



Salim v Oyola (Appeal E017 of 2023) [2023] KEELRC 2842 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2842 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E017 OF 2023
M MBARŪ, J
NOVEMBER 9, 2023

BETWEEN

SARAH SALIM APPELLANT

AND

MWANAISHA QUEEN OYOLA RESPONDENT

(Being an appeal from the judgment of Hon. D.O. Mbeja delivered on 13 February 2023 in Mombasa in CMELRC No. E267 of 2021)

JUDGMENT

1. The appellant file this appeal from the judgment in Mombasa CMELRC No. E267 of 2021 delivered on 13 February 2023. The background of the appeal is a claim filed by the respondent, Mwanaisha Queen Oyola on the grounds that she was employed by the appellant as a housekeeper in Mombasa at a wage of Kshs. 9,000 per month. She worked for 5 years until November 2020 when she fell sick and upon seeking medication, she was diagnosed with pneumonia and anaemia upon which she wrote to the appellant and asked to terminate her employment with payment of her terminal dues but this was declined resulting in unfair termination of employment and the claims were as follows;
 - a. Service pay for 5 years Kshs. 39,000;
 - b. Compensation for work during public holidays Kshs. 31,200;
 - c. Underpayments for 3 years January 2018 to April 2018 Kshs. 26,436;
 - d. Underpayments from May 2018 to April 2019 Kshs. 79,308;
 - e. Underpayments from May 2019 to April 2020 Ksh.79, 308;
 - f. Underpayments from May 2020 to November 2020 Kshs. 52,872.



2. In response, the appellant made general denials and denied that there was no employment relationship between the parties as alleged or work for 5 years. There is no evidence of communication about getting sick, there was no breach of the employment contract and the claims made should be dismissed.
3. In the judgment of the trial court, there was a general finding that there was unfair termination of employment with an award of all the claims made totalling to Kshs. 308,124.
4. There are five grounds of appeal that;
 1. The learned magistrate erred in law and fact by misapprehending the pleadings and evidence placed before him and holding on the issue of wrongful, unfair and unlawful termination thereby arriving at an erroneous and unjust decision.
 2. The learned magistrate erred in law and fact by not considering the pleadings, issues arising from the dispute, the testimony of the witnesses, the entire evidence placed before him and the weighty submissions on behalf of the appellant before arriving to his conclusion.
 3. The learned magistrate erred in law and fact in finding that there was an employer-employee relationship between the appellant and the respondent.
 4. The learned magistrate erred in law and fact by finding that the respondent worked for a period of five years.
 5. The learned magistrate erred in law and fact by misapprehending the evidence placed before him and finding that the respondent proved her case on a balance of probabilities and was entitled to the reliefs as sought.
5. The appellant is seeking that the appeal be allowed with costs and the judgment of 13 February 2023 be set aside.
6. Parties have filed written submissions.
7. The appellant submitted that the respondent filed a claim alleging there was no payment of terminal dues in respect of termination of employment. There was no employment relationship between the parties to justify such a claim and there was an error by the trial court to find that the claims made were justified. The court relied on unpleaded issues. The respondent claimed that she left her employment due to illness and was only claiming terminal dues but the trial court went ahead to make a finding that there was unfair termination of employment rendering the judgment a nullity. In the case of *Pacific Frontier Seas Limited v Kyengo & another* Civil Appeal No.32 of 2018 the court held that it was an error for the court to rely on unpleaded issues because any determinations thereof did not flow from the proceedings.
8. The *Employment Act*, 2007 (the Act) defines who an employee and employer is and which relationship did not exist between the parties. The appellant was not the employer since the respondent admitted to having been employed by the late father and who continued to work for the family after the father died. Wages would be paid by the deceased and later by the mother or the elder brother to the respondent. Hence, the respondent sued the wrong person.
9. The appellant submitted that on the claims made, the respondent did not specify the public holidays she was at work as held in the case of *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR. where there were underpayments, such are a continuing injury which ought to have been addressed within 12 years and to make such a claim was time barred and should have been dismissed.



where there were any underpayments, the respondent is only entitled to the period of November 2019 to November 2020 at Kshs. 79,308.

10. In response, the respondent submitted that terminal dues were wrongly calculated necessitating the respondent to seek the assistance of the Labour Officer who tabulated what was due and invited the appellant to pay but who declined.
11. In the claim, the respondent pleaded that there was unfair termination of employment and the trial court made a finding in this regard. The words only relate to what was pleaded and to this extent the appeal should be dismissed.
12. The appellant submitted that the respondent was employed to take care of the appellant's parents and who paid her wages, she took care of the entire family answerable to the appellant. The admission of underpayments is proof that the appellant was involved in the employment of the respondent as the employer and the judgment of the lower court should be confirmed.
13. This being a first appeal, the court has the duty to re-evaluate the evidence and make a finding but take into account the lower court had the chance to hear the witnesses.
14. With regard to the question of an employment relationship, this is foundational in a claim before the court and before the lower court designated to hear and determine employment claims.
15. On the records, the respondent claimed that she was employed by the appellant as a housekeeper. In her evidence, she testified that she was employed as a house help working for the entire family and the appellant would pay her wages since the mother was old and worked from October 2015 until 2021 when her knees became swollen. She then wrote a letter to her employer seeking payment of her terminal dues.
16. Upon cross-examination, the respondent testified that she used to work in the appellant's parents' house and the appellant would pay her. She was recruited by the mother and the appellant would make payments. The mother allocated her work but the appellant would make the monthly payments. She got ill and wrote to the appellant and was negotiating the payment of terminal dues with the appellant.
17. Indeed, under the Act, the employer is defined. This is to include any person who enters into a contract of service to employ any persons and includes the agent of the principal;

"employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;
18. The appellant's case is that the respondent was employed by her late father and then the mother and that wages would be paid by the brother. Such intricate details about the family circumstances and the presence of the respondent in the family home cannot negate agency in employment. The matter of the appellant making payment of wages to the respondent is not denied save, the response is made of mere denials. No record of employment by the father (deceased) or later the mother or payment of wages by the brother is submitted.
19. The intricate connectedness of the appellant to the respondent's employment and particularly the payment of wages cannot extricate the appellant from the employment relationship. There was employment between the parties giving the trial court jurisdiction to hear the employment dispute.
20. As correctly submitted by the appellant, the respondent in her claim was clear. Her claim related to payment of terminal dues on the basis that she got unwell and hence issued notice to the appellant seeking payment of her terminal dues. This letter is attached at page 63 on the Record of



Appeal. Indeed, the appellant appreciates that the respondent is entitled to part of the claims for underpayments for November 2019 to November 2020.

21. The findings by the trial court that there was unfair termination of employment and then a general award of all what was pleaded then negated the very essence of the claim and necessitating a fresh review and leading to this appeal.
22. The trial court ought to have assessed all the claims made and rendered reasons for the awards made. To allocate a general award of all what is claimed denied the parties the rationale for allocation of each claim.
23. With regard to the wage paid, the evidence by the respondent was that she started at Kshs. 6,000 per month which was increased to Kshs. 9,000 per month. The appellant as the employer did not file any work records particularly payment statements to challenge this evidence. Her evidence is hence taken as the truth.
24. A house help working in Mombasa as of November 2020 had a basic wage of Kshs. 13,572.90 per month. There is no evidence or claim that housing was not allocated to the respondent while undertaking her duties as a house help. What is due is the basic pay of Kshs. 13,572.90.
25. On the claim for service pay, without any record of employment or any compliance with the provision of Section 35(5) and (6) of the *Act*, service pay is due at the rate of 15 days' pay for every full year worked based on the last wage paid. The evidence is that the respondent was employed from October 2015 and left in November 2020 after getting sick. This is a total 5 years.
26. On the wage of Kshs. 13,572.90 for 15 days for 5 years, the respondent is entitled to Kshs. 33,932.25 in service pay.
27. On the claim for work during public holidays, the respondent made a general claim of 3 years for 10 days each without giving particulars thereof. public holidays are gazetted days and not general and such claim should have been dismissed for lack of particulars.
28. On the claim for underpayments from January 2018 to November 2020 the appellant's case is that the claims before the year 2019 were continuing injuries and should have been claimed within 12 months and without such a claim, they became time barred.
29. Continuing injuries in their nature arise during the pendency of employment or 12 months immediately upon cessation of employment in terms of Section 90 of the *Act*. however, upon termination of employment, an employee has the right to claim any lawful and justified entitlement due within 3 years after cessation of employment in terms of Section 35(4) of the *Act* read together with Section 90 of the *Act*.
30. An employee cannot be denied any lawful dues arising out of the employment relationship if such claims are addressed within the limitation period of 3 years after cessation of employment.
31. In the *German School Society v Helga Ohany* Civil Appeal No. 325 of 2018 the Court of Appeal held that;

Undeniably, the above provision in peremptory terms bars civil actions or proceedings based or arising out of the *Employment Act* unless the same is commenced within three years next after the act, neglect or default complained of. However, where there is a continuing injury or damage, the action must be brought within twelve months after the cessation thereof.



32. However, at the end of employment, all employment dues and benefits can be claimed within 3 years from the date employment terminated. Section 90 of the Act allow an employee to claim for unpaid terminal dues, underpayments, untaken leave days or any other benefit within 3 years from the date the cause of action arose. While employment subsisted, the appellant was at liberty to seek in continuing
33. This is clearly distinguishable from a continuing injury taking place within employment which must be addressed within 12 months.
34. In this case, employment terminated at the instance of the respondent in November 2020. She was entitled to her employment terminal dues whatever the reasons that went into the termination of employment in terms of Section 18(4) of the Act, which allow for summary dismissal, subject to payment of dues owed for work done;
- (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
35. The claimed underpayment should have been analysed as pleaded and allocated accordingly.
36. In the period of January 2018 to April 2018 the respondent claimed for a wage of Kshs. 15,609 for 4 months less the Kshs. 9,000 that was paid. However, the due wage in this period is Kshs. 12,926.55 per month less what was paid at Kshs. 9,000 per month and the total due is Kshs. 15,706.20.
37. In the period of May 2018 until November 2020 the Wage Orders remained constant at Kshs. 13,572.90 and for the 30 months on a wage of Kshs. 9,000 there was an underpayment of Kshs. 4,572.90 per month and the total due is Kshs. 137,187 in underpayment.
- Total underpayments are Kshs. 152,892.20.
38. With regard to costs and interests awarded, in employment claims, these are discretionary in terms of Section 12(4) of the Employment and Labour Relations Court Act, 2011. However, award of costs in employment matters should not be applied to punish the employer who has undertaken the due process with regard to termination of employment and particularly one who goes out to pay terminal dues to avoid keeping such dues from the employee who has rightfully earned them.
39. The appellant was invited before the Labour Officer to settle the matter but failed to oblige. The respondent used the services of the trade union without success. On the awards not contested for underpayment for the period of November 2019 to November 2020 at Kshs. 79,308 these have not been paid to the respondent.
40. In these given circumstances, the respondent is entitled to costs and interests on the awards from the date of the lower court judgment and until paid in full.
41. Accordingly, judgment in Mombasa CMELRC No. E267 of 2021 is hereby reviewed in the following terms;
- a. Service pay Kshs. 33,932.25;
 - b. Underpayments Kshs. 152,892.20;
 - c. Costs of the suit before the lower court and this appeal;
 - d. Interests on the awards from the date of judgment of the lower court and until paid in full.

DELIVERED IN OPEN COURT AT MOMBASA THIS 9TH DAY OF NOVEMBER 2023.

M. MBARŪ



JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

