



**Ondari v Danros Kenya Limited (Appeal 12 [B] of 2020)
[2022] KEELRC 1569 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1569 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 12 [B] OF 2020**

**AK NZEI, J
JUNE 16, 2022**

BETWEEN

ELENAH MORAA ONDARI APPELLANT

AND

DANROS KENYA LIMITED RESPONDENT

*(Being an Appeal against a portion of the Judgment of the SPM at Mombasa
– Hon. C.N. Ndegwa delivered on 5th May 2020 in CM-ELRC 305 of 2018)*

JUDGMENT

1. The Appellant herein, Elnah Moraa Ondari, was the Claimant in Mombasa ELR Case No. 304 of 2018, whereby she sued the Respondent herein for wrongful, illegal and unfair termination of employment. She pleaded that she was employed by the Respondent as a clerk from June 2014, earning a monthly salary of ksh.24,0000, and retained continuous employment until 9th March 2018 when her employment was wrongfully and abruptly terminated.
2. The Claimant further pleaded that she was not afforded an opportunity to defend herself before termination and that her attempts at conciliation failed as the Respondent refused, failed and/or neglected to consider such attempts and to make good the Appellant’s demands regarding her terminal dues.
3. The Appellant sought the following reliefs in the lower Court:-
 - a) Maximum compensation for wrongful termination of employmentksh.288,000
 - b) Service payksh.72,000
 - c) Unpaid leaveksh.58,154



- d) Public holidaysksh.22,154
 - e) Overtime payksh.189,519
 - f) Costs of the suit and interest
4. The Appellant filed her witness statement dated 3rd October 2018, basically replicating the averments made in her Memorandum of claim dated the same date. The Appellant also filed a list of documents dated the same date (3rd October 2018), listing six documents. The listed documents included the termination letter titled “Redundancy Termination” dated 8th May 2018, a letter titled “Redundancy pay” dated 14th May 2018, Exit Clearance Form, an email dated 9th May 2018, the Appellant’s National identity Card and a demand notice dated 1st August 2018. All these documents accompanied the Memorandum of Claim.
 5. The Respondent entered appearance on 24th October 2018 and filed a Response to the Memorandum of claim, denying the Appellant’s claim and putting her to stick proof thereof. The Respondent further pleaded that the Appellant had been issued with a valid warning and termination notice, and in a valid, legal and procedural manner with valid grounds for termination and that the Respondent was entitled to terminate the Appellant’s employment in such a manner under the law.
 6. The Appellant filed Reply to the Respondent’s Response on 28th November 2018, and reiterated the averments made in the Memorandum of Claim.
 7. On 21st June 2019, the Respondent filed a witness statement by one Robinson Mangi Chengo, and a list of documents dated 13th June 2019, listing some ten documents. The listed documents included a Redundancy termination letter dated 8th May 2018, Redundancy Pay Calculation dated 12th May 2018, Redundancy Pay Tabulation received by the Appellant on 14th May 2018, Leave Application Forms for the period 3rd November 2016 to 7th November 2016 (both days inclusive), Leave Application Forms for the period 7th September 2016 to 11th September 2016 both (days inclusive), forms for compensation of pending offs/public holidays dated 13th July 2013, forms for compensation of pending offs/public holidays dated 13th August 2015, Exit clearance forms and Certificate of Service.
 8. At the trial on 26th June 2019, the Appellant adopted her filed witness statement as her testimony. She further testified that she was employed in June 2014, earning a salary of ksh.24,000 and was terminated on 9th March 2018 when the Human Resource Officer called her and told her to go away, that later on 8th May, 2018 she was given a letter indicating that her termination was based on redundancy. That she was paid ksh.67,688 by the Respondent; and that the redundancy letter was not copied to anyone. It was the Appellant’s further evidence that she was not paid her leave days and notice pay and that she was the only person sacked by the Respondent.
 9. Cross-examined, the Appellant told the Court that she had been paid ksh.67,688. That she was paid leave and service pay, and was also paid ksh.24,000 being one month salary. It was the Appellants evidence that she received the letter of termination on 8th May 2019.
 10. On his part, the Respondent’s witness, Robinson Mangi Chengo (RW-1), adopted his filed witness statement as his testimony; and produced in evidence the ten documents listed by the Respondent.
 11. Cross-examined, RW-1 testified that the Appellant was employed by the Respondent, and that her employment was terminated by way of a letter of redundancy dated 8th May 2018; that the letter was not copied to the Labour Officer, and did not indicate the criteria used. The witness (RW-1) further told the Court that there was no indication that the Appellant had received her dues from the company.



RW-1 confirmed that the Respondent had received the demand notice and had made some payments, but not as per the demand letter dated 1st August 2018. That the demand was not responded to.

12. The witness (RW-1) further testified that the Appellant was paid one month notice, 3 years severance, approved leave days and salary for March 2018.
13. It is worth noting that the Respondent did not controvert the Appellant's evidence that she was only paid ksh.67,688, but not ksh.169,692.50 as calculated by the Respondent.
14. I have taken note of the Respondent's undated exhibit/document listed as item/exhibit no. 3 on the Respondent's list of documents dated 13th June 2019. The document is titled "Redundancy pay". The document is shown to have been received by the Appellant on 14th May 2018. This document is rather interesting in that it is shown to have been signed by the Respondent's HR on 3/10/2018, and by another person in the Respondent company (Vincent) on 10/3/2018. This notwithstanding, the undated document is addressed to the Respondent and it reads:-

"DEAR ELENAH MORAA ONDARI'

RE: REDUNDACY PAY

These are your dues following your redundancy calculation.

Particulars Amount

March salary consolidated 30,000

Leave pay prorated

(40.25 daysx1.75) 70,437.50

Service pay 3 years @ 15 days per year... 45,000

Notice pay 1 month 30,000

Golden handshake for long service

2 months' salary 60,000

Total gross pay before deduction... 235,437.50

LESS NHIF1,700

LESS NSSF1,050

LESS PAYE62,965

LESS ADVANCE.....

TOTAL DUE169,965.50

The above has been read, understood and accepted by me.

I declare I was not suffering from any occupational disease at the time of my exit. Confirm that I have no other claim from Danro [K] Limited.

Signed below to acknowledge the acceptance of the above."

15. As already stated, the said document is shown to have been signed by the Respondent's HR and another person (Vincent) and the Appellant.
16. It is to be noted that the Appellant testified that she was paid ksh.67,688 but not ksh.169,692.52 as alleged by the Respondent and as indicated in the said document. This evidence was not controverted



- by the Respondent, and the Respondent's witness (RW-1) testified that the Appellant had been paid some money and that there was nothing to show that the Appellant had received her dues from the Respondent's company.
17. The question which arises here is, why would the Respondent cause the Appellant to sign and execute a purported acknowledgement of ksh.169,692.50 and pay her ksh.67,688? Did the Appellant know or understand what she was signing, if at all she signed? Why cause the Appellant to sign a purported declaration that she did not have any other claim against the Respondent and at the same time fail to pay her the full amount of money for which she was signing?
18. As recently stated by this Court in the case of *Bernard Momanyi Ongori v G4s Security Services [k] Limited (formerly known as Securior Services)* [2022] eKLR:-
- “22. The spirit and tenor of the *Employment Act*, 2007 is that an employee must understand every document that he or she signs with or in favour of the employer. That is why the signing by the employee of a contract of service must be witnessed by a person other than the employer (Section 9(2) of the *employment Act*) and communication of reasons for contemplated termination of employment must be done in the presence of a fellow employee or shop floor representative and in a language that the employee understands (Section 41(1) of the *Employment Act*.)
23. In my view, an employer is obligated to demonstrate, to the Court's satisfaction, where an employee is alleged to have signed a discharge voucher in favour of an employer, that the employee understood what he or she was signing, and that the document was in a language that the employee understood.
24. In the present case, the Respondent did not demonstrate that the Claimant understood the contents of the alleged discharge voucher and/or that the document was in a language that the Claimant understood. I will, therefore, proceed to disregard the said document, whether or not the Claimant signed the same.”
19. My view on the foregoing issue is not different in this matter.
20. The trial Court delivered its judgment on 5th May 2020. The Court made a finding that termination of the Appellant's employment was unlawful on account of the Respondent's failure to comply with the mandatory requirement of Section 40 of the *Employment Act*. I respectfully agree with the Honourable trial Magistrate, and uphold that finding.
21. The trial Court awarded the Appellant the equivalent of two months' salary as compensation for unlawful termination of employment.
22. The trial Court dismissed the Claimant's claim for service pay and unpaid leave, public holidays and overtime pay. The trial Court appears to have relied much on the Respondent's document/exhibit (no.3) referred to in paragraph 14 of this judgment, and on the Appellant's evidence that she received payment on those claims.
23. Aggrieved by the said judgment, the Appellant filed the present appeal and set forth five grounds of appeal, which I will deal with together. The Appellant's grounds of appeal as set out in the memorandum of appeal dated 19th May 2020 are as follows:-



- a) the learned Magistrate erred in law and in fact by failing to consider the overwhelming evidence tendered by the Appellant in the Memorandum of claim, witness statement and the entirety of documentation tabled by all the parties as regards quantum of dues payable to the Appellant.
 - b) the learned Magistrate erred in law and in fact by failing to consider the Appellant’s substantive submissions in support of the claim.
 - c) the learned Magistrate erred in law and in fact by summarily discounting the Appellant’s claim for compensation for unfair termination and public holidays.
 - d) the learned Magistrate erred in law and in fact by failing to appreciate the substance of the Appellant’s claim and the peculiar circumstances pertaining thereto.
24. The Appellant seeks setting aside of the trial Court’s judgment in so far as the same relates to quantum payable to the Appellant, and in its place judgment be entered for the Appellant as prayed in the Memorandum of Claim as regards:-
- a) compensation for unfair termination.
 - b) public holidays.
25. The Appellant also prays for costs of the appeal.
26. This is a first appeal. The Court of Appeal stated as follows in the case of *Kenya Ports Authority –v Kuston [kenya] Limited* [2009] 2EA 212: -
- “On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
27. The single issue which, in my view, recommends itself for determination is whether the Appellant is entitled to reliefs as prayed in the Memorandum of Appeal .
28. Having upheld the trial Court’s finding that termination of the Appellant’s employment was unfair, and upon taking into account the circumstances in which the Appellant’s employment was terminated, I award the Appellant the equivalent of nine months’ salary being compensation for unfair termination of employment (ksh.24,000x9 = 216,000)
29. The award of two month’s salary made by the trial Court as compensation for unfair termination of employment is hereby set aside, and is substituted with an award of ksh.216,000 being the equivalent of nine months’ salary.
30. The claim for leave pay and service pay was admitted by the Respondent by producing in evidence its exhibit no. 3, the document titled “Redundancy Pay” whereby the Respondent had calculated the Appellant’s leave pay at ksh.70,437.50 and service pay at ksh.45,000. The Appellant admitted having been paid on those claims. The trial Court rightly dismissed these two claims.
31. The trial Court’s dismissal of the claim for payment on public holidays cannot be disturbed. The Appellant did not plead the particulars of public holidays on which she allegedly worked, and did not present any evidence of having worked on such pleaded holidays. It was not enough to just make a general claim for payment for public holidays.



- 32. In sum, the appeal herein partly succeeds. The trial Court’s award of two months’ salary in compensation for unfair termination of employment is hereby set aside, and the same is substituted with judgment in favour of the Appellant against the Respondent for ksh.216,000 being the equivalent of nine months’ salary in compensation for unfair termination of employment.
- 33. The Appellant is also awarded costs of this appeal and interest; and costs of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Appellant

..... for Respondent

