Population Services Kenya v Watende & 2 others (Civil Application E084 of 2022) [2023] KECA 36 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 36 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E084 OF 2022

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

FEBRUARY 3, 2023

BETWEEN

POPULATION SERVICES KENYA ..... APPELLANT

AND

JEREMIAH MAKORE WETENDE ..... 1ST RESPONDENT

MICHAEL KARANI GAKUYA ..... 2ND RESPONDENT

JAMES MWANGI MUCHIRI ..... 3RD RESPONDENT

(Being an application to adduce new evidence in the appeal from the judgment of the Employment and Labour Relations Court at Kisumu (Mathews N. Nduma, J) dated and delivered on 4th November, 2019 in ELRC Cause NO. 253 of 2016 Consolidated with ELRC Cause NO. 254 AND 255 of 2016)

RULING

1. By a suit dated September 1, 2016 in the Superior Court, the 1st Respondent sued the Appellant for wrongful and unfair termination from employment. The 1st Respondent was the 1st Claimant in the suit before the Superior Court. Consequently, he prayed for compensation for unfair and wrongful termination from employment, general damages, exemplary damages, costs of the suit and any other relief that the Court deemed fit to grant.

2. The 2nd and 3rd Respondents also filed similar suits dated September 1, 2016 against the Appellant for wrongful and unfair termination from employment. They were the 2nd and 3rd Claimants respectively, in the suit before the Superior Court. They sought the same prayers as the 1st Respondent, save that the 3rd Respondent sought an additional prayer of a refund of Ksh 41,070/= and interest on the same. The 3rd Respondent claimed that this sum was illegally deducted from his salary.

3. On its part, the Appellant filed statements of defence denying the claims made by the Respondents.

4. The Superior Court consolidated the three causes nos 253, 254 and 255, which were first heard by Maurine Onyango, J and subsequently by Mathews N Nduma, J who concluded the hearing and rendered the judgment.

5. Upon hearing the parties and evaluating the merits of each case separately, the Superior Court coined two issues of determination namely: whether the performance of the three claimants for the period of January to December 2015 was a valid reason for the termination of their employment and whether the claimants were entitled to the reliefs sought.

6. On the first issue, the Superior Court found that: the Appellant had failed to demonstrate that there was a valid reason to terminate the employment of the Respondents; the Appellant had failed to follow their own Human Resource Manual in dealing with alleged poor performance of the Respondents; and the evaluation of the Respondents was flawed and wrongful and amounted to unfair administrative action with adverse consequence on the Respondents. It thus held that the Appellant had violated Sections 43 and 45 of the *Employment Act* 2007 and the termination of the Respondents employment was wrongful and unfair.

7. In the circumstances, the Superior Court held that the Respondents were entitled to compensation in terms of Section 49(1)(c) and (4) of the *Employment Act* and made the following orders: an award equivalent of ten (10) months salary in compensation to each of the three (3) claimants as follows:

   a 1st claimant – Kshs (103,480x10) 1,034,800

   b 2nd claimant – Kshs (109,903x10) 1,099,030

   c 3rd claimant – Kshs (114,990x10) 1, 149,900

   d. Interest at court rates from date of judgment till payment in full.

   e. Costs of the suit

   f. Appellant to provide the claimants with certificate of service within 30 days of this judgment.

   1. The Appellant was aggrieved by the judgment and lodged Civil Appeal No 3 of 2021 before this Court. The Appeal is dated January 20, 2021. It is scheduled for case management.

   2. By way of a Notice of Motion dated June 14, 2022, the Appellant moved this Court with the present motion. In sum, it seeks leave to admit new and additional evidence in the Appeal as follows:

      a. The Plaints filed in CMCC No 438 of 2016, CMCC No 439 of 2016 and CMCC No. 455 of 2016.

      b. The Defences filed in CMCC No 438 of 2016, CMCC No 439 of 2016 and CMCC No 455 of 2016.

      c. The judgments of CMCC No 438 of 2016, CMCC No 439 of 2016 and CMCC No 455 of 2016.

10. The application is predicated on Sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, Rule 29(2) of the *Court of Appeal Rules*, and all enabling provisions of the law. Rule 29 of the Court of Appeal Rules gives discretion to the Court to allow additional evidence.

11. The Appellant sought for further orders that upon grant of the orders sought (that additional evidence be adduced), the evidence be deemed as part of the record of appeal in Civil Appeal No 3 of 2021.

12. The application is supported by the affidavit of Kithinji Marete, counsel for the Appellant, and the affidavit of Allan Ngunze, Human Resource Director of the Appellant. The Affidavits narrate that the additional evidence is directly relevant to this Appeal, and that it is credible. They further state that the evidence would have been extremely useful at the trial leading to Civil Appeal No 3 of 2021, save that it was unavailable at the time as it consists of proceedings before the Lower Court, in respect of which judgment had not yet been delivered. In addition, it has been stated that as soon as the Lower Court judgment was delivered, a stay of execution was issued for a period of thirty days, after which proclamation notices were issued to the Appellant. Upon receipt of the proclamation notices, the Appellant filed an application for stay of execution pending the hearing of appeals against the Lower Court judgments. The stay of execution was allowed on condition that the Appellant offers a bank guarantee of Kshs 6,000,000/= from a reputable bank; which condition the Appellant satisfied.

13. The Appellant urges that the main basis for the additional evidence is with regard to defamation of the Respondents and the awards given. The Appellant states that the issue of defamation was dealt with by both the Superior Court and Lower Court wherein damages were awarded by both Courts.

14. It appears from the record that other than filing suits against the Appellant in the Superior Court, the Respondents also filed three separate suits, all dated September 1, 2016, in the Lower Court. These suits, namely: CMCC No 438 of 2016; CMCC No 439 of 2016; and CMCC No 455 of 2016, were heard together but three separate judgments were given.

15. In the Lower Court, the Respondents sued the Appellant(s) for defamation for publishing a public notice on an email portal stating that the Respondents contracts had been terminated on account of poor performance. Consequently, the Respondents prayed for orders against the Appellant(s) jointly and severally for a mandatory injunction compelling them to publish an apology retracting the defamatory statements in a medium with similar or wider circulation, general damages, aggravated/ exemplary damages, interest on damages, costs of the suit and any other relief that the Court deemed fit to grant. The Lower Court awarded each Respondent Kshs 1,500,000/= as general damages for defamation and Kshs. 500,000/= as aggravated damages.

16. According to the Appellant, the cause of action in both Courts arose from the same issue, and hence argues that the proceedings before the Superior Court (for wrongful dismissal) were a replication of the proceedings in the Lower Court (for defamation). The Appellant is, therefore, of the view that the damages awarded amounted to unjust enrichment of the Respondents. The Appellant would like the documents from the three suits in the Lower Court adduced in the present appeal to give them the necessary material to mount this argument.

17. The application is opposed by the Respondents through a replying affidavit sworn by Jeremiah Makore Wetende, the 1st Respondent, on behalf of himself and the 2nd and 3rd Respondents. He states that the application is devoid of merit as the evidence sought to be adduced constitutes of pleadings and judgment in the Lower Court emanating from a defamatory publication authored by the Appellant, wherein they sought for mandatory injunction compelling the Appellant(s) to publish an apology retracting the defamatory statements and both general and exemplary damages for the damage caused by the termination of their employment was wrongful and unfair and for compensation for wrongful and unfair termination from employment.

18. The Respondents urge that the Appellant fully participated in the defamation cases and so the resultant judgment does not constitute new evidence. They further state that if the Appellant felt aggrieved by the existence of the defamation cases, it should have challenged its proceedings before the Superior Court to stay or terminate the same. The Respondents argue that the Appellant only seeks to bring in the new evidence at this stage after losing their case in the Superior Court, and in the hope

that the new angle would strengthen their case on a new issue which was never submitted on at the Superior Court for determination. In any case, the Respondents state that in the Superior Court, they neither raised a claim for defamation nor sought any reliefs ordinarily available in such claims. It is their case that the pleadings and judgments in the defamation cases have no relevance in the employment cases as they stemmed from two different causes of action raising completely different sets of issues for determination.

19. Additionally, the Respondents state that allowing the application would cause injustice and prejudice to them and run against the legal principle that there must be an end to ligation. They also state that the Appellant has brought the application late in the day given that directions on the hearing of the Appeal was given on May 31, 2022; and has failed to prove the existence of exceptional circumstances to warrant the exercise of this Court's discretion to allow a new issue at the appellate stage.

20. Lastly, the Respondents state that despite the Appellant having been served with the Court's notice requiring it to file and serve submissions within five days of the date of receipt of the notice, the Appellant has not done so to date and should therefore not be allowed to introduce new evidence.

21. During the virtual hearing of the application, Learned Counsel, Mr Marete, appeared for the Appellant and Learned Counsel, Mr Maloba, appeared for the Respondents. Other than the Notice of Motion Application dated June 14, 2022, the two supporting affidavits and the annextures thereto, the record does not show written submissions by the Appellant. The Respondents filed written submissions.

22. Mr Marete relied entirely on their Affidavits. To this end, the Affidavit of Allan Ngunze bore the grounds in support of the Application. Learned Counsel mainly urged that the Lower Court judgment and the Superior Court judgment are co-related, thus, the additional evidence was relevant for consideration at this stage of the Appeal. He argued that the issue of employment of the Respondents was considered in the Lower Court, while it was also part and parcel of what was before the Superior Court. In addition, he stated that the issue of defamation and publication was considered in the Superior Court and yet the same was ventilated in the Lower Court. However, when he was asked by the Court on the availability of the pleadings (the plaints and defences) in the Lower Court during trial at the Superior Court, since they had averred that the same were not available to them at the time, he conceded that they were indeed available and the Appellant could have drawn the Learned Judge's attention to their existence.

23. Mr Maloba relied on the affidavit of the 1st Respondent and their written submissions. The cases of *Attorney General vs. Torino Enterprises Limited* [2019] eKLR, *Mohamed Abdi Mohamed vs. Ahmed Abdullahi Mohamed and 3 Others* [2018] eKLR and *Mzee Wanje and 93 Others vs A K Saikwa* (1982-88) KAR 463 were cited in the written submissions for the proposition that various guidelines have been developed by this Court and the Supreme Court to enable courts determine whether sufficient reasons exist to admit additional evidence. It was also argued that the power given by Rule 29 should be exercised very sparingly and with great caution. In this regard, the Respondents contend that the evidence sought to be adduced was all along available to the Appellant and no demonstration has been made as to how the evidence would remove vagueness or doubt in Civil Appeal No 3 of 2021. Mr Maloba further argued that no demonstration has been made that special circumstances exist in the instant Appeal to warrant this Court to go out of its way to allow the Appellant to adduce fresh evidence at this stage.

24. We have considered the application and the grounds urged in its support, as well as the rival submissions of the parties and the authorities cited.

25. The application is predicated on Rule 29 of the Court of Appeal Rules which provides that:

> " 29.
>
> 1 On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-
>
> a. To re-appraise the evidence and draw inferences of fact; and
>
> b. In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.
>
> 2 When additional evidence is taken by the Court, it may be oral or by an affidavit and the Court may allow the cross-examination of any deponent.
>
> 3 .....
>
> 4 ....."

26. In *Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR, it was expressed that under Rule 29(1)(b), additional evidence will be introduced on appeal in the discretion of the Court, "for sufficient reason". Though what constitutes 'sufficient reason' is not explained in the Rule, through judicial practice, the Court has developed the principles governing the exercise of its discretion in favour of a party seeking to present additional evidence on appeal.

27. Further, in *Mzee Wanje and 93 Others vs. A.K Saikwa* (1982-

> 88. 1KAR 462, the Court issued the following caution in the application of the Rule:
>
> " This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

28. The Supreme Court, addressing its own inherent right to admit additional evidence at the appellate level, has propounded the applicable principles in Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR. In that case, the Supreme Court comprehensively and authoritatively laid out the principles to be considered in determining whether an appellate Court should accept the adduction of additional evidence. The Court laid out the following principles:

> 79. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
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> a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

e. the evidence must be credible in the sense that it is capable of belief;

f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;

i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

29. After laying down this criterion, the Supreme Court also remarked:

> We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.

30. Applying this multi-pronged test enunciated by the Supreme Court to the case at hand, it is our considered view that the Applicant has failed to meet the threshold for the grant of the extraordinary relief of being permitted to adduce additional evidence at the appellate level. We say so for at least three controlling reasons.

31. First, the Applicant concedes that most of the material (namely, pleadings in the three Lower Court cases) that it seeks to adduce now were in its possession at the time the trial was held. Only the judgments in the three cases were not available at the time of the trial. However, hearings in the Lower Court cases had been completed at the time the employment dispute was heard in the Superior Court, and the Applicant was well aware of the issues which had been framed for determination. Despite this, the Applicant did not adduce before the Superior Court the pleadings which were available to it at the time. The Applicant does not offer any explanation why it did not adduce this evidence beyond conceding that the material was in its possession. Accordingly, the Applicant does not meet the

important test of non-availability before the extra-ordinary relief of adduction of additional evidence on appeal is granted: it has not demonstrated that the evidence could not be obtained with reasonable diligence for use at the trial.

32. In this regard, this matter falls in the category of *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2014] eKLR, where this Court differently constituted rejected the introduction of new evidence at the appeal stage when it was apparent that the Applicant had access to the evidence at the initial trial. The Court stated thus:

> We are of a similar view regarding the letter which the applicant claims was authored by the deceased. This is a letter that has been in the applicant's possession since the death of her husband. She had it all along during the course of the trial. Again, it is unclear why she failed to adduce it if she felt that it would aid her cause. We must reiterate that it is the duty of the applicant to demonstrate to this Court that the additional evidence sought to be adduced was not available during the trial.

33. Second, and related, the fact that the pleadings were available to the Applicant for use at the trial but it did not tender them in evidence demonstrates that the Applicant was in a position to bring to the attention of the Superior Court judge of the legal issue that it now hopes to raise on appeal, namely that any damages granted in the defamation suits had the potential to overlap with damages granted in the employment suit. Yet, despite being aware of the issue, the Applicant neither tendered the pleadings for consideration by the Superior Court nor framed that specific issue for consideration and determination by the Court. In these circumstances, one cannot escape the ineluctable feeling that the Applicant, having been unsuccessful at the trial court, merely seeks a second bite at the cherry on appeal. This militates against the important limitation on when a party would be permitted to adduce additional evidence on appeal: A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case. This is precisely what the Applicant would have succeeded in doing if the Court accedes to its prayers.

34. Lastly, as the Respondents submitted, it would be quite prejudicial to them if the additional evidence is allowed at this stage. In essence, the effect of the additional evidence would be to radically change an important aspect of the suit that was before the Superior Court. The important legal issue that the Applicant belatedly seeks to introduce into the dispute between the parties – in what circumstances an employee can simultaneously recover damages for defamation arising from a publication by the employer about the employee's dismissal and damages for the unfair dismissal itself – was never pleaded, canvassed or framed for consideration in the Superior Court. To allow it on appeal, would be to significantly change the legal dispute between the parties which was heard and adjudicated upon by the Superior Court. This would work serious unfairness on the Respondents.

35. All in all, we are not satisfied that the additional evidence sought to be adduced in this instant substantially meets the threshold enunciated in our jurisprudence for adduction of fresh evidence on appeal.

36. The upshot, then, is that the Notice of Motion dated June 14, 2022 is unmerited. It is hereby dismissed with costs.

Dated and delivered at Kisumu this 3rd day of February, 2023.

P O KIAGE

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JUDGE OF APPEAL

F TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR