



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mulombi v Ndolo Investments Ltd (Appeal E090 of 2022)  
[2023] KEELRC 2620 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2620 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E090 OF 2022  
AK NZEI, J  
OCTOBER 26, 2023**

**BETWEEN**

**SOLOMON KEYA MULOMBI ..... APPELLANT**

**AND**

**NDOLO INVESTMENTS LTD ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. D.O. Mbeja, Principal Magistrate  
delivered on 30th November 2022 in Mombasa CM ELR No. E107 of 2020)*

**JUDGMENT**

1. The Appellant herein was the Claimant in Mombasa CM ELR Case No. E107 of 2020 whereby he had sued the Respondent vide a statement of claim dated 3/11/2020 and filed in Court on 4/11/2020. The Appellant had sought the following reliefs against the Appellant:-
  - a. A declaration that the Claimant's termination from the subject employment by the Respondent was unfair.
  - b. Issuance of a certificate of service.
  - c. Ksh. 104,138.48 on account of unsent annual leave days.
  - d. Ksh. 161,138.15 on account of unpaid house allowance.
  - e. Ksh. 400,778.60 on account of under payment.
  - f. Ksh. 14,420.90 on account of payment in lieu of notice of termination.
  - g. Ksh. 50,473.15 on account of severance pay.
  - h. Ksh. 50,473.15 on account of service pay.



- i. Ksh. 1,071,195.30 as overtime.
  - j. Ksh. 173,050.80 as compensation for unfair termination of employment being the equivalent of the Claimant's 12 months' statutory minimum wage.
  - k. Costs of the suit, and
  - l. Interest on all the money awards at 12% per annum from the date of filing the suit until payment in full.
2. The Appellant had pleaded that he had been employed by the Respondent on 21/4/2013 as a night watchman stationed at the Respondent's premises in Mombasa; at a starting gross salary of ksh. 7,000. That the Respondent required the Appellant to report for duty from 5pm to 6pm, and allowed the Appellant one rest day for every 6 consecutive working days. That the Appellant's monthly salary at the time of termination was ksh. 9,500.
  3. The Appellant further pleaded that his monthly pay was invariably below the stated minimum wage as gazetted from time to time, and set out particulars of underpayment in paragraph 6 of his statement of claim, totaling to ksh. 1,071,195.30. The Appellant further pleaded and particularized his claim for unpaid house allowance and unpaid leave days.
  4. It was the Appellant's further pleading that on 3<sup>rd</sup> July 2020, He reported to work but was denied access, and was verbally informed that he had been laid off.
  5. Other documents filed by the Appellant included a list of witnesses and a list of documents, both dated 3/11/2020. Documents listed on the Claimant's list of documents included letters by the Respondent renewing the Appellant's contract of employment with the Respondent as follows:-
    - a. a contract renewal letter dated 21/4/2014 renewing the Appellant's contract for another six months.
    - b. a contract renewal letter dated 27/4/2016 extending the Appellant's contract for one year.
    - c. a contract renewal letter dated 1/4/2017 renewing the Appellant's contract for one year.
    - d. a salary upgrade letter dated 3/7/2017 upgrading the Appellant's salary to ksh. 9,500 per month .
    - e. a contract renewal letter dated 18/4/2018, renewing the Appellant's contract for one year.
    - f. a contract renewal letter dated 30/6/2019 extending the Appellant's contract for six months.
    - g. a contract renewal letter dated 31/12/2019 renewing the Appellant's contract for six months.
    - h. a letter dated 30/8/2018 transferring the Appellant to work at the Respondent's Stadium Holiday Inn effective 3/9/2018.
  6. It is to noted that the Appellant pleaded as follows at paragraph 7 of his statement of claim
 

“(7) sometimes on 3<sup>rd</sup> July 2020 or thereabouts, the Respondent reported to work but was denied access to his work station by the Respondent. He was verbally informed that he had been laid off.”
  7. The Respondent defended the suit vide an Amended Reply to Statement of Claim dated 3/5/2021 and denied the Appellant's allegations and claim, and put him to strict proof thereof.



8. The Respondent further pleaded:-
  - a. that on 19/3/2020, and due to the outbreak of the Covid-19 pandemic; both the National Government and the County Government of Mombasa ordered all bars and restaurants (which included the Respondent's Stadium Holiday Inn) closed to contain pandemic.
  - b. that the Respondent closed up and issued an internal memo to the staff (who included the Appellant) to proceed on leave until June 2020. That this was also in consideration of a Memorandum of Understanding between the Ministry of Labour & Social Protection, COTU and FKE.
  - c. that the pandemic situation persisted and hence extension to 30/9/2020 to review the progress.
  - d. that come 30/9/2020, the Appellant did not report at all, and the Respondent looked for him to no avail.
  - e. that later, the Appellant informed the Respondent that he was not interested in employment, walked away never to return; and absconded duty. That the Appellant was not entitled to any dues under Section 44(4) of the Employment Act. In view of this act of misconduct.
  - f. that without prejudice, the Appellant's employment was on contractual basis with agreed terms and conditions; all of which terminated by effluxion of time, hence the Appellant could not purport to combine the entire period and purport to claim any dues thereupon at all.
9. Other documents filed by the Respondent included a written statement of one Bernard MMbaha dated 27/4/2021 and a list of documents dated 26/4/2021, listing various documents which included:-
  - a. a contract renewal letter by the Respondent dated 21/4/2014 renewing the Appellant's employment for another six months.
  - b. the Respondent's letter dated 24/4/2016 extending the Appellant's contract of one year.
  - c. the Respondent's letter dated 1/4/2017 renewing the Appellant's contract for one year.
  - d. the Respondent's letter dated 18/4/2018 renewing the Appellant's contract for one year.
  - e. the Respondent's letter dated 30/6/2019 renewing the Appellant's contract for six months.
  - f. Mombasa County Government's Media release dated 19/3/2020 on closure of all bars and restaurants, among other places.
  - g. the Respondent's Internal Memo dated 23/3/2020 on closure of its bars and restaurants due to Covid-19 pandemic.
10. The trial Court's proceedings placed before me show that trial opened on 21/6/2021 when the Appellant testified and adopted his witness statement (as his testimony) and produced in evidence the documents listed on his list of documents. He further testified that he was employed as a night guard on 21/4/2013 at a starting salary of ksh. 7000 and worked from 6.00pm to 6.00am.
11. Cross-examined, the Appellant testified that he was employed on contract, and that there was no provisions for house allowance, service pay and severance pay. That he was terminated without notice, though he saw a notice on closure of bars and hotels issued by the state, that the Respondent's Director told him to go home and await communication to resume duty, but he did not receive any.
12. The Respondent is shown to have called one witness, Barnard Mbaa (RW-1), who adopted his witness statement as his testimony and produced the Respondent's listed and filed documents in evidence.



- The witness testified that the Appellant did not return to work despite the witness calling him on his phone no. 0720397071.
13. Cross examined, RW-1 testified that the Appellant used to work during the day as a day watchman, and was paid a gross salary which included house allowance. That the Appellant left employment, and was paid his dues upto the date he left employment.
  14. The trial Court delivered its judgment on 30/11/2022 and dismissed the Appellant's suit with no order as to costs. The trial Court arrived at the foregoing decision after taking judicial notice of the prevalence of Covid-19 pandemic and closure of bars and restaurants, including the Respondent's Stadium Holiday Inn, that was ordered by the National and County Governments in order to contain the pandemic. The trial Court also took note of the internal memo by the Respondent closing down and sending the staff on leave until June 2020 when the Appellant was expected to report back for review. The trial Court further took note of the fact that by 30/9/2020, the Appellant had not reported back and that the Respondent's Manager (RW-1), contacted him through his number 0720 397071; facts which were not disputed.
  15. In dismissing the Appellant's suit, the trial Court made a finding that the Appellant had not been terminated by the Respondent, but had left his work place without sufficient cause, never to return. The trial Court found the Appellant's case to be devoid of merit.
  16. Aggrieved by the trial Court's said judgment, the Appellant preferred the present appeal vide a memorandum of appeal dated 8/12/2022, and set forth six grounds of appeal as follows:-
    - a. the learned magistrate erred in law and in fact by holding that the Appellant did not establish a prima facie case.
    - b. the learned trial magistrate erred in law and in fact by holding that the Appellant left employment voluntarily.
    - c. the learned trial magistrate erred in law and fact by holding that no sufficient evidence was tendered by the Appellant to sustain the claim, all circumstances considered.
    - d. the learned magistrate erred in law and in fact by dismissing the Appellant's suit against the Respondent based on the Respondent's conflicting accounts on how the subject employment was terminated.
    - e. the learned magistrate erred in law and in fact by failing to allow the reliefs sought in the statement of claim, notwithstanding evidence on record.
    - f. the learned magistrate erred in law and in fact by failing to consider and to apply the provisions of the Regulation of Wages (General) Order to the instant proceedings.
  17. The Appellant seeks the following reliefs:-
    - a. that the appeal be allowed.
    - b. that the trial Court's order dismissing the Appellant's suit against the Respondent be set aside.
    - c. that the statement of claim dated 3/11/2020 be allowed as laid, and
    - d. the Appellant be awarded costs of the appeal and in the subordinate Court.
  18. Having considered the pleadings filed and evidence adduced, issues that emerge for determination, in my view, are as follows:-



- a. whether the Appellant's employment was terminated by the Respondent, and if so, whether the termination was unfair.
  - b. whether the Appellant is entitled to the reliefs sought in the trial Court.
19. It ought to be noted first that this is a first appeal. A first appellate Court is mandated to re-evaluate the evidence presented before the trial Court as well as the judgment, and to arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusion about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (see *Mursal & Another -vs- Manase [2022] eKLR*).
  20. The Court in the *Mursal Case (Supra)* further stated that a first appellate Court has jurisdiction to affirm or to reverse the findings of a trial Court; and that unless restricted by law, the whole case as presented in the trial Court is open for rehearing, both on questions of law and fact.
  21. On the first issue, the global circumstances leading to closure of the Respondent's bar/restaurant on 9/3/2020 are not in dispute, and so is the legality and/or validity of the Respondent's act of sending the Appellant and its other employees on leave until 30/6/2020, and then upto 30/9/2020. The trial Court properly and rightly took judicial notice of the global Covid-19 pandemic which plagued the whole world during the period in issue, and the attendant closure of bars and restaurants. I have noted from a circular issued by the Respondent to all its staff on 23/3/2020 that the Respondent engaged in a business of operating bars and restaurants. I have also noted from a media release issued by the County Government of Mombasa on 19/3/2020 that the said County Government ordered an immediate closure of bars, among other businesses. The said two documents were produced in evidence by the Respondent, and their validity was not disputed by the Appellant.
  22. The Respondent's witness (RW-1) testified before the trial Court that the Appellant did not report back to work on 30/9/2020, and that after efforts to trace him by phone (whose number he gave to the Court) failed, the Appellant showed up and told the Respondent (RW-1) that he was not interested in employment, and left. The Appellant admitted in evidence that the phone number given by RW-1, 0720 397071, was his. The Appellant did not shake and/or rebut the Respondent's evidence to the effect that the Respondent did not terminate the Appellant's employment. I uphold the trial Court's finding that the Respondent did not terminate the Appellant's employment.
  23. Further, from the evidence adduced by both parties, it was a common ground that the Appellant was employed on term contracts. Both parties produced copies of the contracts in evidence. The Appellant admitted this fact in his evidence in Court. The last contract, dated on 31/12/2019, was for six (6) months, running upto 30/6/2020. It is the Appellant who produced in evidence the six months' contract renewal document dated 31/12/2019. No further contract or extension of contract was demonstrated. The Appellant pleaded that he was terminated on 3/7/2020. I have noted that there was no running contract as at that time. The Respondent was under no obligation to either renew the lapsed contract or to give any form of notice over a lapsed contract. Indeed, from the evidence on record, the Appellant's contract lapsed on 30/6/2020 during the covid-19 business closure.
  24. On the second issue, the Appellant's contracts are shown to have been issued successively, with the claimant working continuously on those contracts. In my view, and despite there having been successive term contracts, the Appellant's claim for unpaid leave days, unpaid house allowance and (salary) underpayment cutting across the entire period of employment was in the nature of continuing injury as contemplated in Section 90 of the *Employment Act*. The Appellant properly pleaded the same. The Respondent did not demonstrate that the Appellant either took his leave days



- during the period of employment or was paid in lieu thereof. Section 74(f) of the [Employment Act](#) obligates employers to keep leave records on leave entitlement for each employee, showing leave days taken and those due.
25. Further, the Respondent did not demonstrate having paid house allowance to the Appellant during the period of employment or having housed him pursuant to Section 31 of the [Employment Act](#). No pay statement (payslip) was produced in Court by the Respondent to demonstrate payment.
  26. On the claim for underpaid salary, the Appellant pleaded that his entry salary was ksh. 7,000 per month, and that this was eventually enhanced to Ksh. 9,500. He pleaded and particularized details of the salary underpayment, basing his claim on various minimum wage orders gazetted from time to time during the period of employment. He claimed a total of ksh. 400,778.60. The Respondent did not dispute or rebut the computation pleaded by the Appellant. All that RW-1 told the trial Court is that the Appellant had agreed to the underpayment.
  27. It has to be noted that even where an employee is shown to have contracted to receive a wage that is below the statutory minimum wage, the Court will always substitute the lower wage agreed in the contract of employment with the statutory minimum wage payable to the employee's category of employees at the given period of time.
  28. Further, it ought to be noted that the Appellant's suit in the trial Court was filed within twelve months from the date of cessation of his employment; and therefore cessation of the continuing injury aforesated.
  29. Having said that, I proceed to set aside the trial Court's findings disallowing the Appellant's claims for unpaid leave days, unpaid house allowance and salary underpayment, and I allow those claims as prayed in the Appellant's statement of claim.
  30. The claim for overtime payment is declined as the same was not proved. The Appellant did not demonstrate that he worked from 6pm to 6 am as alleged by him in evidence. Indeed, the Appellant pleaded at paragraph 3(d) of his statement of claim that he worked from 5.00pm to 6.00pm the next day. The Appellant's pleadings were thus at variance with his evidence on the issue of the alleged overtime. The pleadings were never amended.
  31. The claim on account of severance pay cannot be allowed, and is declined. Severance pay can only be awarded where there has been declaration of redundancy pursuant to Section 40 of the [Employment Act](#).
  32. The claim for service pay cannot be allowed unless the same is provided for in a contract of service or a collective bargaining agreement. This scenario is contemplated in Section 35(5) of the [Employment Act](#) which provides as follows:-
    - “(5) An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”
  33. By dint of the foregoing statutory provision, there cannot be payment of service pay unless the terms thereof have been fixed. This fixing can only be done either by contract or by a collective bargaining agreement.
  34. On the claim for issuance of a certificate of service, the Appellant is entitled to be issued with a certificate of service pursuant to Section 51(1) of the [Employment Act](#).



35. In sum, the Appellant’s appeal partly succeeds. Having considered submissions filed by Counsel for both parties herein, I hereby set aside the trial Court’s Judgment delivered on 30/11/2022 and substitute it with a Judgment for the Appellant against the Respondent as follows:-

- a. Unpaid leave days.....ksh. 104,138.48
  - b. Unpaid house allowance .....ksh. 161,138.15
  - c. Salary underpayment..... .ksh. 400,778.60
- Total ksh. 666,055.23

36. The Respondent shall issue the Appellant with a certificate of service within thirty days of this judgment.

37. Each party shall bear its own costs of this appeal, but the Appellant is awarded costs of proceedings in the Court below, and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> OCTOBER 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment 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**

Appearance:

..... for Appellant

..... Respondent

