



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Praying Mantis t/a The Scottish Tartan Hotel & Hotel Octopus (K) Ltd v Andayi  
(Appeal 8 of 2020) [2023] KEELRC 1134 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1134 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL 8 OF 2020**

**S RADIDO, J**

**MAY 11, 2023**

**BETWEEN**

**PRAYING MANTIS T/A THE SCOTTISH TARTAN HOTEL & HOTEL  
OCTOPUS (K) LTD ..... APPELLANT**

**AND**

**PETER MBIRIKA ANDAYI ..... RESPONDENT**

*(Appeal from the judgment and orders of the Chief Magistrate at Kisumu (Hon P. Gesora)  
dated 10.6.2020 in Kisumu Chief Magistrates Employment and Labour Cause No. 26 of 2020)*

**JUDGMENT**

1. In a judgment delivered on 10 June 2020, the Honourable Chief Magistrate found that Praying Mantis t/a the Scottish Tartan Hotel (the Appellant) had unfairly terminated the employment of Peter Mbirika Andayi (the Respondent). The Chief Magistrate awarded the Respondent Kshs 1,128,177/-.
2. The Appellant was aggrieved and on 2 July 2020, it filed a Memorandum of Appeal contending that:
  - (1) The Learned Magistrate erred in law and fact by proceeding with the matter against an express order of this Court issued on February 11, 2019 referring the matter to mediation.
  - (2) The Learned Trial Magistrate erred in law by failing to set aside the order referring the matter to mediation before proceeding with the suit.
  - (3) The order dated January 23, 2020 directing the Chief Magistrate to determine the matter was without jurisdiction as no application was before the Court seeking those directions.
  - (4) The Appellant having registered on May 25, 1994, the Respondent's claims from May 1987 to June 1994 totalling Kshs 36,364/- were not payable.



- (5) The Respondent's claim for unpaid salary from the months of January, February, March and April 2015 were neither liquidated, pleaded nor proved.
  - (6) The judgment for Kshs 210,567/- being 12 months' damages for wrongful dismissal are not payable in law.
  - (7) The dismissal having been summary, the Respondent was not entitled to pay in lieu of notice.
  - (8) The sum of Kshs 154,151/- being pay for leave taken was neither tabulated nor proved in evidence hence not payable.
  - (9) The alleged underpayments pursuant to the various legal notices from 1995 – 2015 set out in the Amended Claim were not payable as the Respondent's employment was not subject to the Gazette Notices.
  - (10) The Learned trial Magistrate erred in law on his interpretation of section 41 of the *Employment Act* when he failed to look at the correspondence exchanged between the Appellant and Respondent before the summary dismissal.
  - (11) The Learned Trial Magistrate erred in law and fact by finding that the Appellant did not oppose the tabulation set out in the Claim despite evidence on record.
  - (12) The Learned Trial Magistrate erred in law in not framing the issues for determination before embarking on writing judgment.
  - (13) The Learned Trial Magistrate failed to consider the law and principles governing employment and termination as set out in the labour laws.
  - (14) The Learned Trial Magistrate erred in law by failing to take into account the Appellant's evidence, submissions and the law in his determination.
  - (15) The Learned Trial Magistrate erred in law by determining matter not pleaded and grounds not submitted.
  - (16) The Learned Trial Magistrate erred in law by failing to consider the authorities submitted guiding the damages payable in the circumstances of the Respondents dismissal.
3. The Appellant filed the Record of Appeal on 17 February 2023, and the Court gave directions on 27 February 2023.
  4. The Appellant filed its submissions on 13 March 2023, and the Respondent on 18 April 2023.
  5. The Court has considered the record of appeal and submissions.

### **Role of the Court**

6. The duty of a first appellate Court was set out in the case of *Kamau v Mungai* (2006) 1 KLR 150, in the following terms

"this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that."



## **Mediation**

7. On 11 February 2019, and after the close of hearing of both the Appellant's and Respondent's evidence, the Court referred the parties to mediation.
8. Nothing came out of the mediation and on 15 May 2019, the parties requested the Court to allow them file submissions. The Court directed them to file and exchange the submissions and on 16 September 2019, the Court reserved judgment to 23 January 2020.
9. However, on 23 January 2020, the Court recused itself from the Cause and ordered that it be transferred to the Chief Magistrates Court. (the parties agreed that the file be transferred to the Chief Magistrates Court).
10. When the parties appeared before the Chief Magistrate on 24 February 2020, he indicated that he would deliver a judgment on 15 April 2020.
11. Although the Appellant contended that the Chief Magistrate disregarded the order referring the parties to mediation, it is clear from the record that when the Court was informed that mediation had not started on 15 May 2019, it is the parties who requested to be allowed to file and exchange submissions.
12. It is only then that the Court directed the parties to file and exchange submissions with judgment being reserved.
13. It is, therefore, not correct as asserted by the Appellant that the Chief Magistrate ignored an order referring the parties to mediation. The mediation efforts had failed before the Court transferred the Cause to the Chief Magistrates Court.
14. And before the Chief Magistrate scheduled the judgment date, the Respondent's advocate requested that the dispute be referred to mediation, but the Appellant's informed the Court that mediation had failed.
15. Grounds 1 and 2 of the Memorandum of Appeal are found without merit.

## **Transfer of Cause to Magistrates Court/Jurisdiction**

16. The Appellant also challenged the judgment on the basis that when the Court transferred the dispute to the Chief Magistrates Court on 23 January 2020, there was no application to that effect.
17. The Court finds the challenge insincere because the record of the day's proceedings indicate that the Court informed the parties that it was conflicted and therefore, the Court proposed the transfer.
18. The 2 advocates who were presented informed the Court that they had no objection to the proposal to transfer the Cause to the Chief Magistrates Court.
19. In fact, the record captures the Appellant's advocate stating:

We appreciate the Court's concern. We agree that the matter be referred to the CMs Court for final determination. Meanwhile, proceedings may be typed on priority basis.
20. The record also indicates that when the parties appeared before the Chief Magistrate on 24 February 2020, it is the Appellant's advocate who requested the Chief Magistrate to give a judgment date instead of requesting for a fresh hearing.
21. The Court observes that at the time of the transfer, the Magistrates Court had jurisdiction over employment disputes where the monthly salary was Kshs 80,000/- and below.



22. Ground 3 of the Memorandum of Appeal, therefore fails.

### **Claims Prior to June 1994**

23. The Appellant also challenged the decision of the Chief Magistrate to award underpayments of Kshs 36,364/- prior to June 1994, before it was registered by the Registrar of Companies.
24. The Court has looked at the pleadings. At paragraph 3 of the Amended Memorandum of Claim, the Respondent pleaded that he was employed by the Appellant in November 1988.
25. At paragraph 3 of the Amended Response, the Appellant admitted the averment.
26. During the hearing, the Appellant's director testified that he had employed the Respondent in 1996 and that he was absorbed by the Appellant when it was registered.
27. In consideration of the admission in the pleadings, and the definition of employer in section 2 of the Employment Act, 2007 to include an agent of the employer, the Court finds this ground of appeal without merit.

### **Unpaid Salaries: January to April 2015**

28. The Respondent asserted that the Appellant did not pay him salaries from January to April 2015, when his employment was terminated. The Appellant made a denial of the claim in the Amended Response.
29. During examination-in-chief, the Respondent testified that the Appellant never issued him with pay slips and that he would sign for his salary in a register kept by the Appellant's director. He also stated that he was not Paid Salaries From January to April 2015.
30. The employer ordinarily keeps employee records including payroll records.
31. The Appellant did not place before the Court any records to show that it paid the Respondent the salaries claimed or testify as to whether it paid the Respondent the salaries claimed.
32. The Court finds that it was not an error for the Chief Magistrate to award the SALARIES FROM JANUARY TO APRIL 2015.
33. During examination-in-chief, the Respondent testified that at the time of separation, he was earning Kshs 6,500/-.
34. However, when awarding unpaid Salaries, the Chief Magistrate used the pleaded sum of Kshs 17,548/-.
35. There was no evidence before the Chief Magistrate to show that the Respondent was earning Kshs 17,548/- and the Chief Magistrate erred in accepting the pleaded salary which was not supported by the evidence.
36. The Court will vacate the award and substitute it with Kshs 60,256/- (computed using prescribed minimum wage at separation).

### **Underpayments**

37. The Respondent claimed that he was underpaid from 1987 to 2015 and he set out the relevant Legal Notices.
38. In allowing the claims, the Chief Magistrate noted that the Appellant had not opposed the tabulations by the Respondent.



39. Underpayments occur where the employer pays below the prescribed minimum wage or below the contractually agreed rates.
40. Section 90 of the *Employment Act*, 2007 prescribes a limitation period of 3 years. The Respondent moved the Court on 14 September 2015. He asserted claims dating back to 1987.
41. In light of section 90 of the *Employment Act*, 2007, the claims for underpayment prior to 14 September 2012, were caught up by the law of limitation and relief was not available.
42. The Respondent was an Accounts Clerk. The nearest occupation to an Accounts Clerk in the Regulation of Wages Order is a general clerk.
43. The minimum wage for a general clerk under Legal Notice No. 71 was Kshs 13,214/-.
44. The Respondent's salary during that period was Kshs 6,500/-. He was therefore underpaid for the 8 months by Kshs 53,712/-.
45. From 1 June 2013 to the time of separation on 29 April 2015, the prescribed minimum wage for a general clerk was Kshs 15,064/-.
46. For the 34 months, the Respondent was underpaid by Kshs 291,176/-.
47. This Court, consequently, finds that the Respondent was underpaid from October 2012 to April 2015 by Kshs 344,888/-.

#### **Failure to Frame Issues for Trial**

48. The Appellant further attacked the judgment on the basis that the Chief Magistrate had failed to frame the Issues in dispute.
49. The Appellant did not raise the question of framing Issues before the hearing commenced. A glimpse of paragraph 3 of the judgment, however, indicates that the Court set out the issues for adjudication.
50. In the Court's view, raising the issue now is more of a red-herring rather than a legitimate complaint.

#### **Unfair Termination of Employment**

51. Before terminating an employment contract, the employer should issue a written notice at least 28 days in advance if the employee is paid by the month.
52. The Appellant herein did not place any evidence before the Court that it issued the notice.
53. Apart from the notice, section 41 of the *Employment Act*, 2007 envisages allowing the employee an opportunity to make representations, preferably accompanied by a colleague.
54. If it a case of summary dismissal, section 41(2) of the *Act* ordains a mandatory oral hearing.
55. The Respondent's testimony that there was no hearing was not rebutted by the Appellant. There was no evidence as to when a hearing was conducted and the persons involved.
56. The Chief Magistrate was therefore right to find that the summary dismissal of the Respondent was unfair.

#### **Compensation**

57. The Respondent served the Appellant for over 15 years and the gazetted minimum wage at time of separation was Kshs 15,064/-.



58. In consideration of the length of service, the Court finds the award of maximum compensation was appropriate, save that the gazetted minimum wage should have been used in computing the compensation, and not Kshs 17,548/- which was pleaded but not proved.

59. The Court, therefore, sets aside the award and substitutes thereof an award of Kshs 180,768/-.

### **Salary in lieu of notice**

60. The Appellant did not give the Respondent written notice of termination nor afford him an oral hearing.

61. The award of one-month salary in lieu of notice was therefore legally sound save that it should have been Kshs 15,064/-.

### **Leave**

62. The Chief Magistrate allowed the Respondent's claim for commuted leave in the sum of Kshs 154,151/-.

63. The Respondent had testified that he had not gone on leave during the duration of employment.

64. Section 28(4) of the *Employment Act*, 2007 circumscribes the number of leave days which can be carried forward to 18 months.

65. Since the Appellant did not procedure the Respondent's leave records, the Chief Magistrate should have restricted himself to the 18 months prior to dismissal.

66. The Chief Magistrate therefore fell into error in allowing the head of the claim as pleaded.

67. The Court will set aside the award and allow the equivalent of one and half months' salary on account of leave based on the minimum wage of Kshs 15,064/- (the statute provides for at least 21 days leave on full pay).

68. The Court awards Kshs 22,596/-.

### **Conclusion and Orders**

69. The Court sets aside/vacates the judgment and makes the following findings:

- i. The summary dismissal of the Respondent was unfair.
- ii. The parties conceded to the transfer and determination of the Cause by the Chief Magistrate.
- iii. Mediation had collapsed by the time the Court gave directions on the filing of submissions and transfer to the Chief Magistrate's Court.
- iv. The Respondent was underpaid.
- v. The Appellant was in breach of contract in respect to leave and underpayments

70. The Court awards the Respondent:

- i. Compensation Kshs 180,768/-
- ii. Pay in lieu of notice Kshs 15,064/-
- iii. Underpayments Kshs 344,888/-



- iv. Leave Kshs 22,596/-
  - v. Salary arrears 2015 Kshs 60,256/-
- Total Kshs 623,572/-

71. Each party to bear costs of the Appeal, while Respondent to have costs before the subordinate Court.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF MAY 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Appellant Muma Nyagaka & Co. Advocates

For Respondent Omondi, Abande & Co. Advocates

Court Assistant Chrispo Aura

