



**REPEBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 7 OF**

**2009**

**UKWALA SUPERMARKET LIMITED .....APPELLANT**

**VERSUS**

**HEZEKIAH MANGO NDUBI.....RESPONDENT**

**(Being an appeal from the judgment and decree of Mmasi, Senior Principal Magistrate, in Eldoret Chief Magistrate's Court Civil Case No. 1441 dated 11.12.2008)**

**JUDGMENT**

The instant appeal arises from a case where the plaintiff, now respondent sued the defendant company for wrongful dismissal and salary payment as well as other dues. He complained that the appellant, Ukwala Supermarket, sacked him without any justifiable reasons on 15<sup>th</sup> May 2004. The learned trial magistrate after hearing the case and considering the facts found that the plaintiff had proved his case on a balance of probabilities and judgment was entered for him as against the defendant company in the sum of Ksh. 134,750/= and costs of the suit as well as interests thereof.

The following grounds of appeal were raised;

1. That the learned trial magistrate erred in law and fact in holding that the respondent had proved his case on a balance of probability without any evidence in that regard.
2. That the learned trial magistrate erred in law and fact in holding that the respondent was an employee of the appellant without evidence in that regard.
3. That the learned trial magistrate erred in law and in fact in holding that the respondent was entitled to Ksh. 5,200 per month as one month's salary pay in lieu of notice when the same was not proved.
4. That the trial learned magistrate erred in law and in fact in holding that the respondent was entitled to pay for days worked before dismissal when no evidence of ever working with the respondent was ever rendered in court and no proof of days worked with the appellant was proved.
5. That the learned trial magistrate erred in law and in fact in holding that the respondent was entitled to pay for extra hours worked as overtime and weekends as the same were unsubstantiated and not proved.
6. That the learned trial magistrate erred in law and in fact in failing to dismiss the respondent's claim on the ground that the respondent had not proved his case on a balance of probability.
7. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submission on record.

The respondent filed a plaint where he highlighted among other complaints that he had been employed by the appellant company as a shop attendant and was earning a salary of Ksh. 5250/= per month with an increment of Ksh. 175/- per month and three (3) month salary in case of termination. He alleged he had been dismissed without cause on 15<sup>th</sup> May 2004 and laid down his claim against the appellant that his suspension and subsequent dismissal was illegal and wrongful in law. He averred that though he issued a demand and notice of intention to sue there was no response from the appellant.

In its defence, the appellant denied that the plaintiff was its employee as alleged or at all and denied that he was wrongly terminated or that he was entitled to compensation from it. It averred that if at all the plaintiff was once its employee, then he was lawfully terminated and has been paid all his dues.

Being the first appeal, the court is reminded of its role to re-evaluate, re-assess and re-analyze the evidence on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons for its decision. See **KENYA PORTS AUTHORITY VERSUS KUSTON (KENYA) LIMITED (2009) 2 EA 212.**

The plaintiff testified as Pw1 and told the court that he had been employed by Ukwala Supermarket as a senior supervisor on 15<sup>th</sup> August, 2003. He stated that when he reported to work on 15<sup>th</sup> May 2004, he was told not to go to work the next day and though he still decided to report on duty he was not given any work to do. He testified that he was not given any notice before he was sacked though he had not committed any offense.

Pw1 further testified that he had never signed a contract with his employer and was never given an employment card but used to sign on the master roll. He demanded three months' salary in lieu of notice and asked to be paid for the extra hours he worked from 8:00 a.m. to 9:00 p.m. which according to his tabulation amounted to Ksh. 116,375/=.

On cross examination, he told the court that his employer whom he referred to as, Manish never told him whether he had been employed on permanent or casual basis and that the only thing he had was a T-shirt printed Ukwala. He stated that he used to be paid his salary per month (a portion in mid-month and end month) and that the extra time he worked was never recorded anywhere.

Upon hearing the evidence, the learned trial magistrate found that plaintiff's evidence was not rebutted, that he had proved his case on a balance of probabilities and entered judgment for him to the tune of Ksh. 134,750/=.

In their submissions, counsel for the appellant outlined the facts of the case and stated that because the plaintiff/respondent never explained the connection he had to Manish whom he said had employed and dismissed him, it was impossible to know whether or not he worked at Ukwala. In regard to this, the respondent had stated he had been given an Ukwala T-shirt upon his arrival to work for the appellant. He stated that only the Master Roll which they signed while receiving their salaries contained his name and that he did not have any other identification.

They submitted that the respondent was a casual labourer and outlined the Employment law in regard to casual workers which stipulates that the notice of termination should be one day and therefore the respondent was not entitled to one month's salary in lieu of notice. The appellant's counsel also submitted that the learned trial magistrate relied on facts which were not pleaded and failed to verify the respondent's claims that he worked for extra hours culminating to 2,660 hours which counsel demonstrated was erroneous. He concluded that the award of ksh. 116,375/= was unjustified and intended to inflict injustice upon the appellant and therefore sought that the appeal be allowed.

The respondent through his learned counsel filed submissions on 7th July, 2014 and reiterated that his claim was for an amount owed to him before dismissal which amounted Ksh. 2,625/= and pay for extra hours bringing the total to Ksh. 134,750/=. The respondent also claimed one month's pay in lieu of notice since no notice of termination had been issued. He submitted that though the appellant filed a defense it never appeared in court to rebut the respondent's evidence. He submitted that the appellant did not show

proof incourt in the form of a Master Roll to rebut the respondent's claim and moreover, the fact that no reason for termination fornotice was given,the termination was unlawful. The respondent cited cases in this regard which entitled him to compensation where a notice of termination had not been issued.

On the issue of proof of the case, it is trite law that **"he who alleges must prove"** which cardinal principle is also captured in Sections 107 to 109 of the Evidence Act which provide as follows:-

**"107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

**(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**109. The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

The threshold of proof in civil cases is on a balance of probabilities. The respondent may have strengthened his case by calling a fellow employee to support his testimony especially because he did not have any supporting documents to prove that he worked for the appellant. However, it is highly unlikely that the respondent decided to move to court and sue the appellant when he never worked for it or had any association with it as alleged by the appellant.

Also, the appellant failed to rebut the testimony adduced by the respondent. They did not provide any evidence to show a contrary scenario to what the respondent complained and therefore the court has nothing to weigh his testimony against.

As regards evidence, the respondent testified that hehad no identification showing that he worked with the appellant except a T-shirt that was handed to himon the day he reported to work. But did this demonstrate that he was not an employee of the appellant? This question can be answered by the case of **LEI MASAKU V KALPAMA BUILDERS LTD CIVIL APPEAL NO.40 of 2007** where the learned Court of Appeal judges stated that;

**"...The appellant testified on oath that he was a casual employee of the respondent. That as such employee, he was not issued with any identification document by the respondentbut merely signed against his name in the register. That register was or must have been in the possession of the respondent. That evidence given on oath was unchallenged and remained uncontroverted. To my mind the evidentially burden thereby shifted to the respondent to denythose facts. It was incumbent upon the respondent to show that either there was no such a register of casualworkers or if there was, the name of the appellant was not appearing thereon.In my view, evidence in rebuttal was necessary.In the absence of such a rebuttal, the facts as presented by the appellant remained unchallenged and uncontroverted."**

Going by the above case law, the assertion by the appellant that the respondent ought to have produced evidence to show that he was an employee of Ukwala Supermarket was inaccurate because no identification was provided to him in the first place. But again a mereT-shirt would not suffice as proper identificationbecause anyone (even a person who is not an employee) would be in possession of a branded Ukwala Supermarket T-shirt.It was therefore up to the appellant to rebut the evidence adduced by the respondent by producing the said Master Roll and showing the court that the respondent's name appeared nowhere, which was not done.

The salary question as raised by the appellant in the memorandum of appeal can only be decided by first determining whether the respondent's dismissal was unfair.**Section 43** of the Employment Act, 2007

provides that:

**“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to be unfair within the meaning of section 45.”**

Section 45 (2) on the other hand provides that:

**A termination of employment by an employer is unfair if the employer fails to prove**

**(a) That the reason for termination is valid.**

**(b) That the reason for the termination is a fair reason-**

**(i) Related to the employee’s conduct, capability or compatibility; or**

**(ii) Based on the operational requirements of the employer and**

**(c) That the employment was terminated according to fair procedure.**

In the instant case, not only did the employer not give a reason for termination, he also dismissed the respondent summarily and told him not to come back on the next day. Indeed, there was nothing to show how the respondent was being paid for the extra hours he worked. The respondent was not provided with any slips or documentation as regards his employment or pay. How then can he be expected to produce such as evidence? As afore stated it was up to the appellant to produce record showing that either the respondent appeared nowhere as an employee of their company or produce records showing that he indeed worked for them but was paid his dues and not dismissed wrongfully or unfairly as claimed. Mere denials as those posed by the appellant cannot suffice.

In the case of **CHEBUT TEA FACTORY v AMOS N.MUKOKHA CIVIL APPEAL NO. 49 OF 2008(ELDORET)** the learned Azangala, J. (as he then was) noted that the rebuttal testimony could not be disregarded by stating as follows;

**“I cannot also say that his findings on damages were not based on evidence. The respondent testified of his injuries. He provided medical evidence of the injuries. This evidence was not challenged by rebuttal testimony.”**

This goes on to show that as long as the evidence adduced by the respondent is not challenged, it holds as truth, having been given on oath. In this regard therefore, the testimony by the respondent concerning the amount he was paid and the extra time holds. He claimed;

- One month’s pay in lieu of notice- Ksh 5,200/=
- Pay for the days worked before dismissal- Ksh. 2,625/=
- Pay for extra hours- Ksh. 134,750/=

**TOTAL            -Ksh. 142,578/=**

The appellant in its submissions raised concerns as to the calculations for the extra hours. The respondent had claimed pay for a period of one year one month; and averred that he had worked for 3 extra hours each day at a rate of Ksh. 43.75/= per hour.

The learned trial magistrate arrived at Ksh. 116,375/- as pay for extra hours worked overtime and weekends though she did not indicate how she arrived at that figure. He tabulated the total to Ksh. 134,750/= which was an error as it ought to have been Ksh. 124,200/=.

1 year 1 month totals to 395 days x 3 hours = 1,185 hours.

1185 hours x 43.75 per hour= Ksh. 51,843.75/=.

Therefore the tabulation ought to be as follows;

- One month's pay in lieu of notice –Ksh. 5200
- Pay for the days worked before dismissal – Ksh. 2615/=
- Pay for extra hours – Ksh. 51,843.75/=

**TOTALKsh. 59,668.75/=**

In the end, the appeal partially succeeds in so far as the amount due to the respondent is concerned which shall be as tabulated above. Therefore the appellant shall be entitled to half the costs of the appeal.

**DATED and SIGNED this 22<sup>nd</sup> day of June 2015.**

**G.W. NGENYE – MACHARIA**

**JUDGE**

**DELIVERED at ELDORET this 6<sup>th</sup> day of July, 2015**

**By: G.K. KIMONDO**

**JUDGE**

**In the presence of:**

1. No appearance for the respondent.
2. Mr. Kariuki for the appellant.