



Chauvel v Hazizi (Appeal E012 of 2023) [2024] KEELRC 1892 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1892 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E012 OF 2023**

**AK NZEI, J
JULY 18, 2024**

BETWEEN

NINA CHAUVEL APPELLANT

AND

KARISA OMAR HAZIZI RESPONDENT

*(Being an Appeal arising out of the judgment of Hon. J. Ongondo –
SPM issued on 16th May 2023, in Malindi CM -ELRC No. 34 of 2021)*

JUDGMENT

1. The Appellant was the Respondent in Malindi Chief Magistrate’s Court Employment Case No. 34 of 2021 whereby she had been sued by the Respondent herein seeking the following reliefs:-
 - a. A declaration that the Respondent’s termination was unfair, unlawful and wrongful.
 - b. Compensation for unfair termination at the rate of 12 months’ salary (12x15,000)kshs. 180,000
 - c. One month salary in lieu of notice....ksh. 15,000
 - d. Service pay @ 15 days for each year of service x 3 years (2009-2012).....kshs. 180,000
 - e. Payment for extra duties done and not paid for @ 15,000x12 months x12 years..... kshs.2,160.000
 - f. Refund of unremitted NSSF deductions....kshs. 20,800
 - g. Illegal salary deductions July 2021.....kshs. 3,000
 - h. Costs of the suit and interest.
2. The Respondent had pleaded:-



- a. that he had been employed as a gardener by the Appellant on 24/11/2009, earning a monthly salary of kshs. 15,000.
 - b. that apart from working as a gardener, the Respondent performed extra duties which included taking care of animals (chicken, rabbits, 2 dogs and donkeys) and was never paid for those services.
 - c. that on 24/7/2021, the Respondent's services were terminated without any lawful cause.
 - d. that the said termination was illegal, wrongful and unfair because it was effected without a valid reason, notice, and without the Respondent being heard.
 - e. that upon termination of the Respondent's employment in July 2021, kshs. 3,000 was unjustifiably deducted from his salary.
 - f. that whereas the Respondent started paying for NSSF in September 2012, the Respondent did not remit deductions for 2014 -2017, March 2018, May and July 2021.
3. Documents filed alongside the Respondent's memorandum of claim dated 21/9/2021 included the Respondent's evenly dated written witness statement and a list of documents listing 3 documents. The listed documents were the Respondent's NSSF statement, a demand letter dated 21/8/2021 and a companies search on One of Us Lamu Limited dated 16/9/2021.
 4. The Appellant entered appearance and filed a statement of defence on 25/10/2021, denying the Respondent's claim and pleading:-
 - a. that the Appellant had never, at any given time, employed the Respondent.
 - b. that the Respondent had been employed by (one) Murthadaw Athman Isaa who was married to the Appellant, and that after his employment was terminated in the year 2018, a company known as One of Us Lamu Limited employed him as a gardener and farm attendant.
 - c. that the Respondent caused violence and breach of peace, contrary to the level of integrity required of the said company's workers, by engaging in physical fight with a fellow worker, one Purity Kadzo, thus interfering with performance of duties.
 - d. that the Respondent absconded duties and left the work premises without any permission or leave being granted.
 - e. that the trial Court lacked jurisdiction as the cause of action arose in Lamu, and that filing the suit in Malindi offended Section 15 of the *Civil Procedure Act*.
 5. Documents filed alongside the Appellant's statement of defence included written witness statements of the Appellant, Jamal Hussein, Selestina Charo and Murthadaw Athman Mohammed. Also filed was a list of documents dated 18/10/2018, listing 5 documents. The listed documents included the Respondent's payslip for October 2019, a copy of the Respondent's NSSF statement (extract), a show cause letter dated 26/9/2021, a summary dismissal letter dated 7/10/2021, an acknowledgment letter from the Labour Office dated 11/8/2021, and a student statement for Brian Omar from Light Academy, among other documents.
 6. The Respondent filed Response (Reply) to the Appellant's statement of defence on 16/5/2022. He also filed a further witness statement dated 13/5/2022 and an evenly dated further list of documents, listing 5 documents. The further listed documents included (mobile) phone screenshots showing



- Mpesa money transfers, a copy of an Mpesa statement dated 4/4/2021 (for the period between 4/4/2021 to 4/10/2021), a show cause letter dated 26/9/2021 and a summary dismissal letter dated 7/10/2021.
7. At the trial, which is shown to have commenced on 31/1/2023, the Respondent (being the plaintiff in the primary suit) testified and adopted his filed witness statements as his testimony. He also produced in evidence the documents referred to in paragraphs 3 and 6 of this judgment. It was the Respondent's testimony that he was employed on 24/11/2009 and was dismissed on 26/7/2021 and was not given any letter. That he was earning kshs. 15,000 at the time of termination.
 8. Cross-examined by Counsel for the Appellant, the Respondent testified that he had not been given any (employment) letter by the Appellant as they had agreed verbally, and that the Appellant's name was not on the Respondent's NSSF statements.
 9. Re-examined, the Respondent testified that the Appellant was a Manager, and paid them by Mpesa. That payslips were for KRA purposes.
 10. The Appellant testified as DW-1. She told the Court that she was a director of One of Us Lamu Limited. She adopted her filed witness statement as her testimony and produced in evidence the documents referred to at paragraph 5 of this judgment. The other defence witnesses, Jamal Hussein (DW-2), Athman Mohammed (DW-3) and Celestina Charo (DW-4) testified and adopted their respective filed witness statements as their respective testimonies.
 11. The trial Court delivered its judgment on 16/5/2022 and made a finding that the Respondent was employed by the Appellant, and that termination of the Respondent's employment was procedurally unfair. The trial Court further made a finding that the Respondent was entitled to the reliefs sought in the memorandum of claim, save for the claim for unpaid extra duties. The trial Court rendered itself as follows:-
 - “(d) On the last issue, it follows that the Claimant is entitled to the reliefs sought as per the memorandum of claim dated 21st September 2021, save for the claim for unpaid extra duties which was not proved.”
 12. Aggrieved by the foregoing judgment, the Appellant preferred the appeal herein and set forth the following grounds of appeal
 - a. that the learned magistrate erred in law and fact by finding that Nina Chauvel is the employer to the Respondent whilst there was overwhelming evidence on record which totally proved that the Respondent's employer was One of us Lamu LTD by virtue of the statement from NSSF, NHIF and PAYS LIP adduced.
 - b. that the learned magistrate erred in law and fact by failing to appreciate the Labour Officer's report dated 17th October, 2021 at page 2 paragraph 3 which clearly stated that the Respondent was not fired but asked to take some time off so as to settle his family issues and resume later when the same had been settled.
 - c. that the learned magistrate erred in law and fact by being blind to the fact that the Labour Officer's Report clearly and directly indicated that the Respondent and his wife were fighting at their place of work, an act which prompted the Appellant as the director of One of us Lamu to ask them to take time off so as to settle their differences before resuming work.
 - d. that the learned magistrate erred in law and fact by finding that the Respondent was entitled to service pay from the year 2009-2012 when in fact there was no single evidence that was adduced by the Respondent to prove that he was employed by the Appellant in the year 2009.



- e. that the learned magistrate erred in law and fact by finding that the Respondent was terminated without any reasons while it is clearly on record that the Respondent was fighting at his place of work and it is for that reason that he was asked to take time off and settle issues with his wife before resuming.
 - f. that the learned magistrate erred in law by finding that termination of the Respondent was unprocedural and yet the Respondent was issued with a Notice to Show Cause dated 26th September 2021 which he never responded to nor showed any cause.
 - g. that the learned magistrate erred in law by failing to provide a basis or give reasons as to why and how he awarded the Respondent service pay amounting to kshs. 22,500/- whilst there was no evidence as to what the Respondent was earning between the year 2009-2012.
 - h. that the learned magistrate erred in law and fact by failing to note that there was no single document adduced by the Respondent to prove that he was in employment from the year 2009-2017. The documents adduced were from the year 2018 and onwards.
13. The Appellant sought the following reliefs on appeal:-
- a. that this Court vacates and/or sets aside the trial Court’s judgment delivered on 16/5/2023 in Malindi Chief Magistrate’s Court ELR Case No. 34 of 2021.
 - b. that judgment be entered for the Appellant as prayed in the Response to the memorandum of claim dated 18/10/2021 by dismissing the Respondent’s suit in the subordinate Court dated 21/9/2021.
 - c. that this Court makes any other order appropriate for the ends of justice.
 - d. that costs of the appeal and those (of proceedings) in the subordinate Court be awarded to the Appellant.
14. This is a first appeal; and all the evidence presented by both parties herein in the trial Court is before this Court for fresh evaluation. It was held as follows in *Mursal & Another -vs- Manesa* [2022] eKLR:-
- “A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another -vs- Associated Motor Boat CO. LTD & Another* [1968] E.a. 123 And In *Peters -vs- Sunday Post Ltd* [1958] E.A. page 424.”
15. Having considered the pleadings filed in the trial Court and evidence presented thereon, issues that fall for determination, in my view, are as follows:-
- a. Whether the Respondent was an employee of the Appellant, and if so,
 - b. Whether termination of the Respondent’s employment was unfair.
 - c. Whether reliefs sought by the Respondent in the trial Court are deserved.
16. On the first issue, it is worthy noting that in any claim arising from alleged termination of employment, the claiming employee has a primary duty to prove and/or to demonstrate the existence of the alleged employment and/or employer/employee relationship between himself and the alleged employer.



- Where the employee fails to do so, and particularly where the alleged employer denies having employed the claiming (alleged) employee, the suit must collapse at that primary stage.
17. In the present case, the Appellant denied ever having employed the Respondent, and pleaded that the Respondent had been employed by one Murthadaw Athman Isaa and thereafter by a company known as ONE OF US LAMU LIMITED. One of the documents produced in evidence by the Respondent was a companies search on the aforesaid company (ONE OF US LAMU LIMITED), in which the Appellant is shown to be the sole director/shareholder of the aforesaid company. The date of the said company's registration is indicated in the said search as 2nd October 2017.
 18. Another document produced in evidence by the Respondent was his NSSF statement. The Appellant also produced in evidence the Respondent's NSSF statement. I have noted from the said statements that from the year 2018, the Respondent's NSSF contributions were remitted to NSSF by One of us Lamu Limited, which is indicted in the said documents as the Respondent's employer.
 19. Further, the Respondent's show cause letter and dismissal letter dated 26/9/2021 and 7/10/2021 respectively and produced in evidence by both parties, are in the said company's letter head and are signed by the Appellant as Director of "One of us Lamu Limited". Further, the Respondent's payslip for the month of October 2019, produced in evidence by the Appellant and shown to have been signed by the Respondent, and whose authenticity the Respondent never disputed, is shown to have been issued by the said company. Indeed, there is nothing on record to show or to even suggest that the Respondent was employed by the Appellant.
 20. The production of evidence by the Respondent to show that the Appellant paid the Respondent via mobile money transfer does not, in my view, change the foregoing position as it was not demonstrated that the money so paid did not belong to the aforesaid company. It is to be appreciated that a limited liability company is a body corporate, a persona juridica, and always operates and transacts through its directors/officials. It cannot transact money transfers, but its directors/officials will do so in their capacities as such.
 21. The Court of Appeal stated as follows in *Victor Mabachi & Another -vs- Nurturn Bates Ltd* Civil Appeal No. 247 of 2005 [2013] eKLR:-

“A company, as a body corporate, is a parson juridica, with separate independent identity in law, distinct from its shareholders, directors, and agents unless there are facts warranting a lifting of the veil.”
 22. In the words of Macnaghten in *Salomon -vs- Salomon & Co.* [1897] AC 22:-

“The company is at law a different person altogether from its subscribers....and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form except to the extent and in the manner provided by the Act.”
 23. In the case herein, the Appellant cannot be held personally liable for acts done by One of us Lamu Limited (the Respondent's employer) or by her in her capacity as a director, Manager or Official of the said company. The Respondent did not find it necessary to enjoin the said company in the suit filed by him in the trial Court, despite the pleadings and evidential documents filed by the Appellant.
 24. There being no evidence, documentary or otherwise, to show that the Respondent was, on a balance of probability, at any time employed by the Appellant, and the Appellant having denied having employed



the Respondent, I make a finding that the Respondent was not shown to have been an employee of the Appellant, and was therefore not her employee. In the absence of an employer/employee relationship between the Appellant and the Respondent, the other two issues cannot be considered.

25. In view of the foregoing, and having considered written submissions filed by both parties herein, the appeal herein succeeds. The trial Court's decree/judgment delivered on 15/5/2023 is hereby set aside, and is hereby substituted with an order dismissing the Respondent's suit filed in the trial Court, being Malindi Chief Magistrate's Court ELR Case No. 34 of 2021 ([*Karisa Omar Hazizi -vs- Nina Chauvel*](#)).

26. Each party shall bear its own costs of both the appeal and of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH July 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

