



**Exotic Penina Fields Group Limited v Makau (Appeal E013 of 2022)
[2023] KEELRC 1919 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1919 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E013 OF 2022**

**B ONGAYA, J
JULY 28, 2023**

BETWEEN

EXOTIC PENINA FIELDS GROUP LIMITED APPELLANT

AND

STEPHEN KIOKO MAKAU RESPONDENT

*(Being an appeal from the judgment and decree of Hon. I.M Kabuya
(Ms) Principal Magistrate, delivered on 20th July, 2022 Kajiado
Employment and Labour Relations Cause No. E025 OF 2021)*

JUDGMENT

1. The learned trial Principal Magistrate delivered the judgment in the suit before the trial Court in favour of the respondent and against the Appellant for:
 - a. An award of Kshs 56,860.77 being compensation for the claimant’s anguish at the rate of gross salary.
 - b. Costs of the suit.
2. The appellant filed the memorandum of appeal dated 19.08.2022 through Michuki & Michuki Advocates. The appellant stated that the trial Court erred in law and fact and misdirected itself as follows:
 - a. By failing to make a finding on whether the claimant’s employment had been terminated or not.
 - b. By finding that the respondent was entitled to compensation equivalent to six (6) months gross salary for “claimant’s anguish” despite the fact that the respondent neither pleaded for the same nor is it provided for under section 49 of the [employment act](#).



3. The appellant prayed for orders:
 - a. That the whole of the judgment be set aside.
 - b. That this honourable court be pleased to order that the suit against the appellants be dismissed with costs.
 - c. That the costs of the lower court cause as well as costs of this appeal be awarded to the appellant
4. The cross-appellant respondent filed the memorandum of cross appeal dated 07.09.2022 and filed through Ngigi Njuguna & Co Advocates. The respondent stated that the trial Court erred in law and fact and misdirected itself as follows:
 - a. By holding that the cross appellant had not been terminated.
 - b. By finding that the cross appellant had agreed to take unpaid leave.
 - c. By holding that the appellant had been affected by the COVID 19 pandemic without proof of financial records.
 - d. By finding that the cross appellant had not been declared redundant.
 - e. By failing to address all the issues placed before her.
 - f. By failing to take all of the cross appellant's evidence and submissions placed before her.
 - g. By applying wrong precedent and principles in employment law and procedures and thereby arriving at the wrong conclusions.
 - h. By failing to consider if the cross appellant ought to have been awarded a month's pay in lieu of notice and thereby failing to award the same.
 - i. By failing to consider if the cross appellant ought to have been awarded unpaid overtime and thereby failing to award the same.
 - j. By failing to consider if the cross appellant ought to have been awarded unpaid public holidays and thereby failing to award the same.
 - k. By failing to consider if the cross appellant ought to have been awarded salary underpayment and thereby failing to award the same.
 - l. By failing to award the cross appellant 12 months' compensation for the unfair and unlawful termination.
 - m. By failing to appreciate that the duty to provide proper and true records lay on the appellant who had not discharged the same.
 - n. By failing to find that the records produced by the appellant had been filed way out of time without leave of the court and that they were forged.
 - o. By failing to take into account the cross-appellant's submissions.
 - p. By failing to apply the correct and proper principles of employment law and procedures and thereby arrived at the wrong conclusion.
5. The cross appellant (respondent) prayed for orders:



- a. That the judgment and decree of the trial court at Kajiado written and delivered by Hon. Irene Marcia Kahuya on 20.07.2022 in Kajiado CMEL cause no E025 of 2021 Stephen Kioko Makau v Exotic Penina Fields Group Ltd against the cross appellant in regard to the relief of a month's salary in lieu of notice, unpaid overtime, unpaid public holiday, salary underpayment and 6 months' compensation be discharged and set aside.
 - b. That this honourable court makes an appropriate judgment and awards the cross appellant a month's salary in lieu of notice, unpaid overtime, unpaid public holiday, salary underpayment and 12 months' compensation as claimed and determines the said suit finally.
 - c. That the cross appeal be allowed with costs to the cross appellants and the appeal be dismissed with costs to the cross appellants.
6. The parties filed submissions on the appeal and cross appeal.
 7. The cross appellant had filed the statement of claim on 09.03.2021. His case was as follows. He was an employee of the Appellant employed as a permanent employee from 08.08.2013 in the harvesting and maintenance department, He was moved to the herbs grading department in 2018 and was later transferred to the stores department where he worked till the day of his termination. He was paid an initial basic monthly salary of Kshs 3,600/- which was increased to a gross salary of Kshs 9,496.77 by the time of his termination which he states was as a result of his industry and determination.
 8. The cross appellant states that at the time of his employment the respondent was trading as Carnation Plants Ltd but later changed to Exotic Penina Fields Group Ltd but his terms of employment and conditions remained unchanged. It is the cross appellant's case that he was chronically underpaid and overworked as his salary was always below the statutory minimum. That in the harvesting and maintenance department and later on in the herbs grading department, he worked 6 days a week from 6.30 am to 6.30 pm and was never paid adequately or at all for the overtime worked. Around January 2019 he was transferred to the stores where he worked from 7.00 am to 3.00 pm for the same number of days.
 9. The cross appellant states that he also worked during public holidays since employment and was not paid as per the prevailing rates. That he worked for the respondent continuously for 6 years 7 months without any warning letter or any disciplinary action being taken against him.
 10. The cross appellant states that the appellant started issuing short term contracts without consultation from January 2019 but still proceeded to terminating them without recourse to the contract or due procedure. On or about 20.03.2020 the appellant was summoned to the HR office and directed to take his 11 remaining leave days for the previous year and that he should wait for a phone call on when to return back to work. The claimant was only paid salary for the days worked in March 2020 and was never called back.
 11. The cross appellant's case is that the termination was unlawful and unfair for reasons that the appellant in terminating the cross appellant acted without giving any valid reason whatsoever. That the reason for termination, if any, was not explained to the cross appellant as required by law under section 41(1) of the *Employment Act* No. 11 of 2007 and that the appellant did not grant the cross appellant any hearing before the termination as required by section 41(1) of the *employment act* no. 11 of 2007.
 12. The appellant filed a memorandum of response on 30.06.2021. The appellant's witness Janet Kambua (DW1), confirmed that the cross appellant was employed by the appellant as a general worker with a gross monthly salary of Kshs 7,746.77/=.



13. It was the appellant's case that the cross appellant was well explained to about the pandemic in a language he understood and agreed that when the situation would normalize, he would be recalled back to work. That the cross appellant proceeded on unpaid leave upon signing a declaration form, thereafter, he was sent a message informing him to report back to work, and he never responded.
14. That the cross appellant was paid holiday overtime for days worked as per pay slips produced in court, and that the cross appellant's pay was in line with the prescribed minimum wages.
15. This is a first appeal and the role of the Court is to reevaluate the evidence and arrive at conclusions one way or the other bearing in mind it did not by itself take the evidence. The decision of the trial Court ought not be disturbed unless shown it misdirected itself and thereby arrived at conclusions that were not just or correct.
16. The 1st issue is whether the termination was unfair. The respondent pleaded that on 20.03.2020 he was summoned and told to take his 11 leave days carried forward from the previous year. Further he was told to wait to be recalled by phone and was paid for days worked in March 2020 but was not recalled. The respondent exhibited the declaration of unpaid leave due to corona virus dated 21.03.2020. The respondent signed in agreement that he would be available for any call or message by the appellant to resume work. Further that if he failed to resume work at the end of the COVID 19 crisis it would be regarded as his full resignation from employment. The trial Court correctly returned that there was no termination. However, the trial Court misdirected itself in finding that the unpaid leave was forced upon the respondent. The Court returns that the evidence was that the respondent took the unpaid leave voluntarily and signed accordingly. The trial Court correctly found that the suit was filed on 09.03.2021 and at a time the respondent had not been recalled per agreement and further, the respondent was subsequently recalled a few days before the hearing of the suit which was about two years since he took the unpaid leave. By the evidence, the Court returns that the trial Court did not err in returning that there had been no termination by redundancy.
17. To answer the 2nd issue the Court returns that the trial Court erred by awarding Kshs.56, 860.62 being compensation for respondent's anguish at the rate of 6 months' gross salaries. There was no basis for such strange award which had not even been prayed for. The grounds for appeal will succeed.
18. To answer the 3rd issue the grounds in the cross-appeal must fail. The Court has found parties separated temporarily and the respondent rushed to file the suit and thereafter admitted to have been recalled. The Court finds that the appellant complied with the terms of the declaration of the unpaid leave due to COVID 19 but the respondent failed to resume duty when recalled and he must be deemed to have resigned per terms of that agreement. The evidence is that there was no basis for notice payment, overtime was paid as well as work on holidays per exhibited payslips, and salary underpayment was not strictly pleaded and proved. The cross appeal is dismissed.

In conclusion the appeal and cross-appeal are hereby determined with orders:

- a. The cross-appeal is dismissed with costs.
- b. The appeal is allowed with costs and trial Court's judgment and decree set aside and, the claimant's suit therein dismissed with costs.

SIGNED, DATED AND DELIVERED IN COURT AT MACHAKOS THIS FRIDAY 28TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

