Greystone Farm (formerly) Equitorial Nut Limited v Kenya Plantation & Agricultural Workers Union (Civil Appeal 13 of 2017) [2022] KECA 731 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 731 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 13 OF 2017

RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA

APRIL 28, 2022

BETWEEN

GREYSTONE FARM (FORMERLY) EQUITORIAL NUT LIMITED ..... APPELLANT

AND

KENYA PLANTATION & AGRICULTURAL WORKERS UNION ..... RESPONDENT

(An appeal from the Judgment and Decree of the Employment & Labour Relations Court of Kenya at Nyeri (B. Ongaya, J) delivered on 4th November, 2016 in Nyeri Employment & Labour Relations Cause No. 45 of 2015)

JUDGMENT

1. This appeal arises from the judgment and decree of Hon. Justice B. Ongaya delivered on 4th November 2016 in Nyeri ELRC Cause No. 45 of 2015 in which, by a Memorandum of Claim dated 27th January 2015 as amended on 21st November 2015, the respondent, Kenya Plantation & Agricultural Workers Union, had sued the appellant, Greystone Farm (formerly Equitorial Nut Limited), for and on behalf of (a) Joseph Maina; (b) Rose Muthoni; (c) Margaret Wambui; (d) Sophie Wanjiru; (e) Mary Nduta; (f) John Mwangi; (g) Zipporah Wanjiru; (h) Julia Wambui; (i) David Mwenda;and (j) Damaris Wambui; all of whom were allegedly employed by the appellant, seeking judgment for –

    a. "reinstatement without loss of benefits;;

    b. payment of salaries from the date of dismissal until the date of reinstatement; and

    c. [in the alternative,] an order directing the appellant to pay to each of the grievants –

    i. 12 months compensation;

ii. payment in lieu of notice;

iii. gratuity/service pay;

iv. payment in lieu of leave; and

v. overtime."

2. The appellant filed its Response to the Memorandum of Claim (as amended) and denied the respondent's claim, contending that it had never employed any of the grievants or assigned them any duties within its premises. It prayed that the respondent's claim be dismissed with costs.

3. The claim proceeded to hearing at the conclusion of which the Hon. Justice B. Ongaya entered judgment for the respondent against the appellant on 4th November 2016 directing that –

a. the appellant do pay each grievant 12 months salary for unfair termination, 1 months salary in lieu of termination notice and gratuity as compounded in the Amended Memorandum of Claim filed on 25th November 2015;

b. the amount in (a) to be paid by 15th December 2016 failing interest to be payable at court rates from the date of the judgment till full payment; and

c. the appellant do pay to the respondent costs of the suit.

4. Aggrieved by the decision of Ongaya, J the appellant filed this appeal praying that –

a. the judgment delivered on 4th November 2015 be set aside; and

b. that "... costs of this appeal be provided for."

5. The appellant is a limited liability company duly incorporated under the *Companies Act* (Cap. 486) (now repealed) and is engaged in the business of coffee and macadamia nuts growing and processing within Murang'a County.

6. The respondent, Kenya Plantation and Agricultural Workers Union, is a registered trade union within the meaning of section 2 of the *Labour Relations Act*, Revised 2012 (2007) and represents employees within the agriculture and plantations sector.

7. The 10 grievants were alleged to have been employed by the appellant on diverse dates between the years of 2007 and 2010 as pleaded in paragraph 3 of the respondent's amended Memorandum of Claim. Notably, paragraph 4 of the same Memorandum contradicts the preceding paragraph by stating that the grievants were dismissed from employment on 23rd April 2012.

8. The respondent claimed to represent the above-named grievants in Nyeri ELRC Cause No. 45 of 2015 seeking reinstatement, salary since the date of their alleged dismissal from employment and, in the alternative, compensation under the various heads set out in the Amended Statement of Claim dated 21st November 2015. According to the respondent, the 10 grievants were assigned different duties within the appellant's premises. There was attached to the amended Statement of Claim a schedule setting out the names of the grievants, their respective dates of employment, dates of termination of employment, their status and position, and salaries allegedly paid to each of them until April 23, 2012 when they are said to have been dismissed. We need not reproduce the contents of that schedule here. Suffice it to say that it is on that basis that the learned Judge proceeded to award the relief that forms the subject matter of this appeal.

9. In its amended Response to the Memorandum of Claim dated 8th December 2015, the appellant denied the respondent's claim and prayed that it be dismissed with costs. According to the appellant, it has never employed any of the grievants listed in the schedule aforesaid, and neither has it ever assigned them any tasks in its premises. In addition to the foregoing, the appellant denied all the particulars set out in the schedule attached to the respondent's Statement of Claim.

10. When the matter came for hearing on 21st September 2016, only Damaris Njeri Wambui testified in support of the respondent's claim and relied on her witness statement dated 29th October 2015. A scrutiny of that statement shows that it was filed in the trial court on 6th October 2015. Be that as it may, that is the only witness statement on record. Although it narrates the circumstances under which she and her fellow workers were dismissed from employment, the witness does not give any particulars of her fellow workers or their terms of service.

11. One Jackline Njeri Karanja testified in support of the appellant's response to the claim and relied on her witness statement dated 16th October 2015. According to her, she was tasked to keep and maintain records of all workers who reported each day, supervised them and paid them. She alleged that one of her colleagues, Sophia Wanjiru (one of the grievants) together with the then manager, Stephen Mwangi, destroyed all their employment records, which made it difficult to verify any of the grievant's employment records.

12. Having heard the appellant and the respondent, and having considered submissions by counsel for the appellant and counsel for the respondent, the learned Judge dismissed the grievants' claims for reinstatement, but entered judgment for each of them against the appellant on 4th November 2016 directing that –

    a. the appellant do pay each grievant 12 months salary for unfair termination, 1 month salary in lieu of termination notice and gratuity as compounded in the Amended Memorandum of Claim filed on 25th November 2015;

    b. the amount in (a) to be paid by 15th December 2016 failing interest to be payable at court rates from the date of the judgment till full payment; and

    c. the appellant do pay to the respondent costs of the suit.

13. Aggrieved by the decision of Ongaya, J the appellant instituted this appeal from the whole of her judgment and decree on 6 grounds, which we need not reproduce in full here. However, we take the liberty to summarise and reframe them. In our considered view, the salient grounds of the appeal before us are that the learned Judge –

    a. erred in failing to consider that the respondent's cause of action was time barred;

    b. erred in failing to appreciate the employment of the grievants was not proved on a balance of probabilities; and

    c. erred in awarding claims that were not specifically proved.

    On these grounds, the appellant requests this Court to allow this appeal with costs to the appellant, and set aside the judgment and decree of the Hon. Justice B. Ongaya given on 4th November 2016 in Nyeri ELRC Cause No. 45 of 2015.

14. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on our findings on the following issues of law and fact in respect of which learned counsel filed written submissions:

a. Was the claim in the trial court time barred?

b. Were the grievants who were represented by the respondent employed by the appellant as claimed?

c. If the answer to (b) is in the affirmative, were they unfairly or unlawfully dismissed from employment as claimed?

d. If the answer to (b) and (c) is in the affirmative, what relief avails to the grievants under statute and common law?

15. We need to point out at the onset that this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co*. [1968] EA p.123.

16. In Selle's case (ibid), the Court held:

> " An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own 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. In particular, 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."

17. Section 90 of the *Employment Act*, Revised 2021 (2007) limits the period within which claims under contracts of service should be brought. The section reads:

> " Section 90.
>
> Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the Act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

18. Even though paragraphs 3 and 4 of the respondent's amended Statement of Claim appear contradictory in so far as they reflect the grievants' last years of service as 2010 and 2012 respectively, we take it that 23rd April 2012, the date stated by Damaris Njeri Wambui as the date of termination of their employment would, perhaps, be more credible subject, however, to proof that they were in the appellant's employment in the first place. Taking 23rd April 2012 as the date of termination, their Statement of Claim was lodged two years and eight months later, a period of less than the three years period of limitation. Accordingly, we find that the grievants' claims represented by the respondent were not time barred as claimed. That settles the first issue before us.

19. With the exception of the schedule annexed to the respondent's amended Statement of Claim, we find nothing on record to support their claim of having been employed by the appellant. Only one grievant, Damaris Njeri Wambui, testified to the claim of such employment, but left the court in

darkness as to what the terms of such employment were. On the other hand, Jackline Njeri Karanja, the appellants employment records had been destroyed by one of the grievants jointly with their manager. The absence of such records, and Jackline's testimony in that regard leaves the matter in limbo as to who in fact were the appellant's employees, and on what terms. We are unable to tell. But for the pleadings in this regard, which were denied, the grievants gave no evidence on this account.

20. We take note of the provision of section 74(1) of the *Act*, which obligates employers to keep and maintain employment records. However, the same cannot be said of an employer whose records were said to have been destroyed by the same employees for whose benefits they were kept and maintained. Neither could the burden of proof of the contents of such records or terms of service be, with all fairness, shifted to such an employer under and by virtue of section 10(7) of the *Act*. We find it inexplicable that only one out of the ten grievants appeared to testify to their alleged employment. In so far as the others did not attend court to give evidence of their respective claims, and in the absence of employment records to back their claims, the learned Judge should not have found for the grievants on any of the heads of claim. We so hold on account of the fact that their claims were expressly denied. Moreover, this was not a representative suit in which one witness could testify in proof of the others' claims. In the circumstances, we find nothing on the record to suggest that so and so, among the grievants, but with the exception of Damaris Njeri Wambui, were employees of the appellant on such express terms as would assist the Court in determining the merits of their respective claims. That disposes of the second and third issues before us.

21. Even though the grievants represented by the respondent did not provide evidence to prove their employment and terms of such employment on the required balance of probability, we are nonetheless mindful of the fact that any compensation pegged on one's salary or wages would be dependent on the quantum of such wages being specifically proved. How would such compensation be otherwise computed? Indeed, there can be no award of general damages in a claim founded on a contract of service. A claim under such a contract can only be reckoned as a claim for special damages, which are required to be specifically pleaded and specifically proved. They were not.

22. This Court in *Hahn v Singh* [1985] KLR p.716 at p.717 and p.721 the Learned Judges of Appeal - Kneller, Nyarangi, JJ.A and Chesoni Ag. JA - held:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

23. Learned counsel for the appellant and for the respondent adopted their written submissions dated 3rd and 11th June 2021 respectively. In addition, learned counsel for the appellant filed his list of authorities dated 3rd June 2021. Having carefully considered the pleadings in the trial court, the evidence on record, the impugned judgment of the learned Judge, the written submissions by counsel and the cited authorities, we find that the grievants did not merit the relief claimed and awarded in the trial court. We find no evidence in proof of the respective claims, and the evidence adduced at the trial did not attain to the required balance.

24. For good reason, this Court clarified the circumstances under which it would be constrained to interfere with the decision of a superior court in *Alfarus Muli v Lucy M Lavuta & Another* [1997] eKLR where the learned Judges held that:

> " The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a

Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."

25. In conclusion:

a. we find that the appellant's appeal succeeds and the same is hereby allowed;

b. the judgment and decree of the Employment & Labour Relations Court of Kenya at Nyeri (B. Ongaya, J) dated 4th November 2016 be and is hereby set aside; and

c. the parties do bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR