



Odoyo & 5 others v General Conference of Seventh Day Adventist Church East-Central Africa Division (ECD) (Cause E063 of 2020) [2023] KEELRC 2785 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2785 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E063 OF 2020
MA ONYANGO, J
OCTOBER 31, 2023**

BETWEEN

**CALEB OUMA ODOYO 1ST CLAIMANT
MARSHA ACHIENG MAANGO 2ND CLAIMANT
ISAIAH OOKO 3RD CLAIMANT
JOYCE AKUMU SIJE 4TH CLAIMANT
PAMELA MWABE 5TH CLAIMANT
CHARITY MAGUWA MWANGACHE 6TH CLAIMANT**

AND

GENERAL CONFERENCE OF SEVENTH DAY ADVENTIST CHURCH EAST-CENTRAL AFRICA DIVISION (ECD) RESPONDENT

(Being an Appeal from part of the Judgment, Order and Decree of Hon. Koech Mrs (PM) issued in the Chief Magistrate Court at Milimani Case No. 1869 of 2019 between Caleb Ouma (1st Claimant) Marsha Achieng Maango (2nd Claimant), Isaiah Ooko (3rd Claimant), Joyce Akumu Sije (4th Claimant), Pamela Mwabe (5th Claimant), Charity Maghuwa Mwangache (6th Claimant) and General Conference East Central Africa Division (Respondent) issued on the 22nd day of September, 2020 at Nairobi)

JUDGMENT

1. The appeal herein arises from the Judgment and decree of Hon. L.B. Koech (Mrs) Principal Magistrate in Milimani CMEL 1869 OF 2019. The suit was commenced by statement of Claim dated 11th October, 2019 in which the Claimants who are the Appellants in the instant appeal sought the following reliefs-



- i. A declaration that the dismissal of the Claimants' employment was unfair.
 - ii. An order directing the Respondent to pay the Claimants the calculated sums as particularized in the schedule of the statement of claim with interest at court rates from the date of termination.
 - iii. An order directing and/or compelling the Respondent to issue Certificates of Service to the Claimants in accordance with Section 51 of the [Employment Act](#), 2007.
 - iv. The costs of this suit with interest thereon at court rates.
 - v. Any other relief as the Court would deem just and expedient to grant.
2. The Appellants allege that they were employed by the Respondent through various oral contracts of service between 2007 and 2013. That on or about 13th January 2013, a day before resuming duty from the Christmas break, they were summoned by the Respondent and informed that the management had decided to outsource restaurant business to a 3rd party and their services were no longer required.
 3. That upon inquiry about their terminal dues they were instructed to immediately leave the Respondent's premises.
 4. Among the documents filed with the Statement of Claim was a breakdown of the terminal dues for each of the Appellants which included one month's salary in lieu of notice, house allowance, severance pay and pay in lieu of annual leave. Each of the Appellants' claims were as follows:
 1. Caleb Ouma Adoyo Ksh.903,000
 2. Marsha Achieng Maango Ksh.903,000
 3. Isaiah Ooko Ksh.840,000
 4. Joyce Akumu Sije Ksh.840,000
 5. Pamela Mwabe Ksh.525,000
 6. Charity Maghuwa Mwangache Ksh.525,000
 5. In the Respondent's Memorandum of Reply dated 5th December, 2019 the Respondent admitted employing the Appellants on various dates and stated that at the time of termination they were all earning Ksh.21,000.
 6. The Respondent pleaded that in December, 2016 it decided to lease out the cafeteria where all the Appellants were working owing to constant losses and managerial challenges experienced in running the cafeteria. That this led to the Appellants being declared redundant.
 7. The Respondent stated that contrary to the averments of the Appellants it had been at all times ready and willing to pay the Appellants one month's salary in lieu of notice, severance pay at the rate of 15 days per year worked and payment in lieu of untaken and unpaid leave of 3 years.
 8. The parties agreed to dispose of the suit in the lower court by way of written submissions.
 9. Upon considering the pleadings and submissions the Trial Court awarded each of the Appellants one month's salary in lieu of notice, severance pay at 15 days' salary per year worked and unpaid leave as follows:
 1. Caleb Ouma Adoyo Ksh.247,800



2. Marsha Achieng Maango Ksh.247,800
 3. Isaiah Ooko Ksh.222,600
 4. Joyce Akumu Sije Ksh.222,600
 5. Pamela Mwabe Ksh.121,800
 6. Charity Maghuwa Mwangache Ksh. 96,600
10. The appellants were aggrieved by the decision of the Trial Court and filed the instant appeal.
11. In the Memorandum of Appeal they have raised the following grounds of Appeal-
- i. The Learned Trial Honourable Magistrate erred in law and fact in finding that the Appellants were entitled to one month's salary in lieu of notice but declined to award compensatory damages.
 - ii. The Learned Trial Honourable Magistrate erred both in law and fact in declining to award house allowance to the Appellants.
 - iii. The Learned Trial Honourable Magistrate erred in law and in fact by holding that the Appellants were only entitled to benefit from one month's salary in lieu of notice, severance pay and untaken and unpaid leave.
 - iv. The Learned Trial Honourable Magistrate erred in both law and fact in failing to pronounce herself on the issue of redundancy.
 - v. The award was manifestly low and unfair given the circumstances of the case. In all the circumstances of the case, the trial Honourable Magistrate failed to uphold the law and render justice to the appellants.
12. The Appellants seek the following Orders:
- i. That part of the Judgment, Order and Decree of the Learned Judge (sic) be set aside.
 - ii. This Honourable Court do award them house allowance as prayed for in the amended statement of claim dated 18th December, 2019
 - iii. This Honourable Court do award them compensatory damages as prayed for in the amended statement of claim dated 18th December, 2019.
 - iv. That the Respondent herein do bear the costs of this Appeal.
13. The Appeal was disposed of by way of written submissions.
14. In the Appellants submissions it is contended that the Trial Court erred in holding that their gross pay included house allowance. It is submitted that the payslips produced by the appellants showed that they were not paid house allowance. The Appellants relied on the decision in Joseph Sani Orina v Hiprora Business solutions (E.A) Limited [2017] eKLR where Abuodha J. held that:

“Gross salary as opposed to basic salary usually includes house allowance and other allowances paid by an employer and include basic pay. It is therefore correct that the claimant was paid a consolidated salary hence was never entitled to house allowance.”



15. It is further the submission of the Appellants that although the Trial Magistrate addressed the issue of severance pay, she failed to pronounce whether the redundancy was carried out within (the strike ambit of the law). (sic)
16. It is submitted that the Respondent did not give notice to the Appellants as required by section 40 of the *Employment Act* and the redundancy was therefore unfair hence the Appellants were entitled to compensation of 12 months salary. The Appellants relied on the decision in Stephen Keyo Olus v Intrahealth International [2019] eKLR
17. For the Respondent it was submitted that before the Appellants filed the suit in the trial court, their advocates sent a demand letter to the Respondents in which they set out their demands as per letter dated 8th April, 2019 at page 68-70 of the Record of Appeal.
18. That following telephone discussions with the Respondents Advocates the Appellants sent a raised computation of their demands which offer was accepted by letter dated 11th April, 2019 as reflected at page 71 of the record.
19. It is therefore the Respondent's position that the claim by the Appellants was compromised before the suit in the lower court was filed and it is the said compromise that was adopted by the Trial Magistrate. That this is captured in the Judgment of the Trial Court as follows:

“The Respondent claims that this suit has already been compromised following a proposal by the Claimants which the Respondent was agreeable to. It is my considered view that if the parties had reached an agreement on what each Claimant was entitled to, then, there was no need for the parties to file submissions and await court judgment. I have also noted that the Claimants earned different salaries”.
20. The Respondent submits that the Appellants have not appealed against the findings of the Trial Magistrate as outlined above and neither have the findings been raised in the Memorandum of Appeal.
21. Relying on the decision in Kakamega High Court Civil Appeal No. 38 of 2015, Mumias Sugar Company Limited & Another v Beatrice Akinyi Omondi the Respondent urged the court not to disturb the findings of the Trial Court.
22. Counsel submitted that the terms of admissions made “without prejudice” are only not to be used where negotiations failed, relying on the decision in Walker v Wilsher (1989) 23 QBD at 337 and Rush and Tomkins Ltd v Greater London Council [1989] AC 1280.
23. It is submitted that parties should be encouraged to fully and frankly put their cards on the table as was stated in Scott Paper Co. v Drayton Paper Works Ltd [1927] 44 RPC 151 AT 156.
24. The Respondent further relied on the Treatise Hulsbury's Laws of England Vol.17 at paragraph 213 where it is stated:

“The contents of a communication made “without prejudice” are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show the negotiations have taken place, but they are otherwise not admissible.”



25. The Respondent further relied on the decision in Nairobi Cause No. 2512 of 2012 Millicent Wambui v Nairobi Botanical Gardening Limited where Nzioki wa Makau J. stated.

“The application revolves around “without prejudice” communication. The use of the term ‘without Prejudice’ is used by parties as a means to enable offers and counter offers to be made to settled disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing lawsuit. The words “without prejudice” impose upon the communication an exclusion of use against the party making the statement in subsequent court proceedings. It is a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in litigation. A party making a “without prejudice” offer does so on the basis that they reserve the right to assert their original position, if the offer is rejected and litigation ensues.”

26. It is further the submission of the Respondent that the issue whether the Appellants were entitled to one month’s salary in lieu of notice was not determined by the Trial Magistrate as the Appellants had made an offer which was accepted by the Respondent. That the payment has been made in full.
27. On the issue of compensation, the Respondent submitted that damages are based on proven harm or loss suffered by a party and does not include punitive damages, relying on the decision in *Cuossens v Attorney General* [1999], EA 40 and *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR.
28. The Respondent further submits that a party is bound by its pleadings and the issue whether the Appellants are entitled to compensatory damages was never before the trial court. Further, that compensatory damages can only be awarded where the court finds that there was unfair termination.
29. It is submitted that the Appellants have not demonstrated what wrong the Respondent has committed to warrant compensatory damages.
30. On the issue whether the trial court erred in failing to pronounce itself on the issue of redundancy the Respondent submitted that the trial court made a finding as follows:

“The Respondent on the other hand submits that in December 2016, its administrative committee decided to lease out its cafeteria owing to huge losses. By leasing out to a third party, the Claimants were technically rendered redundant. That a meeting was convened in January 2017 for the purpose of informing the Claimants that the Cafeteria was no longer viable and that a third party had taken over. It is my considered view that the Claimants were duly notified of the redundancy and the termination of their services could not be said to have been unfair. The Claimants are however entitled to the months salary in lieu of notice”

31. It is submitted that the Appellants have not explained how the finding of that Trial Magistrate failed to address the issues of redundancy.
32. On the issues whether the award to the Appellants was manifestly low as to warrant interference by this court the Respondent submitted that the amounts awarded by the Trial Court were higher than what had been negotiated and agreed on by the parties. That it is the Appellants who reduced the amounts that were to be paid which the Trial Magistrate enhanced in her judgment.
33. The Respondent submits that it has settled the claim in full and the appeal ought to be dismissed.



Analysis and Determination

34. The issues that arise for determination from the Memorandum of Appeal and submissions of the parties are the following:
- i. Whether the Appellants are entitled to compensatory damages,
 - ii. Whether the Appellants are entitled to house allowance.

Compensatory Damages

35. Compensatory damages is provided for in section 49(1)(c) of the *Employment Act* where the termination of contract of an employee is unjustified. The maximum compensation payable is 12 months' gross monthly wage or salary.
36. The Appellants have urged the Court to find that their redundancy amounted to an unfair termination and that they are therefore entitled to compensatory damages. It is their position that the trial court did not pronounce itself on this issue.
37. Redundancy is provided for in section 40(1) of the *Employment Act* as follows
40. Termination on account of redundancy
 - (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
 - a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;



- e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

38. It is evident from the facts of this case which are not contested, that the Respondent did not notify the Appellants and the Labour office about the impending redundancy within the timelines provided for in the Act. Other than notification of intended redundancy, the Respondent complied with the other provisions of section 40 of the Act.
39. Does want of notification make the redundancy unfair in terms of Section 45(2) of the Employment Act to entitle the Appellants compensation? The section provides that a termination is unfair where the employer fails to prove valid reason for the termination or to comply with fair procedure.
40. In the instant case the Respondent has stated that sometime in December, 2016 its Administrative Committee decided to lease out its cafeteria where all the Appellants were engaged owing to consistent huge losses and managerial challenges in running the cafeteria. That the most economically viable option was to lease out the cafeteria to a third party. That it is this decision that led to the Appellants being declared redundant.
41. The Claim by the Appellants is contained at paragraphs 6 to 10 of the statement of claim as reproduced below:
- 6. Sometimes on or about the 3rd of January, 2017, the Claimants were summoned a day early from their Christmas break to the Respondents premises. While there, they were verbally informed on the decision to dismiss them based on the reason that the management had decided to outsource the restaurant business to the third party and that their services were no longer required.
 - 7. The foregoing the Claimants were asked never to report to their designated work stations.
 - 8. To their surprise no communication about the same was given to them before breaking for the Christmas break in December, 2016 about the intended outsourcing of the restaurant business to a third party.
 - 9. The Claimants on inquiring about their due terminal benefits, they were instructed to immediately leave the respondents premises.
 - 10. The Claimants aver that they never received any intended closure/ out source of the business to a third party by the Respondent. Equally, no notice was ever served upon the area labour officer regarding the intended redundancy based on the reasons as enumerated by the Respondent.



42. Redundancy is a legitimate mode of termination of employment where the services of an employee are no longer required by an employer due to operational demands and where the employee is not at fault as is the case herein.
43. It is clear from the pleadings in the claim that the Appellants did not challenge the validity of the reasons for redundancy. They only challenge the notification.
44. It is evident that there was valid reason for the redundancy and the Respondent substantially complied with the process as set out in section 40(1) of the Act with of the exemption of notice under Section 40(1) (a) or (b).
45. It is my view that this element of non-compliance by the Respondent does not render the redundancy unfair in terms of Section 45(2) of the Act to justify payment of compensation. What the Appellants missed was the one-month notification under Section 40(1)(b) which in my view would have been paid together with the termination notice under section 40(1)(f).

House Allowance

46. House allowance is provided for under section 31 of the Act as follows:

31. Housing

1. An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
2. This section shall not apply to an employee whose contract of service—
 - a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
 - b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

(2).The Minister may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employees shall be dealt with as shall be specified in the notice.

47. The Regulation of Wages (General) Order under the *Labour Institutions Act* provides that basic minimum monthly wages gazetted therein are exclusive of housing allowance. Rule 4 thereof provides as follows:

4. An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the First or Second Schedule, be paid housing allowance equal to fifteen per cent of his basic minimum wage.

48. In the instant case the pay slips for all the Appellants indicates the same figure as both basic pay and gross pay.
49. The Appellants have urged the Court to find that they were not paid house allowance.



50. My understanding of Section 31(2)(a) of the *Employment Act* as read together with Rule 4 of the Regulation of Wages (General) Order is that the gazetted monthly minimum wage does not include 15% house allowance so that an employee would be underpaid if the monthly minimum wage is not increased by the 15% element of housing allowance. Such an employee would therefore be entitled to the additional 15% house allowance to make the pay consolidated as envisaged in Section 31 (2) (a) of the *Employment Act*. This means that an employee whose wage or salary is above the minimum consolidated wage, that is the minimum gazetted wage plus 15% house allowance, cannot claim that their salary is not consolidated and demand an additional 15% over and above the salary or the wages paid.
51. The Appellants herein have not claimed that any of them were underpaid. Their pay slips clearly indicate that what they were paid as basic salary was also their gross salary and was not below the consolidated gazetted minimum wage.
52. The terms “basic pay”, “gross pay” and “consolidated pay” are not defined either in the *Employment Act* or in the *Labour Institutions Act*. I have also attempted to look up the terms in Black’s Law Dictionary Tenth Edition and failed to find a definition of the said terms. The only definition we have are therefore those in the provisions that I have reproduced above.
53. I accordingly find that the Appellants have not proved that the gross wages they were paid did not include an element of house allowance.
54. For the foregoing reasons, I find no reason to disturb the judgment of Hon. L.B. Koech delivered on 22nd September, 2020 with the exception that in addition to the awards to each of the Appellants by the trial court, I award them each one months pay in lieu of notification of redundancy under Section 40(1)(b) of the *Employment Act*.
55. The Respondent shall bear the costs of this appeal.
56. Interest shall accrue on the award of one month pay herein awarded from the date of this Judgment.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER, 2023.

M. ONYANGO

JUDGE

