



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAL, J.J.A)

CIVIL APPEAL NO 129 OF 2016

BETWEEN

CAVINE OUMA WERE.....APPELLANT

AND

PIONEER PLUMBERS LIMITED.....RESPONDENT

*(Being an Appeal against the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Monica Mbaru, J.) dated and delivered on 10th August, 2015*

*in*

*E.L.R.C Cause No. 1261 of 2013)*

\*\*\*\*\*

JUDGMENT OF THE COURT

1. This is an appeal from the ruling of the Employment and Labour Relations Court (ELRC) at Nairobi (M. Mbaru, J.) largely dismissing the appellant's claim and only awarding him Kshs. 5,400.00 as an underpayment. The court also entered judgment in favour of the respondent and ordered the appellant to refund to the respondent Kshs. 25,700.00 less the stated underpayment.
2. A brief background of the matter will help place this appeal in perspective. The appellant was employed by the respondent as a casual labourer earning a daily wage of Kshs. 250.00 in August 2008. This had gradually increased to Kshs. 356.00. as at the time his services were terminated.
3. It was the appellant's case that sometime in June, 2011 while working at the respondent's site in Karen, he requested for one-week leave to attend his mother's burial, which leave was granted. During the said leave he unfortunately lost his sister, upon which misfortune he informed the respondent through a foreman, one Mr. Ochieng Judah, of his predicament and requested for an extension of the leave.
4. He said that on reporting back to work, he was instructed by the foreman to report to the respondent's Head Office at Industrial area for official communication. Upon his arrival, he was instructed by the Managing Director's secretary to go back home and await communication. He later went back to the office, but did not receive any formal communication on the fate of his employment.
5. Consequentially, he filed a complaint with the District Labour office, Nairobi, for intervention pursuant to **Sections 47 and 49** of the Employment Act, 2007 (the Act) as in his view, the termination was wrongful and unfair. The labour officer called several conciliation meetings but the respondent never attended although there was exchange of several letters between them. Ultimately, by a Notice of Intended Prosecution dated 1st November, 2011 the labour officer gave the respondent 10 days to deposit a sum of Kshs. 25,700.00 with the labour office failing which legal action would be taken. The respondent quickly dispatched a cheque for the cited amount and assumed that the dispute had been resolved only to receive another demand letter dated 18th November, 2011 stating that the earlier amount was a typing error and the actual amount owed was Ksh. 115,140.00. The respondent was consequently given 7 days to settle the balance of Ksh. 89,440.00 which it declined to do.
6. Upon failure to reach an amicable agreement the appellant, on 12th August 2013, filed a claim, **E.L.R.C Cause No. 1261 of 2013**, against the respondent alleging unlawful termination of his employment and claimed reliefs as follows:

**a) Terminal benefits:-**

- i. One month salary in lieu of notice (26 days x 504.24).....Kshs. 13,110.50
- ii. 65.5 days accrued leave (65.5 days x 504.25).....Kshs. 33,028.38
- iii. 2 years gratuity (16 days x 2yrs x 504.25).....Kshs. 16,136.00
- iv. Underpayment of wages (Legal Notice No. 98 of 2010)
- v.  $(504.25 \times 26 = \text{Kshs. } 13,110.50 - (334 \times 26) = 8,700.00 \times 6 \text{ months})$ .....Kshs. 52,920.00

**TOTAL**

**Kshs. 115, 194.88/=**

**Less** **Kshs. 25,700/=**

**Paid** **Kshs. 89,494.88/=**

- b) Compensation for unfair termination  $(15,127.50 \times 12) = \text{Kshs. } 181,530/=$**
- c) Interest in (a) and (b) above at court rates until payment in full**
- d) Costs of the suit**
- e) Any other relief that this Honourable court deems fit and just to grant**

7. He pleaded that the said termination was unfair, wrongful and unlawful. He cited the following particulars:

- i. The Respondent had never issued any written warning to the claimant.**
- ii. The Claimant had never been a subject of any disciplinary action by the Respondent.**
- iii. The requirements of section 41 of the Employment Act, 2007 were not complied with, in any event.**
- iv. There was no fair procedure in the termination of the employment.**
- v. There was no notice issued to the claimant.**

8. It was the appellant's case that the respondent employed him sometime in August, 2008 until June 2011 when his employment was terminated. However, he was never issued with an employment contract; that he was employed as a plumber on a daily wage of Kshs. 250.00, which was later increased to Kshs. 356.00 upon confirmation; that when he started working for the respondent he was stationed in a building site along Mogotio Road in Westlands area; that at the time of his termination he was working under the supervision of one Mr. Christopher, who was the foreman in charge, at the respondent's site at Galleria Mall, in Karen area.

9. He deposed that he had worked for the respondent for a period of more than five (5) months as a casual labourer and therefore, by dint of **Section 37(1)** of the Act, he was deemed an employee on regular terms and was owed the amount in his statement of claim as tabulated above.

10. In opposition, the respondent filed a statement of defence, denying the appellant's claim in its entirety, and further raised a counter claim seeking a refund of Kshs. 25,700.00, which it had paid to the appellant as full and final settlement, with interest and Kshs. 6,480.00 being one month's salary in lieu of notice.

11. In submissions filed on behalf of the respondent, learned counsel posited that the appellant was employed as a casual labourer on a daily wage of Kshs. 270.00 and that his duties involved digging of trenches. Further, that he was employed in the said position from 25th September, 2010 until 11th March, 2011 when his services were terminated after he absconded duty without any reason and/or notice and returned after two weeks. In addition, that the appellant was never confirmed in his employment and had always worked as a casual labourer.

12. It was the respondent's case that on the material day the appellant was absent from duty without reason and/or notice. That according to the respondent's daily work records as kept by the accountant for purposes of payment of casual labourers, the appellant's details did not appear in the standard worksheets as from 11th March, 2011 and that this was a clear indicator that he was absent from work and/or absconded duty.

13. It was also the respondent's case that the appellant did not fill any leave form requesting for compassionate leave to attend his mother's burial nor is there any record showing that he requested for the said leave to be extended to enable him attend his sister's subsequent burial. In addition, that when he finally returned to his place of work sometime in April he found that he had been replaced but was offered a

reallocation to the respondent's site at KPLC, Runda, which he declined and failed to report on duty without giving reasons. That the only communication from the appellant thereafter was a letter from the District Labour Officer citing the appellant's complaint for alleged unfair/unlawful termination. Also, the respondent denied sending away the appellant when he reported to work. Further, the alleged termination could only have been executed by the Managing Director, who had not interacted with the appellant at any point.

14. Further, that it paid on without prejudice basis, a sum of Kshs. 25,700.00 in full and final settlement of the appellant's terminal dues following the intervention of the District Labour Office. However, it was the respondent's case that the appellant was not entitled to any amount whatsoever owing to the fact that he had worked for the respondent for only six (6) months and that it was evident he had absconded duty contrary to his allegations of unlawful/unfair termination; that the Kshs. 25,700.00 paid to the appellant was unjust as the respondent did not owe the appellant and the same ought to be refunded.

15. In summary, the respondent prayed that the suit be dismissed; an order that the sum of Kshs. 25,700.00 paid to the appellant be refunded; the appellant be ordered to pay the sum of Kshs. 6,480.00 being one month's salary in lieu of notice and costs of the suit plus interest.

16. From the preceding facts and evidence before her, the learned Judge identified the issues for determination to be: the purported unlawful, wrongful and unfair termination of the appellant's employment and the non-payment of his terminal dues.

17. The learned Judge found that from the evidence adduced before court, the appellant's employment was between 25th September, 2010 and 11th March, 2011 as a general labourer who commenced work as a casual employee and by dint of **Section 37** of the Act, his employment became full time employment. The Judge further found that the appellant's evidence as to the events leading to his termination were hazy. That against the respondent's evidence the only inference that could be drawn is that it was not clear where the appellant was between 11th March, 2011 and September, 2011 when he was absent from work and that he had absconded duty.

18. The learned Judge also held that despite the fact that the appellant was deemed an employee on regular terms, and that he was not issued with a written contract, the law could only protect him to a certain extent. That since he had been absent from work for a period of five (5) months without notice, his claim for notice pay or compensation was not justified.

19. The learned Judge held that since the appellant was deemed an employee on regular basis, he was entitled to full pay for the three months out of about five months that he had worked for the respondent in accordance with **Section 37** of the Act. However, the underpayment claimed was not justifiable since he was a general labourer. That under the wage guidelines he was entitled to a daily rate of Kshs. 416.00 as opposed to the Kshs. 356.00 that he was being paid hence all that was due was the difference, which in a duration of three (3) months amounted to Kshs. 5,400.00. As to the claim for gratuity, the learned Judge found that it was not justified as the appellant had served for less than one year. On the claim for leave for two years, the learned Judge found it unjustified, as the appellant had been absent from work for an unreasonable period without notice.

20. On the respondent's counter-claim, the learned Judge found that the amount of Kshs. 25,700.00 paid to the appellant as full and final settlement was not justified as the terminal dues prayed for were not supported by evidence and the said amount ought to be refunded to the respondent. Ultimately, she held that;

**“In conclusion therefore, the claim is dismissed save for that the Claimant is held entitled to Kshs. 5,400.00 in underpayment. Judgment is entered for the Respondent for the refund of Kshs. 25,700.00. What is due to the Respondent shall be less the stated underpayment. Each party shall bear their own costs.”**

21. Aggrieved by the aforementioned findings, the appellant proffered the instant appeal founded on 7 grounds which can be condensed that; the learned Judge erred in fact and in law by: failing to consider what she ought to have considered hence arriving at erroneous findings as to the appellant's terms of employment; finding that the appellant had absconded duty and that his termination was not unfair/unlawful and; failing to consider the findings of the District Labour Office.

22. Parties filed written submissions and lists of authorities. When the matter came up for plenary hearing, the parties were represented by learned counsel; Mr. Angaya who held brief for Mr. Oluoch for the appellant, while Mr. Kanyankore held brief for Mr. Mbugua for the respondent. Both counsel informed the Court that they would rely on the written submissions and lists of authorities and did not need to highlight.

23. In his submissions, counsel for the appellant faulted the learned Judge for failing to consider relevant material and also considering extraneous matters hence arriving at a misapprehension as to the terms of employment of the appellant and denying the appellant reliefs as prayed for. For instance, counsel contended that the learned Judge failed to consider evidence adduced to the effect that the appellant had been employed by the respondent since 2008 despite such evidence being corroborated by the evidence of DW3, one Christopher Mubea, who testified that the appellant undertook plumbing works at the respondent's site at Mogotio Road, Westlands area in the year 2008.

24. Relying on the cases of **Shanga Kitsao Mumba V. Mabati Rolling Mills (2017) eKLR** and **Francis Maina Kamau v. Lee Construction (2014) eKLR**. counsel argued that it was also clear from the correspondence between the District Labour Office and the respondent that the appellant had been the respondent's employee between sometime in 2008 until June 2011. That such contents of the correspondence were not disapproved by the respondent yet the respondent intentionally failed to produce the appellant's records for the said period. Further, that the trial court failed to appreciate that it was the respondent's duty to keep the employment records of the appellant.

25. Counsel further faulted the learned Judge for finding that the appellant had absconded duty and that his termination was lawful. He urged that it was clear from the proceedings that the appellant had requested for leave to attend his mother's burial and that such leave was approved and extended by the respondent's foreman in charge. Further, that such evidence was not rebutted by the respondent, in fact that such evidence was affirmed by the respondent's witnesses when they testified to the effect that the site supervisor and foreman were in charge of the appellant and had the right to terminate or grant leave to the appellant.

26. Citing the case of **Musembi Kithoe V. Twin River Estate Limited (2013) eKLR** he argued that the appellant was terminated verbally prior to which, he was never issued with a warning letter in regard to the allegations of absconding work. Further, that it is evident from the record that the appellant was never subjected to any disciplinary procedure or given an opportunity to defend himself against the allegations.

27. Thirdly, counsel contended that the learned Judge erred in denying the appellant payment in lieu of notice, compensation for unpaid leave accrued, underpayments and gratuity despite the same having been determined by the Labour Officer and found to be justified. In sum he urged the Court to find the appeal meritorious and allow it hence granting orders as prayed.

28. Opposing the appeal, counsel for the respondent submitted that the Employment Act provided for both written and oral contracts. That despite the fact that **Section 9** of the said Act provides that a contract of service for a period exceeding three months shall be in writing, the absence of one does not negate the presumption of the existence of a contract.

29. Placing reliance on the case of **Francis Maina Kamau V. Lee Construction (2014) eKLR** and **Section 10(7)** of the Act, counsel posited that the law provides that in the absence of a written contract, the burden of proving the terms of employment were on the employer.

That the respondent adduced evidence before the court, being weekly work sheet forms which are standard forms that were finger printed by the appellant which proved the length of the appellants employment, hence satisfying the standard and legal burden of proof required. In view of the forgoing counsel urged that the appeal lacked merit and ought to be dismissed.

30. This being a first appeal, we are enjoined to re-evaluate the evidence we have summarized above and arrive at our own decision one way or another. See **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212**, with a caveat however that we did not see or hear the witnesses as they testified. See also **Seascope Ltd V Development Finance Company of Kenya Ltd (2009) KLR 384**.

31. Having considered the record in light of this Court's mandate as set out above, the rival submissions and principles of law relied upon by the parties in support of their opposing positions, we discern the issues that fall for our consideration as follows:

**i. Whether the appellant was unlawfully terminated and whether he is entitled to the remedies sought.**

**ii. Whether the trial judge was bound by the findings of the District Labour Office.**

32. On the first issue, it is paramount that this Court examines the applicable law. The Employment Act, 2007, places a heavy burden on employers in instances of summary dismissal and unfair termination for breach of an employment contract. Under **Section 43** of the Act, an employer must prove the reasons for termination/dismissal; **Section 45** provides that the employer must prove that the reasons are valid and fair and; **Section 47 (5)** provides that 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.

33. In the event that it is established that an employee is terminated on grounds of misconduct, the Employment Act under **Section 41** provides that such employee is to be notified of the particulars of such misconduct in a language that he/she understands and that they are accorded a fair hearing to show cause why disciplinary measures should not be taken against them.

34. It is evident that in the instant case, the appellant alleges that he was unfairly/unlawfully terminated. In determining the appellant's case this Court must bear in mind the provisions of **Section 47(5)**. The appellant's case was that he was away with permission which he said he had been given by his supervisor, who also extended the same following his sister's alleged death. The appellant was nonetheless not able to satisfy the trial court that either his mother or sister had died and that he had attended their burials. Nor was he able to establish the exact days he had travelled or the days he claimed he had worked.

35. On the other hand, the respondent had availed to court all the attendance daily sheets duly signed by the appellant from the records placed before the court; the appellant could not establish a gap of over 5 months. The trial court found, and correctly in our view, that the appellant had absconded from work for at least 5 months. He was not therefore unfairly terminated as he claimed and so most of the reliefs he sought were not available to him.

36. On the second issue, the appellant challenges the trial Judge's decision on grounds that she did not take the conciliator's investigation, analysis and recommendations into consideration. The position in law is that whereas it is commendable for the trial court to take the conciliator's findings into account, this is not mandatory. The court can, for sound reasons to be given in the ruling, which the learned trial Judge did in this case depart from such findings. See **Kenya Union Of Commercial, Food, and Allied Workers (Kucfaw) V. Mombasa Water Supply & Sanitation Company & another (2015) eKLR**.

37. The appellant faulted the learned Judge for finding the duration of his employment was between 25th September, 2010 and 11th March, 2011 and not between August 2008 and June 2011 as found by the conciliator as cited in the correspondence between the conciliator and the respondent. A careful perusal of the correspondence indicates that upon the appellant filing a complaint with the labour office, the conciliator wrote to the respondent requesting for copies of all necessary documents in the respondent's possession pertaining to the appellant's employment. It is also evident that the conciliator wrote to the respondent demanding certain amounts being what the appellant was entitled to and later wrote a demand letter citing unlawful termination of the appellant and calculations of the amount, which the appellant was entitled to. It is evident that the respondent refuted the allegations as leveled against it by the conciliator and in turn provided documentary evidence challenging the appellant's terms of employment as alleged by the conciliator. Additionally, the report containing the investigation and recommendations of the conciliator does not appear on record.

38. On the issue of the appellant's terms of service the learned Judge in her decision held that: the respondent shared documents supporting its position as to the appellant's term of service which indicated a period between 25th September, 2010 and 11th March, 2011; that in the

event that the Labour Officer could not ascertain the appellant's term of service contrary to the respondent's argument, the burden is upon the appellant to prove and confirm the correct terms. The learned Judge in light of this stated that, **"In the absence of any such confirmation, the records made available to the Court indicate employment as running from 25th September 2010 and 11th March 2011."**

39. It is evident that the learned Judge did not depart from the findings of the conciliator without justifiable reason. Since neither the conciliator nor the appellant was clear as to the appellant's term of service it was only prudent for the learned Judge to rely on the evidence on record. We hold that in departing from the conciliator's findings, the court strictly relied on the evidence before it and arrived at the appropriate conclusion. The learned Judge cannot therefore be faulted on that issue.

40. In all, we find no basis whatsoever for interfering with the learned Judge's findings. We find the appeal devoid of merit and dismiss it with no order as to costs on account of the appellant's impecunious status.

**Dated and delivered at Nairobi this 24th day of January, 2020.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**