



REPUBLIC OF KENYA



**Exotic Penina Fields Group Limited v Simiyu (Appeal E011 of 2022)
[2023] KEELRC 1830 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1830 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E011 OF 2022
B ONGAYA, J
JULY 28, 2023**

BETWEEN

EXOTIC PENINA FIELDS GROUP LIMITED APPELLANT

AND

OSCAR OPICHO SIMIYU RESPONDENT

(Being an appeal from the judgment and decree of Hon. I.M Kabuya(Ms) Principal Magistrate, delivered on 20th July, 2022 Employment Cause E031 of 2021 at Kajiado)

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 orders as follows:
 - a. That a declaration that the Claimant was unfairly and unlawfully terminated.
 - b. That the claimant is awarded Kshs 113,961.24 being compensation for wrongful dismissal at the rate of 12 months' gross salary in terms of section 49(1)(c) of the employment act laws of Kenya.
 - c. 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 finding that the respondent was entitled to a full compensation of twelve (12) months without providing any explanation or reasons on whether she had considered the provisions of section 49 of the employment act prior to making the said award.



- b. By finding that she did not see the employment contract(s) between the parties when the copies of the same had been filed in court and contained in the respondent's list of documents dated 26.05.2021.
3. 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.
4. The appellant prayed for orders:
 - a. That the whole of the judgment on the compensatory award of twelve (12) months be set aside.
 - b. The costs of this appeal be awarded to the appellant.
5. The cross appellant (respondent) filed the memorandum of cross appeal dated 07.09.2022 through Ngigi Njuguna & Co Advocates. The respondent stated that the trial Court erred in law and fact and misdirected itself as follows:
 - a. By holding that through the alleged August 2019 terminal dues letter, the appellant had proven that unpaid leave days, unpaid public holidays and unpaid overtime had been catered for.
 - b. By finding that the cross appellant had been given any exit package.
 - c. By holding that the cross appellant had not denied or challenged his being paid unpaid leave days, unpaid public holidays and unpaid overtime as claimed.
 - d. By holding that the alleged pay slips proved that overtime and leave allowance had been paid as and when due.
 - e. By finding that the cross appellant had not denied or challenged his being paid a month's salary in lieu of notice.
 - f. By failing to award the cross appellant unpaid leave days despite overwhelming evidence on record.
 - g. By finding that the cross appellant had been compensated for his unpaid public holidays.
 - h. By failing to address the issue of overtime and thereby failing to award the cross appellant unpaid overtime pay despite his providing the same.
 - i. By holding that the cross appellant had not proven his salary underpayment claim despite his providing proper computation vis a vis the relevant minimum wage orders and thereby failing to award the same.
 - j. By failing to find that the duty to provide proper and true records lay on the appellant who had not discharged the same.
 - k. By failing to find that the records produced by the appellant had been filed way of time without leave of the court and that they were forged.
 - l. By failing to take into account the cross-appellant's submissions.
 - m. By failing to apply the correct and proper principles of employment law and procedures.
6. The cross appellant (respondent) prayed for orders:



- a. That the judgment and decree of the Chief Magistrate’s Court at Kajiado written and delivered by Hon. Irene Marcia Kahuya on 20.07.2022 in Kajiado CMEL cause number E031 of 2021; Oscar Opicho Simiyu –vs- Exotic Penina Fields Group Ltd against the cross appellant in regard to the relief of a month’s salary in lieu of notice, service pay, unpaid leave days, unpaid public holidays, unpaid overtime and salary underpayment be discharge and set aside
 - b. That the Honourable Court upholds the judgment on unfair and unlawful termination, 12 months’ compensation and further makes an appropriate judgment on the reliefs of a month’s salary in lieu of notice, service pay, unpaid leave days, unpaid public holidays, unpaid overtime and salary underpayment 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
 - c. The costs of this appeal be awarded to the appellant.
7. The parties filed submissions on the appeal and cross appeal.
 8. The cross appellant had filed the statement of claim on 06.04.2021. His case was as follows. He was an employee of the Appellant working as a general worker in the herbs grading department from 03.09.2011 when the appellant was trading as Carnation Plants Ltd and was later promoted to the position of a supervisor. His monthly basic pay was Kshs 6,700 and his gross salary was Kshs 9,496.77 per month.
 9. At the time of his employment the Appellant was trading as Carnation Plants Ltd but later changes to Exotic Penina Fields Group Ltd but his terms of employment and conditions remained unchanged and unaffected.
 10. It was the cross-appellant’s case that he was chronically underpaid and overworked as his salary was always below the statutory minimum. That he worked from 6.30 am to 10.00pm and worked 6 days a week and was not paid adequately or at all for the overtime and rest days worked.
 11. The cross appellant stated that from 03.09.2011 to 03.07.2017 he was not given an opportunity to enjoy his leave days neither was he paid for the same.
 12. It was his case that he worked for the appellant continuously for a period of 7 years and 11 months without any warning letter or any disciplinary action being taken against him.
 13. That on 30.07.2019 together with nine others the cross-appellant was summoned to the HR office and told to go home due to the shortage of work.
 14. It was his case that he was not issued with a month’s notice or payment in lieu thereof. He was paid Kshs 16,000 upon termination. That he was not issued with a notice to show cause, neither was he given an opportunity to explain or defend himself and that the appellant did not issue him a redundancy notice.
 15. The cross-appellant stated that the termination or redundancy of his employment was unlawful and unfair on the grounds that the appellant in terminating him acted without giving any valid reason whatsoever, the reasons for termination, if any, was not explained to the him as required by law under section 41 (1) of the Employment Act no 11 of 2007, the appellant did not grant him any hearing before the termination as required by section 41(2) of the Employment Act no 11 of 2007 and the appellant did not issue a redundancy notice.



16. The Appellant filed a memorandum of response on 13.08.2021. The appellant confirmed that the cross-appellant was employed by it as a supervisor with a gross monthly salary of Kshs 9163.66 and was on a contract commencing from 04.06.2019 to end on 03.06.2020.
17. It was the appellant's case that the cross-appellant consistently recorded poor performance despite being issued with several warnings. That the cross appellant was paid all public holidays worked as per payslips produced in court.
18. That the cross-appellant's contract was terminated as a consequence of the poor performance. Termination was on 30.07.2019 and he was paid one-month salary in lieu of notice as well as all pending leave days and service pay. He was also paid salary for the month of July 2019, and that all his final dues were paid and he acknowledged by signing the payment voucher. Further, the cross-appellant was paid according to the prescribed minimum wage of that time.
19. The 1st issue for determination is whether the cross-appellant is entitled to the unpaid leave days, unpaid public holidays, unpaid overtime and salary underpayment. The termination was on 30.07.2019. The statement of claim was dated 13.03.2021 and filed on that date or shortly thereafter. The time of limitation of such continuing injuries under section 90 of the Employment Act, 2007 is 12 months from the date of cessation thereof. The Court finds that the claims on those headings were time barred as at the time of filing of the suit. The Court finds that the trial Court did not err. The one month in lieu of notice had been paid per evidence on record and the Court returns that the trial Court did not err in declining to award that sum. The cross-appellant was a member of NSSF and under section 35 of the Employment Act he could not qualify for service pay or gratuity and the cross-appellant correctly abandoned that claim per his submissions. The Court further returns that the trial Court's findings were consistent with the evidence on record when the trial Court returned thus, "Nonetheless, the Respondent have proven before this court through the production of the August 2019 terminal due schedule that items (ii) to (iv) were catered for in the Claimant's exit package; which aspect has not been expressly denied by the Claimant. Similarly, the bundle of pay-slips all show that overtime and leave allowance was paid as and when due." The grounds in the cross-appeal will therefore collapse. While making that finding the Court observes that the ground in the cross-appeal about irregularity in appellant's documents appears abandoned because no submissions were made for the cross-appellant in that regard.
20. The appellant does not dispute the trial Court's finding that the termination was unfair because the cross-appellant established that the termination letter did not state the reason for termination and if it was for misconduct as was urged for the appellant, then the appellant had failed to comply with section 41 of the Employment Act, 2007 on affording the cross-appellant a notice and a hearing. The appellant submits an award of 12 months was excessive. To urge that point the appellant raises the substantive point that the cross-appellant was serving on a one-year contract but which the trial Court in error found that it had failed to see it on record whereas and which the appellant says were on record. The Court has considered the record and not all alleged contracts for the entire period the cross-appellant had served are on record. Further, of the ones exhibited, the one dated 21.01.2017 is incomplete without a signature page; the one dated 21.01.2018 while being signed by the cross-appellant was not witnessed at all as appears to have been required in a provided space for witness; and, the one dated 03.06.2019 was not signed by the cross-appellant and was not as well witnessed in the provided space. The Court returns that in that consideration, the appellant's submission that the trial Court erred in finding that the term contracts were not on record is rejected and the Court finds that the trial Court did not err, on a balance of probability in finding thus, "...However, I have combed through the documents filed and have not come across the employment contract hence there was no proof of such. On the contrary the many years worked as shown from the Claimant's NSSF statement



for the period between 1/8/11 to 31/7/19 can be deemed to have been that of a permanent worker since there was no written contract at hand and the fact that he was being remunerated at the end of thirty days.” Thus the point on term contract does not aid the appellant in urging error on the part of the trial Court.

21. The Court has considered the record. While the termination was indeed unfair in merits and procedure as found by the trial Court, the evidence and findings by the trial Court were that the cross-appellant had received warning letters on several occasions. The cross-appellant testified that his team members would destroy the appellant’s items resulting in all team members receiving warning letters. By that evidence, on a balance of probability, the cross-appellant severally received warnings. The appellant proposes award of one month in compensation on account the learned magistrate failed to consider the factors in section 49 of the Act. In proposing a month’s salary, the appellant offers no basis in the submissions. In supporting the 12-months’ award the cross-appellant rebukes award of one-month as an attitude of tokenism on the part of the appellant. In absence of due process and established reasons for termination and taking into account the long unbroken service, it appears that those are aggravating factors under section 49 of the Act. However, the cross-appellant, in the Court’s opinion, contributed to his termination in light of the warnings. The Court awards him 10 months in place of the 12 months especially that the respondent also appears to have considered compliance with issuance of a certificate of service. Thus the trial Court’s award of Kshs.113, 961.24 shall be reduced to Kshs. 94, 967.70 accordingly.
22. The Court has considered the balance of justice including the established unfair termination and each party to bear own costs of the appeal.

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

1. The cross-appeal is dismissed.
2. The appeal partially succeeds with orders the trial Court’s judgment and decree is varied only to the extent that the award for compensation for unfair termination Kshs.113, 961.24 shall be reduced to Kshs. 94, 967.70 accordingly.
3. Each party to bear own costs of the appeal and cross-appeal.

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

BYRAM ONGAYA

PRINCIPAL JUDGE

