Wanjiku t/a Verjoda Gardens Villa v Amukhule (Employment and Labour Relations Appeal E012 of 2023) [2024] KEELRC 2067 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2067 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2023

HS WASILWA, J

JULY 24, 2024

BETWEEN

VERONICA WANJIKU T/A VERJODA GARDENS VILLA ..... APPELLANT

AND

PETER OMIENA AMUKHULE ..... RESPONDENT

JUDGMENT

1. This appeal arose from the Judgement of Honourable E.A Nyaloti (CM) delivered on 15th November, 2022 in Nakuru Chief Magistrate ELRC case No. 249 of 2019. Dissatisfied with the Judgement, the Appellant, Respondent in the trial Court suit, lodged this Appeal by a Memorandum of appeal dated 30th May 2023 based on the the following grounds; -

    1. That the learned magistrate erred in fact and in law in finding that the Respondent was entitled to an award of damages Kshs. 100,000/= as compensation contrary to the express provisions of section 49(1)(c) of the *Employment Act* which stipulates that compensation should be equivalent to a number of months' wages or salary not exceeding twelve (12) months.

    2. The learned magistrate erred in fact and in law by failing to comply with the provisions of Rule 28(2) of the Employment an Labour Relations Court (Procedure) Rules 2016 by rendering a decision/judgement that did not contain a concise statement of facts in the matter and the reasons for the decision in respect to award of damages for(I)-(viii).

    3. The learned magistrate erred in fact and in law by making a determination as to piercing of corporate veil suo moto when the issue raised by the Appellant was that of misjoinder and the parties never addressed the issue of lifting the corporate veil.

    4. The learned magistrate erred in fact and in law by reaching a finding that the respondent was employed in the year 2009 based on the NSSF records which finding was contrary to the

evidence tendered at the trial and not appreciating that membership to NSSF is retained by a member regardless of the number of times the member may change employment.

5. The learned magistrate erred in fact and in law in awarding the Respondent damages for public holidays and overtime when the Respondent in his Memorandum of claim at paragraph *10* clearly pleaded that he used to work on alternate days and any oral testimony contrary to the pleadings could only amount to departure from the pleadings hence inadmissible.

2. In the Memorandum of Appeal, the Appellant sought for the following Orders; -

   a. This Appeal be allowed with costs.

   b. The whole Judgement/decision delivered on the 15th November 2022 by the Hon. E.A Nyaloti(CM) in Nakuru CMERLC No. 249 of 2019 be set aside.

   c. The costs of this Appeal be borne by the Respondent.

   d. Any such further Orders that may be made by this Honourable Court which it may deem fit to grant.

3. The background of the trial court's case is that the Respondent herein was employed by the Appellant verbally on 25th March, 2016 as a general worker, earning a monthly salary of Kshs 9,300 till September, 2017 when his salary was reduced to Kshs 7500 and earned this money until his termination on 16th January, 2019. The circumstances of termination is that on 16th January, 2019, while the Respondent was at work, he was informed by the Respondent's manager that the work at the Respondent had reduced and thus, his services were no longer needed.

4. It is averred that during the pendency of his employment, the Respondent was granted only 17 leave days on the month of April, 2017. That throughout his employment he was underpaid and asked to work during public holidays without any compensation. He also stated that he used to work on alternating days of the week. He maintained that the termination was unfair for lack of notice, reason and procedure.

5. In his claim, the Respondent sought to be paid 16 days worked in January, 2019 and not paid, Notice pay, underpayments, leave pay, public holidays pay, normal overtime and Gratuity.

6. The Appellant herein opposed the Suit and in her defence stated that she has been sued individually when, she is just one of the Directors. She disputed the claim and stated that the Respondent was employed by the Verjordia Garden Villa Limited with effect from 1st July, 2017 to 16th January, 2019 as a cleaner under a negotiated consolidated salary. Further that the Respondent was given Kshs. 200 for his meals and Kshs. 50 bus fare for all the days, he was on duty.

7. It was averred that the Respondent used to work for one full day and take a rest the next day, thus the claim of overtime is without any basis. It was stated further that the Respondent was granted his full annual leave.

8. The circumstances leading to the termination according to the Appellant herein is that sometimes in early, 2019, the Appellant was not doing well financially and decided to lay off some of its workers including the Respondent, however that it offered casual employment on need basis, which the Respondent declined. In the end, it was stated the claim does not disclose any reasonable action against the Appellant and urged the Court to dismiss the suit.

9. After hearing the opposing parties, the trial Court found the termination of the Respondent unfair and awarded compensation for the unfair termination, notice pay, underpayments, leave pay, public

holidays pay, Gratuity, overtime and salary for 16 days worked in January, 2019 all amounting to Kshs. 393, 206. The Respondent was also awarded costs of the suit with interest.

10. It is this Judgement that caused the filling of this Appeal. Direction were taken for this Appeal to be canvassed by written submission, with the Appellant filing submission on 28th June, 2024 and the Respondent filed on 3rd July, 2024.

Appellant's Submissions

11. The Appellant submitted that this Appeal is a first Appeal and it being a first appeal this court in exercise of its appellate jurisdiction is required to independently evaluate the evidence and arrive at its own independent decision as was aptly stated by the Court in Maore v Mwende [2004] eKLR where the court of Appeal held thus; "This being a First Appeal, it is our duty to reevaluate the evidence assess it and make our own conclusion remembering that we have not seen nor heard the witnesses and making due allowance or this."

12. That the Court restated this position in Selle v Associated Motor Boat Company Ltd [1968] EA 123 where the Court of Appeal in considering a first appeal observed as follows: -

> " An Appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judges finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression or the demeanor of a witnesses inconsistent with the evidence generally "'.

13. The circumstances under which a trial Court decision can be interfered with was discussed in Court of Appeal case No. 77 of 1982 Ephantus Mwangi and Geoffrey Nguyu Ngatia v Duncan Mwangi Wambugu [1982-1988] 1 KAR, where the court held that;-

> " the court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or that his impression based on the demeanor of a mater a witness was inconsistence with the evidence of the case generally'".

14. On the 1st and 2nd Grounds of Appeal, it was argued that section 49(1)(c) provides that an award of compensation shall be the equivalent to a number of months' wages or salary not exceeding 12 months based on gross monthly wage or salary of the employee at the time of dismissal or termination'. However, that the trial court in its judgment awarded compensation of Kshs. 100,000, without basing its judgement on the Respondent's salary and giving the number of months awarded, therefore that the award is erroneous. In support of this, they relied on the case of Olpajeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR where this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award and that the exercise of discretion must not be capricious or whimsical.

15. The Appellant also relied on the case of George Onyango Akuti v G4S Security Services Ltd [2013] eKLR and the case of Joseph Niogu Kamunge v Charles Muriuki Gachari [2016] eKLR ,in support of the assertion that general damages are not awarded for wrongful termination but are an exercise of the trial court's discretion which should be applied reasonably.

16. Accordingly, it was submitted that damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice. Similarly, that by finding the Respondent's termination unfair, he was only entitled to damages equivalent to the salary he would have earned for

the period of notice, and the trial Court erred in awarding him more. This was the view of the Court in CMC Aviation Limited v Mohammed Noor [2015] eKLR, where the Court held that despite a finding of unfair termination of employment, the fact that the employment contract was terminable by one month's notice meant an award of one month's salary in lieu of notice was reasonable compensation.

17. It was also submitted that the trial court failed to give reasons for the award of the maximum compensation under section 49 of the *Employment Act*.

18. On payment of Gratuity/service pay, it was submitted that the amount is not an entitlement and that the same can be awarded if not provided for under the Employment contract as was the case herein. Moreover, that the employer was remitting NSSF contributions for the Respondent, thus disqualifying him from award of service pay.

19. With regard to grounds 3,4 and 5, it was argued that the Court advanced a case substantially different from that which was pleaded by the Respondent in his Claim, this is because the trial court raised the issue of lifting of the corporate veil as part of the issues for determination which issue was never raised by the appellant neither was any testimony given concerning lifting of the corporate veil. Thus, the trial court erred in law in decided on the issue of piercing the corporate veil when it was not pleaded.

20. The Appellant submitted that parties are bound by their pleadings and any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. This was held by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji NIG vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: - "... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....in fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as Joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

21. The Appellant reiterated that the Respondent used to work on alternate days as admitted at paragraph 10 of the Memorandum of claim, hence any claim of overtime, leave and public days is without basis. Also that the Respondent admitted to going for leave, hence the claim for leave awarded should be set aside.

22. In conclusion, the Appellant submitted that the Appeal is merited and urged this Court to allow the same with costs.

Respondent's Submissions

23. The Respondent submitted on three issues, whether compensation damages as awarded was excessive, whether the Appellant was wrongly sued and whether the Respondent's award for damages of working on public holidays and overtime was irregular.

24. On the first issue, it was submitted that to determine whether the compensation damages as awarded by the Trial Court was excessive, it is imperative to determine, whether the Respondent was an employee of the Respondent and whether the termination was justified. On that note, it was argued that it was determined by the trial court that the Respondent was an employee of the Appellant. Further that the Respondent herein was terminated from employment because he did not engage in discussions to allow him be engaged as a casual reliever. Therefore, that the termination, on that ground, was contrary

to the provisions of Section 45 (1) and (2) of the*Employment Act*. In this, they relied on the case of Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR, where the Court summarized those procedures as follows: -

> "Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warming letters issued by the employer to the employee. Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

25. On whether the award for damages was excessive, the Respondent submitted in the negative and cited the case of Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR where the Court stated that;-

> "What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the apocopate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies."

26. It was submitted in furtherance to the above, that an award for damages is under Judicial discretion and that the trial Court had the judicial discretion in awarding compensatory damages it deemed fit having found that the Respondent was unlawfully terminated. In support of this, they relied on the case of Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR where the Court stated as follows;-

> "...when giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. The Black's Law Dictionary 9th edition at page 534 defines judicial discretion as follows: "the exercise

of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right"

27. To buttress their arguments, the Respondent cited the case of Reuben Owino Obonyo v China Aero Technology international Engineering Corporation [2021] eKLR where the Court stated that;-

> "Section 49 of the *employment Act* provides for reliefs that a Court that has found a termination of an employee to have been unfair, can avail to such an employee. Among those reliefs is a compensatory one. The Court may award a number of months' gross salary, but the total number of months ought not exceed twelve. An award of the compensatory relief is discretionary, the extent of the award, and whether it should be granted, is discretionary and dependent on the circumstances of each case."

28. Accordingly, that the damages awarded by the trial Court were exercised under Judicial authority and reasonable in the circumstances.

29. On whether the Appellant was wrongly sued, it was submitted that the Appellant herein at the Trial Court failed to produce any evidence as to the existence of other directors and failed to produce any evidence as to the nature of the company and without such evidence, the court was justified in finding her liable.

30. On the award of Public Holidays, it was submitted that the Appellant discharged his evidential burden as to his workings on overtime and public holidays and hence the burden shifted to the Appellant to controvert the same, which they never did. It was argued that the evidence on record clearly shows that the Respondent herein signed on the muster roll on days that were public holidays, a fact that was not controverted by the Appellant, hence the award of public holidays claim, should be sustain.

31. On whether the Court met the threshold of structure of a judgment, it was submitted that the issue does not go to the substance of the matter herein. In any event, that Rule 28(2) of the Employment and Labor Relations Court (Procedure) Rules 2016 provides as follows, (2) A decision of the Court shall be in writing and contain a concise statement of facts and the reasons for the decision, which the Judgement as delivered was in full satisfaction of the above rule.

32. In conclusion, it was submitted that it is not in dispute that the Respondent herein was an employee of the Appellant herein on the strength of evidence of both parties at the Trial Court. The question before this Honorable Court is whether the termination of the Appellant's employment was both procedurally and substantively done and having been determined at the Trial Court, that the termination was unlawful, the Respondent urged his Court to uphold the decision by the trial court and dismiss the Appellant's Appeal with costs.

33. I have examined all the averments and submissions of the parties herein. As submitted in this judgment by the appellants this court indeed has a responsibility to reevaluate the evidence of the parties and make a determination accordingly.

34. From the evidence on record, the Respondent was an employee of the Appellant which fact the Appellant admitted. The only question is the period within which the Respondent served because according to him he worked from 25.3.2016.

35. When the Appellant's witness testified, he indicated that the Respondent worked under a contract but the same had not been presented to court.

34. The Respondent however produced his NSSF statement which shows the name of his employer as the Appellant herein and the date of employment being 1.9.2009.

35. It is not clear why he indicates he was employed in 2016 when the statement he produced himself shows 1.9.2009.

This in my view shows some dishonesty or confusion on the Claimant's part.

36. That notwithstanding and in the absence of the Appellant submitting the contract of employment of the Respondent, revert back to section 10 (7) of the *Employment Act* which states as follows:

> " 10. (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."

37. Given this position, I will take the Claimant's position that his employment start date is 25.3.2016 as he has stated.

38. The Respondents served the Appellant accordingly and from the evidence on record he worked on alternative days on a 12 hour shift and then went on off. The claim for off days will therefore not arise as was pleaded by the Respondent in his claim at the lower court.

39. The Appellants have averred that the Respondent was paid Kshs 9,300 all consolidated as salary which was like 250/= per day. The Respondent served as a general labourer. As per Legal Notice No. 112 of 1st May 2017, the minimum wages for such a labourer was basic salary 11,926.40 plus house allowance of Ksh. 1788.95 making gross pay of 13715.35/=. It therefore follows that the Respondent was underpaid by Kshs. 13715.35 – 9300 = 4415.35 per month which translates to 4415 x 8 months = 60,684.65.

40. From March 25th 2016 to 30th April 2017, the period of 12 months he was paid also 9,300/=. As per Legal Notice No. 117 of 2015, the minimum wage for a general labourer was 10,954.70 and so he was underpaid by (10954.70 – 9300) x 12 = 1054.7 x 12 = 36,403.4/=

Total underpayment translates to Kshs 97,088.05.

41. The trial Magistrate had found the underpayment to be 70,000, which the Appellant are disputing in this appeal. There having been no cross appeal, I will leave the underpayment to stand at 70,000/=.

42. The appellant has also appealed on the ground that the Respondent was granted 33,000/= holiday pay. I would argue with the Appellant on this issue that since the Respondent worked on alternative days, he would or would not necessarily work during holiday and so there must be evidence of the days he worked on holidays to qualify for holiday pay rate.

43. The Respondent was terminated by the Appellant for refusing to accede to take up casual employment. In the clear circumstances of the case, the Appellant were insisting that they were not doing well financially and so had to terminate the Respondent on redundancy. They were obligated to follow the laid down procedure for dismissal or redundancy which is provided under section 40 of the *Employment Act* which states as follows:

> " 40. Termination on account of redundancy
>
> (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash; (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

2. Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

3. The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister."

44. This was not done. It is my view that indeed the termination was unfair and unjustified and so the Respondent was entitled to compensation. The trial court proceeded to grant the Respondent notice pay of 13,715.35 which is proper but proceeded to grant a blanket figure of 100,000/= as compensation

under section 49 of the *Employment Act* compensation is pledged as the salary of an employee up to a maximum of 12 months. It was indeed an error to grant a blanket figure of 100,000/= without indicating how many months compensation were granted and the basis of the same.

45. On issue of corporate seal being lifted, the Appellant has submitted that she is a Director of the company sued and she is sued alone. The Appellant did not submit any evidence to show the nature of the enterprise Verjodia Gardens Villa is. In the Memo of Response filed by the Appellant on 28.11.2019 the Appellant only indicated that she was operating a business known as Verjodia Garden Villa Ltd. This I perceive to be a business name.

46. The Appellant has not produced any evidence that the entity is a company registered under the Company's Act and so distinguishing herself from the company.

47. My view the issue of lifting of the corporate seal is immaterial in the circumstances and despite the trial Magistrate proceeding to address this issue, the landscape of this claim didn't change and there is no indication that the Appellant was prejudiced by that move.

48. Having analyzed the evidence, the facts and the law and having considered the judgment of the trial court, I find the appeal lacks merit and is dismissed accordingly save for the alteration on compensation payable to the Respondent for unfair termination which put in perspective and I award the Respondent 8 months' salary compensation given the nature of the injustice against her and this translates to

    8 x 13,715.35 = 109,722.8/=

    Less 33,000 holiday pay

49. The rest of the award by the lower court will remain undisturbed. The Respondents will be paid costs of this appeal and of the claim at the lower court plus interest at court rates with effect from the date of this judgment.

JUDGEMENT DELIVERED VIRTUALLY THIS 24TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Fred Nyakundi; court assistant

Ms Mbeche for the Respondent

Ms Bosisbori for the Appellant