



**Abongo v Chemelil Sugar Co Ltd (Appeal E051 of 2022)
[2023] KEELRC 2591 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2591 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E051 OF 2022
S RADIDO, J
OCTOBER 25, 2023**

BETWEEN

HENRY ODHIAMBO ABONGO APPELLANT

AND

CHEMELIL SUGAR CO LTD RESPONDENT

(Being an Appeal from the order/Ruling of the Honourable Court (Hon. P.K. Rugut) delivered on December 1, 2022, at Tamu Law Courts in Tamu Magistrates Court Employment and Labour Relations Cause No. E003 of 2022)

JUDGMENT

1. Through a Memorandum of Appeal lodged with the Court on 31 December 2022, Henry Odhiambo Abongo (the Appellant) challenges the judgment of the Honourable Magistrate on the grounds:
 - i. That the learned Magistrate erred in law and in fact by failing to consider the testimony of the witnesses and the pleadings.
 - ii. That the learned Magistrate misdirected herself in making her judgment by ignoring the Appellant's submissions.
 - iii. That the learned Magistrate failed to consider that the Claimant had worked for more than three continuous months for the Respondent and therefore his contract had automatically converted under section 37(3) of the *Employment Act*.
 - iv. That the learned Magistrate erred in law and in fact by failing to consider the evidence tendered by the Appellant of underpayment of salaries.
 - v. That the learned Magistrate erred in law and fact in disregarding the fact that the Respondent failed to prove that the Claimant had retired from employment.



2. The Appellant filed the Record of Appeal on 27 July 2023 and the Court gave directions on 12 June 2023 and 19 September 2023.
3. The Appellant filed his submissions on 3 October 2023.
4. The firm of Amos O. Oyuko & Co Advocates filed a Notice of Appointment to act for the Respondent on 4 October 2023. The Respondent's submissions were filed on 16 October 2023.

Role of First Appellate Court

5. The role of a first appellate Court has been the subject of discussion in numerous Court decisions.
6. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse 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.
7. This Court will keep the interdict in mind.

Unfair termination of employment

8. The Appellant's case before the Principal Magistrate was that the Respondent terminated his employment unfairly because he was not given notice.
9. The Principal Magistrate found that the Appellant's employment had not been terminated unfairly but rather that he had retired upon reaching the retirement age of 60 years.
10. In reaching the conclusion, the Principal Magistrate considered a letter dated 20 September 2021 written by the Appellant to the Respondent requesting to be facilitated to claim his benefits from the National Social Security Fund.
11. The Respondent engaged the Appellant through fixed-term contracts of 3 months. The contracts were regularly renewed upon expiry.
12. The last written contract produced in Court was from 1 September 2020 to 30 November 2020.
13. The Respondent did not deny that the Appellant continued in employment after 30 November 2020. The Appellant produced in Court pay slips up to August 2021 to show that he was still in employment.
14. Lacking a written contract and, because the Appellant was being paid by the month, the Appellant became an employee on monthly contracts and was entitled to the protections assured employees by the *Employment Act*, 2007.
15. When the Appellant wrote to the Respondent on 20 September 2021, he expressly made reference to retirement and not termination of employment.
16. This Court is in agreement with the Principal Magistrate that based on the letter, this was a case of retirement and not unfair termination of employment.
17. Compensation and pay in lieu of notice are therefore not available as remedies.



Casual employment

18. The Appellant was paid by the month and going by the definition of casual employee in section 2 of the *Employment Act*, 2007, he was not a casual employee by the stretch of any imagination. He was not paid at the end of the day.
19. The Appellant was on fixed-term contracts.

Underpayment of salaries

20. The Appellant anchored his claim for underpayment of salaries on a Collective Bargaining Agreement between the Sugar Employers Group of the Federation of Kenya Employers and the Kenya Union of Sugar Plantation and Allied Workers.
21. The Principal Magistrate rejected this head of the claim on the ground that the Appellant had failed to produce a copy of the Collective Bargaining Agreement in Court.
22. It was incumbent upon the Appellant to prove that there was an agreed remuneration below which he was being paid.
23. By failing to produce a copy of the Collective Bargaining Agreement, the Appellant failed to prove this head of the claim and it was rightly rejected despite the Respondent admitting that there was a Collective Bargaining Agreement in place.
24. Further, the fact that the Respondent's witness made some admission as to the Appellant's salary as of 1 May 2015 could not salvage the case for underpayments considering the Appellant moved the Court in 2022 while some aspects of the claim were caught up by the provisions of section 90 of the *Employment Act*, 2007.

Unpaid leave

25. The Appellant prayed to be awarded the equivalent of 76 months accrued leave in the sum of Kshs 132,757/-.
26. Section 28(4) of the *Employment Act*, 2007 circumscribes how many leave days can be carried forward. The period is only up to 18 months.
27. The Appellant did not suggest or testify that he accumulated leave over 76 months with the approval of the Respondent or that he applied for leave and was denied.
28. The Principal Magistrate did not, therefore, err in declining to award this head of the claim.
29. The Court notes that the Respondent acknowledged that the Appellant would be paid any outstanding/accrued leave upon clearing.
30. The Appellant should clear with the Respondent to access any accrued leave days commuted into cash.

Gratuity

31. The Respondent conceded to this claim but added that payment would be made upon the Appellant clearing as required under the Human Resource Policy.
32. The Court finds that this head of relief was premature as the Appellant had failed to comply with the terms of the Human Resource Policy on clearance before getting the payment.



Housing

33. On account of housing, the Appellant claimed a total of Kshs 187,671/-. The Appellant testified that despite providing him with accommodation, the Respondent used to deduct Kshs 400/- monthly on account of rent.
34. The Respondent testified that the rent deduction was agreed on a tenancy agreement of 7 October 2017.
35. This head of the claim could not have succeeded because the Appellant was on a consolidated wage and he had a running tenancy agreement with the Respondent.
36. There was no Cross-Appeal.

Conclusion and Orders

37. The Appeal is dismissed with no order on costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF OCTOBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Juliet Dima & Associates Advocates

For Respondent Amos O. Oyuko & Co Advocates

Court Assistant Chrispo Aura/Everylyne

