REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO. E 193 OF 2024.

VOI POINT LIMITED.....

APPELLANT

VERSUS

ROSE MWAKANDANA SEZI.....RESPONDENT

JUDGMENT

Background

1. The appeal before this Court arises from a judgment by Honourable A.M Obura, Chief Magistrate, delivered in Voi MCELRC Case No. E 015 of 2023 on 26th April 2024. The learned Magistrate found the Respondent's case to be meritorious and consequently granted some of the reliefs she sought in her pleadings in her favour. Aggrieved by the entire decision, the appellant challenges it on the grounds set out in the Memorandum of Appeal filed herein and dated 20th September 2024.

2. When the appeal was listed for directions regarding the disposal of the matter, this Court ordered that it be canvassed through written submissions. Subsequently, the parties filed their submissions in accordance with the directions.

The Respondent's case before the trial court

3. By a Memorandum of Claim dated 29th September 2023, the Appellant initiated legal proceedings against the Respondent in the aforementioned suit and sought the following reliefs;

    I. Compensation for wrongful, unlawful and or unfair termination of employment [12 months x KShs. 8, 715] .....KShs. 104,580.

    II. One month's salary in lieu of notice.....KShs. 8, 715.

    III. House Allowance [15% x 8,715x 32 months] .....KShs. 41,832

    IV. Salary in lieu of annual leave.....KShs. 12, 201

V. Interest on [i]-[iv] from the date the same became due until payment in full,

VI. Certificate of Service, and

VII. Costs of the Suit.

4. It was her case that she was first employed by the Appellant on 16th April, 2019, as a sorter. She worked continuously until sometime in January 2022, when her Supervisor summoned her to his office and instructed her to go home and only return after being called by the Respondent to do so. She was never called to report back to work at any point thereafter.

5. She argued that she was therefore verbally dismissed from her employment. The termination was unfounded, unlawful, unilateral, without any prior warning, and entirely disregarded the procedures outlined in the Employment Act.

6. At the time of the termination, she was earning an average monthly salary of KShs. 8,715. During the entire

period of her employment, the Respondent neither allowed her to proceed on annual leave nor paid her in lieu thereof. The Respondent did not pay her House allowance. She was not issued a Certificate of Service, which she was legally entitled to.

7. Through her Advocate, she aimed to resolve the dispute amicably by writing to the Respondent, but her Advocate's letter received no response. As a result, she was compelled to initiate legal proceedings against them.

8. She categorically denied executing the contract dated 1st July 2021.

The Appellant's Case before the trial Court.

9. The Respondent called one witness, Mr Zakia Abdi, to testify in support of their case. The witness stated that the Respondent's claim was premature because it was filed without her first exhausting the internal dispute resolution mechanism agreed between the parties, as set

out in the Sisal Sorting Service contract dated 1st July 2021, between her and the Appellant.

10. The Respondent, in direct breach of the terms of the contract, which stipulated that any dispute over her employment with the Appellant be resolved amicably between the parties, and if an amicable settlement is not reached, the matter should be referred to a mediator before legal action is taken, initiated this suit against them.

11. The witness stated that on or about 9th April 2019, the Appellant employed the Respondent for a two-month contract and assigned her sisal sorting duties in its brush room. It was a term of the contract that she was to earn a daily wage of KShs. 367.00. Further, her wages could be paid in a lump sum, every two weeks, the salary was subject to statutory deductions, including but not limited to those for remittance to NSSF, and compensated for leave days earned but not taken.

12. The witness stated that the Respondent continued to work for the Respondent after her initial contract had lapsed. The Appellant faithfully continued to fulfil their obligations according to the employment contract mentioned above.

13. In the latter half of the year 2021, the Appellant undertook a strategic initiative to reorganise its workforce and reassess the employment terms of its various employees, aiming to enhance operational efficiency and foster career development. Accordingly, the Appellant found it appropriate to extend to the Respondent an open-ended piece rate contractual agreement with improved employment conditions.

14. The Appellant explained the nature of the shift in terms of employment, terms of the new contract, and the implications thereof to the effect that she would be engaged as an independent contractor. She signed a contract dated 1st July 2021. Upon execution of the agreement, the Respondent started working as an independent contractor. She ceased being an employee of the Appellant.

15. The Respondent had her own working hours and was free to work for other employers so long as she delivered 2.4 tonnes of sort sisal every twenty-four hours to the Appellant.

16. Her fees were paid every two weeks, and as she had requested, the Appellant kept deducting her NSSF contributions and duly remitted the same.

17. In January 2022, the Appellant decided to terminate the Respondent's services in accordance with the terms of the aforementioned Sisal Window Sorting Service contract. The employment was terminated at the start of the month, and no salary was due to her.

18. As an independent contractor, she was not entitled to terminal dues or a certificate of service. Consequently, the Respondent's claim lacked merit. If she had any cause of action against the Appellant, it could be for breach of contract.

The Appeal

19. Aggrieved by the Judgment of the learned trial Magistrate, the Appellant impugns the decision, setting out four [4] grounds that she erred in law and fact;

I. In failing to hold that the Court had no jurisdiction to hear, adjudicate over/or determine the matter on account of the Respondent's failure to exhaust the internal dispute resolution mechanism agreed upon between the parties.

II. In failing to appreciate the doctrine of privity of contract, thereby failing to appreciate that the Respondent had not exhausted the dispute resolution mechanism agreed upon.

III. In failing to consider the Appellant's evidence, including but not limited to the Respondent's Contract of Employment, against the weight of the evidence tendered by the Respondent.

IV. In failing to evaluate the evidence in its totality and in failing to take into consideration submissions and

authorities submitted by the Appellant, thereby arriving at an erroneous decision.

Analysis and Determination.

20. This Court, being a first Appellate Court, is bound to reevaluate and reconsider the material placed before the trial Court and come up with its own independent findings and conclusions. See **Selle vs Associated Motor Boat Co. [1968] EA 123**.

21. I have carefully considered the pleadings, evidence and submissions by the parties before the trial court, the grounds of appeal, and the respective submissions by their Counsel in this appeal, and the following issues emerge as those around which this appeal revolves, thus;

a) Whether the trial court possessed jurisdiction to entertain the Respondent's claim.

b) Whether the learned trial Magistrate erred in law by determining that the Respondent's contract was a contract of service rather than a contract for services.

c) Whether the reliefs awarded were justified.

22. True as submitted by Counsel for the Appellant, jurisdiction is everything. Without it, a Court of law is supposed to down its tools, and proceed no more. In **Owners of the Motor Vessel "Lilian S" v Caltex Oil [Kenya] Ltd [1989],** the Court elaborated, thus;

> *"Jurisdiction is everything, without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction……Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

23. Counsel submitted that the trial Court's jurisdiction was invoked prematurely. The contract of employment

between the parties, dated 1st July 2021, explicitly provided, inter alia, that any dispute arising between the parties regarding the contract could be first referred to mediation before the authority of a court is engaged. As such, the trial Court didn't have jurisdiction to entertain the claim. To support the submission, Counsel placed reliance on the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR.**

24. In my view, a court's legal jurisdiction derives from either the Constitution or legislation or both. The parties' agreements and/or contracts cannot bestow jurisdiction on a court that it cannot legally possess, or divest the jurisdiction it lawfully holds. Agreements and contracts by parties through their stipulations on referral of matters to mediation, arbitration, negotiations, and conciliation or for engagement of internal workplace dispute resolution mechanisms, do not oust a Court's jurisdiction but only suspend the same pending utilisation of the alternative mechanisms. With great respect, any authority cited by

Counsel for the Respondent, including **Nyakwara v Triviton Healthcare Africa [Kenya] Limited 2024,** where the Court held;

> *" 13. ..... It is the parties' prerogative to attempt settlement through mediation, and to refer the dispute to arbitration, failing mediation. It is not the mandate of the Court to refer parties to arbitration. They agree to positively reject the jurisdiction of the Court and embrace private mechanisms of dispute resolution. The Court would be acting against the Parties' wishes by intervening as proposed by the Claimant. Any referral is a prerogative of the parties, and the Court can only stay its proceedings if it presently has jurisdiction, or is likely to have jurisdiction upon the occurrence of certain events contemplated by the parties in their contract. The Court does not presently have jurisdiction, and none is contemplated in future, under the contract executed by the parties."*

has not persuaded this Court.

25. It is in the spirit of the foregoing that Rule 56 [5] of The Employment and Labour Relations Court [Procedure] Rules,2024, provides;

"Where the Constitution, a written law, collective bargaining agreement, contract of service, policy, or other instrument provides for an alternative dispute mechanism-

a) A person being party to a dispute may file a suit and seek appropriate interlocutory relief pending exhaustion of such alternative dispute resolution mechanisms or pending determination of the suit.

b) Want of exhaustion of such alternative dispute resolution mechanisms shall not operate as a bar to a suit for application for interim orders or alleging unconstitutionality or unlawfulness of the action, omission, decision or other matter in dispute pending such exhaustion.

c) A suit filed prior to exhaustion of such alternative dispute resolution mechanism may be stayed and

not struck out on account of exhaustion. [Emphasis added].

26. I note that at no point did the Appellant move the trial court to either halt its proceedings due to alleged lack of jurisdiction or to stay the proceedings pending the internal mechanisms, before the hearing began or during its course. This approach was necessary for two reasons: first, the execution of the agreement dated 1st July 2021, by the Respondent, was denied, and therefore its applicability was in question; second, the claimant had expressly stated in her witness statement that she attempted an amicable settlement by writing to the Respondent through her Counsel, but the Respondent did not accept the attempt. They never responded to Counsel's letter.

27. Having failed to raise the issue as I have stated, the learned trial Magistrate would not have the basis to hold that she did not have jurisdiction; if she had to, and

definitely in the written submissions, which could not be a substitute for evidence, would not provide such a basis.

28. The Appellant argued before the learned trial Court that the Respondent was an independent contractor, in other words, someone who worked under a contract for service rather than a contract of service, particularly under the contract of employment dated 1st July 2021. As such, she was not entitled to the protections and rights of employees as outlined in the Employment Act. However, this Court has not overlooked the fact that a careful consideration of the Appellant’s pleadings, evidence, and submissions shows that they interchangeably refer to the term 'independent contractor' and 'piece rate worker.’ In my view, this is a misnomer.

29. It is important to emphasise at this point that the label the parties have assigned to their relationship does not matter. Even if the contract explicitly states that the worker is an independent contractor, the courts will not hesitate to look beyond the label to uncover the true relationship between the parties.

30. This Court notes that the contract dated 1st July 2021, on which the Appellant placed their argument, read in part;

> *"This agreement is made on this 1st day of July 2021 at Voi, Kenya, between Sisal brushing service provider;*
>
> *Name Rose Sezi Mwakandana*
>
> *Department WINDOW SORTING*

ID NO 151942

And Voi Point Ltd, located at VOI P.O. BOX 10, Voi, Kenya

In reference to Employment Act Chapter 226 Section 2, where it states that "piece work'' means any work for which pay is ascertained by the amount of work performed, irrespective of time occupied in its performance……."

31. In the case of **Benjamin Joseph Omusamia v UpperHill Springs Restaurant [2021] KEELRC 3[KLR],** this Court held;

“42. Those under a contractor-client relationship play in a different league from those in an employee-employer one. The expansive protection and remedies provided for under the current labour relations system under various legislations are only available to employees. Independent contractors are not employees and thus do not enjoy the protection of statutes. This makes it imperative for me to determine the relationship from the onset.”

32. From the employment contract itself, which the Court has an obligation to uphold; otherwise, it would be susceptible to a legitimate claim of contract reformation for the parties, as evidenced by the aforementioned excerpt of the contract, the parties understood their contract to fall within the scope of the Employment Act, and rightly so. As such, it is clear that the parties intended to create and did create an employee-employee relationship, not a contractor-client relationship.

33. Given the foregoing considerations, it is difficult to comprehend the rationale behind the Appellant's claim that the Respondent was engaged as an independent contractor rather than an employee, and it is also apparent that the Appellant's challenge to the trial Court's determination that there existed an employee-employer relationship between the parties lacks merit.

34. I have carefully considered the Appellant's detailed and well-researched submissions regarding the relationship between them and the Respondent, as well as the authorities cited, and conclude that the above finding renders them irrelevant for the purposes of this matter.

35. The Respondent's submissions on the issue are accurate; however, having reached my conclusion solely based on the contractual stipulation, I see no justification in utilizing this Court's valuable time to analyse the submissions, particularly concerning the criteria for determining a contract for a service relationship, as opposed to a contract of service.

36. I have carefully considered the Appellant's submissions under the head "**whether the Honourable court arrived at the impugned judgment properly",** and conclude that, in my view, they are not persuasive for two reasons. First, they do not reflect the appreciation that submissions are never a substitute for evidence. Clearly, the submissions under the head have gone into great depth on matters that were neither pleaded and evidence given on. Paragraphs 51-53 exemplify this position.

37. Second, the submissions do not address and appreciate the duty imposed by the Employment Act, 2007, on the employer, under sections 41[to prove that the tenets of procedural fairness were adhered to], section 43 [to prove the reason[s] for termination], section 45 [to prove that the reason was fair and valid], and section 47[5], [to demonstrate that the termination was justified. This duty was aptly elaborated in the Court

of Appeal's decision in **Pius Isindu Machafu v Lavington Security Guards Limited [2017] eKLR.**

38. As correctly noted by the Appellant’s Counsel, Section 47[5] imposes a reciprocal legal obligation on both the employee and the employer. Under this provision, the employee first bears the responsibility of demonstrating that an unlawful termination of employment has occurred. It is well established through judicial precedent that this legal burden requires the employee to prima facie establish that the termination was deficient with respect to procedural fairness and substantive justification. In the case before the trial Court, the Respondent contended that her termination was unjustified and conducted without her being afforded a hearing. The Appellant did not refute these claims, as they failed to provide evidence to controvert this position, likely due to a misjudgment influenced by their interpretation of the relationship with the Respondent. By reason of this, I am not convinced that the learned trial Magistrate was to hold that the Respondent did not

discharge her burden under section 47[5] of the Employment Act.

39. Legal burdens are discharged by the parties shouldering them only when they tender sufficient evidence before the Court for that purpose. Having failed to adduce evidence to demonstrate that the termination complied with the dictates of section 41 of the Employment Act, and the reasons for the termination, it is not difficult to conclude that the Appellant did not discharge their duty, and the termination was unfair by dint of the provisions of section 45 of the Employment Act. The Magistrate did not err in holding that the termination was unfair.

40. In the upshot, I find this Appeal lacking in merit. It is hereby dismissed with costs.

41. The reasoning contained herein, along with the conclusions reached concerning the issues that arose in this appeal, and this Court's determination, shall apply to a related appeal, namely **Appeal E 194 of 2024 – Voi**

Point Limited v. Mtsololo Nzole Mtsololo. For clarity of record, that appeal is equally dismissed for want of merit.

Read Signed and Delivered this 18th Day of November 2025.

OCHARO KEBIRA

JUDGE