



**Tarmal Wire Products Ltd v Bayiri (Appeal E068 of 2021)
[2023] KEELRC 2286 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2286 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E068 OF 2021
AK NZEI, J
SEPTEMBER 28, 2023**

BETWEEN

TARMAL WIRE PRODUCTS LTD APPELLANT

AND

DZUYA CHIRINGA BAYIRI RESPONDENT

*(Being an Appeal from the Judgment and decree of Hon. R.M. Amayi -
SRM Kaloleni delivered on 5th May 2022 in CM ELRC No. E40 of 2012)*

JUDGMENT

1. The Appellant herein was the Respondent in Kaloleni Chief Magistrate’s Court in the said Court’s ELR Case No E040 of 2020 whereby the Appellant had been sued by the Respondent vide a memorandum of claim dated October 15, 2020. The Respondent had pleaded that he was employed by the Appellant as a Helper/Operator in May 2016 and worked for 4 years, earning ksh 9,600 per month at the time of termination. That the Respondent was terminated verbally in April 2020 by the Respondent’s Human Resource Manger without following the procedural fairness envisaged in Sections 40 and 41 of the [Employment Act 2007](#).
2. The Respondent sought the following reliefs against the Appellant:-
 - a. notice pay.....Ksh 20,064.05
 - b. compensation for unfair termination (20,064.05X 12 months)Ksh, 240,768
 - c. severance pay of each completed year of service (15 days per year) 10,032X4
....Ksh 40,128
 - d. unpaid accrued leave for 4 years (20,064.05X4 years)Ksh 80,256.20



- e. underpayment as per Wage Order 2017 (12 months)Ksh 124,848.60
 - f. underpayment as per Wage Order 2017. (12 months).....Ksh 124,848.60
 - g. underpayment as per Wage Order 2017. (12 months).....Ksh 124,848.60
 - h. underpayment as per Wage Order 2017 (4 months).....Ksh 41,616.20
- Total Ksh 672,529.65
- i. a declaration that the claimant was on a permanent employment.
 - j. costs of the suit.
 - k. Certificate of Service.
3. Other documents filed by the Respondent included an affidavit in verification of the claim, the Respondent's written witness statement dated October 15, 2020 and one evidential document, namely a demand notice dated 25/8/2020.
 4. The Appellant defended the suit and denied the Respondent's claim vide a memorandum of defence dated December 10, 2020. The Appellant pleaded:-
 - a. that the Respondent was employed by the claimant as a general labourer on fixed term contracts with the first commencing on 11/9/2017 and ending on December 11, 2017; and the last one, for a fixed duration of 3months, commencing on December 23, 2019 and ending on 23/3/2020.
 - b. that in view of the fact that the Respondent's fixed term contract terminated automatically by effluxion of time, there was no need of invoking the process applicable where the employer is contemplating pre-mature termination of an employee's contract.
 - c. that the Respondent's allegation that he was unfairly terminated had no basis in law.
 - d. that the Respondent was not entitled to severance pay as he was not declared redundant, his contract having terminated automatically by effluxion of time.
 - e. that the Respondent utilized all his leave days during his entire duration of service and where he did not utilize his leave, he was paid cash *in lieu of* such untaken leave.
 - f. that the Respondent was a general labourer, and was paid in accordance with applicable minimum wage guidelines. That the Respondent was not underpaid.
 - g. that failure to issue the Respondent with a certificate of service was occasioned by Covid-19 pandemic at the time of the Respondent's exit, and that the same will be issued promptly.
 5. Other documents filed by the Appellant included a written witness statement of one Osman Yakub dated December 10, 2010 and an evenly dated list of documents listing 5 documents. The listed documents included an Employee's Personal Details Form, a bundle of the Respondent's fixed term contracts, the Respondent's leave forms, petty cash/disclaimer forms dated 23/3/2020 and a payslip for the month of March 2020.
 6. Trial opened on 27/4/2021 when the Respondent testified and adopted his written witness statement, which substantially replicates his statement of claim, as his testimony. He also produced his listed document in evidence. The claimant further testified that he was not paid his dues. He also testified



- that he used to sign 3 months contracts; and that his last contract was to end in June since he had renewed it in April, but was not given a copy. This contradicts the Respondent's pleading that he was terminated in April 2020.
7. The Respondent further testified that he was unfairly terminated without notice, that he never took leave, and that he could only be absent from duty due to sickness. That he was dismissed from employment before expiry of his contract.
 8. Cross-examined, the Respondent admitted having signed the documents exhibited by the Appellant, but denied having received any payment.
 9. The Respondent called one witness, Osman Yakub (DW-1), who adopted his written witness statement, which replicates the averments made in the Applicant's statement of defence, and produced in evidence the documents referred to in paragraph 5 of this judgment. Cross-examined, DW1 testified that the Respondent was not sent away from employment due to corona, but was on a contract which expired automatically.
 10. The trial Court delivered its judgment on October 5, 2022 and disallowed the Respondent's claims, except the claim based on underpayment, and ordered an issuance of a certificate of service. The Court awarded the claimant Ksh 154,959 being underpayment and ordered the Appellant to issue the Respondent with a certificate of service within 30 days of the judgment.
 11. Aggrieved by the said judgment, the Appellant preferred the present appeal vide a memorandum of appeal dated October 11, 2022 and set forth the following grounds of appeal:-
 - a. the learned magistrate erred in law and in fact in holding that the claimant was underpaid.
 - b. the learned magistrate erred in law and misdirected herself in holding that the applicable minimum wage for general labour was Mombasa (sic) as opposed to all other areas.
 12. The Appellant prayed that:-
 - a. the trial Court's judgment delivered on October 5, 2022 be set aside.
 - b. the Appellant be awarded costs of the appeal.
 13. This is a first appeal. It was held as follows in *Mursal & Another v Munene (suing as the legal administrator of Dalphine Kanini Manesa)* [2020] KEHC 82[KLR]

“A first appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing, both on questions of fact and law....

A first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full fair and independent consideration of the evidence at the appellate stage. Anything less is unjust.”
 14. In the present case, the Respondent's memorandum of claim did not contain any pleading on underpayment, and no particulars of any underpayment were pleaded. Under payments are in the nature of special damages and must be specifically pleaded and subsequently proved by way of evidence. The Respondent only mentioned underpayment in the prayer/reliefs part of his memorandum of claim.
 15. Ordinarily, evidence adduced at trial is aimed at proving matters and/or allegations made in the pleadings. Any evidence and/or purported evidence that is aimed at “proving” matters not pleaded



serves no purpose. The trial Court awarded the Respondent Ksh 154,969 being underpayment for a period of 31 months.

16. The foregoing award is without basis as the Respondent did not pleaded to any underpayment. Evidence and submissions, oral or written, cannot be a substitute for pleadings.
17. I find and hold that the award of Ksh 154,969 as under payment for 31 months, or for whatever period, was not justified. The end result is that the trial Court's judgment/decree delivered/passed on October 5, 2022 is hereby set aside, save for issuance of a certificate of service, and is substituted with an order dismissing the rest of the Respondent's claim filed in the trial Court, with no order as to costs.
18. Each party will bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH SEPTEMBER 2023.

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgement has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

