of the CBA was that the union represent interest of workers in employment. That the job field assistant was listed under clause 34 of the CBA. The Respondent submits that authority relied on by the appellant of Christopher O. Omolo v Severin Sea lodge (2016)e KLR in paragraph 21 and 24 only applied where the recognition agreement and CBA are silent on its application.
18. The Respondent relied on the decision by Justice Maureen Onyango in Kenya Union of Sugar Plantation and Allied Workers -vs- West Kenya Sugar Cause No. 110 of 2013 ) where the court held:-

“The CBA contains a clause on casual employees and acting circumstance. The respondent negotiated the CBA with the Claimant in which a clause was agreed to relating to casual employee. The Claimant has locus standi to endorse a clause on its CBA. Having agreed to negotiate the clause and having even agreed to discuss the issue to insert some of the casual employee to fixed term contract, the respondents is stopped from enjoying the right of the claimant to represent the casual employee.” That in ruling of Nduma J in Cause No. 258 of 2018, KUSPAW -vs- West Kenya Sugar Company, the court affirmed that all fixed term contract employee and casuals of the Appellant were entitled to CBA salary increase. . The Respondent submits that on deduction, when he joined employment he found restriction to effect that all fixed contracts and casual employees were restricted by employer from joining the union. That the Appellant had refused making deduction and dispute was in court in KUSPAW -vs- West Kenya Limited Cause No. 388 OF 2018. The respondent in submission addressed what he termed as cross appeal for compensation for discrimination relying on the decision by Justice Monica Mbaru decision against KCB Bank(supra) and prayed for general damages of Kshs.5 million.

## Decision

19. The court in appeal is guided by Sella decision ( supra)and considering the grounds of appeal and the submissions of the parties will proceed to evaluate evidence before trial court and reach own conclusion on this issue. The following facts were established at the trial court:- That the Claimant had a fixed term contract of one year from 1st August 2017 to July 2018 ( page 68 ), that he served beyond the contract period and the trial court held that was extension of the fixed term contract and that the contract was for employment as field assistant with consolidated salary of Kshs.16260 split into two parts monthly Kshs 9756 and variable pay of Kshs.6504 depended on performance. The fixed contract provided for



annual leave of 21 days and terminal notice of one month among other terms. The contract was signed by both parties on 31st July, 2017. The contract was terminated for gross misconduct ( page 78). There was a CBA between the Appellant and the Kenya Union of Sugar Plantation and Allied Workers of 1st May 2017 to 30th April 2019 ( page 23) during period of service of Claimant. The Field Assistant, were under category UG 03 with negotiated salary effective 1st May 2017 of Kshs.29,993.00 Basic salary and effective 1<sup>st</sup> May 2018 Kshs.31,492.00/-. That thus the claimant was enjoying inferior terms compared to colleagues due same job.

20. The trial court having found discrimination awarded underpaid salary, unpaid house allowance, 23 leave days not taken and unpaid leave travel allowance.
21. The Appellant submits that the parties entered contrary voluntary and that membership to the union was voluntary and claimant could not claim to benefit from CBA when he was not unionized and submits that claimant was different from the unionized staff hence a reasonable distinction as held in Barclays Bank of Kenya Limited & Another -vs- Gladys Muthoni & 20 Others ( 2018) eKLR “... Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ....whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.” The court found this was not the holding of the court in this case but submission by counsel who cited the quote under paragraph 47 where it is stated:- 47. Responding to those submissions, Mr. Kanjama opened with the definition of discrimination as found in the case of Rose Wangui Mambo & 2 Others vs Limuru County Club & 15 Others [2014] eKLR citing Peter K. Waweru vs Republic [2006] eKLR as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ....

whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.” The court abhors the practice of wrong citations as it is a total waste of judicial time.

22. The Appellant further submitted the difference in pay was not based on written or unreasonable grounds as held in Ol Pejeta Ranching Limited -vs David Wanjau Muhoro (2017) e KLR that:- ‘In claims of this nature, where the claimant invokes the principle of equal pay for equal work the claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds. It was observed in Louw v Golden Arrow Bus Services (Pty) Ltd (supra) that discrimination on a particular ‘ground’ means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, Adolph A. Landman in his article The Anatomy of Disputes about Equal Pay for Equal Work,

“The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the



disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on.”

23. The appellant further submitted that the Respondent was not a member of union and by choice and relied on Section 52 of LRA to effect that even where employer refused the employee to join the union he can do so directly as held in *Humphrey Nyaga Thomas & 25 Others Kenyatta University ( 2021) eKLR*.
24. It was the opinion of the Appellant that the Respondent could not have benefited from the CBA having not been a member paying dues as held in *Christopher O. Omolla Case (Supra)*.
25. The respondent did not dispute he was not unionized but submitted the CBA applied to him. The Respondent submitted that the terms of the CBA were not disclosed at time of contract contrary to Section 10 (3) of the *Employment Act* requires disclosure of CBA at initial stage of employment and that tainted his consent. The appellant did not produce evidence to controvert this. Section 10(3) provides:- “The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of— (a) any terms and conditions relating to any of the following— (e) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the person by whom they were made;” That Section 59 (3) of the *Labour Relations Act* obliged the appellant, the contract drawer, to include all CBA provision in his individual contract at that particular time. That on discovering he was on inferior times he raised issue with Human Resource Manager who at trial indicated the Claimant did not follow proper procedure and further the Claimant/Respondent submits he was never availed the procedure. The Respondent submits in failing to disclose CBA and procedural policies governing his employment terms the Appellant obtained his consent fraudulently and relied on the case of *Omondi Justus Rang’anga & 28 Others -vs- KCB Bank Kenya Limited Cause No. 618 of 2021* where Hon. Mr Rubaru stated:-“ 68.... The legal duty to disclose the existing CBA in the contracting process vests on the employer, pursuant to Section 14 of the *Employment Act*. Where the employer then proceeds to issue fixed term contracts and blind side the employee on the terms and conditions under the CBA for that cadre of employees and despite any consent given by the employee placed under such circumstances such is direct fraud, it is misrepresentation of facts of existence of the CBA regulating employment and this being contrary to the law regulating the basic terms and conditions of employment is illegal. Such invalidates the term contract issued by the Respondent to the Claimant. The lack of knowledge of existing CBA negates the consent given at the point of signing each contract and the respondent with the knowledge failed to disclose favourable terms and conditions of employment resulting in engaging in unfair labour practice outlawed under bill of rights for being constitutional pursuant to Article 4 of *the Constitution*”. The court upholds the foregoing to decision to find that the appellant obtained the consent of the respondent contrary to the law being section 10(3)e of the *Employment Act* which had superior wages in comparison to what was offered for similar job of field assistant to the respondent. The court finds that the action by the appellant was ulterior motive of making more profits by getting cheaper labour from uninformed employees through material non-disclosure.
26. The Claimant relied on decision of *Nduma Nderi J Kisumu ELRC Cause No. 258 of 2018 KUSPAW - VS- West Kenya Sugar Company Limited*. Paragraph 12 where he held :- “ It is clear from the judgment of Maureen Onyango J dated 18th June 2018 and delivered by myself on 12th March 2018 that the negotiated CBA between the parties include casual workers and employees of fixed terms”. In the judgment the court found that Justice Nduma Nderi ordered for deduction of union dues from the wages of all the listed worker still in its employment who have voluntary become members of the union. From the foregoing the court finds that the union could only deduct dues for those who had



become members. The Claimant had not produced evidence he had become a member of the union. The appellant was thus not obliged to include all the CBA terms in his contract. The Appellant was only obliged to disclose the existence of the CBA terms.

27. The issue before the lower court was payment of different wages for similar work being that of a Field Assistant. As his evidence claimant relied on basic pay wages for Field Assistants. Under the CBA ( page 39) and sample payslip of colleague which had basic salary of Kshs. 31,492/- and Housing allowance of Kshs.4724( page 44). This evidence was not controverted by the Appellant. The appellant justified the different to be freedom of contract and for the claimant not being voluntarily unionized. The court found that the claimant was not a party to the CBA . However, the reason of payment of different salary for same work ( field assistant) ought not to be based on unlawful grounds or ulterior motive.
28. The principle of “ equal work should receive equal pay” was discussed in decision cited by Appellant of Eratus K. Gitonga-vs- National Environmental Management Authority, Law Society of Kenya 9 interested party ) 2019 e KLR where Justice Byram Ongaya cited with approval decision in Louw-v-Golden Arrow Bus Services ( PTY) Limited ( 1999) ZALC 166 to wit:- ‘ “The principle “equal work should receive equal pay” in its true form may be extended to analogous situation namely that work of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed, e.g. the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination. In other words it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g race or ethnic origin.” In the OI Pejeta Ranching Limited -vs David Wanjau Muhoro ( 2017) Eklr a decision of the court of Appeal relied on by both parties. On similar work pay the court held:- “ further , fairness requires that people doing similar work should receive equal pay”. Similar work is not the same as work of equal value as a claimant in the a case of equal work the claimant has to prove the equal value. At page 178, the court found that the Appellant paid mobility allowance at same rate as unionized field assistants. The court holds that the difference in the basic salary for the similar job was arbitrary. The court holds that the case before the lower court being of similar work ( field assistant) with unequal pay, the learned trial magistrate rightly held it was discrimination to pay different wages for similar job by the appellant against the respondent .

**2<sup>nd</sup> Issue Whether learnt trial magistrate erred in law and fact by finding the Respondent was under paid.**

29. The court upholds the decision of the lower court with respect to the discrimination and upholds the award of underpaid salaries having found the claimant was entitled to same basic pay as the other field assistants as provided under the CBA for being similar work. The court finds that housing is a statutory right under section 31 of the [Employment Act](#). The appellant contract and payslips of the claimant did not have housing component but stated consolidated pay. The consolidated salary was explained under the contract as being two parts, fixed pay of Kshs 9756 and a variable pay of kshs 6504(page 41). Th court finds that fixed pay is not equal to consolidated salary. The said clause of the contract (page 41)was ambiguous and the court interprets it against the drawer of the contract being the appellant to find house allowance was not provided for. The court upholds the awarded unpaid house allowance at 15% basic pay of Kshs. 78,280.95.



**3<sup>rd</sup> issue :Whether learnt trial magistrate erred in law and fact on in awarding untaken Leave days.**

30. On leave days, the statutory period under section 28 of the *Employment Act* is 21 days. The learnt magistrate held that the summary dismissal indicated the claimant had accrued leave days and on perusal of payslip, such payment was not made. The appellant submits that they prior produced evidence and the Respondent admitted at trial court he was owed payment of 9.57 outstanding leave days ( page 109 and 178 respectively )which they submit amount to Kshs. 11,809.00. The court found the submission to be true. The learnt trial magistrate erred in law in and fact in awarding 23 days as untaken leave. The judgment of the trial court is amended by setting aside the award on leave of Kshs. 27,858 (23 days) and substituted with award of Kshs. 11,809.00. The Claim for unpaid leave travelling allowance was not contested and is upheld.
31. The Respondent in is written submissions at appeal raised a cross appeal. The court holds that submissions are not pleadings and a cross appeal must be pleaded and served on the Appellant for response. The submissions are held to be bad in law with respect to the cross- appeal and held to be of no consequence.

**In conclusion**

32. The Appeal was successful on issue of leave only. The judgement of Hon. JR. Ndururi in Kakamega ELRC claim No. 35 of 2021 Leonard Ngaira Lihangu – vs West Kenya Sugar Company Limited delivered on 23rd June, 2022 is upheld on all claims save for payment in lieu of leave days which is set aside and substituted with Kshs. 11,809.00/-.
33. The court holds that award of interest caters for loss of money value /inflatio . The court awards interest at court rates from date of Judgement at lower court on 23<sup>rd</sup> June , 2022 which interest does not appear awarded in the judgment of trial court.
34. The judgement of Hon. Ndururi is set aside and substituted as follows:
- a. Total underpayment salaries is upheld at Kshs. 289,618
  - b. Total unpaid house allowance us upheld at Kshs. 78,280.25
  - c. Judgement in lieu of leve not taken ( 9.5 days ) Kshs. 11,809.00
  - d. Unpaid leave travel allowances Kshs. 2850 total amount Kshs. 382,557.95 ( amounts payable subject to statutory deductions )
  - ( e) interest is awarded at court rates from date of judgment in the suit of 23<sup>rd</sup> June 2022 until payment in full.
  - ( f) Costs in lower court upheld. No costs of appeal.
35. It is so ordered.

**DATED , SIGNED AND DELIVRED THIS 30<sup>TH</sup> DAY OF MAY 2023 IN OPEN COURT AT KAKAMEGA**

**JEMIMAH KELI**

**JUDGE**

In The Presence Of

Court Assistant- Lucy Macheso



Appellant :- Javer

Respondent :- Absent

