St Leonard's Maternity & Nursing Home v LMM (Civil Appeal 59 of 2019) [2023] KECA 1148 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1148 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 59 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

SEPTEMBER 22, 2023

BETWEEN

ST LEONARD'S MATERNITY & NURSING HOME ..... APPELLANT

AND

LMM ..... RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Kericho (D.K. Njagi Marete, J.) delivered and dated 9th October 2018 in ELRC No. 53 of 2017)

JUDGMENT

1. The appellant, St Leonard's Maternity & Nursing Home Limited, is dissatisfied with the judgment delivered on October 9, 2018 by D. K. Njagi Marete J. of the Employment and Labour Relations Court (E&LRC) at Kericho in Cause No 53 of 2018. Through the judgement, the learned Judge allowed the claim of the respondent, LMM, seeking various awards against the appellant for unlawful termination of employment. The appellant raises six grounds of appeal, to wit, that the E&LRC erred by considering pleadings as evidence; that the E&LRC misdirected itself as to the standard of proof applicable where sexual harassment has been alleged; that the burden of proof with regard to the allegation of discrimination was not discharged; that the learned Judge erred in failing to find that Summit Medicare Ltd was a different entity from St Leonard's Maternity and Nursing Home; that the respondent's submissions were not supported by the evidence on record; and, that the learned Judge erred in failing to consider and analyse the submissions by the appellant thereby arriving at an erroneous conclusion.

2. At the trial, the gist of the respondent's claim was that she was an employee of the appellant from December 2012 to December 2014. Her case was that during that period she served at the appellant's clinic in Nyansiongo up to November 2014 when she was transferred to its other clinic in Chepilat. She alleged that the transfer was occasioned by her refusal to yield to sexual advances by the appellant's manager, one Mr. Patrick Tweni. The respondent alleged that while she worked at Nyansiongo, Mr.

Tweni would deliver drugs at night and she was expected to receive the consignment. Further, that during the delivery of the drugs the manager made inappropriate comments bordering on sexual advances to her. She stated that when she declined his advances, she was transferred to Chepilat at a time when she was heavy with child. It was the respondent's case that they were later asked to reapply for their jobs and in December 2014 she was terminated when she received a letter from Mr. Tweni informing her that she did not qualify for absorption by the appellant. In summary, her case was hinged on allegation of sexual harassment and discrimination resulting in unfair termination.

3. For the appellant, their case was premised on the statement of defence dated January 30, 2018 as well as the evidence of DW1 Patrick Tweni and DW2 Daniel Mulongo Sitati. According to the appellant, the manager (DW1) was mandated to deliver drugs to its clinics and that he did not in any way make sexual advances towards the respondent. The appellant further alleged that it seconded the respondent to Summit Medicare Ltd facility at Nyansiongo and that her transfer to Chepilat was occasioned by laxity and underperformance. It was also the appellant's case that the secondment to Summit Medicare Ltd was to end in December 2014. This prompted them to ask all employees who were on secondment to reapply afresh to Summit Medicare Ltd for retainer and that the respondent did not qualify for the new engagement her termination. In summary, the appellant denied in *toto* all the allegations made against it by the respondent.

4. In his judgment, the learned Judge held that the respondent had proved her case against the appellant. He found that the respondent had been sexually harassed, discriminated against and wrongfully terminated. The trial court proceeded to make an award of Kshs. 20,000 being one month's salary in lieu of notice; Kshs. 40,000 as compensation for leave not taken; Kshs. 240,000 being 12 months' salary as compensation for wrongful termination; Kshs. 600,000 being general damages for sexual harassment; Kshs. 100,000 being general damages for discrimination at the work place; and, the costs of the claim.

5. On June 13, 2023 when this matter came up for virtual hearing, Mr. Migiro appeared for the appellant while Ms Wachira appeared for the respondent. They had filed their written submissions which they sought to rely on accompanied by short oral highlights. Adverting to the submissions dated June 6, 2023, Mr. Migiro submitted that the learned Judge erred in failing to appreciate that Summit Medicare Ltd was a different entity from St Leonard's Maternity and Nursing Home. Counsel pointed out that they had raised this as an issue but the learned Judge failed to make a finding on it despite the appellant producing the certificates of incorporation for the two entities hence proving their distinct and independent nature. Counsel relied on the case of *Godwill and Trust Investment Ltd v Will and Bush Ltd* [2011] LCN/B820 (SC) as cited in *Maureen Onsongo v EOH Ltd & EOH/Copy Cat Ltd Company* [2021] eKLR to support his argument that the appellant was wrongly cited as a party in this case.

6. Mr. Migiro also submitted that the respondent made claims in her pleadings which were not proved by evidence. Counsel faulted the learned Judge for relying on the averments contained in the pleadings as opposed to what was proved by way of evidence. To this end, counsel relied on the case of *CMC Aviation Ltd v Cruisar Ltd* [1987] KLR 103.

7. With regard to the ground that the respondent's submissions were not supported by the evidence, counsel asserted that the respondent made submissions which were not backed by evidence and which the learned Judge misconstrued as evidence and proceeded to rely upon to make his determination. Counsel relied on the decisions in *Joseph Murangi & Another v Beatrice Kainda Kaibiria*, Civil Appeal No 175 of 1996 and *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR to submit that submissions cannot take the place of evidence.

8. Finally, Mr. Migiro submitted that the trial court erred in failing to critically analyze the appellant's arguments, submissions and authorities thereby arriving at unbalanced findings.

9. On her part, Ms Wachira opposed the appeal through the submissions dated June 12, 2023. On the question as to whether the respondent was an employee of the appellant, counsel submitted that the evidence on record clearly established that the respondent was an employee of the appellant. Counsel further pointed out that the respondent was seconded to Summit Medicare Ltd in a memorandum of understanding which was entered into prior to incorporation of Summit Medicare Ltd. Counsel relied on the case of *Kenya Methodist University v Kaungania & Another* [2022] KECA 90 (KLR) to submit that a party that seconds an employee to another is the nominal employer whose powers and duties are reinstated once the secondment ends. Counsel also submitted that the respondent was an employee of the appellant and not on locum. Counsel relied on the case of *Furaha Menza Nzai v Carlos Angore* [2019] eKLR where the Court considered duration of employment to determine whether an employee was on locum or not.

10. Ms Wachira also submitted that the respondent discharged her burden of proof as she had given her evidence on oath. Counsel contended that the appellant had failed to pinpoint the specific allegations made in the submissions which were not proved through evidence. Counsel submitted that the respondent's evidence on oath and exhibits which were produced remained uncontroverted and proved her case.

11. With regard to the standard of proof in discrimination and sexual harassment cases, counsel submitted that the burden of proof is with the employer to disprove claims put forth by a claimant. Counsel referred to section 5(7) of the *Employment Act* to submit that the respondent clearly discharged her burden of proof and it was then incumbent upon the appellant to disprove her claims and evidence. Counsel submitted that the appellant did not rebut the allegations made by the respondent in respect to the instances when discrimination and sexual harassment took place. Counsel referred to the Supreme Court decision in *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR) to submit that discrimination can occur due to unfair practice. Counsel also rebutted the appellant's argument that the respondent filed submissions which were not in tandem with the evidence on record. She took this Court through the record pointing out the evidence adduced and connecting the same to the submissions filed at the trial. In the end, counsel urged us to dismiss the appeal with costs.

12. This is a first appeal and our mandate under rule 31(1)(a) of the *Court of Appeal Rules,* 2022 transcends both issues of law and fact. As was stated in *Abok James Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, we are called upon, as a first appellate court, to independently re-consider the facts vis-à-vis the applicable law and legal principles and arrive at our own independent conclusion. Upon reviewing the memorandum of appeal, the record and the submissions by counsel, we are of the view that this appeal turns on resolution of two issues, namely, whether the claims of sexual harassment and discrimination were proved against the appellants; and, whether the respondent was unfairly and wrongfully terminated by the appellant.

13. Before we delve into the issues we have identified for our determination, we find it judicious to recall the applicable standard of proof in claims of sexual harassment and discrimination. To assess the applicable standard of proof, it is imperative that we appreciate how discrimination and sexual harassment intertwine. Section 5(3)(a) of the *Employment Act* prohibits discrimination on grounds of "...race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin,

disability, pregnancy, marital status or HIV status." Describing the elements of sexual harassment, section 6(1) of the *Employment Act* provides thus:

> " An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—
>
> a. directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express —
>
> i. promise of preferential treatment in employment;
>
> ii. threat of detrimental treatment in employment; or
>
> iii. threat about the present or future employment status of the employee;
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> b. uses language whether written or spoken of a sexual nature;
>
> c. uses visual material of a sexual nature; or
>
> d. shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction."

1. Article 1(G) of the *African Charter on Human and Peoples' Rights* on the Rights of Women in Africa defines discrimination against women thus:

> " Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;" (Emphasis ours)

15. In *Ooko & another v SRM & 2 others* [2022] KECA 44 (KLR), this Court interrogated the interlink between sexual harassment and discrimination and held thus:

> " Sexual harassment is defined in Black's Law Dictionary, Tenth Edition as "a type of employment discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks and unwelcome touching". It is therefore a genre of discrimination..."

16. From the foregoing, there is no doubt in our minds that sexual harassment is a genre of discrimination. If that be the case, then the applicable burden of proof is that which is prescribed under section 5(7) of the *Employment Act*. The manner in which the said burden of proof applies was explained by the

Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR thus:

> "(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary...
>
> (52) ...
>
> (53) In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof."

17. It is upon the foregoing principles that we proceed to assess whether the claims of sexual harassment and discrimination by the respondent were proved against the appellant. During trial, witnesses for both parties sought to have their witness statements and bundles of documents admitted on oath. The witnesses were then cross-examined and re-examined. DW1 testified in cross-examination that he was the Hospital and Facility Manager of the appellant. In his witness statement, he stated that he would deliver drugs to Summit Medicare Ltd clinics in Nyansiongo and Chepilat. These are the two facilities where the respondent worked. It is also worth noting that one Dr Nyauma was a director of both facilities while DW1 acted as Manager and signed off letters for both the appellant and Summit Medicare Ltd. At page 124 of the record of appeal is the respondent's NSSF membership statement where the appellant is indicated to have been the respondent's employer. All this chain of evidence discredits the appellant's claim that it was not the respondent's employer. We are further guided by the holding in *Kenya Methodist University v Kaungania & Another* (*supra*) that even if there was secondment of the respondent to Summit Medicare Ltd, the employment relationship was still between the respondent and the appellant. The appellant cannot therefore run away from responsibilities or liabilities arising out the employment relationship it had with the respondent. We therefore find that the appellant was indeed the respondent's employer.

18. Having made the foregoing finding, the next issue is whether the respondent surmounted the initial burden of proof required to establish a *prima facie* case on sexual harassment and discrimination. The respondent in her written statement narrated how DW1 delivered drugs to her facility in Nyansiongo during night hours. She also narrated how she lived within the facility so as to ensure that the facility was never left unattended. Further, she stated how DW1, on one occasion uttered the words "hizi vitu zote uko nazo na unakataa nazo". The respondent understood this to mean that the manager was making sexual advances to her. According to the respondent, the events that followed were her transfer to Chepilat and the ultimate termination. In his statement, DW1, the person accused of having sexually harassed the respondent, proffered what amounted to a mere denial of the incidences of sexual harassment. In our view, the inference made by the learned Judge of the E&LRC with regard to the events spanning from sexual advances, decline by the respondent, her transfer to Chepilat while she was expectant and without transport allowance, and her ultimate dismissal makes her story believable. Further, such chain of events, from a reasonable person's perspective, and if not properly rebutted leaves no doubt that they were as a result of her refusal to yield to DW1's sexual advances.

The reasonable man test herein is not a novel invention. In *Ooko & another v SRM & 2 others* (*supra*) that test was explained thus:

> "...the applicable threshold and standard was set in *R v Birmingham City Council ex parte* EOC (1989) AC 1155 that it is enough that the victims considered reasonably that they had been treated less favourably, and there must be a reasonable ground for this perception. Likewise, the US Supreme Court held in *Oncale v Sundowner Offshore Services 5*23 US 75 (1998) that the objective severity of the harassment should be judged from the perspective of the reasonable person in the plaintiff's position, considering all the circumstances."

19. We further wish to observe, just like did the learned trial Judge, that sexual harassment cases are personalized. Just like other sexual offences, more often than not, incidences of sexual harassment take place in private spaces pitting the perpetrator against complainant. They generally do not occur in the presence of any witness. In the present case, DW1 was the appellant's manager and in the absence of a sexual harassment policy as envisaged under Section 6(2) of the *Employment Act*, it would be difficult to ascertain whether the appellant had modalities of dealing with such cases. In that case, it would not be proper to blame the victim of such acts for not following the proper reporting channels which channels do not exist. In the end, we find that indeed, the respondent discharged the burden of proof that was initially placed upon her.

20. As for the appellant, it was DW1 who was accused of having sexually harassed the respondent and the person who oversaw her transfer and ultimate termination. The appellant on their part opted to proffer denial of the incidences. Its case, put on the scales against that of the respondent leaves no doubt that the respondent's story is believable. We have no doubt that the appellant failed to discharge its burden of proof in as far as the allegations of sexual harassment and discrimination were concerned.

21. Having made the above findings, the answer as to whether the respondent was unfairly terminated is obvious. It follows from the chain of events as we have already highlighted that the respondent's termination was precipitated by her failure to yield to the sexual advances of DW1. It is absurd, and no explanation was tendered as to why her letter of regret arrived on the deadline for applications to Summit Medicare Ltd. That level of "efficiency" on the part of DW1 and the appellant is questionable. We have no doubt in our minds that the intention of the letter dated December 1, 2014 was geared towards formalizing the termination of the respondent and which termination was achieved vide the letter dated December 5, 2014. Consequently, we find that the respondent was unfairly terminated.

22. In the end, we find this appeal to lack merit and the same is hereby dismissed. It is necessary to observe that the appellant did not challenge the awards made to the respondent. In the circumstances and having found that the appeal on liability has no merit, we are not obliged to venture into the issue of quantum as that is an issue that fell squarely within the discretion of the trial court.

23. The final issue for our determination is the question of the costs of this appeal. We have considered the circumstances of this case, the conduct of the parties during the hearing of appeal and at the trial. The rule of thumb is that costs follow the event but discretion is reserved for the court seized of the matter to depart from the rule for good reason. In the present case, we do not find any intervening factor to warrant a departure from the rule. In the circumstances, we dismiss this appeal for lack of merit and direct the appellant to bear the costs of the appeal.

24. In conclusion, this appeal is hereby found to be without merit and is dismissed with costs to the respondent.

25. It is so ordered.

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

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL