REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Criminal Appeal 532 of 2006

JOHN KINGORI MWANGI……..……..APPELLANT

-AND-

REPUBLIC……...…….RESPODENT

***(An appeal from the Judgement of Senior Resident Magistrate Mrs. Ngugi dated 15th March, 2006 in Criminal Case No. 1222 of 2004 at the Nairobi Law* Courts)**

JUDGEMENT

The appellant was charged with several cognate offences relating to the production of employment records to an authorised officer, contrary to the terms of the Employment Act (Cap. 226, Laws of Kenya).

The charge in the first count was: wilfully failing to produce employment records to an authorised officer contrary to s.50(1)(b) of the Employment Act (Cap.226) as read together with s.52 of the same Act. The particulars were, firstly, that the appellant being the proprietor of Accra Hotel and employer of one ***Elphas Aguvasu Kayugira*** (a waiter) at the said Hotel, did wilfully fail to produce employment records to a Labour Inspector as demanded in writing on 14th August, 2003 and 2nd September, 2003. To this count, which fell under s.50(1)(b) of the Employment Act (Cap. 226), there was an alternative charge brought under s.38 as read with s.48 of the same Act. The particulars here were that the appellant had wilfully failed to keep written records of employment for the said ***Elphas Aguvasu Kayugira.***

In count 2 the appellant faced the charge of wilfully failing to tender wages earned by and payable to an employee, contrary to s.4(8)(a) of the Employment Act (Cap.226) as read with s.48 of the same Act.

In count 3 the charge was that the appellant herein had wilfully failed to provide an employee to whom a regulation-of-wages order applied, with conditions of employment as prescribed, contrary to s.15(2) of the Regulation of Wages and Conditions of Employment Act (Cap.229) as read together with clause 9(1)(a) of the Regulation of Wages (Hotel and Catering Trades) Order, 1981.

The charge under count 4 was: wilfully failing to pay an employee the minimum statutory wage contrary to s.15(2) of the Regulation of Wages and Conditions of Employment Act (Cap. 229) as read with clause 3(1) of the Regulation of Wages (Hotel & Catering Trades) Order, 1981.

PW1, ***Elphas Aguvasu*** testified that the appellant herein had employed him as a waiter, at Hotel Accra in Nairobi, and that the agreed salary at the time of employment, 27th May, 2001 was Kshs.3000/= per month. PW1 used to work for at least eight hours a day, and sometimes would remain at work until 11.00 pm. He remained in employment for two-and-a-half years, before he resigned from employment in July 2003. During the time he remained in employment, the appellant had no occasion to go on leave.

PW1 was paid in arrears at the end of the month, but for July, 2003 he was not paid even when he demanded his pay. PW1 reported this matter to the Labour Office, and his complaint was that he had not been paid for July 2003; he had not been given leave pay; he had not been paid for overtime work.

On cross-examination by learned counsel ***Mr. Waiganjo***, PW1 said he had worked for the appellant until 29th July, 2003 and had then resigned, having given notice to that effect on 26th July, 2003. PW1 was not aware he was required to give a certain number of days' notice before leaving employment, nor did he know he could forfeit his salary for want of such notice.

On the basis of the testimony of PW1, the learned Senior Resident Magistrate put the appellant on his defence, and he subsequently gave sworn testimony as DW1. He said his hotel had employed PW1 as a casual worker and so the applicable terms were temporary. DW1 said he did not owe any wages to PW1, and as to leave for PW1, he said: "We do not give casuals leave until it has accumulated to the extent that they may get leave." DW1 said he did not owe the complainant any unpaid dues.

DW1 said he was running three hotels, and had management staff who conducted administration for all of these. He did not know how junior staff in these hotels were employed, and he was unaware if records were kept in respect of such employees. He said: "I would not know if the complainant appeared in the records." He also said: "I would not know if the complainant had accumulated leave."

DW2, ***Douglas Ombati***, testified that he was the manager of Accra Hotel and he had worked there for 10 years. He said he hires casual labour, and need not report such hiring to the directors of the Hotel chain. Of such casual workers, DW2 said: "We do not usually keep records of casuals. They [do] not have to be paid at the end of the month. We keep records of those who are paid on a monthly basis."

DW2 said he is the one who had hired PW1, as a casual employee, and that PW1 had then done casual work for three months, being paid on piece-rate basis – and all dues were paid to PW1. DW2 testified that casual employees are not required to give any notice when they leave employment.

DW2 said he came to know the complainant in 2000, and that the complainant worked as a casual worker from 2000 – 2001.

Mr. Waiganjo submitted that the evidence tendered by the prosecution was not corroborated – and was not a safe basis for entering a conviction. He urged that the appellant herein be acquitted.

Mr. Karanja for the Labour Office (prosecution) urged that the evidence of PW1 had been consistent and coherent, as compared to that of the two defence witnesses. He submitted that a person who had worked for more than three months, was no longer a casual worker, as a matter of law. He urged that there was no evidence to contradict that of PW1, that there had been a contract of employment between him (PW1) and the appellant herein; and ***Mr. Waiganjo*** contested this contention as one seeking a shift in the burden of proof, to the defence.

The trial Court established as a fact that the complainant had been employed by the appellant herein for pay. But there remained the question whether the complainant was employed on a permanent basis, or as a casual worker. The Court found no evidence that the Labour Department had made a demand for the employee's records and there was a failure to produce the same. This point had remained hazy, as the investigating officer was not called as a witness. But the Court found that the defence had admitted it had no record in respect of casual employees.

The trial Court found that PW1 had worked as a permanent employee, and was thus entitled to a minimum statutory wage as provided for under the Regulation of Wages and Conditions of Employment Act (Cap.229), s.15(2) as read with Clause 3(i) of the Regulation of Wages (Hotel and Catering Trades) Order, 1981; and that he was entitled to annual leave as provided for under s.15(2) (a) of the same Act as read together with clause 9(1) (a) of the Regulation of Wages (Hotel and Catering Trades) Order, 1981.

The Court acquitted the appellant in respect of count 1 and the alternative charge, and count 2. But

the Court found the appellant guilty in respect of counts 3 and 4. The learned Magistrate treated the appellant as a first offender and, after hearing counsel's mitigation address, imposed a fine of Kshs.400/= or in default, a jail term of 30 days.

In the petition of appeal it is contended as follows:

(i) that the trial Court erred in law and in fact in convicting the appellant in counts 3 and 4 when there was no corroborated evidence to support conviction;

(ii) that the trial Court had failed to record *coram* on 17th June, 2005 when the appellant was put to his defence;

(iii) that the trial Court had erred in fact and in law by shifting the burden of proof from the prosecution to the appellant;

(iv) that the trial Court erred in law and in fact in entering a conviction even after finding that there were no records to show the employment status of the complainant when he was in the appellant's employ;

(v) that the trial Court erred in law and in fact by convicting, without reference to defence evidence;

(vi) that the trial Court erred in fact and in law by convicting, when proof had not been effected to the required standard;

(vii) that the sentence was manifestly unjustifiable in the circumstances.

These points were urged further by learned counsel ***Mr. Waiganjo,*** who contended that the trial Court had entered convictions on the basis of no evidence. He submitted that the testimony of PW1, by itself, was not enough; and there should have been corroboration. Counsel urged that documentary records should have been produced to show that the appellant had failed to grant leave to the complainant as an employee.

Learned State Counsel ***Ms. Gateru*** contested the appeal. She urged that the trial Magistrate had not erred when she convicted the appellant on the 3rd and 4th counts – for it was ascertained that the complainant had worked for as long as two-years-and-a-half, but had been paid a wage lower than the prescribed rate, and had not been allowed to take leave. Although there was no documentary evidence to show the terms and conditions of employment, the trial Magistrate had found the complainant's evidence consistent, and had formed the opinion that he was a truthful witness. By virtue of the Regulation of Wages and Conditions of Employment Act (Cap. 229), an employee in the position of the complainant was entitled to at least 24 days of leave, on normal working days, during every span of 12 months of service; and the complainant was entitled to 48 days' leave for the period during which he was employed.

Counsel submitted that the agreed pay of Kshs.3000/= per month, fell below the statutory minimum and was thus, contrary to law.

Ms. Gateru submitted that, contrary to the contention for the appellant that the Court record for 17th June, 2005 did not show *coram*, it was clear that ***Inspector of Police Kyaa*** who had been present on 17th May, 2005 and on 3rd June, 2005 was holding brief for ***Mr. Karanja*** as prosecutor; the defence counsel was present; *coram* was properly indicated.

On the point taken that the investigating officer had not been called as a witness, learned counsel submitted that even though the testimony of this officer would have been useful, she had not been traced, and failure to call her could not nullify the prosecution case.

Ms. Gateru urged that the appeal had no merit and should be dismissed, conviction upheld, sentence

affirmed.

I would uphold the trial Court's decision dismissing the 1st count and the alternative charge, and the second count. Had the investigating officer been called, she is the one who would have given the best testimony on such records as the Ministry of Labour would have required the appellant to produce, failure to produce which could pass as a violation of the labour law.

I will not uphold the technical point raised for the appellant: that during the "case-to-answer" session on 17th May, 2005 the Court failed to keep a proper record of *coram*. I have established as a fact, from the record, that the Court was on that occasion, properly constituted, and the record omits not any officer who was required to be present in Court.

As regards the two counts in respect of which the Court made a verdict of guilty, learned counsel ***Mr. Kamotho*** has anchored his challenge on the absence of records, and lack of corroboration. He contends that the testimonies of PW 1, the complainant, were not by themselves enough; certain records ought to have been produced to confirm what he said; and other witnesses or materials should have been tendered to corroborate his testimony.

This would be a rather literal understanding of corroboration; for the nuances of the term corroboration in the law of evidence, are explained in works of scholarship. ***Sir Rupert Cross*** and ***Nancy Wilkins*** in their work, *An Outline of the Law of Evidence*, 4th ed. (London; Butterworth, 1975) thus write (pp.98 – 99):

"***Corroboration is confirmatory evidence implicating the person against whom it is required in a material particular; it may consist of the express or implied admission or other relevant conduct of such person……."***

My understanding of the foregoing principle is that, subject to the general principle that the burden of proof in a criminal case rests upon the prosecution, there may well be a situation in which the testimony of the accused, itself serves the purpose of providing corroboration to the statements of prosecution witnesses.

The law regarding what witnesses to call is clear from the content of s.143 of the evidence Act (Cap.80, Laws of Kenya), which thus reads:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact''.

It follows that the trial Court in this case incurred no failing in law by acting on the testimony of PW 1 alone, and without the testimony of the investigating officer.

From that position, it follows that the outcome of this appeal must rest on the manner in which the trial Court dealt with the *facts*. A correct and judicial assessment of facts is always the foundation upon which a just decision rests.

I have already reviewed the evidence taken before the trial Court, as required by law: "….the parties to the cause are… entitled ... to demand the decision of the court of appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should take due allowance in this respect'', *The Glannibanta* (1876), 1 P.D. 283 (***James, Baggallay, L.JJ.*** and ***Lush, J*** at p.287).

I see good cause to make allowance for the trial Magistrate's assessment of the quality of the complainant's evidence; and I will accept that the complainant was not a casual worker who had worked for the appellant for less than three months as contended. The complainant had been in employment for some two-years-and-a-half, and was thus an employee with certain entitlements, as held by the trial Court, under statute law.

It was the testimony of the appellant's witnesses that the complainant had not been a permanent employee but was a casual worker, and so was not entitled to leave. Now this *corroborates* the complainant's testimony that he had been granted no leave; and in view of the trial Court's findings that the complainant worked for the appellant for two-years-and-a-half, it is proof beyond-reasonable-doubt that the appellant had committed offence charged in count 3.

I do not doubt the finding of the trial Court, that the lawful pay due to the complainant in the 2½ years that he was employed by the appellant, had not been paid. Therefore, in my judgment, conviction of the appellant on the fourth count was proper in every respect.

I dismiss the appellant's appeal, uphold conviction on the two counts, and affirm sentence as awarded by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 11th day of February, 2008.

J.B OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Appellant: Mr. Waiganjo

For the Respondent: Ms. Gateru