



REPUBLIC OF KENYA



KENYA LAW
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**Exotic Penina Fields Group Limited v Nyasimi (Appeal E012 of 2022)
[2023] KEELRC 1829 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1829 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E012 OF 2022
B ONGAYA, J
JULY 28, 2023**

BETWEEN

EXOTIC PENINA FIELDS GROUP LIMITED APPELLANT

AND

LYDIA KEMUMA NYASIMI 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 Cause No. E033 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. Compensation in terms of gross salary for 6 months.
 - b. Costs of the suit.
2. The appellant filed the memorandum of appeal dated August 19, 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 September 7, 2022 through Ngigi Njuguna & Co Advocates. The respondent stated that the trial court erred in law and fact and misdirected itself as follows:
- a. By failing to appreciate that the consolidation was in regard to the issue of unfair and unlawful termination only and was not to be treated as personal injury claim.
 - b. By failing to address all the reliefs pleaded and thereby arriving at the wrong conclusion.
 - c. by drafting the judgment as she did without appreciating that the cross appellant had been employed at different time and earned a different salary from that of the consolidated filed.
 - d. By finding that the cross appellant had agreed to take unpaid leave.
 - e. by holding that the appellant had been affected by the covid pandemic without proof of financial records.
 - f. By finding that the cross appellant had not been declared redundant.
 - g. By failing to address all the issues placed before her.
 - h. By failing to take all of the cross appellant's evidence and submissions placed before her.
 - i. By applying the wrong precedent and principles in employment law and procedures and thereby arriving at the wrong conclusions.
 - j. 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.
 - k. By failing to consider if the cross appellant ought to have been awarded unpaid overtime and thereby failing to award the same.
 - l. By failing to consider if the cross appellant ought to have been awarded unpaid public holidays and thereby failing to award the same.
 - m. By failing to consider if the cross appellant ought to have been awarded salary underpayment and thereby failing to award the same.
 - n. By failing to award the cross appellant 12 months' compensation for the unfair and unlawful termination.
 - o. By failing to appreciate that the duty to provide proper and true records lay on the appellant who had not discharged the same.
 - p. 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.
 - q. By failing to take into account the cross appellant's submissions.
 - r. 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 July 20, 2022 in Kajiado Cmel cause no E033 of 2021 *Lydia Kemuma Nyasimi –vs- 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 this cross appeal be allowed with costs to the cross appellants and the appeal be dismissed with costs to the cross appellants.
6. Both parties filed submissions on the appeal and cross appeal.
7. The cross appellant had filed the statement of claim on April 7, 2021. Her case was as follows. She was an employee of the Appellant employed as a general worker in the herbs grading department from November 10, 2015 but was not issued with an employment contract, with a monthly gross salary of Kshs 9,496.77.
8. She states that at the time of her employment the appellant was trading as carnation plants ltd but later changed to exotic penina fields group ltd but her terms of employment and conditions remained unchanged and unaffected.
9. The cross appellant stated that she was chronically underpaid and overworked as her salary was always below the statutory minimum. That she worked from 6.30 am to 8.00 pm 6 days a week and was not paid adequately for overtime and rest days worked. That she also worked during public holidays since employment, and was not paid as per the prevailing rates.
10. She states that she worked for the respondent continuously for 4 years 4 months without any warning letter or any disciplinary action being taken against her.
11. She states that on or about March 19, 2020 the appellant summons her to the assembly together with others, and were informed that there was no work anymore. She states that she was given compulsory unpaid leave of 5 days and was informed that she would be called back, and that she has never been called back.
12. It is the cross appellant’s case that her employment on March 19, 2020 was unlawfully and unfairly terminated for reasons that the appellant acted without giving any valid reason, and that the reason for termination, if any, was not explained to her 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(2) of the *employment act* no. 11 of 2007.
13. The Appellant filed a memorandum of response on August 13, 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/=.
14. It was the appellant’s case that the cross appellant was well explained to about the pandemic in a language she understood and agreed that when the situation would normalize, she would be recalled back to work. That the cross appellant proceeded on unpaid leave upon signing a declaration form, thereafter, she was sent a message informing her to report back to work, and she never responded.



15. 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.
16. 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.
17. The appeal is substantially similar to Appeal No E013 of 2022 at Machakos between the appellant herein with the respondent being Stephen Kioko Makau. The reasoning and opinion of the Court in the judgment in that appeal delivered today apply in the instant Accordingly, in conclusion the appeal and cross-appeal herein 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 as 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

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