Manyinsa v Lavington Security Limited (Civil Appeal 55 of 2019)
[2023] KECA 1376 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1376 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 55 OF 2019

F SICHALE, FA OCHIENG & WK KORIR, JJA

NOVEMBER 24, 2023

BETWEEN

JACOB OSORO MANYINSA ..... APPELLANT

AND

LAVINGTON SECURITY LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of the Employment and Labour Relations Court at Nakuru (Mbaru J) dated 29th November 2018 In (Nakuru ELRC Cause No. 203 of 2015))

JUDGMENT

1. The appellant has filed this appeal against the judgment of Mbaru J dated November 29, 2018, in which the learned judge partly allowed his claim and awarded him overtime pay at Kshs 219,297/=, leave pay at Kshs 21,146.00/= and costs all assessed at Kshs 20,000=. The appellant was aggrieved by the said award thus provoking the instant appeal *vide* a Notice of Appeal dated December 4, 2018 and a memorandum of appeal dated July 5, 2019, raising 9 grounds of appeal as follows: -

> " a. That the learned judge erred in law and in fact in failing to award the appellant (the then claimant) Notice Pay the (sic) despite the fact that the respondent did not establish through evidence that termination of the claimant was procedural or fair.
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> b. That the learned judge erred in law and in fact in falling to find that the basic salary constituted house allowance which was not factored hence the house allowance, being 15% of basic salary.
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> c That the learned trial judge erred in law and in fact in failing to award the relief for underpayment irrespective of the fact that the said relief was correctly pleaded and tabulated in the memorandum of claims.

d. That the learned trial judge erred in law and fact in totally failing to award the claim for off duties despite the fact that the said relief was properly pleaded and tabulated and there having been no challenge from the respondent.

e. That the learned trial judge erred in law and in fact in totally failing to award the claim for public holidays despite the fact the said relief was properly pleaded and tabulated and there having been no challenge from the respondent.

f. That the learned trial judge erred in law and in fact in totally failing to award the claim for leave despite the fact that the said relief was properly pleaded and tabulated and there having been no challenge from the respondent.

g. That the learned trial magistrate erred in law and in fact in failing to award compensation as is provided for under Section 49 (i) (c) despite finding that the termination was un-procedural and without notice.

h. That the trial judge erred in law and in fact in adopting wrong analysis and law as basis for denial of the reliefs set out in the memorandum of claims.

i) That the trial judge erred in law and in fact in assessing costs as being of Kshs 20,000/= without giving justification from diversion from the applicable Remuneration Order."

2. The brief facts in this appeal are that the appellant had been employed by the respondent on September 1, 2012, as a security guard. It was the appellant's case that on January 30, 2015, he was dismissed from employment by the respondent; that the circumstances leading to his dismissal were that his supervisor came and told him to report at KEPHIS and that this presented a challenge because the appellant did not know where KEPHIS was. That this was coupled with the fact that it was at night and that further when he requested for transport, he was offered none; instead his supervisor commanded him to remove his uniform and report to the office on the following day for failure to comply with lawful orders.

3. It was the appellant's further contention that he used to work for 12 hours from 6:00am to 6:00pm; and never took any offs and also worked during public holidays.

4. The respondent on the other hand denied the appellant's claim and contended that he had not been dismissed from official duty as alleged but had instead deserted duty on 6th January 2015 and that he was duly paid his salary for the days worked.

5. Subsequently thereafter, the appellant filed a Statement of Claim dated May 8, 2017, seeking *inter alia* payments for overtime and leave, which claim was partly allowed by the Trial Court (Mbaru J), on November 29, 2018, thus provoking the instant appeal.

6. When the matter came up for plenary hearing on 31st May 2023, Mr. Maragia learned counsel appeared for the appellant whereas Mr. Koome appeared for the respondent. Both parties relied on their written submissions dated December 1, 2022 and May 4, 2023 respectively.

7. It was submitted for the appellant that he had proved the reliefs sought in his Memorandum of Claim and that pursuant to the provision of section 10 (7) of the *Employment Act*, the same was categorical on the party bearing liability for proof and that in the instant case, the respondent was required to produce credible evidence discounting each and every relief that had been sought. It was further submitted there was no single document filed by the respondent to discount the appellant's assertions leading to an inescapable conclusion that the appellant's claim was valid.

8. It was the appellant's further contention that the Court acted unfairly towards the appellant since the respondent not only failed to appear in court but never filed any document to demonstrate desertion. Consequently, we were urged to upset the finding by the trial court that the appellant deserted duty and hold that this was a case for unlawful dismissal entitling him to the reliefs as sought.

9. It was further submitted that the learned judge erred in failing to award the reliefs sought for notice, under-payment, off days, compensation, public holidays and leave, which claims were properly computed in the Memorandum of Claim notwithstanding the absence of a separate or alternative tabulation from the respondent. Consequently, we were urged to set aside the trial court's order disallowing the reliefs and enhance the amount that was awarded in the following terms;

    i). Notice - Kshs 11,633.55/=

    ii). Underpayment - Kshs 138, 763.29/=

    iii). Off days - Kshs 129,159.01/=

    iv). Compensation - Kshs 139, 602.60/=

    v). Public holidays- Kshs 33,791.48/=

    vi). Leave - Kshs 21,146.34/=

    vii). Total - Kshs 474,096.27/=.

10. On the other hand, it was submitted for the respondent that no evidence was led to ably establish the name of the supervisor who allegedly gave the appellant instructions, proof of working hours being 12 hours in a day, proof of working on holidays and proof of requisition for money on account of compensation for work done and that in light of the foregoing, absence of the appellant from work without permission, as was evident in the current scenario, would sufficiently attract summary dismissal pursuant to section 44 (4) (a) of the *Employment Act*.

11. It was submitted that the entire appeal was unmerited as no sufficient proof was presented in the trial court to warrant any of the prayers granted, and more so, the ones prayed for in this appeal and that therefore there was absolutely no basis for the grant of the orders previously granted, or now sought. It was further submitted that no contract was produced in evidence and that the Court was not duly bound to infer provisions of a contract where no such document was presented.

12. It was further submitted that no evidence was led to prove any of the reliefs sought and that it follows that the entirety of the appellant's case was based on allegation without any form of supporting document.

13. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the cited authorities and the law. We are required as a first appellate Court by Rule 31 of the Court of Appeal Rules 2022, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123 and *Kenya Anti-Corruption Commission v Republic & 4 others* [2013] eKLR.

14. Having carefully perused the record and the rival pleadings by the parties it is evident that one issue arises for our determination namely;

    Whether the claim/reliefs sought by the appellant were proved to the required standard.

15. It is common ground that the appellant had been employed by the respondent as a security guard on September 1, 2012 until January 31, 2015 when he was allegedly dismissed by the respondent. The

respondent on the other hand in its defence contended that the appellant was not dismissed as alleged but had deserted duties on January 6, 2015 and that he was duly paid his salary for the days worked in the month of January.

16. It is also common ground that the appellant was the only witness in this case and save for copies of bank statements, no other document was produced by the appellant to prove his case. Additionally, the respondent did not call any evidence to counter the appellant's contentions. The appellant's evidence therefore remained his word against that of the respondent.

17. The appellant in his evidence in chief testified, inter alia as follows;

> " I was directed to go to the office the next day. My duties were not paid. This led to unfair termination of my employment. Work hours 6am to 6pm. I did not take an off. On public holidays I would be at work. No payment was done or form of compensation. My salary was paid at the bank. I seek claim as outlined in memo of claim. I did not desert duty."

18. From the above excerpts from the evidence of the appellant, it is evident that save for making general allegations, no evidence whatsoever was led to prove any of the claims/reliefs sought for under various heads for notice, under-payments, overtime, off days, public holidays, leave and compensation. The appellant for example did not state the number of days he had worked overtime, the accrued leave days and the number of days that he had worked on public holidays. Additionally, no documentary evidence in support of any of the claims.

19. It is indeed trite law that he who asserts must prove. See *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, in which this Court stated thus;

> "As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107
>
> (1) of the *Evidence Act* cap 80, which provides:
>
> "107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

20. There is however the evidential burden that is cast upon any party of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:

> "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
>
> The two sections carry forward the often repeated evidential adage: "he who asserts must prove".

21. Again in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR this Court rendered itself thus:

> It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side." (Emphasis added).

22. From the circumstances of this case and for the reasons we have enumerated above, we find no difficulty in finding and holding that indeed the appellant did not prove his case to the required standard in civil cases, namely on a balance of a probabilities.

23. We now turn to the contention by the appellant that the respondent bore the burden of proof pursuant to section 10 (7) of the *Employment Act* No. 11 of 2007. That Section provides as follows: -

> " If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection 1, the burden of proving an alleged term of employment stipulated in the contract shall be on the employer."

24. It is indeed not in dispute that the respondent did not produce any document to counter the appellant's case. The learned judge while addressing herself on this issue remarked as follows;

> " The respondent did not file any work records. The response filed is empty and devoid of any material evidence contrary to rule 13 of the *Employment and Labour Relations Court (Procedure) Rules* read together with section 10 (7) of the *Employment Act*, 2007."

25. From the circumstances of this case, we are of the considered opinion that the provisions of section 10 (7) of the *Employment Act* 2007, comes into play to disprove such claim as had been put forward by the employer. For instance if an employee stipulates that his monthly salary was Kshs.50,000/-, the employer could only challenge that assertion by making available the contract which stipulates a different amount.

26. It was not in dispute that the appellant had been employed by the respondent as a security guard. Secondly, there was no evidence tendered to prove any of the reliefs sought by the appellant, sought by the appellant. As an example, if he had said that he worked on the Mashujaa Day, in the year, 2014, the employer could only dispute that by producing work-logs.

27. In the instant case, the appellant merely tabulated figures without evidence to support and prove the same; therefore, he did not discharge the burden of proof placed on him to prove the reliefs sought or the claims made.

28. Faced with a similar situation in the case of *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR). where a party had merely listed special damages without proving the same, this Court stated thus: -

> "The appellant apart from listing the alleged loss and damage, it did not... lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to

award them. Indeed, there was not credible documentary evidence in support of the alleged special damages."

29. Again, In *David Bagine v Martin Bundi* [1997] eKLR, this Court cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), where he held that: -

> " [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

30. We think we have said enough to demonstrate that this appeal is without merit. In the circumstances, the orders that commend to us is to hereby dismiss the same in its entirety with no costs.

31. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF NOVEMBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

F.A OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR