



Manchester Outfitters Limited v Tailors and Textiles Workers Union (Civil Appeal 89 of 2018) [2024] KECA 304 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 304 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 89 OF 2018
HM OKWENGU, MA WARSAME & JM MATIVO, JJA
MARCH 15, 2024**

BETWEEN

MANCHESTER OUTFITTERS LIMITED APPELLANT

AND

TAILORS AND TEXTILES WORKERS UNION RESPONDENT

(An appeal from the Judgment of the Employment & Labour Relations Court at Nairobi (Wasilwa, J.) dated 1st September 2017 in Cause No. 169 of 2014)

JUDGMENT

1. The respondent, Tailors and Textiles Workers Union allege that on the morning of 20th January 2013, their member, one Mr. Maina Mwangi, who was employed by the appellant, Manchester Outfitters Limited as a machine operator for about 3 years and 9 months was instructed to leave his post without explanation and terminated without cause or notice and without payment of his dues.
2. Aggrieved, Mr. Mwangi reported the matter to the respondent Union, who in turn reported the dispute to the Minister of Labour under Section 62 of the *Labour Relations Act* (2007). A Conciliator, R.A. Litaba was thereafter appointed by the Minister. It is alleged that the appellant remained inactive in the meetings and in the end conciliator recommended and instructed the appellant to pay one month in lieu of notice, and accrued leave days/public holidays not paid for a period of twelve (12) months preceding the termination within 10 days from 1st June 2013.
3. The appellant ignored the said recommendations of the conciliator prompting the respondent to file the suit before the Employment and Labour Relations Court, whose judgment is the subject of this appeal.
4. On its part, the appellant maintained that Mr. Mwangi was an imposter as he had failed to provide his staff number, employment contract and copies of his pay slip or documents to prove he was an employee of the appellant to sustain the cause of action.



5. Upon considering the evidence on record, the trial court entered judgment in favour of Mr. Mwangi, finding that he was unlawfully and unfairly terminated and was entitled to Kshs 243,270/= made up as follows:
 - a. 1 months' salary in lieu of notice at Kshs 10,600/=
 - b) Leave for 2012/2013 at Kshs 10,600/=
 - c. Wages for 21 days of May 2013 before termination, $21/30 \times 10,600 =$ Kshs 7,420/=
 - d. 12 months's salary as damages for unlawful termination, $10,600 \times 12 =$ Kshs 127,200/=
 - e. 45 months house allowance at 15% of 10,600 x 45 months = Kshs 71,550/=
 - f. Service pay of 15 days salary for each year worked, $5300 \times 3 =$ Kshs 15,900/=
6. Aggrieved with the award, the appellant has filed the appeal before us which is predicated on the grounds that the learned Judge erred in law and fact by:-
 - a. finding that the respondent was an employee of the appellant;
 - b. misdirecting itself on the fundamental issue of onus of proof, by finding that the allegations by the respondent ought to be proved by the appellant;
 - c. relying on the report by the conciliator who did not produce his report; and
 - d. assessing damages where there was no proof of an employment relationship between the parties.
7. The matter was disposed of by way of written submissions. According to the appellant, the appeal turns on the onus of proof. The learned Judge was faulted for erroneously requiring the appellant to prove beyond reasonable doubt that Mr. Mwangi was not in its employment despite the fact that the respondent did not discharge the onus of proof of employment.
8. The learned Judge was also faulted for relying on the contents of the conciliator's report which was inadmissible in evidence as it was not produced by the author. Furthermore, there was no basis in awarding terminal dues when there was no proof that Mr. Mwangi was actually employed by the appellant.
9. On his part, the respondent relied on Section 112 & 115 of the *Evidence Act* and submitted that it was exempt from the general rule of evidence given that the fact of the employment relationship between Mr. Mwangi and the appellant was especially within the knowledge of the appellant. Consequently, the burden of disproving the existence of their special relationship lies with the appellant. Furthermore, it was evident that the appellant had failed to keep a record of its employees as required under the *Employment Act* and the learned Judge was well within the precincts of the law by placing the burden of proof on the appellant. The Court was urged to dismiss the appeal.
10. We have considered the record of appeal, submissions by counsel and the law. This being a first appeal, we are cognizant that our primary role is to re-evaluate, re-assess and re-analyse the evidence before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. See *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212.
11. It has been repeatedly held that under the general principles of the law of evidence that he who asserts must prove based on the latin maxim 'ei incumbit probatio, qui dicit, non qui negat' - the burden of



proving a fact rests on the party who asserts the affirmative of the issue and not upon the party who denies it.

12. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Hence, since the respondent claimed that Mr. Mwangi worked with the appellant as a tailor and his services were illegally and unfairly terminated on 20th January 2013, it was incumbent on the respondent to prove that an employer-employee relationship existed between Mr. Mwangi and the appellant by leading cogent and reliable evidence in respect thereof which could be oral and/or documentary.

13. There is a distinction between the legal burden of proof and evidentiary burden of proof. This distinction is expounded in *Halsbury's Laws of England*, 4th Edition, Volume 17 [para 13 and 14] which provides:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.

Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

14. Taking the above provisions and the record into consideration, we note that the record filed by the appellant is incomplete and excludes some of documents filed by the respondent in the trial court, specifically the conciliator's report. However it is apparent that the respondent at the beginning of the trial through its pleadings filed documentary evidence that indicates Mr. Mwangi's staff number with the appellant in an overtime sheet which also indicates hours worked and approved by the appellant in the year 2011 and 2012. The respondent further set up its case through his own testimony and led evidence revealing that he was not issued with an employment letter or a pay slip and that he was dismissed verbally on 20th January 2013.
15. In our view the evidence led by the respondent through its pleadings and Mr. Mwangi's oral testimony before the trial court raised a prima facie inference creating some nexus between the parties in the form of a probable employer-employee relationship. Consequently, the onus, shifted to the appellant to adduce rebutting evidence to meet the case made out by the respondent, by proving that in all the circumstances of the case Mr. Mwangi was not an employee and at no point did the issue of unlawful termination arise.
16. In rebuttal the appellant's witness, Mr. Joseph Ngatia, a Sales Manager with the appellant company for 30 years testified that he knew all the employees- in the company but the said Mr. Mwangi was



- unknown to him and therefore an imposter. On cross examination he stated that the appellant kept a record of all the employees working for it and that its human resource may have the said records.
17. Our reading of the impugned judgement, reveals that the learned Judge focused on the appellant's failure to produce a register of their employees as required under section 79 of the *Employment Act* which would have proved that Mr. Mwangi was not in their employ.
 18. The register under Section 79 of the *Employment Act* is a material document which can prove whether an individual was an employee of a company or not and if so, how long he had actually worked with the employer. If employers choose not to comply with the legal requirement to maintain a register of its employees then how would employees in such an unequal battle be able to prove the employer employee relationship exists when the simplest course for an employer is to deny the very relationship by refusing to produce the register after having extracted work from the employee for numerous years whilst not furnishing them with pay slips, employment numbers, leave forms or employment contracts?
 19. Clearly, if the record of employees did exist, as was alleged by the appellant's witness, then it was specifically within the knowledge of the appellant who chose not to produce it before the trial court. It may then be reasonably concluded that the said withheld register was most likely unfavourable to them and on the contrary would have supported the case of the respondent or that the appellant tried to avoid its liability towards the employee by a point blank denial of there having been an employer employee relationship between them.
 20. The learned Judge therefore did not err in making an inference that the appellant's failure to produce the register indicated that Mr. Mwangi was in fact their employee.

Section 119 of the *Evidence Act* provides:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

21. In the Indian Case of *T.S. Murugesan Pillai v. M. D. Gnana Sambandha Pandara Sannadhi* AIR 1917 PC the court held that:-

“A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in Their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition.
22. In addition, the learned Judge in reaching her decision also relied on the conciliator's report and found that the appellant in its submissions did not deny employing Mr. Mwangi, but instead stated that they were simply unable to trace his records. The appellant zealously refuted this finding and faulted the Learned Judge for relying on the conciliator's report which it claims was not produced by the author and was therefore inadmissible
23. Our perusal of the record shows that at no point during the course of the trial did the appellant object to the production of the conciliator's report. The appellant cannot therefore suddenly wake up from slumber at this stage and raise objection to the report this late in the day. Its production was not an



issue before the trial court and consequently, the Learned Judge had no reason not to consider the same in its findings.

24. The Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (2015) eKLR stated as follows:-

How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

25. Looking at the proceedings, before the said report was admitted as an exhibit, it had passed the stages as enumerated above. In addition, it is instructive to note that a conciliator is a public officer under Section 66 of the *Labour Relations Act* authorised to conduct fact-finding exercises and subsequently signs his report. In the circumstance, the *Evidence Act* mandates the making of certain presumptions in the circumstance under Section 84, which provides:

Records of evidence.

Whenever any document is produced before any court, purporting to be a record or memorandum of any evidence given in a judicial proceeding or before any officer authorised by law to take such evidence, and purporting to be signed by a judge or magistrate or any such officer as aforesaid, the court shall presume—

- a. that the document is genuine;
- b. that any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true; and
- c. that such evidence was duly taken

26. Having failed to discharge the evidentiary burden that Mr. Mwangi was not its employee, we find that the employer employee relationship was established by the respondent who led cogent and reliable evidence in that regard. We therefore concur with the findings of the learned judge: that Mr. Mwangi was employed in May 2009 and was terminated in January 2013 and was therefore in continuous employment with the appellant for over 3 years and was a permanent employee; it was the duty of the appellant to issue him with an appointment letter under section 9 of the *Employment Act* which would have pointed out how the relationship would terminate; there is no indication that Mr. Mwangi was issued with a termination letter nor was there a disciplinary hearing before his dismissal contrary to Section 45(2) of the *Employment Act* and the trial court was right in finding that that Mr. Mwangi was unlawfully and unfairly terminated.



27. Based on the foregoing, the only conclusion to be drawn is that Mr. Mwangi was thrown out of his job arbitrarily, without following the lawful procedures for dismissal. Consequently, we find that the respondent was entitled to the remedies sought.

28. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

