Buku v Sagar Builders Limited (Civil Appeal 360 of 2018)
[2024] KECA 526 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 526 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 360 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

MAY 9, 2024

BETWEEN

MALISEN DUBA BUKU ..... APPELLANT

AND

SAGAR BUILDERS LIMITED ..... RESPONDENT

(Being an Appeal against the Judgement and Decree of Employment and Labour Relations Court at Nairobi (Hellen Wasilwa, J.) dated 21st September, 2017inELRC Cause No. 1363 of 2014)

JUDGMENT

1. The central controversy we are asked to resolve is whether there existed an oral contract of service between Malise Duba Buku (the appellant or Buku) and Sagar Builders Limited (the respondent or Sagar).

2. In the proceedings commenced first at the Industrial Court at Nairobi as Cause number 1363 (later Nairobi Employment & Labour Relations Court Cause No. 1363 of 2014), Buku asserted that on or about 1st February 2013, he was employed by the respondent as a day watchman, at a monthly salary of Kshs.8,500.00. A pay which he alleged contravened the minimum pay prescribed in legal notice No. 71 of 1st May 2012 and was therefore an underpayment.

3. He averred that his contract was unfairly terminated on 1st March 2014 and he moved the court for an order that the respondent do issue him with a certificate of employment and damages of Kshs. 294,081/15. The damages comprised various heads of claim; underpayment of salaries, non-payment of overtime, non-payment for weekly resting days and public holidays worked; one month's salary in lieu of notice, severance pay and 12 months' salary compensation.

4. The defence of the respondent dated 31st March 2016 denied that Buku had worked for it.

5. The evidence taking was short, only Buku testified. His evidence was that the respondent had employed him as a guard at their site and he had worked for 12 months from 1st March 2013(not 1st February 2013 as pleaded) at a monthly salary of Kshs.8,500. He would work from 6.00 a.m. to 6.00p.m. The site was at Muthithi Road, Westlands. As to who exactly employed him, his testimony was:

> " Murji is one who employed me. She is daughter of Sagar"

6. As fate would have it, it is the same Murji who sacked him.

7. The respondent offered no evidence.

8. In a short judgment, delivered on 21st September 2017, Hon.Wasilwa J dismissed the claim and rendered herself thus:

> "12. The respondent denied knowing the claimant nor employing him. Indeed he who alleges must prove.
>
> 13. The burden of proving an employment relationship lies upon the claimant. It was an aspect upon him even to call a witness to confirm he worked with him. It was also upon the claimant to call for any records he wishes that may build up his case. There is no evidence that he asked respondent to produce certain documents for his perusal and use and they refused. It is upon the claimant as an employee to prove his case on a balance of probability that would lay the foundation of this case.
>
> 14. It is my finding that the claimant's case as presented does not prove he was an employee of the respondent."

9. Aggrieved by that decision, Buku is now before us in a first appeal framed around the memorandum of appeal dated 24th September 2018 which raised 5 grounds. All the 5 revolve around a singular issue: whether the trial court erred in holding that the appellant had not proved the existence of an oral contract of employment.

10. At the hearing of the appeal there was no appearance of the parties or counsel although there was evidence of service on the advocates on record. However, the firm of Okemwa & Co. Advocates for Buku had filed written submissions dated 10th June 2023 which we shall consider.

11. It is argued, in those written submissions, that even where an employment is oral in nature, the claimant must still produce some evidence whether documentary or viva voce to corroborate his word, and once the claimant has done so, then the burden of proving or disproving the employment shifts to the employer. It was contended that it is the responsibility of an employer to document the employment relationships *(Casmin Nyalakuru Nyakberio v Mwakika Agencies Limited* [2016] eKLR).

12. Counsel argued that nothing precluded the respondent from attending court to dispute the evidence presented by the claimant and the denials in the pleadings could not do so and neither could its counsel's submissions substitute it.

13. Statute recognises both oral and written contracts of service (section 8 of the *Employment Act* Cap, 226 (the Act). However, the law requires that certain contracts of service be in writing with section 9(1) and (2) of the *Act* providing:

> ""9 A contract of service—
>
> (1)

a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)."

14. It was the oral testimony of Buku that he was employed from the period 1st March 2013 until the sudden termination on 1st March 2014. This was for a period of more than three months and, if he was to be believed, then his contract of service ought to have been in writing. Important from the provisions which we have set out above is that the responsibility of drawing up a written contract is on the employer and it would be unjust for an employee who is party to an employment contract which ought to be in writing to be penalised for non-existence of a written contract merely because of a deliberate or inadvertent failure by the employer to draw the contract.

15. In addition, where an employer has not drawn a written contract of service, where the law requires it, then an employee will be put at a disadvantage because of inability to marshal documentary evidence. An employer should not be allowed to benefit from a situation he/she may have consciously and intentionally created. In circumstances such as those, the employer will be required to provide some evidence and proof of the contract of service after which the burden shifts to the employee to disprove it.

16. With this in mind, we re-evaluate the evidence that was before the trial court to see whether or not, in our own assessment, Buku proved the oral contract bearing in mind that we did not hear or see him testify. That is our remit as a first appellant court (*Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA)

17. It was the evidence of Buku that he was employed by the respondent on 1st March 2013 (although he had pleaded 1st February 2013). Specifically, it was one Murji who hired him. He referred to Murji as the daughter of Sagar; presumably the daughter of a director of Sagar. He was not given any written appointment letter. He was employed as a guard on a monthly salary of Kshs. 8,500/- which was paid to him by voucher which he would sign. His duties were to guard a site, which duties included opening and closing the gate. The site was at Muthithi Road in Westlands.

18. We think that Buku had marshalled sufficient evidence to invite or require a rebuttal from the respondent. We say so because Buku had given unshaken evidence of: the date of employment; who had hired him; the nature of employment; the duties involved; where he was deployed to work; and his pay. While the respondent had denied the employment, it chose not to call any evidence. Notwithstanding that Rule 14(4) of the *Employment and Labour Relations Court (procedure) Rules* uniquely provides that pleadings may contain evidence, this is not one circumstance where the pleadings, in themselves, could exonerate the respondent. This is because some evidence of the contract of service had been placed before the trial court. The respondent, upon whom the responsibility of drawing up a written contract of service rested, should have led some evidence to extricate itself from the evidence of Buku. Having failed to do so, then what Buku told Court needed to be believed. Our own assessment of the evidence leads us to a different outcome from that reached by the trial court.

19. Further, we believe the evidence by Buku that his employment was terminated without notice at all. The respondent, who did not call any evidence, would then have to suffer the consequences that flow from the provisions of section 43 of the *Act* which reads:

> " 43. Proof of reason for termination –
>
> 1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
>
> 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

20. In the end, we find that Buku, had on a balance of probabilities, proved that his employment with the respondent had been unlawfully terminated by the respondent.

21. Now, the trial court had not assessed the damages that Buku would have been entitled to. This, of course, is unconventional because a trial court is duty bound to return an opinion on damages even where liability is not proved.

22. This is an old matter and we have mulled over whether we should not just make a determination on the damages and bring the matter to an end. But we have thought otherwise. Justice is better served for both parties if that duty is left to a trial court so that any dissatisfied party can exercise its unalienable right of appeal. It is a tenet of a right to fair hearing that we do not intend to trample upon.

23. Ultimately, we set aside the judgment of Wasilwa, J read and delivered on 21st September 2017 and in its place find that there was a contract of service between the appellant and the respondent which was unlawfully terminated by the respondent.

    We order that, as prayed, the respondent do issue a certificate of employment to the appellant. Further, we remit the matter back to the Employment and Labour Relations Court (other than Wasilwa, J), for determination and assessment of damages.

24. The appellant shall also get costs for the appeal and at trial.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

S. GATEMBU KAIRU, FCIArb.

JUDGE OF APPEAL

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F. TUIYOTT

JUDGE OF APPEAL

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J. LESIIT

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED DEPUTY REGISTRAR