



REPUBLIC OF KENYA



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Ndwiga v Kathageri Youth Polytechnic (Employment and Labour Relations Appeal E001 of 2024) [2025] KEELRC 77 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 77 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2024
ON MAKAU, J
JANUARY 24, 2025

BETWEEN

JANE WANJA NDWIGA APPELLANT

AND

KATHAGERI YOUTH POLYTECHNIC RESPONDENT

(Being an appeal from the Judgment of the Honourable Mr. Francis N. Kyambia (CM) delivered on 25th January, 2024 in Embu CMELRC Cause NO. E005 of 2022)

JUDGMENT

Introduction

1. The appellant was employed by the respondent as Accounts Clerk in 2006 until July 2020 when she was given a compulsory leave without pay due to covid-19 Pandemic. She was to return upon reopening of the school. The school reopened in November 2020 but she never resumed work as the respondent failed to recall her from the compulsory leave.
2. In January 2022, she reported the matter to the Labour office at Embu and in March 2022 she involved her trade union in the dispute. On 4th April 2022, the respondent and the union negotiated a settlement agreement in the following terms:-
 - a. Service gratuity Kshs.98,000.00
 - b. Salary for 6 months Kshs.42,000.00
 - c. 3 months' salary in lieu of notice Kshs.21,000.00
Kshs.161,000.00
 - d. The agreed sum to be subjected to statutory deductions.



- e. The net to be paid in three instalments.
3. The appellant rejected the said settlement agreement and sued the respondent for:
 - a. Three months' salary in lieu of notice Kshs.48,000.00
 - b. Service pay/gratuity Kshs.228,144.00
 - c. Damages for unlawful termination Kshs.195,552.00
 - d. Under paid wages Kshs.1,561,728.00
Kshs.2,034,312.00
 - e. Costs and interest
4. The respondent admitted that it employed the appellant and that it sent her on compulsory leave. However, it averred that it recalled the appellant after the school reopened and denied all the allegations made against it by the appellant. It further averred that should the court find in favour of the appellant, then it should award the appellant compensation not exceeding 12 months' salary.
5. The matter went to full hearing and both sides called one witness. Thereafter the trial court (Hon.F.N Kyambia CM) rendered his judgment where he concluded that the appellant had proved a case of unlawful termination and awarded her compensation equal to ten months salary plus one month salary in lieu of notice based on monthly salary of Kshs.7000. However, he dismissed the claim for service pay/gratuity and underpaid wages for lack of particulars and evidence.
6. The appellant was aggrieved and brought this appeal seeking the following orders: -
 - a. That this appeal be allowed and that the part of the judgment denying the award of service pay and underpayments set aside and substituted with an award of service pay and compensation for underpayments as prayed and/or as this Honourable court may determine.
 - b. The Honourable court be pleased to grant such further orders and relief as it may deem necessary looking at the circumstances of the case.
 - c. The costs thereupon be awarded to the Appellant.
7. The appeal stands on the following grounds: -
 1. That the Learned Magistrate erred in law and in fact in failing to award the Appellant service pay/gratuity.
 2. That the Learned Magistrate erred in law and in fact in failing to award the Appellant the claim on underpayment of salary contrary to well established legal regime on underpayments as captured under the minimum wages regulations.
 3. That the Learned Magistrate erred in law and in fact in disregarding the Appellant's submissions in respect service pay and underpayments.
 4. That the Learned Magistrate erred in law and in fact in holding that the Appellant had not satisfied the requirements for award of service pay and underpayments.

Submissions on the appeal

8. It was submitted that the trial court erred by failing to award the claim for service pay/gratuity yet there was supporting evidence. Reference was made to the NHIF, NSSF, letter by the appellant's union and



the settlement agreement dated 4th April 2022 which confirmed that the respondent deducted NHIF and NSSF from her salary and failed to remit to the relevant Agencies.

9. It was submitted that, since the appellant served for 14 years, and as such based on a rate of one month's pay per year of service, her service pay equals to Kshs.228,144. The said sum is calculated using the minimum wage for the appellant's position under the Regulation of Wages (General) (Amendment) Order 2018 as it had done in the lower court. For emphasis, reliance was placed on *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited (Cause 871 of 2012) (2014) KEELRC 715 (KLR) (Civ) (28 January 2014) (Award)*.
10. It was further submitted that the trial court erred by failing to award the prayer for underpaid wages. It was argued that the appellant had clearly particularized the claim for under paid wages and further expounded the same in the written submissions but the trial court failed to grant the prayer for lack of particulars.
11. It was further submitted that even if the claim had not been particularized, the trial court ought to have taken judicial notice of the existing wages regulations. It was argued that since the court found that the appellant was receiving a monthly salary of Kshs.7,000 in 2020, the same was clearly underpaid. It was urged that the court should uphold the rule of law and not to aid an unlawful breach of the law by the respondent.
12. For emphasis, reliance was placed on the case of *Mohamed v Malelu (Appeal E093 of 2022) (2024) KEELRC 454 (KLR) (21 February 2024) (Judgment)* and *Ignas Karingo Mghona, Mathias Otonyo Sese, Miriam Chenye, Roseline Mghoi Kilio & Jeniffer Mbinya Julius v Star of Hope International Foundation (Cause 236 of 2013) (2016) KEELRC 1612 (KLR) (4 March 2016) (Award)* where the court faulted the employers for paying their employees below the minimum wages prescribed by the Regulation of Wages (General Amendment) Order.
13. Finally, it was urged that based on the minimum monthly salary of Kshs.16,296, the underpaid wages was Kshs.9,296 per month for 14 years as explained in her written submission on page 51 of the Record of Appeal. Consequently, the court was urged to allow the appeal with costs.
14. The Respondent, on the other hand, submitted that the appellant was employed pursuant to section 59 of the *Basic Education Act, 2013* as read with Regulation 19 of the Basic Education Regulations and was thus remunerated in accordance with the terms stipulated by the respondent.
15. It was further submitted that the appellant was not a civil servant or a public officer and therefore she cannot claim salary as per the MPSYG/DPSM/2/6/4A VOL XI (3) of 2018.
16. It was submitted that Regulation 18 of the Basic Education Regulations, *Legal Notice 39 of 2015* provides that professionals employed by the Board of Management shall enjoy similar terms and conditions of their counter parts in the civil service and the applicable schemes of service.
17. Reliance was placed on the case of *Board of Management Nyeri Primary School v Maina & 33 others (Civil Appeal 81 of 2017) (2021) KECA 63 (KLR)* where the Court of Appeal held that employees of BOM were not civil servants or public officers and therefore it was the BOM which had the mandate to determine the terms of service of the employees.
18. It was further submitted that the appellant cannot claim salary under the circular mentioned in the Memorandum of claim since she had signed an appointment contract which stipulated the salary payable, the period of employment and her designation within the school.



19. Reliance was placed on the case of Dominic Matangwe Manyasa v Chairman, Secretary of Board of Management of Our Lady of Mercy Girls Secondary School-Busia (2018) eKLR where the court echoed the decision in the case of BOM, Nyeri Primary School, supra.
20. It was submitted that the appellant never raised the claim of salary underpayment during her period of service yet she admitted during the trial that she had fully understood and agreed to the terms of the employment contract including payment. Reliance was placed on the case of George Kimiti Kiguru v Board of Management Bavuni Secondary School (2022) eKLR where Wasilwa J dismissed a claim for underpayment because the employee had accepted a job based on salary offer to him by the BOM.
21. It was further submitted that a claim for underpayment is in the nature of special damage and must thus be specifically proved. It was submitted that the appellant never proved that she was underpaid. Reliance was placed on Twiga Construction Limited v Julius Nyamai Mulatia (2018) eKLR where a claim for underpayment was dismissed for lack of evidence.
22. It was further submitted that although the appellant pleaded underpayment under the minimum wage regulations, she failed to plead particulars thereof and provide evidence in support. Consequently, it was urged that the trial court was right in dismissing that prayer in the circumstances.
23. It further submitted that the appellant was sent on compulsory unpaid leave from 13th July 2020 due to Covid-19 pandemic and on 15th July 2022, she was served with a termination letter citing financial challenge due to effects of covid-19 pandemic. Consequently, it was contended that the reason for the unpaid leave and the subsequent termination was justified.

Determination

24. This being a first appeal, my mandate is to re-evaluate the evidence and arrive at my own independent conclusion. I gather support from *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 where the court held thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

25. In the above context, I have perused the record of appeal and considered the submissions made herein. The appeal does not challenge the whole judgment but only two issues.
 - a. Whether the appellant is entitled to award of service pay/gratuity.
 - b. Whether the appellant is entitled to an award of under paid salary.
 - c. Who should bear costs of the appeal.

Service pay/gratuity

26. The appellant faulted the trial court for failing to award her service pay/gratuity for the 14 years she served the respondent. She urged for the same be awarded based on the minimum pay of Kshs.16,296 at



the rate of 30 days' salary or 15 days' salary for each year of service. The respondent made no submission in opposing the appeal on the issue of service pay.

27. I have considered the evidence on record and I have noted that there is a statement of NSSF contributions for about five years but it is not legible. I have further noted from the record the respondent and the appellants' union signed an agreement dated 4th April 2022 whereby it acknowledged that for 14 years, it deducted NSSF contributions from the appellant but failed to remit to the relevant Agency.
28. On the basis of the foregoing evidence, I am satisfied that the appellant had proved on a balance of probability that she was entitled to payment of service pay under section 35 (5) of the Employment Act. The said provision stated that: -
- “(5) An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked terms of which shall be fixed.”
29. The parties did not produce any written evidence to show what rate should be applied to calculate service pay. However, there is a legion of court decisions where a rate of 15 days' pay has been used.
30. In the instant case, the termination was on account of redundancy and therefore under section 40 she would have been entitled to severance pay at the rate of 15 days' pay for each year worked. Consequently, I find that a rate of 15 days' pay per year of service is reasonable in this case. I gather support from the Elijah Kipkoros Tonui case, supra, where the court applied the rate of 15 days' pay for each year of service.

Under paid wages/salary underpayment

31. The appellant also faulted the trial court for failure to award her the prayer for under paid wages as prescribed by the Regulation of Wages (General Amendment) Order 2018. The respondent submitted that the trial court was right in dismissing that prayer because, the same being in the nature of special damages, the appellant did not plead any particulars thereof and no evidence was adduced to prove it.
32. I have considered the memorandum of claim dated 7th June 2022. It states as follows in paragraph 8 and 9: -
- “8. The claimant avers that throughout her employment she was underpaid by the respondent for failing to pay her salary as per the regulated minimum wage contrary to the law.”
- “9.d Underpaid Wages Kshs.1,561,728.”
33. There were no particulars of the said under payment and the formula upon which the sum of Kshs.1,561,728 was arrived at. The figure was just plucked out of the air.
34. I say so because, first, the appellant did not plead whether his work place was situated in a city or Municipality or other zones. Without a mention of the place where she was stationed leaves, the court with no reference point. Secondly, the appellant, also did not plead particulars of what he called regulated minimum wage from 2006-2022. Finally, he also did not give any evidence to prove the actual underpayment for each month from 2006 to 2022.
35. The appellant purported to improve her pleadings through her written submissions before the lower court and also before this court. However, that did not help much because written submissions are neither pleadings or evidence. The appellant lost the claim for under paid wages when she failed to



plead proper particulars of the claim and then failed to adduce sufficient evidence to substantiate the same.

36. To that extent, I agree with the trial court that the appellant did not plead and prove the claim for under paid wages to the required standard. Consequently, the said claim fails.

Costs

37. The appellant appealed on two issues and succeeded in one. Consequently, I award her half costs of the appeal.

Conclusion

38. I have found that the trial court erred by failing to award the appellant service pay, but I have affirmed the finding that the claim for under paid wages was not specifically pleaded and proved. Consequently, the appeal partially succeeds, and the impugned judgment is varied to read as follows: -

- a. One month notice.....Kshs.7,000.00
- b. Compensation.....Kshs.70,000.00
- c. Service pay.....Kshs.49,000.00
Kshs.126,000.00
- d. The award is less statutory deductions.
- e. The appellant will have half costs of the appeal.
- f. The appellant is awarded interest at court rate from date of filing the suit.
- g. The costs awarded by the trial court are not disturbed.

DATED, SIGNED AND DELIVERED AT NYERI THIS 24TH DAY OF JANUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

