



**Mwandebe v Highland Creameries & Food Limited (Appeal  
E046 of 2022) [2023] KEELRC 1927 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1927 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E046 OF 2022**

**M MBARÚ, J  
JUNE 29, 2023**

**BETWEEN**

**WILSON MWANDEBE ..... APPELLANT**

**AND**

**HIGHLAND CREAMERIES & FOOD LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. T. N. Sinkiyian, Senior  
Resident Magistrate delivered at Voi on 27 June 2022 in ELRC No.1 of 2021)*

**JUDGMENT**

1. The background to this appeal is a claim filed by the appellant before the lower in Voi ELRC No.1 of 2021 on the grounds that he was engaged by the respondent as a sales person in Voi and its environs and issued with a written contract dated 1<sup>st</sup> May 2018 earning ksh.27,000 per month where he worked until July 2018 when the payment of his wages stopped. There was no notice or any reason given and despite reporting to work faithfully until 8<sup>th</sup> January 2019 he was not paid his wages and he decided to resign from his employment.
2. The appellant's case before the lower court was that the respondent failed to pay his terminal dues, he was underpaid and hence claimed the following;
  - a. Salary arrears for 6 months Ksh.162,000;
  - b. Notice pay Ksh.27,000;
  - c. Pro rata leave Ksh.20,250;
  - d. Constructive dismissal for non payment of salaries amounting to unfair termination of employment and compensation at ksh.324,000;
  - e. Certificate of service; and



- f. Costs of the suit.
3. The response was that there was no wrongful or unfair termination of employment and the appellant was a stranger to the respondent and the contract of employment dated 1<sup>st</sup> May, 2018. Without employment, the claims made are not justified. The terms and conditions of the contract of service are not in tandem with its practices and cannot be found in their data system making the claimant a stranger and the documentation is not authentic. The reliefs sought are not justified.
  4. In the judgment, the learned magistrate made a finding that the appellant failed to prove there was employment and that he was working for a distributor, the respondent was wrongly sued and hence dismissed the claim with costs to the respondent.
  5. Aggrieved by the judgment, the appellant filed the appeal on the grounds that the learned magistrate failed to make a finding that he was constructively dismissed by the respondent and that his submissions and evidence were not put into account and the judgment should be set aside and the appeal allowed in terms of his claims.
  6. Both parties were invited to attend court on 3<sup>rd</sup> May, 2023 for taking hearing directions but only the appellant attended. Hearing directions were issued and the respondent served but failed to attend.
  7. The appellant addressed the appeal by way of written submissions that he was employed by the respondent as a sales agent after interviews from their Upper Hill office in Nairobi. The claimant was selling products distributed by a local distributor but under the employment of the respondent. He worked well until July 2018 when payment of his wages stopped and in January 2019 he resigned due to non payment of his wages and claims in constructive dismissal.
  8. The appellant has a letter of employment by the respondent and such is sufficient evidence to confirm his employment status as held in *David Namu Kariuki v Commission for the Implementation of the Constitution* [2015] eKLR. In *Gladys Chelimo Bii v Kenya Power and Lighting Company Limited* [2021] eKLR the court held that where an employee is employed on probation and the employee continues to work beyond such period, there is presumption of full time employment. The failure by the employer to pay the was due in contrary to the law and amounts to unfair termination for employment where the employee is forced to resign. The burden of proof in terms of Section 47(5) of the *Employment Act*, 2007 (the Act) is upon the employee who alleges there was unfair termination of employment and the employer must justify the reasons leading to termination of Employment in terms of Section 43 of the Act and which the respondent failed to discharge.
  9. The work records are to be kept by the employer as held in *Agatha Bugosi Said v Vegpro Kenya Limited* [2014] eKLR. The burden to keep work record has to be addressed by the employer at all material times and failure to address a mandatory provision of the law results in unfair termination of employment as held in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR. In this case, the non payment of wages was not justified which led to the appellant resigning from his employment and his claims should be awarded and the appeal allowed.
  10. This being a first appeal, the court is required to evaluate the evidence and the entire record and arrive at own findings taking into account the trial court had the opportunity to hear the witnesses and make its findings.
  11. The appellant filed his Record of Appeal which includes letter dated 1<sup>st</sup> May 2018 being letter of offer of employment as a sales Man for the Voi region. The respondent contested this letter and asserted that its practice was not to issue such letter and the same was not authentic.



12. The appellant also produced evidence that his wages would be paid through his phone Mpesa Number 070591670. He produced Mpesa account details.
13. Upon cross-examination, the appellant testified that some wages would be paid by Nyanchieng'a Nyakerario an employee of the respondent. The appellant also testified that my role was to do sales and marketing. No sheets were being signed but we were reconciling with the distributor of the company I had. It was New Generation the distributor, the work was a sales representative of Highlands Creamers New Generation has my data, all reconciliation the distributor has 6 months and I was not paid.
14. Whereas the employer is under a legal duty to produce work records once suit is filed in terms for Section 10(6) and (7) of the *Employment Act*, 2007 such records must relate to the employment of the given employee, if the subject person was the employee.
15. The appellant filed his employment contract dated 1<sup>st</sup> May 2018 signed for Alice Nzau the human resource manager.
16. The appellant also filed Mpesa statements which has different payments but none are directly from the respondent;  
On 19<sup>th</sup> July 2019 after he had left the respondent he received ksh.9,400 from Barclays bulk payments; and  
On 14<sup>th</sup> May 2018 he received ksh.18,102 from Barclays bulk payments; on 17<sup>th</sup> April, 2018 a similar payment of Ksh.18,103 was paid.  
Several other payments are made by Nyanchieng'a Nyakerario.
17. The claim that the due wage payable was ksh.27,000 is without evidence. the issue of employment of the appellant by the respondent denied and hence the appellant was placed at a higher threshold to prove his employment with the respondent.
18. Amos Ayua testified to support the respondent's case and asserted that as the finance manager, he did not process or have the appellant records. Any payments from the office required one to have data in the system with KRA PIN, identity card and bank account which the appellant failed to prove that he had issued these details as an employee. That the practice of the respondent was to employ under one year contracts where interviews are conducted at Nyansiongo in Nyamira County. For the appellant, he was being paid by one Nyakerario and not the respondent.
20. Without proof of employment, the appellant claiming constructive dismissal, such then was lost. The learned magistrate analysed the evidence and found there was no employment. the appellant filed record and his evidence was that there was a distributor, Nyanchieng'a Nyakerario and who paid him and not the respondent.
21. Despite the respondent not attending or filing any responses to the appeal, the finding of the trial court cannot be faulted. Without proof of employment, the appellant having been employed as a sales man, the fact of him being under a distributor, this is not a proper employment claim against the respondent. the learned magistrate made a correct finding in this regard and the claim properly dismissed.
22. The appeal is found without merit and is hereby dismissed. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.**

**M. MBARŪ**

**JUDGE**



**In the presence of:**

Court Assistant: Japhet

..... and .....

