



Windell v Dzuya (Appeal E066 of 2022) [2023] KEELRC 1260 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

APPEAL E066 OF 2022

M MBARŪ, J

MAY 18, 2023

BETWEEN

GREGORY WINDELL APPELLANT

AND

TOBIAS KATANA DZUYA RESPONDENT

(Being an Appeal and Cross-Appeal against the Judgment and Decree of Hon. J. B. Kalo, Chief Magistrate delivered on 24th August, 2022 in Mombasa CM ELRC No.788 of 2019)

JUDGMENT

1. The background to this appeal is a claim filed by the respondent in Mombasa CM ELRC No.788 of 2019 on the grounds that on December 1, 2002 he was employed by the respondent as a caretaker at the family residence at a monthly wage of Ksh. 4,000 and later enhanced to Ksh. 10,000 and was provided with accommodation. The terms of employment remained unwritten without payment of statutory dues and was never issued with a payment statement. The respondent worked without taking any rest days. The claim was that there was subjection to slavery and servitude, unsafe working conditions and on October 24, 2012 he respondent suffered work injury and was denied access to medical records because the appellant wanted to avoid detection and liability for such injury. As a result, the respondent suffered loss and injury to his eyes and back which were only detected after medical assessment on May 17, 2019 and January 2, 2019 and he filed Mombasa ELRC Misc. Appl. No.275 of 2019 – *Tobias Katana Dzuya v Gregory Windwell* seeking leave to file suit against the appellant.
2. The respondent's case was that on July 22, 2019 he was forced to sign a letter of resignation. This was for the appellant to avoid liability and payment of his terminal dues in the following terms;
 - a. Compensation for underpayments from December 2002 to August, 2012 Ksh. 4,378,944; September 2012 to July, 2019 Ksh. 1,764,761.25;
 - b. Unpaid salaries for daytime watchman Ksh. 2,572,274;



- c. Unpaid salaries as an assistant Ksh. 2,807,169;
 - d. General damages for lower back injuries and eye injury;
 - e. NHIF contributions Ksh. 169,150;
 - f. Service pay Ksh. 147,861.63;
 - g. Pay for rest days for day caretaker Ksh. 1,822,893; Pay for rest day as a daytime watchman Ksh. 1,822,893;
 - h. Pay for public holidays as caretaker Ksh. 385,611.98; Pay for public holidays as a daytime watchman Ksh. 185,943.45;
 - i. Untaken leave days as caretaker Ksh. 729,982.04; Untaken leave as daytime watchman Ksh. 351,999.99;
 - j. Compensation for wrongful dismissal as caretaker Ksh. 321,684; Comps nation as daytime watchman Ksh. 155,118.60;
 - k. Certificate of service;
 - l. Exemplary damages; and
 - m. Costs of the suit.
3. In response, the appellant filed reply and counter-claim on the grounds that the respondent was employed at a start wage of Ksh. 7,000 and increased to Ksh. 10,000 per month. Parties agreed that employment could be terminated upon reasonable notice. The respondent was not subjected to slavery or servitude as alleged or underpaid and was allowed leave days and all dues paid. The appellant provided a safe working environment and as a missionary was not capable of subjecting the respondent to the alleged injustices and these claims are time barred leaving the court without jurisdiction.
 4. The respondent filed Mombasa Misc. Appl. No.275 of 2019 seeking leave to file suit but did not serve the appellant.
 5. The respondent resigned from his employment out of own volition and his certificate of service is ready for collection.
 6. In counter-claim the appellant's case was that the respondent terminated his employment on July 16, 2019 without notice and he should pay Ksh. 10,000 to the appellant. He had taken a loan of Ksh. 15,000 and a balance of Ksh. 12,000 was unpaid and this is due all at Ksh. 22,000.
 7. The Hon. Magistrate delivered judgment on August 24, 2022 with an award of;
 - a. Ksh. 605,061 compensations for underpayment;
 - b. Ksh. 147,861.63 in service pay;
 - c. Interests from the date of judgment if not paid in 30 days.
 8. Aggrieved, the appellant filed this appeal on the grounds that the findings that there were underpayments was in error and the formula applied in assessing underpayments was not stated and using a salary of a caretaker instead of that of a gardener after a finding that the respondent was a gardener and hence there is an error. The appellant also faulted the trial court on the basis that the extra payments made to the respondent were not put into account as part of his salary and the award



of Ksh. 605,061 as compensation for underpayment of a gardener for 3 years was in error. The award of a service pay of Ksh. 277,861 is without giving reasons.

In cross appeal, the respondent has 4 grounds that;

- a. The learned magistrate erred in fact and law in finding that the cross-appellant left employment voluntarily.
 - b. The learned magistrate erred in fact and law in failing to find that there was no free agency on the part of the cross-appellant when he signed the letter dated July 17, 2019.
 - c. The learned magistrate erred in law in capping of underpayment at 3 years yet a claim for underpayment is never defeated by passage of time.
 - d. The learned magistrate erred in law in failing to award costs of the claim to the cross-appellant even at the very least, along the margins of the cross-appellant's success.
9. For these reasons the respondent as the cross-appellant is seeking that his appeal be allowed with an award of compensation for unfair termination of employment, payment as a caretaker at Ksh. 28,147.60 x 12 total compensation Ksh. 337,771.20 and enhancement of the award of underpayment to Ksh. 1,602,522.60 and costs.
 10. Both parties attended and agreed to address the appeal by way of written submissions.
 11. The appellant submitted that the respondent was employed in December, 2002 at a wage of Ksh. 4,000 which increased to Ksh. 10,000 when he voluntarily resigned in July, 2019. The respondent testified that he was employed as a gardener, caretaker, personal assistant and day watchman [guard] and sought compensation for underpayment and unpaid salaries for positions held and statutory dues. The appellant filed a response and counterclaim but the same was withdrawn upon negotiations and after hearing, the court failed to address which position was held by the respondent so as to properly assess the terminal dues. The respondent relied on computations of a caretaker and day guard instead of a gardener which should have been addressed.
 12. The appellant also submitted that there was voluntary termination of employment and hence no care of unfair termination of employment claimed in the cross-appeal. Claims going back to 3 years are time barred as held in *Teresia Wanjiku Ngugi v Kiambu Institute of Science and Technology* [2021] eKLR and *George Ochieng Okey v For You Clothing Limited* [2021] eKLR the court is limited to claims for up to 3 years. After the respondent resigned from his employment he cannot claim compensation for alleged unfair termination of employment. The respondent cannot have been an employee in 3 different positions which finding should be addressed in this appeal and the claims for underpayments, statutory due and costs should be dismissed.
 13. The underpayments for a gardener in Mombasa should be assessed as follows; August, 2016 to April, 2017 wage due Ksh. 10,954 – 10,000 x 9 months is Ksh. 8,592.30; May 1, 2017 to April 30, 2018 wage due Ksh. 12,926.55 – 10,000 x 12 is Ksh. 35,118.60; and May 1, 2018 to August, 2019 wage Ksh. 13,572.90 – 10,000 x 15 months Ksh. 53,593.40 Total due Ksh. 97,304.40.
 14. The appellant submitted that the respondent is entitled to Ksh. 97,304.40 for the last 3 years of his employment and an award beyond such amount was in error and to this extent the appeal should be allowed and the cross-appeal dismissed with costs. On the court award of Ksh. 227,861.21 the appellant has since paid Ksh. 80,000.
 15. On the claim for service pay the correct calculation for a gardener should have been; Ksh. 13,572.90 for 202 months in employment total due being Ksh. 30,546.18.



16. In response, the respondent filed submissions challenging the appeal and in support of his cross-appeal that he was employed as a caretaker from December 1, 2002 taking care of the appellants premises and including gardening and his wages should be assessed based on a caretaker's wage. The findings by the trial court that he was a gardener was not correct and the underpayments due should be assessed. The evidence given before the trial court is at variance with the court findings.
17. The respondent supported his cross-appeal and submitted that he was coerced to resign from his employment when Michelle Windwell wrote his resignation letter and made him to sign it. He is illiterate and he could not read and there was admission that the letter was not written by him. the trial court held that the respondent had not expressed any intention to resign from his employment yet accepted that there was voluntary resignation which was not the case but involuntary resignation. Without due process, employment terminated unfairly and compensation should be assessed and awarded. The wage due for a caretaker in Ksh. 28,147.60 x 12 all at Ksh. 337,771.20.
18. The respondent also submitted that the capping of the due underpayments to 3 years was in error since he had worked for the appellant for 17 years and this was admitted in the pleadings and evidence. There was no justification in capping the payment of his dues to 3 years which denied him his due wages and underpayments as held in *Kathra Hussein Noor & Another v Kaderdina Hajee Essak Limited* [2016] eKLR that where the salary of an employee remains in arrears, it remains unpaid, recovery of the arrears or the underpayments is not to be defeated by limitation under Section 90 of the *Employment Act*. all accrued benefits must be paid including underpayments.
19. The respondent faulted the trial court for awarding service pay less Ksh. 80,000 whereas the same should have been calculated at Ksh. 227,861 less Ksh. 80,000 and unpaid service pay is Ksh. 147,861.63. In *Martin Ileri Ndwiga v Olerai Management Company* [2017] eKLR the court held that service pay is due where an employer fails to comply with the provisions of Section 35(5) and (6) of *the Act* and this should be and at 15 days' pay for every year worked.
20. The failure to award costs was not justified as held in *Grace Waitbira Hungi v Riley Services Limited* [2016] eKLR that costs follow the event and in this case, costs and interests should have been awarded hence the cross-appeal should be allowed with costs.
21. This being a first appeal, the mandate of the court is to reappraise the evidence and to draw inferences of fact and law and make own conclusions taking into account that this court is being called upon to consider the evidence, evaluate and make own findings and in doing so the Court must bear in mind that it neither heard nor saw the witnesses testify and should therefore make due allowance for that as held in *National Land Commission v Munubi & 4 others* (Civil Appeal 248 of 2020) [2022] KECA 391 (KLR) (4 March 2022) (Judgment).
22. Upon considering the record in the light of the submissions set out above and the principles of law relied upon by the respective parties, the issues that arise for determination as raised in the memorandum of appeal and the cross-appeal are:
23. Whether the trial court erred in finding that the respondent was employed as a gardener for the last 3 years and other claims were time barred;

Whether the trial court erred in assessing underpayments;

41. Whether the cross-appeal that the respondent did not voluntarily resign and compensation be assessed should be allowed;



Whether costs should be awarded.

42. On the first issue and position held by the respondent while working for the appellant, in the Memorandum of Claim filed on August 28, 2019 the respondent under paragraph 7 pleaded that he was employed as a caretaker and in the course of time other duties were added without pay. The respondent also stated that he was not issued with any written contract. Under paragraph 8 he assessed his duties to include gardening, taking care of the Windel's pets, mowing lawn as well as keeping the external compound of the Windells tidy.
43. Employment of the respondent by the appellant is admitted. There was no written contract of employment. The duties allocated were general and not related to any skill or trade. The legal duty to issue a written contract of employment is on the employer in terms of Section 10 of the [Employment Act](#), 2007 (the Act). Failure to issue a written contract leaves the court with the word of the employee against the employer and the employer having failed to address a mandatory legal requirement, the court is bound to believe the employee save, where the employee was undertaking general duties, he was a general worker for the purpose of assessing his due wages regulated under the various [Wage Orders](#).
44. Without any written agreement, the claims that the respondent was a caretaker, gardener, daytime watchman [guard] were correctly assessed by the trial court with a finding that he could not hold multiple positions at the same time. Such finding cannot be faulted. The respondent remained a general worker under the protections of Section 37 of [the Act](#). Any alleged enhanced roles should have been in writing as required under Section 10 and 13 of [the Act](#).
45. The claim was also that employment commenced on December 1, 2002 until the contested letter of resignation dated July 22, 2019. The period of employment is supported by the appellant through the evidence of Michelle Windell who testified that she met the respondent in the year 2002 when she moved to Mombasa in October, 2002 and hired him soon thereafter and the claim that employment started in December, 2002 is hence correct.
46. Without any written contract of employment, the respondent remained in the service of the appellant undertaking general duties from the year 2002 until the year 2019 and with the passage of the Act, his employment became protected under the provisions of Section 37 of [the Act](#) with rights and benefits and including payment of all his terminal dues at the end of his employment whatever the reasons leading to termination of employment in terms of Section 18(4) of [the Act](#);

(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.
47. The entire period of employment became subject to the law applicable at the end of employment, the Act. The assessment of terminal dues on the face of protections of employment under Section 37 of [the Act](#) should have been analysed for the entire period of employment which was continuous and hence not subject to the provisions of Section 90 of [the Act](#) in terms of lodging claims with the court. Having filed his case in court in good time, the trial court had a duty to assess terminal dues for the entire period of employment, December 1, 2002 to July 22, 2019.
48. As a general worker, the appellant provided the respondent with housing and the evidence that he was paid a thirteenth wage was not challenged and the fact that he was at work for 5 days each week, such removed him from claiming any rest days, leave pay and house allowances under the provisions of Section 27, 28 and 31 of [the Act](#) but the underpayments over the years are due.



49. The claim was that in the year 2002 the wage paid was Ksh. 4,000 which was graduated to Ksh. 10,000 at the time employment was terminated. The respondent did not do an analysis as to when the change in the payments took place.
50. The appellant filed various work records with different salary vouchers and payments and Michelle Windell testified that she would pay the respondent his salaries and a thirteenth salary every year and whenever the family travelled to their home country in the United States of America, the respondent would be paid extra Ksh. 15,000 to compensate him for the extra duties.
51. To appreciate the bundle of documents and payment, Michelle Windell testified that she was in charge of paying the respondent from the year 2002. She testified as follows;
- ... in 2002 the pay was ksh.4000 per month...
- In 2003 the salary was Ksh 4000 ...
- In 2004 he was paid Ksh. 10,000
- In 2005 he was paid Kshs 5000
- In 2006 he was paid Ksh 6000
- In 2007 he was paid Ksh. 10,000
- In 2008 he was paid Ksh. 10,000
- In 2009 he was paid Ksh. 7,000
- In 2010 he was paid Kshs 7000
- In 2011 he was paid Ksh 7500
- In 2012 he was paid Kshs 7500 and Ksh. 15,000 in December;
- In 2015 he was paid Ksh 8000
- In 2016 he was paid Ksh 10,000
- In 2017 he was paid 10,000 from January to October and Ksh 15,000 in November
- In 2018 he was paid Ksh 15,000
- In 2019 he was paid Ksh 10,000 ...
- We underpaid the claimant in 2019. The minimum wage was Ksh. 12,926 but we paid him Ksh. 10,000/ we may have underpaid him in 10,000/- in 2017 ...
52. These payments are supported with receipts, notes and different records and are very important in analysing the claims of underpayments. This evidence was not challenged in any material way before the trial court.
53. In the year 2003 under the *Regulation of Wages (General) Orders* issued under Legal Notice No.48, the minimum wage for a general worker in Mombasa was Ksh. 3,905 and in the year 2002 the respondent's wage was Ksh. 4,000 above the minimum wage.
- In 2003, on a wage of Ksh. 4,000 there was no underpayment.
54. In 2004 the minimum wage was Ksh. 4,335 and the appellant's evidence is that the respondent was paid Ksh. 10,000 ways above the minimum wage without underpayment.



55. In 2005 the minimum wage was Ksh. 4,638 and a wage of Ksh. 5,000 was paid above the minimum wage.
56. In 2006 to minimum wage was Ksh. 5,195 and the respondent was paid Ksh. 6,000. There is no underpayment.
57. In 2007, 2008 and 2009 the minimum wage was Ksh. 6,130 the appellant paid Ksh. 10,000 and Ksh. 7,000 in 2009. There is no underpayment
58. In 2010 minimum wage was Ksh. 6,743 and the appellant paid Ksh. 5,000 less Ksh. 1,743 and for 12 months, total underpayment is Ksh. 20,916.
59. In 2011 the minimum wage was Ksh. 7,586 and the appellant paid 7,500 less Ksh.86 and for 12 months there is total underpayment of Ksh. 1,032.
60. In 2012 the minimum wage was Ksh. 8,579.80 and the appellant paid Ksh. 7,500 less Ksh. 1,079.80 and for 12 months' total underpayment is Ksh. 12,957.60.
61. In 2013 and 2014 the due minimum wage was Ksh. 9,780.95 and Ksh. 10,954.70 respectively and the appellant did not indicate what was paid. The respondent did not specify when his claim for graduated wages from Ksh. 4,000 to Ksh. 10,000 started. In the written submissions, none of the parties addressed this gap.
62. In The year 2015 the minimum wage was Ksh. 10,954.70 and the appellant paid Ksh. 8,000 less Ksh. 2,954.70 and for 12 months the underpayment is Ksh. 35,456.40.
63. In 2016 the wage remained at Ksh. 10,954.70 and the appellant paid Ksh. 10,000 less Ksh.954.70 and for 12 months' total underpayment is Ksh. 11,456.40.
64. In 2017 the minimum wage was Ksh. 12,926.55 and the appellant paid Ksh. 10,000 less Ksh. 2,926.55 and for 12 months the underpayment due is Ksh. 35,118.60.
65. In 2018 and 2019 the minimum wage was Ksh. 13,572.90 and the appellant paid Ksh. 10,000 less Ksh. 3,572.90 and for the 14 months worked in this period the underpayment is Ksh. 50,020.60
The underpayments over the years all amounting to Ksh. 166,957.60.
66. With regard to service pay, Michelle Windell testified that the appellant would pay all medical bills for the respondent and when she gave him NSSF and NHIF forms to sign he refused and took the option to meet his medical expenses. The payment of NSSF and NHIF is a legal requirement and not subject to mutual consent not to pay. The payment is due to the statutory body and even where the employer opts to pay for medical bill, non-payment of statutory dues should attract a penalty. Within employment, an employer who fails to pay such statutory dues in terms of Section 35(5) and (6) of *the Act* is sanctioned by payment of service pay at the rate of 15 days' wage for every full year worked and based on the last wage paid.
67. The respondent was last earning a wage of Ksh. 10,000 instead of 13, 572.90 which shall apply in assessing service pay for the total number of full years served from December 1, 2002 to July 22, 2019 all being 15 years. The tabulation under Section 35(5) is 15 days' pay for every full year being Ksh. 6,786.45 x 15 total Ksh. 101,796.75 in service pay.
68. On the cross-appeal, the respondent's case is that he was coerced to resign from his employment. The letter of resignation was written for him and it was never read to him when he signed it. He has defined himself as illiterate.



69. Michelle Windwell testified that she travelled back home in the United States to take care of her ailing mother and when she came back she noticed the respondent had not properly accounted for monies left in his custody and Ksh. 13,000 had been withdrawn from the bank account since they had trusted him and left the ATM card with him so that he could pay bills for the house. Several other items were missing from the house and when she asked the respondent about these matters, their relationship started to deteriorate and so she left the appellant to take charge of the respondent but one day she noticed that his allocated accommodation was empty and when she asked the respondent said he had quit his employment. Further, that she took into account that the respondent had served them well and wanted to give him his terminal dues and severance pay in a package and hence wrote the letter of resignation for him which he asked to go away and read and then return which he was allowed to do. There was no coercion as alleged.
70. The respondent on his part insisted that his employment was unfairly terminated and he should be paid notice pay and compensation.
71. The evidence by Michelle Windwell on the course of events with regard to letter dated July 22, 2019 when the respondent resigned was not challenged in any material way save for the respondent to allege that he did not read it. That he is illiterate. The fact of him taking the letter away to read and then return it with allegations that he had not read it does not speak of an honest person. What was the need of vacating the allocated premises earlier on and then seeking to quit employment then allow Michelle Windwell to write the letter and then carry it away? Logic is that the respondent realised his actions and instead of engaging the appellant, opted to make a claim of coercion. Upon realisation that his employment had terminated through resignation through what he alleged to be coercion, he did nothing to complain about such matter until he filed his claim.
- The letter of resignation notes that;
- ... on Wednesday, July 17 2019 I, Tobias Katana, quit my job as caretaker for Mr. Gregory S Windwell with no Notice. I was caretaker from December 2002 until July 16th 2019.
72. This letter is signed on July 22, 2019 meaning the respondent stopped attending duty on July 16, 2019 and on July 17, 2019 the letter was drafted and he left with it and only returned it on July 22, 2019.
73. The timelines allowed were sufficient for the respondent to consult on this letter and return it to the appellant. The court finds no mater of coercion.
74. In this regard, the assessment by the trial court that the respondent terminated his employment voluntarily is sound and cannot be faulted.
75. On the cross-appeal with regard to the award of costs, in employment and labour relations court proceedings, the award of costs is not automatic even where a claim is found to be successful. Section 12 (4) of the *Employment and Labour Relations Court Act*, 2011 allow the court the discretion to award costs when it is just and hence this is discretionary. unless the trial court failed to exercise discretion judicially, then the findings that each party should bear own costs cannot be disturbed. The respondent did not submit any matter of wrong application of the trial court discretion and findings on costs are at the discretion of the trial court.
76. At the end of employment, the appellant paid the respondent Ksh. 80,000 in severance pay plus Ksh. 5,000 half month's salary for July total being Ksh. 85,000. Such amount should have been put into account.



77. Accordingly, the cross-appeal is found without merit and is hereby dismissed. The appeal partially succeeds and the judgment of the trial court in Mombasa CM ELRC No.788 of 2019 delivered on August 24, 2022 is hereby reviewed and the following orders allowed;
- a. The respondent was a general employee of the appellant;
 - b. Employment was from December 1, 2002 to July 16, 2019 a period of 15 full years;
 - c. Underpayments are due for the entire period of employment all at Ksh. 166,957.60.
 - d. Service pay is awarded at Ksh. 101,796.75;
 - e. These dues shall be paid less statutory deductions in terms of Section 49(2) of the [Employment Act, 2007](#);
 - f. The dues above shall be paid less Ksh. 85,000 already received by the respondent;
 - g. Each party shall meet own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

