



REPUBLIC OF KENYA



Processors v Ngali (suing as personal representative of the Estate of the Late Jairus Kutsuru Ambira) (Appeal E085 of 2021) [2023] KEELRC 1996 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1996 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E085 OF 2021**

**M MBARÚ, J
JULY 13, 2023**

BETWEEN

CRUSTACEAN PROCESSORS APPELLANT

AND

**CAROLINE BEATRICE NGALI (SUING AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF THE LATE JAIRUS KUTSURU AMBIRA) RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. C. Ndegwa PM at
Mombasa delivered on 14 December 2021 in Mombasa CM ELRC No.489 of 2019)*

JUDGMENT

1. The appeal herein follows the judgment in Mombasa CM ELRC No.489 of 2019 awarding the claimant service pay at Ksh.90,000 and salary for May 2017 at Ksh.20,000 with costs.
2. Aggrieved, the appellant filed this appeal on five grounds and the gist of which is that the learned magistrate made an error in awarding service pay and pay for May 2017 and these awards should be set aside with costs.
3. The appeal is that the respondent herein filed his claim before the lower court against the appellant as the legal representative of the Estate of the late Jairus Katsuru Ambira on allegations that he was an employee of the appellant working in the position of Manager from 23 July 2008 to 22 May 2017 when he became ill and died.
4. In the Memorandum of Claim filed before the trial court, the respondent's case was that he had been employed as a quality controller under a written contract earning Ksh.20,000 and he got promoted as manager earning Ksh.40,000 per month until death on 22 May 2017 and hence, with end of employment, he was entitled to;
- 5.



- a. Service pay for 9 years;
 - b. Leave pay for 4 years;
 - c. Off days for 154 days; and
 - d. Salary for May 2017.
6. The appellant's response was that the deceased had been an employee but not a manager as alleged and he remained a quality controller per the contract of employment earning ksh.20,000 per month until he died. He was never promoted as manager and the claims made are not justified.
 7. The appellant produced medical records and NHIF and NSSF payment records together with a hospital bill for the deceased employee.
 8. Both parties attended and agreed to address the appeal by way of written submissions.
 9. The appellant submitted that the learned magistrate erred in law in awarding service pay for 9 years whereas the respondent was a member of NHIF and NSSF and hence service pay was not legally due under Section 35(5) and (6) of the *Employment Act, 2007* (the Act).
 10. The appellant as the custodian of work records submitted the payments made to the respondent including pay for May 2017. The deceased was paid his salary despite not being able to attend work due to illness and he succumbed to illness after being unwell for so long. He was admitted in hospital and the appellant paid a bill of Ksh.372,183.93 and had not been on duty for 2 years.
 11. The respondent submitted that there is no evidence submitted that the appellant had registered the respondent with NSSF and NHIF as required under Section 35(5) and (6) of the Act and in evidence, the witness called confirmed that he could not recall if the salary for May 2017 had been paid. the duty of the employer to keep work records is under Section 10(6) and (7) and Section 74 of the Act which the appellant has failed to address.
 12. This being a first appeal, the court has a duty to evaluate the pleadings, the evidence and arrive at own conclusions.
 13. The awards of service pay and pay for May 2017 are challenged by the appellant.
 14. Indeed, service pay is only due under the provisions of Section 35(5) and (6) of the Act.
 - (6) This section shall not apply where an employee is a member of—
 - (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund.
 19. Service pay is not due to an employee who is registered under another scheme offering retirement benefits, or has such benefits under a CBA or there is another more favourable scheme and the employee is a member of the NSSF.
 20. The respondent does not contest that there was illness for over two years and admission in hospital for two years and the appellant paid the bill which has been filed as part of the records. The provisions of Section 35(6)(c) of the Act apply herein. Service pay premised on this evidence is not due.



21. With regard to the pay for May 2017, indeed under Section 10(6) and (7) the employer has a duty to file work records. The option to keep the employee who was ailing for two years despite the provisions of Section 30 of the Act does not justify the non-payment of wage and the production of the payment statement in terms of Section 20 of the Act. In this regard, the learned trial magistrate well assessed the due wage at Ksh.20,000.
22. Accordingly, the appeal partially succeed and the judgment in Mombasa CM ELRC No. 489 of 2019 reviewed with an order that the respondent is only entitled to Ksh.20,000 salary for May 2017 only. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

