



**Ochura v County Government of Homabay (Appeal E003 of 2023)
[2023] KEELRC 1767 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1767 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E003 OF 2023
CN BAARI, J
JULY 20, 2023**

BETWEEN

ELMADA OKOM OCHURA APPELLANT

AND

COUNTY GOVERNMENT OF HOMABAY RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. O. Omwansa (SPM) at Oyugis delivered on 5th October, 2022 in Oyugis Magistrate Court ELRC CAUSE NO. 30 OF 2020)

JUDGMENT

1. The appeal herein, arose from a Judgment rendered on October 5, 2022, where the Trial Court found in favour of the Appellant and proceeded to make an award of Kshs 10,686.00 being one month's salary *in lieu* of notice. The Appellant was also awarded costs of the suit and interest thereon.
2. The Appellant being aggrieved that the Trial Court did not award him all the reliefs that he sought, lodged this appeal on January 31, 2023.
3. The appeal is premised on the grounds that:
 - i. The Learned Trial Magistrate misapprehended both law and fact in failing to award the specific items of claim as prayed for given that the claims were undefended.
 - ii. The Learned Trial Magistrate erred both in law and fact in not appreciating that the Appellant had proved his case on a balance of probabilities as required by law.
 - iii. The Learned Trial Magistrate misapprehended both law and fact in failing to appreciate that his duty was only to assess awards as prayed for, interlocutory judgment having been regularly obtained.



- iv. The Learned Trial Magistrate erred both in law and in fact in not considering the Appellant's submissions together with the provisions of the law and precedent, hence arriving at wrong findings.
 - v. The Learned Trial Magistrate erred both in law and fact in making arbitrary awards under the heads of the Appellant's claim by applying wrong principles of the law or by failing to apply the right legal principles.
4. The Appellant prays that his appeal be allowed, and the judgment and decree of the Trial Magistrate be set aside and be substituted therefore with a just judgment with a proper award of his claims.
 5. The Appellant further prays that he be awarded the costs of the appeal.
 6. Submissions on the appeal were filed for both parties.

The Appellant's Submissions

7. It is the Appellant's submission that having entered an Interlocutory Judgment, the Learned Trial Magistrate was bound to hold the Respondent liable to pay his Claims as pleaded in the Statement of Claim.
8. The Appellant further submits that the issue of liability was determined by virtue of the Interlocutory Judgment which was endorsed on July 1, 2021. He sought to rely in *Felix Mathenge Vs Kenya Power & Lighting Company LTD* [2008] eKLR to support this assertion.
9. The Appellant submits that the Learned Trial Magistrate made no reference whatsoever to his submissions in his Judgment dated October 5, 2022, and further made no reference to the provisions of the law cited by the Claimant in the submissions, which if he did, he would have come to a different conclusion and awarded him the Claims sought.
10. It is the Appellant's submission that the Trial Court handled his case as though it had been defended, and assumed that what was contained in the termination letter was the truth in total disregard of the Appellant's testimony and the witness statement dated November 23, 2020 filed together with the Statement of Claim.
11. The Appellant finally submits the appeal herein, is merited and urge the Honourable Court to allow it and award the Appellants all the items of his claim as outlined in paragraph 8 of the Statement of Claim.

The Respondent's Submissions

12. The Respondent submits that the burden of proving the assertion of a fact, lies with the party seeking to rely on the same, as outlined under Section 107 of the *Evidence Act*, Cap 80 of the laws of Kenya.
13. The Respondent submits that it is the Office of the Sub-County Livestock Officer, Rachuonyo South that suspended its activities but not the services of the Appellant. It is its submission that the Appellant was never terminated.
14. It is the Respondent's submission that the Appellant did not avail any documentation to show that the Office of the Sub-County Livestock Officer, Rachuonyo South, continued its activities despite them indicating that they had suspended their activities.



15. The Respondent further submits that the services of the Appellant have never been terminated by the Respondent at all. It is the Respondent's submission that the Appellant on his own volition decided to terminate himself by filing Oyugis ELRC 30 of 2020.
16. The Respondent submits that the Appellant failed to establish a case of unlawful termination of employment during the trial, as is required under Section 47(5) of the *Employment Act*, 2007. The Respondent had reliance in *Monica Wanza Mbavu V Roofspec & Allied Works Co LTD* [2021] eKLR, to buttress this position.
17. The Respondent further submits that the Appellant's claim for reliefs sought in respect of the years 2012, 2013, 2014 and 2015 should be dismissed for being time barred.
18. It is the Respondent's submission that the Appellant never availed records and schedule of the work hours as per his contract of employment, and that no evidence was adduced to show that he worked overtime.
19. The Respondent submits that the Appellant's claim for leave for the six (6) years that he was in the employ of the Respondent, should be dismissed for being statute barred.
20. It is the Respondent's final submission that the suit herein was duly heard to its logical conclusion, and a sound judgment delivered based on the Appellant's pleadings.
21. The Respondent urges this Court to dismiss the appeal with costs to the Respondent, and uphold the judgment of the Trial Court.

Analysis and Determination

22. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized into the following two grounds: -
 - a. Whether the Trial Court erred in making a finding on liability after entry of an Interlocutory Judgment; and
 - b. Whether the Appellant proved his case for the award of all the reliefs sought.
23. In handling a first appeal, this Court is guided by the Court of Appeal holding in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, where it held that:

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way”
24. The trial court entered an interlocutory judgment in favour of the Appellant for failure of the Respondent to enter an appearance in the suit.
25. The matter then proceeded for formal proof hearing where the Appellant testified in support of his case, leading the trial court to the conclusion that the Appellant did not prove that he was entitled to the reliefs sought and awarded him one month salary in lieu of termination notice.
26. Having stated the role of this court at this juncture, I am called upon to re-evaluate the evidence tendered and arrive at my own conclusion in respect of the Appellant's case.



27. To start with, the Appellant was issued a letter dated May 27, 2019, which although he purports to be a termination letter, is actually a letter of recommendation. The letter states that the Appellant had worked for the Respondent for six (6) years, but due to realignment and reorganization, the Respondent suspended their activities and that any assistance given to the Appellant will be appreciated.
28. The Respondent's position is that it did not terminate the Appellant, but that the Appellant left on his volition. This obviously is not true, the Respondent having stated that it had reorganized and realigned its activities.
29. This in my view, is a case of redundancy badly handled, going by the fact that the Respondent issued the Appellant with a letter of recommendation, clearly indicates that it was assisting him secure alternative employment.
30. Further, the Respondent did not defend the suit before the Trial Court, and hence the Appellant's evidence is not controverted.
31. The Appellant having adopted his witness statement and produced documents showing that he was an employee of the Respondent, is in my view prove on a balance of probability that he was an employee of the Respondent, and whose exit was not handled in accordance with the mandatory provisions of Section 40 of the Employment Act. (See Paul Ngeno vs Pyrethrum Board of Kenya Limited [2013] eKLR)
32. The Appellant was not given notice of the reorganization and realignment. He was instead, left to find out that his services were no longer required the hard way.
33. Although the Respondent argues that it did not terminate the Appellant, the fact that he was not being paid a salary and the subsequent recommendation letter, is clear indication that he no longer was in the service of the Respondent.
34. In the circumstances, I hold that the Appellant's service with the Respondent was unprocedurally severed rendering the termination unfair.
Whether the Appellant proved his case for the award of all the reliefs sought,
35. An employment relationship is regulated by the terms of the contract of service. For this reason, even where an interlocutory judgment is entered, the Appellant remained under obligation to prove each of the claims that he seeks from the Court.
36. The evidence before Court does not show that the Appellant proved that he worked overtime as to be entitled to overtime pay. I thus uphold the holding of the Trial Court in this respect.
37. In regard to the claim for unpaid house allowance, the Bank statement produced before Court shows that the Respondent paid the Appellant a consolidated salary. Section 31(2)(a) of the Employment Act, exempts employees whose salary is consolidated from claiming a separate payment on account of house allowance.
38. This claim thus equally fails and is dismissed.
39. For reason that the Respondent did not defend the Appellant's suit, the clam for leave earned and not paid is allowed on the premises that the employer being the custodian of employee records, which includes leave forms, did not produce any to show that the Appellant utilized his leave.



40. In *Mesback Ktio Ikulume v Prime Fuels Kenya Limited* (2013) eKLR the Court held that it is the employer's duty to keep certain records including annual leave taken and leave due, and should produce the same in legal proceedings.
41. The claims for under payment and special damages was not proved and they fail.
42. The Appellant is awarded Kshs 64,116 on account of leave earned and not paid.
43. In conclusion, the appeal is allowed and orders made as follows: -
 - i. A declaration that the Appellant was unfairly terminated.
 - ii. The award of one month's salary *in lieu* of termination notice is upheld at Kshs 10,686/-
 - iii. The Appellant is awarded Seven Months' salary for unfair termination at Kshs 74,802/-
 - iv. Leave earned but not paid at Kshs. 64,116
 - v. The award of costs and interest by the Trial Court is left undisturbed.
 - vi. The costs of the appeal shall be borne by the Respondent
44. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 20TH DAY OF JULY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Appellant

Mr. Yogo present for the Respondent

Ms. Christine Omolo - Court Assistant.

