**Kambogo v Norwegian People's Aid (Civil Appeal 84 of 2015)**
**[2023] KECA 314 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 314 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 84 OF 2015**

**DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA**

**MARCH 17, 2023**

**BETWEEN**

**THEODORE OTIENO KAMBOGO ..... APPELLANT**

**AND**

**NORWEGIAN PEOPLE'S AID ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (E. K. O. Ogolla, J.) delivered on 2nd February 2012 in Civil Case No. 774 Of 2000)***

## JUDGMENT

1. The appellant, Theodore Otieno Kambogo, sued the respondent, the Norwegian Peoples Aid, in the High Court of Kenya at Nairobi HCCC No 774 of 200 claiming a sum of Kshs 15,833,910 on account of: outstanding leave (250 days); half salary saved on his behalf; contributions to a provident fund; 15 days pay for each year worked; costs; and interest thereon.

2. According to the appellant, he was employed by the respondent in various capacities since 1986 until May 13, 1997 when his employment was terminated and, apart from being an employee, he was also a duly elected director of the respondent.

3. In his plaint dated April 25, 2000, the appellant claimed that, by an oral agreement between him and the respondent, the respondent agreed to save a sum of Kshs 80,000 throughout his employment with effect from the year 1986, and that the sum so saved would be paid to the appellant on termination of his employment.

4. In its defence, the respondent admitted that the appellant was in their employment until May 13, 1997 when his employment was terminated, but denied the alleged oral agreement relating to the alleged savings of Kshs80,000 throughout his employment; that upon termination, the appellant was paid his dues in full in the total sum of Kshs 309,000 on account of 3 months salary in lieu of notice; that it had no provident fund; that the appellant was not entitled to 15 days' salary for each year worked; that

the appellant was not declared redundant; and that the appellant's claim had no merit and should be dismissed with costs.

5. In its judgment dated February 2, 2012, the High Court (EKO Ogola, J) found no legal basis to uphold any of the claims advanced by the appellant as pleaded in his plaint. Accordingly, the learned Judge dismissed the appellant's suit with costs to the respondent. Aggrieved by the judgment, the appellant moved to this Court on appeal on 14 grounds, namely that the learned Judge erred in law and fact: by not giving the appellant's case due consideration and weight as provided in the plaint; by holding that the affidavit evidence by Helge Rohn was conclusive without viva voce corroboration; in holding that the Respondent had filed documentary evidence on records of employment and failing to advance any reasons as to why they were not availed; in holding that Helge Rohn had locus standi in the making of the Replying Affidavit; in accepting extraneous matters not filed and served via affidavit; in holding that the evidence of Hans Havik and Helge Rohn was reliable given that the duo had been sacked due to the subject matter in court; in holding that the evidence of Oddvar Gjorkness a person who joined the Respondent in 2003 while the appellant had left in 1997 was conclusive evidence without documentary evidence; in disregarding the appellant's evidence on record and instead substituting it with the Respondent's submissions as evidenced by the Judgment, which is a replica of the respondent's submissions; in holding that the Appellant's employment with the Respondent's begun on January 10, 1995 while in fact it begun on March 16, 1986; in holding that the Plaint was unmeritorious; when he analysed the purported Defence filed by the Respondent; in that he failed to address the issues raised by the Appellant objectively and with an open mind; and failing to analyse and contextualise the respective parties cases, their contention before the court and the submission on the law.

6. In support of the appeal, the appellant filed written submissions dated December 16, 2022 citing the High Court decision in *Mursal and Another vs. Manese (suing as the legal administrator of Dalphine Kanini Manese)* [2022] KEHC 282 (KLR) for the proposition that the first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own conclusion on whether to allow the appeal.

7. Opposing the appeal, learned counsel for the respondent, M/s. Hamilton Harrison and Mathews, filed written submissions dated December 13, 2016 citing the cases of A*bok James Odera T/A. A. J. Odera and Associates vs. John Patrick Machira T/A. Machira and Company Advocates* [2013[ eKLR highlighting the principle that, as the first appellate court, this Court has the duty to consider both matters of fact and of law; and *Kirugi and Another vs. Kabiya and 3 Others* [1987] KLR 347 on the proposition that the burden was on the appellant to prove his case on the balance of probabilities.

8. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial and draw our own conclusions. In doing so, we must bear in mind the fact that we have not had the benefit of seeing and hearing the witnesses first-hand and, accordingly, take into account that fact.

9. This approach was adopted in the persuasive decision of our predecessor court in *Dinkerrai Ramkrishan Pandya vs. R* 1957 EA p.336. In that case, the Court cited with approval the case of *Figgis vs. R* 19 KLR p.32, which had also adopted the principle in *The Glannibanta (2)* (1876) 1 PD p.283 where the Court had this to say at p.287:

> " ... the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are, as they were ... material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot

excuse itself from the task of weighing conflicting evidence and drawing its own inferences and 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.

10. We also take to mind the decision in *Highway Developers Limited vs. West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle vs. Associated Motor Boat Co.* [1968] EA p.123, which was also a case in point. In Selle's case (*ibid*), this Court held:

> " ... 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 account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. Having carefully examined the record of appeal, the grounds on which it is founded, the written and oral submissions made by the appellant and by learned counsel for the respondent, all relevant legal principles and authorities cited in the rival submissions made to us, we are of the considered view that the appeal stands or falls on our findings on the following four main issues of law and fact, namely: whether the appellant was entitled to leave pay allegedly outstanding for a period of 250 days in the sum of Kshs 868,500; whether during the appellant's employment, the respondent-maintained savings on his account in the total sum of Kshs 10,560,000; whether the appellant made contributions to and was therefore entitled to recover, Kshs 4,078,800 from the alleged provident fund to which he allegedly contributed 30% of his monthly salary; and whether the appellant is entitled to Kshs 566,610 on account of 15 days pay for each year worked.

12. On the 1st issue as to whether the appellant was entitled to a sum of Kshs 868,500 on account of leave pay allegedly outstanding for a period of 250 days, the appellant claimed that he was engaged in strenuous work and could not go on leave during the period between 1986 and 1992 because he was alone in the office. According to him, he worked for 11 to 12 years without annual leave.

13. In opposition to the appellant's claim, the respondent's resident representative, Helge Rohn, denied that the appellant had accumulated the 250 leave days. According to Helge, there was no record of any request by the appellant for leave, and that he had not given any consent or authority to the appellant to accumulate any number of leave days.

14. The respondent's case was that clause 6(c) of the Standard Terms of Employment (the STE) required annual leave to be taken during the calendar year, and that written approval of the Resident Representative was required for anyone to carry forward any number of leave days. According to Helge, the leave policy was in place even before the Standard Terms of Employment were introduced in 1995. Clause 6(c) of the STE reads:

> 6.
>
> c. The annual leave must be taken during the calendar year. Exceptions from this must be obtained from the resident representative, after written request."

15. It is noteworthy that the trial court did not, in the impugned judgement, address itself to the question as to whether the appellant was entitled to recover the amount claimed on account of alleged accumulated leave. Be that as it may, we find no evidence on record to suggest that the amount claimed was recoverable, or that the appellant had any authority under the respondent's Standard Terms of Employment to carry forward any annual leave. Accordingly, the appellant's claim for Kshs 868,500 under this head fails.

16. As to the appellant's claim on the alleged savings of 50% of his salary on his account during the term of his employment, his case is that the respondent undertook to make the alleged savings under an oral agreement. On the other hand, he admitted that there was no provision for such savings in his written contract of service. In his testimony, Helge denied that the alleged oral agreement was ever made. In its judgment, the trial court correctly observed that Mr. Helge had no capacity to enter into such a contract with the appellant unless such authorisation was clearly expressed. The trial court found, as we hereby do, that there was no evidence of such an agreement ever being made. He did not prove this claim on a balance of probabilities. Likewise, the appellant's claim for Kshs10,560,000 under that head fails.

17. On the 3rd issue regarding the alleged contribution by the appellant to a provident fund said to have been administered by the respondent, the appellant's claim was no more than a bare allegation. No evidence was adduced in proof of such contributions. In his testimony, the appellant admitted that he had no evidence of the alleged membership to a provident fund administered by the respondent. On the other hand, the respondent evidence was that it did not have or administer a provident fund. In effect, his claim for Kshs 4,078,800 on that account had no basis, and the same fails.

18. Finally, the appellant's claim that he was entitled to 15 days' pay for each year worked was equally unfounded in view of the fact that his employment was terminated in accordance with the *Employment Act* and all his terminal dues paid. At the trial, the appellant admitted receiving 3 months' salary in the sum of Kshs 309,000 in lieu of notice. However, it is not clear from the record as put to us the reason why his employment was at an end. What is clear, though, is that it was not a case of redundancy for which terminal dues were recoverable on the basis of 15 days' salary for each year served.

19. All said, we find nothing to fault the trial judge's decision to dismiss the appellant's claim in the trial court. Accordingly, we find that the appeal herein fails and is hereby dismissed with costs to the respondent. The Judgment and Decree of the High Court of Kenya at Nairobi (EKO Ogolla, J) delivered on February 2, 2012 in Civil Case No 774 of 2000 is hereby upheld. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.**

**D. K. MUSINGA (P)**

**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**

**.....**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**