Achelis Material Handling Ltd v Rawal (Civil Appeal 42 of 2017)
[2022] KECA 1123 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1123 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 42 OF 2017

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 21, 2022

BETWEEN

ACHELIS MATERIAL HANDLING LTD ..... APPELLANT

AND

KAMLESH V RAWAL ..... RESPONDENT

(Being an appeal from the Judgment/decree of the Employment and Labour Relations Court at Mombasa delivered by Rika, J. on 24th February 2017InMombasa ELRC Cause 593 of 2014 (Originally Nairobi IC Cause 115 of 2010)

JUDGMENT

1. The respondent in this appeal filed a Claim against the appellant, his employer, before the Industrial Court Cause No. 115 of 2010 (later transferred to Mombasa Employment and Labour Relations Court as No. 593 of 2014) claiming payment of 1% overseas commission on total indent sales value as a benefit conferred on him by the contract of employment, and which benefit was not paid to him upon resignation from the appellant company.

2. The appellant was a purchaser of ferries and heavy earth-moving equipment. The respondent worked with the appellant Company, as the Branch Manager, Mombasa Office. The respondent was aggrieved by the fact that upon his resignation on February 23, 2008 he was not paid all his dues, which included 1% overseas commission of paid- up sales that came to an amount of Kshs. 12,341,079.99/-. He claimed that vide transactions that the respondent negotiated with Hyster Europe as well as with Germany-based Company Schifbau-Und Entwicklungeselschaft Tangermunde Mbh & Co (SET), the appellant sold equipment to Kenya Ports Authority (KPA) and Kenya Ferry Services (KFS) amounting to Kshs. 1, 234, 107, 998. 50/-; that out of those sales his commission amounting to Kshs. 12, 341, 079. 99/- was due and not paid, upon resignation.

3. The appellant in it's statement admitted that the respondent was it's employee, and that his monthly salary was Kshs. 122, 500/-; and that he earned benefits of Kshs. 300, 000/- annually in school fees and 1% overseas commission of paid up sales. The appellant denied that after payment of Kshs. 184, 660/-, Lothar Denter was to advice on the payment of overseas commission to the respondent, as claimed by the respondent. It also denied that the company ever sold any equipment to KPA and KFS, contending that the said sale to KPA was by Hyster Europe, while the sale to KFS was by Schifbau-Und Entwicklungeselschaft Tangermunde Mbh & Co. KG (SET). That as such, the paid-up price for the equipment was not made to the Mombasa Office, or the appellant. Hence the appellant maintained that the respondent's claim was misconceived and urged the same to be dismissed with costs.

4. After the hearing, the learned trial Judge was satisfied that the respondent had shown that he was entitled to overseas commission at 1% of the total indent sales value, and that he should not have been kept out of the proceeds of international trade. The learned Judge found that the respondent merited the commission as claimed, and in addition awarded him 14% interest on the principal sum, from February 12, 2010 which was the date he initiated the action until payment in full, and with costs.

5. The appellant was aggrieved by the Judgment and decree of the Court and so filed this appeal. There are 13 grounds listed in the memorandum of appeal. These grounds were later reduced into 2 issues in the appellant's written submissions. The first head is whether or not the learned judge erred in fact and law in finding that the respondent was entitled to sales commission derived from the sale of equipment from Schiffnau and Entwicklungelsleschaft Tangermund Mbh and Company KG (SEC), Hyster Europe to Kenya Ferry Services and Kenya Ports Authority respectively. The second head was on whether the learned judge erred in fact and law in finding that the claim for overseas commission, if at all could be claimed, was not time barred under Section 90 of the *Employment Act*, 2007. The appellant in its memorandum of appeal sought that the impugned judgment be set aside and the subject suit be dismissed.

6. The issues for determination are derived from the two issues raised by the appellant's which are whether the ELRC erred in finding that the respondent was entitled to sales commission of 1% of the total indent sales value derived from the sale of equipment to Schiffnau and Entwicklungelsleschaft Tangermund Mbh and Company KG (SEC), Hyster Europe to Kenya Ferry Services and Kenya Ports Authority respectively. Secondly, whether the ELRC erred in finding that the claim was not time barred.

7. The appeal was heard virtually before us on the July 4, 2022 with learned counsel Mr. Wandabwa present for the appellant. While Mr. Asige was present for the respondent. Each counsel had filed their written submissions. Mr. Wandabwa's submissions were dated June 29, 2022 while those by Mr. Asige were dated June 29, 2022. Mr. Asige stated that even though he had just been served with the appellant's submissions, he was ready to proceed.

8. We have considered this appeal. This being a first appeal, it behooves this Court to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 this Court espoused that mandate or duty as follows:-

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

9. Mr. Wandabwa highlighted his submissions and stated that the appellant's position was that the German company, SEC and Hyster Europe directly bid for and contracted with the respective suppliers for the impugned supply of equipment to KPA and KFS respectively. He urged that consequently, the respondent's claim was not in respect of Mombasa sales or sales by the appellant's headquarters but were directed by foreign entities and therefore the respondent was not entitled to the commission claimed.

10. Mr. Wandabwa urged that the finding that the appellant being a middleman for various foreign companies made indent sales, and if made in Mombasa the respondent would be entitled to a 1% commission on the sales, was not in tandem with the respondent's letter of appointment, which provided for commission on Mombasa office paid up sales. That in any event the sales were not Mombasa office sales. That the letter did not make any reference to indent sales commission, and that by so finding the ELRC re-wrote the employment contract, which a court cannot do. For that proposition counsel relied on the case of *National Bank of Kenya Ltd v. Pipeplast Samkolit (K) Ltd*, [2001] eKLR.

11. Mr. Wandabwa urged that the learned ELRC found that the respondent was entitled to 1% commission on the Mombasa indent sales irrespective of whether the appellant had been paid its dues by the European suppliers, which the appellant contended was in error as the commission was payable based on paid up sales to the appellant upon which the respondent could base his claim. That the respondent did not adduce evidence to show what was paid up and what was not.

12. Mr. Asige in response to this point urged that the respondent was entitled to 1% commission for both local and overseas sales as per the respondent's letter of appointment. Counsel urged that the commission clause did not delimit when the commission on the Mombasa office paid up total sales was payable to the respondent.

13. The learned ELRC found, and correctly so, that there were facts which were not in dispute including the fact that the respondent was employed by the appellant as a Branch Manager on May 2, 2003; that he resigned voluntarily on January 22, 2008; that he was entitled to among other benefits, 1% commission of Mombasa office paid up slaes; that it was indicated by the appellant on the computation form that the Managing Director, Mr. Lothar Donter would advise on the overseas commission. It was also found that appointment letter contained the contentious clause on commission, which the ELRC quoted verbatim as providing " KES 1% of (Mombasa) paid up sales"

14. The contention is whether the commission clause restricted the respondent to claim only the local sales or whether it included indent sales as well. The parties did not agree on the interpretation of this clause. The ELRC defined indent as described in Business Dictionaries as "an order of goods, placed often through a foreign agent, under specified conditions of sale, the acceptance of which, by the supplier or the agent, constitutes a contract of sale...The agents are empowered to act as middlemen, and the sales done through middlemen, called indent sales." There was no contest with this definition.

15. In regard to the impugned sales to KPA and KFS, the respondent's position was that the appellant was a middleman for several European companies who sold goods to KPA and KFS, and got paid and was thus liable to pay the respondent the commission claimed. The appellant's position was that it was involved at dealer level and not commercial level in the impugned transactions between and Hyster and KPA. The ELRC found that the appellant was a middleman and a local agent of the European companies and that the European companies entered the Port of Mombasa market through the appellant. The ELRC was satisfied that the respondent was the focal man in the impugned transactions involving SEC and Hyster for reason he purchased the tender documents; he processed

tenders; he oversaw the success of the transactions; and even when dispute on procurement of the equipment arose, was a witness for the appellant.

16. We noted that the appellant's witness was the General Manager of the appellant company. His evidence was that he did not deal and was not involved at all in the transactions involving Hyster and KPA and those involving SET and KFS, saying he learnt of them in 2003. These are the transactions that gave rise to the respondent's claim. The GM maintained that Hyster and SET dealt directly with KPA and KFS. He also testified that the respondent was only entitled to claim commission for local sales.

17. The respondent's evidence was that he dealt with various European companies for the supply of equipment and parts at the Mombasa office on behalf of the appellant, as his employer. His evidence that he dealt with Hyster in regard to tenders at Mombasa Port for various supplies, including empty container handling trucks, and with Tarberg for supply of tractors also to KPA was not controverted. The respondent evidence that in the Hyster transactions he was involved in the purchase of tender documents; that he tendered on behalf of Hyster, and followed up on the tenders to success was not controverted. Also not controverted was his evidence that he was also involved in the tender for ferries from KFS, under instructions of SET, and that the tender went through. The respondent was clear that he was involved in all these transactions on behalf of his employer, the appellant. Indeed the appellant cannot deny these transactions, given the documents it filed especially in the supplementary record of appeal, which attest to various contract agreements entered between KPA and Hyster and between SET and KFS, in which the appellant signed. We agree with the finding of the ELRC that the respondent was the focal man for the European companies, and was actively involved to ensure the success of these companies in the sales market in Mombasa, including the Mombasa Port.

18. In regard to the commission, the respondent maintains that the letter of appointment which specifically provided for commission on sales did not specify to which sales the commission would apply, and therefore he was entitled to claim for all paid up sales in the Mombasa office. The appellant on the other hand contended that commission was only payable for Mombasa office paid up sales, meaning it applied only to local sales by Mombasa office.

19. The ELRC invoking section 9 and 10 of the *Employment Act*, interpreted the commission clause to mean that it did not indicate it was restricted to day-to-day sales made locally. That since the appellant dealt with local and international trade, had the appellant intended that the commission should apply only to local trade, the appellant should have expressly excluded overseas trade.

20. The letter of appointment of the respondent is at page 11 of the supplementary record of appeal. We already quoted verbatim what it provided under commission, but we shall repeat it here for convenience. It provides "Commission KES 1% of (Mombasa office) paid up sales". The intention of the parties in this provision must be, that for the commission to be payable, the sales were; one handled at the Mombasa office; two that the sales must be paid up; and three the commission will be 1% of the total sales. From the evidence adduced before the ELRC the Mombasa office handled both local and overseas sales. The bone of contention by the parties is whether the sales were local or whether they included overseas sales.

21. The appellant's argument that the commission was only payable for the local sales cannot carry the day. There are many reasons for this conclusion. The letter of appointment was drawn by the appellant, and as the *Employment Act* provides, it is the appellant as the employer who had the obligation to draw up a written contract of employment. So it was within its power to make clear provisions expressing exactly what was due to its employee(s). Quite apart from the appellant not having an exclusion clause, the fact the Mombasa office handled both local and overseas trade should have been a strong factor to compel the appellant to specify sales excluded from commission, if that was intended.

22. The other reason the appellant's argument is untenable can be inferred from its Computation of Final Dues Form, drawn in respect of the respondent to compute his final dues. The appellant's record of appeal, at pages 57 and 58 contains the computation by the appellant of the respondent's final dues. It has among the horizontal itemized list of payable heads, two heads under commission, one for local and the other for overseas commission. And under the local commission head a computation is included and a figure given of the 1% commission due. Under the overseas head, the words 'LD TO ADVICE' are written. What can be concluded by these words is that the overseas commission was recognized as payable to the respondent, and that LD, who was identified at the trial as the appellant's Managing Director, Mr. Lothar Denter, was to advice on the amounts.

23. We agree that the respondent was involved in international trade and if no commission was meant to accrue from that trade, the appellant was obligated to state so in its letter of appointment to the respondent. As the ELRC observed, under section 9 (2) and 10 of the *Employment Act* obligated the appellant to give a contract of employment with clear terms, including those of remuneration, how payable, when payable, and if there were any conditions to entitlement to state so in the contract. We find that the learned Judge of the ELRC analyzed and evaluated the entire evidence and the law, with due consideration of the submissions by counsel, and came to the right conclusion that the respondent was entitled to 1% commission of the total paid up overseas sales handled at the Mombasa office.

24. The other issue was whether the respondent's claim was time barred. It was the appellant's case that the same was time barred by dint of section 90 of the *Employment Act*. That section provides:

> " 90. Limitations
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> 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.'

25. The appellant's argument is that the respondent's claim, if due at all, became due in 2004 for the forklifts and 2007 for the ferries. The basis of that was explained as being the years that the respective contracts were signed. The respondent on its part urged that the ground of limitation was unavailable to the appellant and should be disallowed. Counsel urged that the respondent wholly concurred with the ELRC findings.

26. In regard to limitation the learned ELRC Judge observed:

> " The claim was brought within 3 years allowed under section 90 of the *Employment Act*. He is entitled to claim all the benefits which accrued to him during the entire period of employment. The respondent (appellant herein) alleges the claim is time barred without stating the date when the overseas commission became due. The Court is satisfied the claim was made within time and the claimant is not barred from recovering a benefit conferred upon him by the contract of employment which accrued to him during employment."

27. We noted that the issue of limitation was raised for the first time in the appellant's final submissions before the trial Court (ELRC). Being a jurisdictional issue the appellant should have raised it at the first opportunity as a preliminary point. To raise it after the close of the trail in final submissions in the case is not fair and does not sit well with the court process. It is correct to say that that issue was not canvassed at the trial. The ELRC made an observation that the appellant required to provide more

details, and in particular when the overseas commission became due. The ELRC was in effect finding that the issue had not been presented to the court for determination.

28. In the case of *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015] eKLR this Court dealt with a similar situation on such issue and pronounced itself thus;

> " ...we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury."

29. Similarly, in *George Owen Nandy v Ruth Watiri Kibe* [2016] eKLR, this Court rendered itself thus:

> " ... To allow the appellant to now turn around and claim illegality of a trial after its conclusion and judgment despite having all the material facts could set a bad precedent. It would present a situation where a litigant would go through the rigours and motions of a trial which they have reason to believe might be illegal and only raise it on an appeal when they lose. That would result in wastage of valuable judicial time. A situation where parties raise all the issues they have in the trial for deliberation should be encouraged so that matters are dealt with expeditiously, conclusively and not in installments. Further this Court does not have the benefit of the reasoning of the High Court on the issue of the interlocutory judgment. Accordingly, we eschew all the aforementioned grounds of appeal that flow or touch on the entry of the interlocutory judgment."

30. We agree with the learned Judge of the ELRC conclusion on this issue. We must echo what this Court decried in George Owen Nandy v Ruth Watiri Kibe, supra. That a situation where parties raise all the issues they have in the trial for deliberation should be encouraged. That ground fails.

31. Before we conclude this judgment we must deal with an issue that the respondent made a central issue in his submissions before this Court. Mr. Asige for the respondent urged that the appellant's appeal was defective and incompetent and should be struck off for want of compliance with the rules on service, statement for address contrary to Rules 75 (3), 79 (1), (a) (b), (3), 87 (1) (b), 82 (1) of the *Court of Appeal Rules* [2010]. Rule 86 of the *Court of Appeal Rules*, 2022 provides:

> " 86. Application to strike out notice of appeal or appeal
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> A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.
>
> Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.

32. We do not wish to say much on this as clearly the respondent was too late to raise this issue on competence of the appeal.

33. All in all, we have no basis for interfering with the judgment of the learned Judge.

The appeal fails and is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR