Ondieki v Comply Industries Ltd (Civil Appeal 33 of 2019)
[2023] KECA 1146 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1146 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 33 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

SEPTEMBER 22, 2023

BETWEEN

HENRY MOSOTI ONDIEKI ..... APPELLANT

AND

COMPLY INDUSTRIES LTD ..... RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Nakuru (M. Mbaru, J.) dated and delivered on 6th December 2018 in E&LRC Cause No. 209 of 2016 (As consolidated with Cause No. 304 of 2015 & Cause No. 357 of 2016))

JUDGMENT

1. This is a first appeal against the judgment delivered on December 6, 2018 by M. Mbaru, J. of the Employment and Labour Relations Court (E&LRC). At the trial, the appellant had through the amended memorandum of claim dated November 29, 2016 sought judgment against the respondent for underpayment of Kshs.24,459; unpaid overtime of Kshs.355,887; compensation for unutilized annual leave amounting to Kshs.58,833.60; claim for unpaid leave allowance of Kshs.30,707.60; claim for salary in lieu of notice of Kshs.20,770; and, damages for unlawful termination to the tune of Kshs.249, 240. The appellant's claim was dismissed and being dissatisfied with the judgment of the trial Judge, he appeals to us on 9 grounds as follows:

    i. That the Learned Judge erred in law and in fact in disregarding the evidence and submissions of the appellant and instead placed heavy reliance in uncorroborated evidence of the respondent.

    ii. That the Learned Judge erred in law and in fact in disregarding the appellant's submissions on the appellant's termination that had been decided by her brother in a related matter arising out from a similar cause of action in Nakuru E.l.r.c No 205 Of 2016 *Alex Ocharo v Comply Industries* thus arriving at an unfair finding.

iii. That the Learned Judge erred in law and in fact in failing to consider the reasons for termination of services of the appellant by the respondent as pleaded *vis-à-vis* the respondent's oral evidence hence arriving at an unfair finding.

iv. That the Learned Judge erred in law and in fact in finding that the appellant was paid on an hourly rate of kshs.85.5 by the respondent and that the same was cumulatively paid within the minimum wage notwithstanding that the same was neither pleaded nor supported by any documentary evidence hence arriving at an unfair finding.

v. That the Learned Judge erred in law and in fact in holding that the appellant's employment was not terminated by the respondent despite the oral and documentary evidence produced in support of the said allegation by the appellant.

vi. That the Learned Judge erred in law and in fact in holding that the claimant had a legal duty of availing the person who allegedly orally terminated his services notwithstanding the admission by the respondent's witness that the said person was still under the employ of the respondent hence shifting the burden of disproving the appellant's own allegation back to him thus violating clear rules of evidence and arrived at an unfair finding.

vii. That the Learned Judge erred in law and in fact in finding that the appellant's claim for overtime was adequately covered by the hourly payment despite contrary oral and documentary evidence by the appellant hence arrived at an unfair finding.

viii. That the Learned Judge erred in law and in fact in finding that the appellant acknowledged payment of notice pay and annual leave from the respondent when the same was not particularized in the agreement dated July 6, 2015 thus effectively ended up re-writing the agreement in issue and arrived at an unfair finding.

ix. That the Learned Judge erred in law and in fact in heavily relying on the payment agreement dated July 6, 2015 and disregarded legal and genuine concerns raised on its probative value during cross-examination of the respondent's evidence hence arrived at an unfair finding."

2. The appellant's case was hinged on the amended memorandum of claim, reply to the statement of defense and his own *viva voce* evidence adduced at trial. The appellant's case was that he was an employee of the respondent between 2000 and March 2015 serving as a casual labourer. He started as a gardener and was later promoted to a supervisor. His case was that his employment was orally terminated by the respondent's supervisor called Victor. It was also the appellant's claim that during his time as an employee, he worked from 7.00 am to 6.00 pm daily without break and for 7 days a week without rest contrary to regulation 27 of the Regulation of Wages (General) Order. He additionally alleged that he worked during public holidays contrary to section 28 of the *Employment Act*. According to the appellant, upon termination he lodged a complaint with the labour office and after the investigation of his complaint he was paid Kshs.63,031 as terminal dues.

3. On the other hand, the respondent's case was premised on the filed statement of defence and the evidence of Nicodemus Musyoka. Although the respondent conceded that the appellant was its employee, it denied underpaying him during the period of employment stating that the appellant was paid Kshs.85.5 per hour and was therefore remunerated for all the hours worked. With regard to the working hours, the respondent stated that the appellant worked from 8.00 am to 5.00 pm. In response to the appellant's claim that he never went on leave during the entire period of employment, the respondent stated that the appellant was compensated for this claim plus payment in lieu of notice by the labour officer. The respondent also averred that at the time of the alleged oral termination, it had been forced to cordon off its premises to avert damages which could have arisen due to the rowdy nature

of the employees who had stormed the premises upon hearing rumours of job losses. The respondent, however, denied claims that it terminated the appellant's employment stating that it is the appellant who objected to re-designation thereby unlawfully skipping work.

4. The trial Judge in her judgment dismissed all the claims put forth by the appellant noting that the payment made by the respondent to the appellant through the labour officer adequately compensated him for any claims that could have arisen from the claim of unutilized annual leave. The trial Judge also found that the appellant abdicated duty thereby contributing to his termination hence no claim could arise for unlawful termination. On the issue of underpayments, the court ruled that since the appellant was paid on an hourly rate, the amount paid was within the minimum wage rate and covered every hour worked.

5. Before us, this matter was canvassed by way of written submissions with counsel for the appellant, Mrs Mukira, undertaking a brief oral highlight of the submissions in plenary. Counsel for the respondent neither filed submissions nor attended the plenary for hearing of the appeal. Mrs Mukira combined grounds 1, 2, 3, 5 and 9 and submitted that from the evidence adduced the appellant sufficiently established a *prima facie* case that his employment was unlawfully terminated; and that once this was done, the onus was upon the respondent to adduce evidence justifying the termination. Counsel relied on *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR in support of this argument and asked us to find that the respondent had failed to surmount its evidentiary burden. Counsel also submitted that the learned Judge erred in failing to adopt the decision in *Alex Ocharo v Comply Industries* [2017] eKLR in which another Judge of the Employment and Labour Relations Court found in favour of the plaintiff who was dismissed by the respondent at the same time and for the same reasons as the appellant. Counsel argued that the respondent ought to have adduced evidence to support the claim that the appellant absconded duty and in the absence of such evidence, the findings of the learned Judge cannot stand. To buttress these submissions, counsel relied on the cases *Ronald Nyambu Daudi v Tarnado Carriers Ltd* [2019] eKLR; *Janet Nyandiko v Kenya Commercial Bank Ltd* [2017] eKLR; and, *Milano Electronics Ltd v Dickson Nyasi Muhaso* [2021] eKLR.

6. In respect to grounds 4 and 7, counsel relied on section 10(6) and (7) of the *Employment Act* to submit that the burden of proving or disproving the existence of a term of employment is always with the employer. Counsel also relied on *Abigael Jepkosgei Yator & Another vs. China Hanan International Co. Ltd* [2018] eKLR and urged us to find that the respondent did not discharge its obligation under Section 10(6) and (7) of the *Employment Act* as it failed to produce the work records to support its averment that the appellant did not work beyond the normal working hours. Counsel urged us to find that the trial court erred in failing to find that the appellant worked overtime.

7. Counsel also submitted that the issue raised by the respondent that the appellant was paid an hourly rate of Kshs. 85.5 and was cumulatively paid the minimum wage was never pleaded. Counsel reiterated that parties are bound by their pleadings and therefore this issue was not among those to be determined by the trial court. Counsel asserted that the learned Judge erred when she placed reliance on this fact to support her finding that the appellant's claim for overtime was sufficiently covered by the hourly payments. The learned Judge was also faulted for holding that the appellant was required to call as a witness the person who allegedly terminated his employment. According to counsel, this finding offended section 47(5) of the *Employment Act* which places the burden of justifying the grounds for the termination of an employment contract on the employer.

8. Counsel further submitted that the payment agreement signed at the County Labour Office was ambiguous and made no reference to notice pay and annual leave. Counsel argued that it was not within the purview of the trial court to rewrite a contract between the parties and faulted the Judge

for interpreting the payment agreement to have included notice pay and annual leave. In conclusion, counsel urged this Court to allow the appeal and award the costs to the appellant.

9. This is a first appeal and our mandate under rule 31(1)(a) of the *Court of Appeal Rules*, 2022 requires us to independently re- consider the facts *vis-à-vis* the applicable law and legal principles prior to arriving at our independent conclusion. This position resonates with the holding by this Court in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

10. From our review of the record, we find that the parties agree that the appellant was employed by the respondent as a casual labourer. It is also not disputed that the appellant's grievances were presented to the County Labour Officer and a resolution arrived at which culminated in the payment agreement dated July 6, 2015. This being the case, this appeal turns on the resolution of the question as to whether the appellant was unfairly, unlawfully and un-procedurally dismissed by the respondent, and if so, whether the appellant is entitled to compensation as prayed. The issue of the costs of the appeal will also fall for determination at the tail end of this judgment.

11. In respect to the events leading to the termination, it was the appellant's case that while they were working at Finlays in Kericho, he was summoned by the respondent's supervisor, Victor, to go back to Nakuru since there was no more work and that they would be terminated. The appellant also testified that the respondent paid him for the 17 days worked. The respondent's position was that the appellant was indeed called back to the office as averred. However, upon arriving at the respondent's premises, the appellant and other employees became rowdy after which they were sent to the County Labour Office.

12. The cornerstone of evidentiary burden of proof is as legislated in section 107 and 108 of the *Evidence Act*. The import of section 108 is that the burden of proof is always cast upon a party whose claim would otherwise fail if no evidence was adduced at all were given on either side. As for section 107, a person desirous of a court to find in their favour as to the existence of any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The provisions of the *Employment Act* must then be read not in isolation of these provisions of the *Evidence Act* but in unison with them. Our view aligns with the holding of the Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR that:

> "(47) It is a timeless rule of the common law tradition, Kenya's juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part."

13. Section 47(5) of the *Employment Act* which should be read in unison with sections 107 and 108 of the *Evidence Act* provides as follows:

> " For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

14. From the evidence adduced, one thing is clear, that it is the respondent who invited the appellant to its head office and then sent him to the County Labour Office. The respondent did not inform the Court why the summons, which was allegedly for redeployment, made the appellant and the other employees rowdy. Additionally, the respondent never substantiated the claim that the appellant was due for redeployment. The trial court while finding in favour of the respondent blamed the appellant for failing to call as a witness one Victor, an employee of the respondent, who orally terminated his contract. The appellant had alleged in his pleadings and stated in his oral testimony that Victor was the respondent's supervisor who terminated his employment by word of mouth. The appellant had therefore discharged the burden placed on him by section 47(5) of the *Employment Act* proving that his termination was unfair and wrongful and it was now upon the respondent to adduce evidence justifying the grounds of termination. At this juncture the burden of proof shifted to the respondent who was then required to call Victor to come and rebut the appellant's evidence. In our view, the onus ought to have been with the respondent to either prove that there was no employee within its ranks by the name Victor or that the said employee, if he existed, did not terminate the appellant's employment orally. It is also important to observe that the respondent's witness confirmed that it is their supervisor who summoned the appellant alongside other workers and sent them to the County Labour Office when they allegedly became rowdy.

15. We note that the learned Judge found that the appellant contributed to his termination when he accepted the payment of the terminal dues without a notice of termination from the respondent. The acceptance of the terminal dues by the appellant arose after the fact and the respondent through the evidence of Nicodemus Musyoka acknowledged participating in the conciliatory process spearheaded by the County Labour Officer. By the time the parties were appearing before the Labour Officer, the appellant's employment had already been terminated and what was being discussed was his entitlement.

16. In our view, the burden was on the respondent to disprove the allegation of unfair termination by adducing evidence to rebut the alleged oral termination and to explain the events leading to its disengagement with the appellant. These were matters within the respondent's knowledge or that of its employees but it failed to offer evidence in that regard. In the end, we agree with the submission of the appellant's counsel that the learned Judge failed to properly apply section 47(5) of the *Employment Act*. It follows that without any evidence to the contrary, the appellant discharged his initial evidentiary burden and the respondent failed to discharge the resulting burden of proof. This finding resonates with the provisions of section 43(1) of the *Employment Act* which states that:

> "(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."

17. It is our finding therefore that the appellant's dismissal by the respondent was unfair as it was un-procedural. It offended section 44(2) of the *Employment Act* in that the appellant's contract was

terminated without notice and consequently became an unfair termination in the terms of section 45 of the same Act. It follows therefore that the trial court erred when it misapprehended the evidence adduced by the parties coupled with the inappropriate application of the law and legal principles thereby arriving at the wrong conclusion that the appellant skipped work and thus contributed to his dismissal. We therefore respectfully disagree with the finding of the learned Judge that the termination of the employment of the appellant was lawful.

18. The next issue for our determination is whether the appellant was entitled to the reliefs sought in respect of the other claims. We have gone through the trial court's reasoning on this issue, the evidence on record as well as the exhibits produced. We find that contrary to the appellant's contention, the trial court's finding that the claims for underpayment, unpaid overtime, unutilized annual leave, unpaid leave allowance and salary in lieu of notice were not merited is backed by the evidence on record. All these claims had competently been dealt with by the County Labour Officer and any claims that was due to the appellant was paid. Indeed, from the casual attendance sheet, it is noted that the appellant's hourly rate was Kshs 85.5 and the forms also contains a column where hours worked daily were tallied. The appellant's argument that the findings of the learned Judge were not backed by evidence is therefore not sound.

19. We also find the appellant's submission that the issue of hourly rate payment was not raised in the respondent's defence untenable. The respondent at paragraph 5 of the statement of defence pleaded that the appellant was being paid as per the government regulations. In our view, the issue of hourly rate payment was advanced to explain how the appellant's payment was arrived at and as an explanation to the casual attendance sheet produced by the appellant as part of his exhibits appearing as number 8 in the list of documents. It is our finding therefore that the issue of hourly rate payment formed part of the issues at the trial and the court was rightly enjoined to address that issue. The trial Judge was satisfied, and we find no reason to fault her, that the discharge voucher signed before the County Labour Officer adequately covered the appellant's claims in so far as his terminal dues were concerned. Our understanding is that terminal dues are always all inclusive of the amount payable to an employee upon termination of contract save for damages for unlawful termination that a court seized of the matter may in its discretion decide to award.

20. The question that lingers is whether the appellant is entitled to compensation for the unfair termination of his employment by the respondent. Having found that his employment was unfairly terminated, it follows that he ought to be compensated. One of the remedies under section 49 of the *Employment Act* is that found in subsection (1)(c) which provides for compensation "the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

21. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR, this Court explained that the remedies under Section 49 are "discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case."

The Court went ahead and stated that:

> " This is made clear by section 49 (4) which sets out some 13 considerations which the trial court must take into account before determining what remedy is appropriate in each case. Those considerations include, inter alia, the circumstances of the termination and the extent to which the employee caused or contributed to it and the practicability of reinstatement or re-engagement."

22. In the appeal before us, the appellant was terminated without any reason or justification. He was treated with hostility without appreciation of the services he had rendered to the respondent. We have found that the appellant did not contribute at all to his dismissal by the respondent. In the circumstances of this case, and considering the award by Radido Stephen J. of the E&LRC in the related case of Nakuru E&LRC Cause No 205 of 2016, *Alex Charo v Comply Industries Limited*, we find that the equivalent of five months gross wages is a fair and adequate compensation for the appellant. At an hourly rate of 55.50 for 8 hours a day for 5 months, the appellant is entitled Kshs. 66,600.00 and that is the compensation we award him for unfair and wrongful dismissal.

23. The upshot of the foregoing is that this appeal partially succeeds only to the extent that the finding of the learned Judge that the appellant was fairly dismissed is set aside and substituted with a finding that the appellant was unfairly and wrongfully dismissed. The appellant is therefore entitled to compensation in that regard. Otherwise, the appeal in respect to the other claims is without merit and is therefore dismissed.

24. The final issue is with regard to the costs of this appeal. The respondent did not participate in this appeal. The appeal has also partially succeeded. The respondent having been served with the appeal and failed to participate, there is no reason as to why the appellant should not have costs. Partial success should come with partial costs. The appellant is therefore awarded half the costs of the appeal against the respondent.

25. In short, this appeal succeeds to the extent that the appellant is awarded Kshs.66,600.00 as compensation for unfair and wrongful termination of employment. The appellant is also awarded half the costs of the appeal.

26. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR