REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

APPEALS DIVISION

APPEAL NO. E185 OF 2024

MERIDIAN DRIVING COLLEGE LIMITED…….
……APPELLANT

VERSUS

WALTER MAKWATA……..RESPONDENT

(Being an appeal against the Judgment of the Senior Principal Magistrate at Ruiru Hon. Christine Asuna Okello delivered on 13th June, 2024 in ELRC No. E024 of 2023)

JUDGMENT

1. The appellant appealed the Judgment of the Senior Principal Magistrate at Ruiru Hon. Christine Asuna Okello delivered on 13th June, 2024 in ELRC No. E024 of 2023 on grounds inter alia:-

a. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant was formulated or registered /incorporated or became in existence on **7th July 2022** whilst the Respondent claimed or alleged to have been employed from **1st February 2022** even before the formation/incorporation of the company thereby arriving at an erroneous decision.

b. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the appellant hired its premises for operations in **September 2022** hence the Respondent would not be working for the Appellant before establishment of the premises.

c. That the Learned Trial Magistrate erred in law in failing to appreciate when the motor vehicles were purchased or licensed from **October 2022** and failed to consider that as at **1st February 2022** when the Respondent avers/alleges to have been employed

there were no vehicles to drive and the allegations that the respondent was employee; as a driver or instructor could not be the truth since vehicle are essential tools of trade for a driver and had not been acquired as at **1st February 2022.**

d. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate the Appellants evidence as to its incorporation, operations and ignored all the evidential value of documents tendered by the Appellant thereby arriving to an erroneous decision.

e. That the Learned Trial Magistrate erred in law and in fact by over emphasizing on the Respondent evidence and totally ignoring on the Appellants evidence tendered.

f. That the Learned Trial Magistrate erred in law and in fact by failing to consider that the Respondent failed to offer contrary evidence on the formation /incorporation when lease was entered into, or when vehicles were bought to enable employing the Respondent hence arriving at an erroneous decision.

g. That the trial magistrate erred in law and in fact by taking as gospel truth that the Respondent was employed on **1st February 2022** without any evidence being let to that fact, as no payment of a salary or wage Was ever tendered for **February 2022** thereby arriving at an erroneous decision.

h. That the Trial Magistrate erred in law and fact by basing her calculations from **I'1 February 2022** in her judgment when no evidence was provided as to the date of commencement of employment thereby arriving at an erroneous decision.

i. That the trial magistrate erred in law and fact by failing to appreciate that the Respondent never produced a valid driving license and never proved whether he was employed as a drier or a driving instructor as alleged thereby arriving at an erroneous decision.

j. That the learned trial magistrate erred in law and in fact by taking into account things she was not supposed to consider and failed to consider evidence she was supposed to consider thereby arriving at an erroneous decision.

2. The appellant therefore prayed that the appeal be allowed and that the trial court's judgment be set aside and the appellant be awarded the costs of the appeal.

APPELLANTS WRITTEN SUBMISSIONS

3. Counsel for the appellant Mr. Kanyi, submitted among others that during the trial as per the respondents' pleadings dated **30th June 2023,** which he adopted he alleged that he had been employed as a driver/ driving instructor yet during trial the respondent clearly indicated that he had no employment contract and that he had not produced any driving license / instructor's license in his list of documents or any other document to prove his assertion. In this regard counsel relied on the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR where** the Supreme Court held inter alia that a person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. According to counsel, the respondent failed to discharge this burden at the trial further, during hearing the respondent indicated that he was employed since 1st February 2022 yet it was very clear from the appellants' list of documents, the certificate of incorporation that the company was incorporated in 7th July 2022 and the respondents lease agreement for their building premises showed it was leased to them on 8th September 2022 and a closer look at the appellant's sale agreements dated 31st August 2022 clearly showed the specific timelines the vehicles were bought.

4. Counsel therefore submitted that a question therefore arose

if one can be employed in a non- existent company or way before a company was incorporated. Even if that was the position, there was no premises to operate from or vehicles to drive. The appellants' lists of documents spoke volumes in terms of the timelessness and clearly showed that the claimants claim had been tailored with pure malice and without any poof. The respondent had no employment contract, no driver's instructor's license to prove indeed he was employed as an instructor. During the trial he confirmed not to have the same and thus could only have been a casual worker. In support of the submission, counsel relied on the case of **Godfrey Allan Tolo v Tobias O. Otieno & another [20221 eKLR** and **Milton M Isanya versus Aga Khan Hospital Kisumu (2017) eKLR,** where Justice Maureen Onyango J, expressed herself as follows:

> "In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation

Deriving from the above case, counsel submitted that the respondent's assertion of constructive dismissal did not meet the above the threshold to start with as the claimant was just a laborer working three days a week receiving the agreed amount with the respondent. Further it was both the claimants and respondents evidence that he deserted work and there was effort to reach him but he blocked the respondent's phone number. Therefore, it was clear that the respondent never got to prove to the court that indeed there was an employee employer relationship in the 1st place.

5. On the issue whether the appeal was merited, counsel relied on the case of **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123** where it was stated:-

> "*.this court must reconsider the evidence, evaluate it itself and draw itsown conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.*"

Mr. Kanyi further submitted that it was clear that the honorable court made an error of fact and of law by failing to consider some relevant facts such as that there was no contractual relationship of employer-employee relationship on a long term basis but as a casual laborer since the respondent claimed to have been employed even before the company began. Furthermore, the respondent never brought enough evidence before the honorable court to prove his assertions. It was therefore the appellants' submission that the appeal was indeed merited and the same ought to be allowed.

6. On the issue of costs of the appeal, counsel submitted that costs follow the event and the appellant had ably demonstrated he was deserving of the costs. Counsel relied on that case of **DGM v EWG [2021] eKLR** which cited the case of **Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013) eKLR** which approved the words of Murray C J in **Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227** that;

"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds of doing.

RESPONDENT'S SUBMISSIONS

7. Counsel for the respondent Mr. Kimani submitted inter alia that the Appellant claimed that the Respondent was a casual employee working for three days a week and paid per week. However, the Appellant did not produce any document to confirm the allegations. On the other hand, the Respondent produced a copy of a cheque issued by the Respondent being monthly payment, although the cheque bounced. This cheque was clear evidence, and the only evidence before trial Court, that the Respondent was to be paid a monthly salary as a permanent employee and not casual. Counsel further submitted that in any event Section 2 of the Employment Act defined a "casual employee" to mean "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time." This definition was enough to remove the respondent from the category of casual employees. Counsel relied on the case of

Lawi Wekesa Wasike v. Mattan Contractors Limited cited above, the court while addressing a similar issue stated as follows:

> *"The defence that the Claimant was a causal employee is not supported by any evidence. The duty is upon the employer to keep a record of its employees at any given time. This is a good practice as such a record is used to effect payments and to ensure the safety and security of such employees while at the Respondent employment. To keep such a record would in itself set out who are the full time or causal employees. It is not an offence to keep some employees as casuals. Where the nature of work required to be undertaken by a particular employee is of the nature that is ad hoc, not planned for or on short term, to keep such a record would vilify the Respondent and or help the Court assess the exact relationship between the Claimant and the respondent. The Court is left with the evidence of the Claimant and the Respondent and without any record, the evidence of the Claimant is to be believed.*"

8. The Appellant claimed that the Respondent was an employee from October 2023 to April 2024. Even if one was to assume this to be correct, these were seven (7) months and such employment would be converted under Section 37 of the Employment Act to a term contract/permanent contract of service.

9. Concerning absconding duties, counsel cited the case of **Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] eKLR** where the Court observed that;

> "The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee's unexplained absenteeism

> through the available internal disciplinary channels...It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.
> Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it.

Further in the case of **James Okeyo v Maskant Flower Limited [2015] eKLR,** the court observed as follows on the issue:-

> "...the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.''

It was therefore the Respondent's humble submission that he was not a casual employee but a term / permanent employee and the trial court did not make an error in its findings.

10. Regarding the duration of employment, counsel submitted that the Respondent informed the Court in his witness statement that he was employed by the Respondent from 1st February 2022 as a driver / driving instructor subject to the terms and conditions expressly agreed between the parties and implied by the Employment Act.

11. The Appellant on the other hand informed the Court that the Claimant was employed from October 2022. However, the Appellant as the Employer was obligated to maintain

records of its employees. Section 9, 10 and 74 of the Employment Act were mandatory. The Respondent ought to have produced the records required by the law to prove the date of employment of the Claimant. As was noted in **Lawi Wekesa Wasike v Matfan Contractors Limited case:-**

> "…the duty is upon the employer to keep a record of its employees at any given time. This is a good practice as such a record is used to effect payments and to ensure the safety and security of such employees while at the Respondent employment to keep such a record would verify the Respondent and or help the Court assess the exact relationship between the Claimant and the respondent. The Court is left with the evidence of the Claimant and the Respondent and without any record, the evidence of the Claimant is to be believed.''

12. The Appellant produced an uncertified photocopy of the certificate of incorporation of company. It was clear from the face of the document that it was computer-generated document thus electronic evidence. Section 106B of the Evidence Act provides that such electronic evidence would only be admissible if the conditions laid out in that provision are satisfied. This is for the purposes of authentication of the validity of the documents. **Section 106B (4)** provides:

> "In any proceedings where if is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following -
>
> *(a)* identifying the electronic record containing the Statement and describing the manner in which it was produced
>
> *(b)* giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
>
> *(c)* dealing with any matters to which conditions mentioned in

subsection (2) relate; and

(d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it."

13. In **Jack & Jill Supermarket Ltd v Viktar Maina Ngunjiri [2016] eKLR** the Court stated as follows:

> "This provision is clear that, for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of Section 106 B (4). The Plaintiff avers that there is such a certificate. In line with this provision, PW 2 is required to identify the electronic record containing the statement and describing the manner in which if was produced as well as giving the device used for production..."

14. The Appellant also produced a "Driving School Licence" in an attempt to show that it did not exist in February 2022. However, this document states that it is a renewal from 07 20 2022. This meant that there existed a license prior to the renewal which the Respondent has failed to produce.

15. In addition, the Appellant produced a sale agreement dated 10th September 2022 (listed as no. 8 in the Appellant's list of documents produced at the trial). This document was a car sale agreement, and it was clearly indicated that the buyer was **Charles Njoroge Mwangi (T/A) Meridian Driving College.** This was sufficient evidence that the Appellant had been trading using a business name Meridian Driving College. This corroborates

the Respondent's testimony that the driving school had been in existence even before the Respondent was employed in February 2022.

16. The Appellant's witness also admitted during cross-examination that the Appellant had many branches including Ruiru, Thika and the head office in Juja. However, no lease or tenancy agreement for these branches and the head office were produced. The Appellant only produced a lease agreement for one branch in Kahawa Sukari, which agreement was not evidence of when the Respondent started its operations.

17. It therefore followed that the Respondent had proved on balance of probability that he was employed in February 2022 and that the Appellant was carrying out business in whatever form during that period. In any event, it was incumbent on the Appellant to keep records of employment as required by the law, which it failed.

18. In conclusion counsel submitted that the trial court did not make an error in arriving at the conclusion that the Respondent was employed as claimed in the statement of claim. The appeal was therefore without merits and ought to be dismissed.

DETERMINATION AND DISPOSITION

19. The Court has reviewed and considered the grounds of appeal, the submissions by the appellant and the respondent. The court has further reviewed and considered the judgment of the trial court and is of the view that in order to dispose of this appeal, the issue that require to be determined is whether the respondent was an employee of the appellant or not. According to the respondent, he was employed by the appellant as a driver cum driver instructor. The appellant has denied that the respondent was its employee and contended that the period the respondent alleges that he was an employee, the appellant had not been incorporated and further that the vehicles he alleges to have been driving had not been purchased. The appellant produced an alleged certificate of incorporation and sale agreement for the alleged motor vehicles before the trial court to support these allegations. The appellant however did not seem to deny that the respondent was its employee. It instead contended that the respondent was a casual employee working three times a week.

20. The trial court in its judgment found that by withholding

the respondents salary and issuing him with a bouncing cheque, the appellant was guilty of constructively dismissing the respondent. The court therefore proceeded to award the respondent as prayed in his statement of claim.

21. The role of this court as an appellate court has been set out in several cases for instance in the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR,** the Court of Appeal stated that: -

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

In addition to the above observations by the appellate court, this court cannot perfect an imperfect employment arrangement between an employer and an employee besides Employment Act generally and more particular section 8 as relates to oral contracts and section 10 as relates to written contracts, an employer is required by law to document particulars of any employment arrangement with an employee. Section 74 further requires an employer to keep employment records. Section 10(7) places the burden of proving or disproving an alleged term of contract on the employer, in a claim where an employee alleges any term, where such employer failed or omitted to document the terms of employment.

22. In this particular case, the appellant though alleging that the respondent was a casual worker, did not keep or produce before the trial court, any employment records to vouch for or disprove the allegations by the respondent. The trial court therefore did not make any error in finding as she did, in favour of the respondent.

23. Concerning the award for twelve months, salary, the court notes that this is a maximum award provided for in the Act and where it must be made, the court doing so ought to justify the same. The court has perused the judgment of the trial court and finds no justification for awarding the respondent the maximum compensation for 12 months' salary. The claimant from his pleadings alleged that he was employed by the appellant on 1st February, 2022 as driver/driving instructor and worked until 28th April, 2023. This was just over a year. Driving is a practical skill and getting employment as a driver or driving instructor may not be difficult. In the circumstances awarding the claimant the maximum 12 months' salary as compensation was excessive in the circumstances. This award is therefore revised to three months' salary that is to say Kshs. 71,148.

24. The order on unremitted NSSF and NHIF is also set aside since no evidence was adduced to show the respondent was registered in the two organizations besides having awarded the respondent service pay, it was untenable again to make an order on unremitted NSSF and NHIF. The Court further observes that failure to register and make statutory deductions is an offence under the constitutive statutes of

these organizations. The unremitted funds belong to these organizations and cannot be awarded to a claimant as they do not belong to him. The same reasoning applies to the award for unremitted PAYE which is also set aside.

25. In conclusion the appeal is partially allowed as follows:

		Kshs.
a.	**One month's salary in lieu of notice**	**23,716**
b.	**Unpaid salary for 14 months**	**220,024**
c.	**Salary arrears**	**32,000**
d.	**Housing allowance**	**49,803**
e.	**Three months' salary as compensation for unfair termination**	**71,148**
f.	**Service pay**	**13, 834**
	Total	**410,525**

26. The appellant to issue the respondent with certificate of service.

27. The appeal being partially successful, each party to bear their own costs of the appeal

28. It is so ordered.

Dated at Nairobi this 2nd day of March 2026

Delivered virtually this 2nd day of March 2026

Abuodha Nelson Jorum

Presiding Judge-Appeals Division