



**Mwanthi v Guvumba (Appeal E056 of 2023)
[2024] KEELRC 1725 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1725 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E056 OF 2023**

**AK NZEI, J
JULY 4, 2024**

BETWEEN

MARY MWANTHI APPELLANT

AND

COLLINS GUVUMBA RESPONDENT

(Being an appeal from the whole judgment and decree of Hon. D. O. Mbeja- PM delivered on 8th May 2023 at Msa Chief Magistrate's Court in Cause No. 375 of 2021)

JUDGMENT

1. The Appellant herein was the Respondent in Mombasa Chief Magistrate's Court Employment Case No. 375 of 2021 whereby she had been sued by the Respondent herein who sought the following reliefs:-
 - a. One month salary in lieu of notice.....kshs. 15,500
 - b. Unpaid salary for 17 days worked in May 2021...kshs. 8,789.
 - c. Unpaid house allowance for 30 months at the rate of 15% of the basic salary (15/100x15,500x30)...kshs. 69,750
 - d. Unpaid leave days 517x30x 2yearskshs. 31,020
 - e. Unpaid overtime 9 hrsx150x30 months ...kshs. 40,500
 - f. Unpaid NHIF 1000x30 monthskshs. 30,000
 - g. Risk allowance 100x30 monthsx30 dayskshs. 90,000
 - h. Compensation for unlawful termination (15,500x12)....kshs. 186,000



- i. Service pay/severance pay.....kshs. 23,250
 - j. Certificate of service.
 - k. Costs and interest.
2. The Respondent had pleaded that he had been employed by the Appellant as a Turnboy on 21/12/2018 at a basic salary of kshs. 15,500, and had worked continuously until 17/5/2021 when the Appellant unprocedurally terminated him without according him an opportunity to defend himself. The Respondent had further pleaded:-
 - a. that his employment was terminated verbally without following the laid down lawful procedure.
 - b. that he was not allowed to take leave during the period of employment.
 - c. that the Respondent used to work for 7 extra hours per day without overtime pay.
 - d. that the Respondent was not paid house allowance during the entire period of employment.
 - e. that the Appellant did not pay the Respondent's statutory deductions (NHIF and NSSF) for the period worked.
 - f. that termination of the Respondent's employment was unlawful and was in breach of the Respondent's employment rights.
3. Documents filed alongside the Respondent's memorandum of claim included the claimant's written witness statement dated 31/5/2021 and an evenly dated list of documents. The listed documents included copies of the Respondent's identity card, a letter from the Ministry of Labour and a demand letter, all of which were not included in the record of appeal filed by the Appellant.
4. The Appellant entered appearance (under protest) on 14/3/2022 and filed Response to the claim, denying the Respondent's claim and putting him to strict proof thereof. The Appellant pleaded that the Respondent was a complete stranger to her, and denied ever engaging in transport business.
5. The Appellant further pleaded that there was never any contract and/or any privity of contract between herself and the Respondent, and prayed that the Respondent's claim be dismissed.
6. The Appellant filed two witness statements, her own witness statement dated 4/3/2022 and a witness statement of Gabriel Makolo, dated 29/9/2022.
7. At the trial, the Respondent (being the claimant in the primary suit) adopted his filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 3 of this judgment. He further testified that brake fluid spilt on a delivery book at his place of work, and that this was the reason for his termination. That he used to be paid kshs. 15,550 at the end of every month. That he was employed as a turnboy while Gabriel Makolo was the driver. It was the Respondent's further evidence that he was not given a contract, and that he was not a casual as he used to earn a monthly salary.
8. Cross-examined and re-examined, the Respondent testified that he used to be paid his salary in advance and at the end of the month, that he used to be paid in cash and that he signed on the Appellant's book. That the Appellant, who has a contract with KDTA was a transporter and had almost ten vehicles. The Respondent further testified that he was employed by the Appellant and worked on daily basis, and used to report to work at the Appellant's yard in Changamwe, that they used to transport tea to godowns within Mombasa on daily basis and even on public holidays and without leave, and that he



- only stayed at home on Sundays. That the Appellant's husband, one Samuel Wainaina, was in charge, but the Appellant owned the vehicles. That the Appellant employed the Respondent and sacked him.
9. The Appellant testified and referred to her filed witness statement. She testified that she was a clerk with Bahari Tea Company that dealt with Warehousing, and that she deals with drivers and loaders. She denied owning any vehicles, knowing the Respondent or doing any transport business.
 10. Cross-examined, the Appellant testified that she was an employee of Bahari Tea, which is a tea company, and which did tea warehousing; and that Gabriel Makolo was one of their clients.
 11. The Appellant's witness (Gabriel Makolo – RW2) denied having been employed by the Appellant. He testified that he had been employed by a boss that he had never seen as he dealt with the manager, James Omari. That he had worked with the Respondent who worked as a casual. That the Appellant worked at Bahari Tea as a supervisor. He denied knowing Samuel Wainaina. He denied having been employed by the Appellant and testified that the Respondent had been taken to him (as a Turnboy) by James Omari, the manager. That he (Gabriel Makolo) worked for Waswa Transporters.
 12. The trial Court delivered its judgment on 8/5/2023 whereby it made a finding that the Respondent had been employed by the Appellant and that he had been wrongfully, unfairly and unlawfully terminated, and was thus entitled to the reliefs sought. The trial Court allowed the claims for notice pay, salary for 17 days worked in May 2021, house allowance for 30 months at the rate of 15% of basic salary, unpaid leave days, overtime as prayed, risk allowance and six months' salary compensation for unfair termination; a total of Kshs. 278,309. The Respondent was also awarded costs of the suit and interest. Interest was ordered to be calculated from the date of filing suit.
 13. Aggrieved by the aforesaid judgment, the Appellant preferred the appeal herein, and set forth the following grounds of appeal:-
 - a. the learned magistrate erred in law and fact in finding that the claimant was entitled to any of the reliefs sought in the memorandum of claim.
 - b. the learned magistrate erred in fact and in law by failing to appreciate and/or to consider all the evidence adduced by the Respondent.
 14. The Appellant sought the following reliefs on appeal:-
 - a. that the appeal be allowed and the judgment of the lower Court be set aside.
 - b. costs of the appeal.
 15. This is a first appeal. The evidence presented in the trial Court is before this Court for fresh evaluation. This Court however takes cognizance of the fact that it never saw or heard the witnesses testify.
 16. Having considered the pleadings filed and evidence presented before the trial Court, issues that fall for determination, in my view, are as follows:-
 - a. whether the Respondent was an employee of the Appellant.
 - b. whether the Respondent's employment was unfairly terminated by the Appellant.
 - c. whether reliefs sought in the trial Court are deserved.
 17. 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 an employer/employee relationship between himself and the Respondent/employer. Where the employee fails to do so, the suit must collapse at that primary stage. In the present case, the Respondent pleaded and



testified that he was employed by the Appellant, that he was not given a contract, that he was being paid in cash and signed on the Respondent's book, and that his employment was terminated verbally by the Appellant.

18. Although the *Employment Act* recognizes verbal employment contracts, the existence of that contract or the employer/employee relationship created by that verbal contract must be proved by the party alleging its existence. Such proof is not impossible as a party alleging to have been contracted verbally can present corroborative evidence by a person or persons who either worked with him, knew that he was working for the employer in issue or actually used to see him working there. Such corroborative evidence may come from work colleagues, neighbours at work or even family members, among others.
19. In the present case, the Respondent did not tender any evidence to show that he worked for the Appellant. The Appellant denied knowing the Respondent or having employed him. The person that the Respondent alleged to have worked with, Gabriel Makolo, testified as the Appellant's witness and denied having been employed by the Appellant. He testified that he worked as a driver for an employer known as Waswa Transporters, whereat one James Omari was the manager. He further testified that he had been employed by the said James Omari, and that the Respondent was taken to him as his Assistant. The said Gabirel Makolo denied having been employed by the Appellant or knowing Samuel Wainaina.
20. There being no evidence, documentary or oral, to show that the Respondent was, on a balance of probability, employed by the Appellant, and the Appellant having denied having ever employed the Respondent, I return a finding that the Respondent was not shown to have been an employee of the Appellant. The other two issues cannot be considered in the absence of an employer/employee relationship.
21. In view of the foregoing, the trial Court's decree/judgment dated 8/5/2023 is hereby set aside, and is hereby substituted with an order dismissing the Respondent's suit filed in the trial Court, being Mombasa Chief Magistrate's Court Employment case No. E375 of 2021.
22. Each party will bear its own costs of the appeal and of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH 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

4

Appeal e056/2023

