



IN THE COURT OF APPEAL

AT MOMBASA

(CORUM: VISRAM, KOOME & MURGOR, JJA)

CIVIL APPEAL NO. 50 OF 2018

BETWEEN

SYLAS OTHIAMBO MANDI.....APPELLANT

AND

COASTAL BOTTLERS LIMITED.....RESPONDENT

(An appeal from the judgment and order of the Employment and Labour Relations Court at Mombasa (O. Makau J.), dated 2nd December, 2016

in

(E & LRC No. 345 of 2014)

JUDGMENT OF THE COURT

1. **Silas Othiambo Mandi** (appellant), was employed by **Coastal Bottlers Ltd** (respondent) for a period of nine (9) years but the contract of employment was terminated on 30th September, 2008 upon its coming to an end. The appellant however contends that despite the termination, he continued working for the respondent until September, 2011 when he was turned away from his place of work. Up until the time when the said services were terminated, the appellant was earning a gross salary of Ksh 7,318 per month.

2. Upon the said termination in September, 2011 the appellant filed suit claiming Ksh 1,437,320 made up of service pay, leave allowances, three months' salary in lieu of notice and overtime worked from 2002 to 30th September, 2011 when his employment was terminated without notice by the respondent. The appellant contended that despite the letter advising the Human Resource department to stop his salaries he continued working and was being paid which was tantamount to a new contractual relationship.

3. The appellant's claim was resisted by the respondent; although it was admitted that the respondent was employed on a fixed contract from 1st March, 2002 which was regularly renewed with the last one lapsing on 30th September, 2008 when it was terminated. The appellant was paid all his dues; the service pay was not paid because the appellant was a member and contributed to the NSSF. During cross examination the appellant admitted that he was served with a letter of termination of the contract of employment on 23rd September, 2008, he nonetheless went on to claim that after the said termination he went on working for the respondent until 30th September, 2011 when he reported on duty but was turned away at the gate.

4. Upon weighing the evidence that was adduced by the appellant and the respondent's human resource manager, the learned trial Judge was not persuaded the appellant had proven his case on a balance of probability. In particular, the Judge found the appellant was served with a notice of termination on 30th September, 2008 upon the contract coming to an end and he was duly paid all his dues in his bank account. On the other hand, the Judge was satisfied that the respondent proved that the appellants' employment ended on 30th September, 2008 after the respondent failed to further renew the fixed term of contract and there was no evidence by the appellant to support his claim that he continued working until 30th September, 2011. In conclusion, the Judge made the following observations:-

“Under section 90 of the Employment Act a claim founded in the Act or contract of employment is time barred unless it is commenced within 3 years next after the cause of action arose. In this case the dues sought accrued on 30th September, 2008 when the claimant's services (sic) at the respondent. From then to 28th July, 2014 when the suit was filed is over 5 years. Consequently, I agree with the defence that the claim herein is statute barred”

5. As a consequence, the appellant's suit was dismissed with no order as to costs thereby provoking the instant appeal that is predicated on some 5 grounds of appeal to wit; that the learned Judge erred in law and fact by; finding the appellant's employment ended on 30th September, 2008; by disregarding the appellant's evidence of engagement upto and until 30th September, 2011; by shifting the burden of proof on the appellant while disregarding the provisions of the Employment Act and the skewed relations between the parties; by finding the claim was statute barred and failing to determine whether the appellant's termination was lawful and procedural. The respondent also filed a cross appeal clamouring to be awarded costs which in any event follow the event.

6. When this appeal came up for plenary hearing, **Mr Mutugi**, learned counsel holding brief for **Mr Mkomba** appeared for the appellant. Counsel relied on the written submissions and made no oral highlights. In the submissions, counsel for the appellant faulted the trial Judge for placing a burden of calling the respondent's employees as witnesses of the appellant which was unreasonable and oppressive burden to place on a litigant in a labour dispute as these were witnesses who would jeopardize their employment opportunities with respondent as there was no gain to themselves. Moreover, the appellant gave evidence of how he used to go to work even after he received the letter bringing his contract to an end. The appellant used to indicate his attendance on a manual register kept at the gate until 30th September, 2011 when he was denied access to the premises by the respondent's officers. According to counsel for the appellant, under **Section 109** of the Evidence Act, it was the respondent who was enjoined to call further evidence to prove that termination occurred in 2008 and that the appellant did not continue working even after the lapse of the contract. It was the burden of the employer to justify any termination of employment and in this case the burden was upon the respondent and not vice versa. In this regard counsel cited the case of **Kenfright (E.A) Limited v Benson K. Nguti [2016] e KLR**.

7. Counsel for the appellant further faulted the trial Judge for holding that the assessment form dated 15th December, 2008 that was produced by the appellant in support of his claim that he worked beyond his termination was not authentic. This was despite the fact that the form was executed by an officer of the respondent which evidence was unrebutted. Counsel made extensive reference to the provisions of **Section 9** of the **Employment Act** which defines a contract of service; that it must be in writing. Moreover, in this case there were no written contracts from 2004. Besides, there was no evidence of a termination letter except a letter advising the human resources to stop the appellant's salary and to pay his terminal dues. Counsel for the appellant went on to submit that the issue of wrongful termination ran concurrently with the issue of time-bar and since the respondent did not prove as obligated under **Section 43** of the **Employment Act** that the termination was lawful, the issue of statutory limitation did not arise.

8. Opposing the appeal was **Mr. Noorani** who in addition to the written submissions made some oral highlights. He started by pointing out that when the claim was filed, the appellant did not seek a prayer for damages for unlawful termination; on the allegation that there was a shift of the burden of prove, counsel stated that it was the appellant who bore the burden of first establishing that there was unlawful termination, that would have then shifted the burden to the respondent to prove that the termination was lawful. The respondent produced the entire payroll up to November, 2011 to demonstrate that the appellant was not an employee beyond 30th November, 2008. On cross appeal on costs counsel cited the provisions of **Section 12 (4)** of the **Employment Act** which provides that the court may make such orders as to cost as it considers just. Counsel urged us to dismiss the appeal and allow the cross- appeal.

9. We have given careful consideration to the record of appeal and deliberated on the submissions of counsel in the manner of a retrial, as we must on a first appeal under **Rule 29 (1) (a)** of the Rules of this Court this being a first appeal. We must, of course, defer to the findings of fact made by the trial court, especially where they are based on the credibility of witnesses because that court had the added advantage of hearing and seeing the witnesses. Nevertheless, we are entitled to interfere with those findings if they are based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings. See **Mwangi vs Wambugu [1984] KLR page 453** where it was also stated:

"An appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

10. That said, the issue for determination is whether the Judge erred by holding that the appellant failed to prove that he worked for the respondent up to 30th September, 2011 and whether by filing a claim in July 2014 the same was time barred. We also have to determine the issue of costs raised in the cross- appeal by the respondent. It was common ground that the appellant was employed by the respondent pursuant to a contract that was regularly renewed up until 30th September, 2008 when a letter was issued to the human resources and the accountant to remove the appellant from the payroll. The appellant was paid his dues being salary, 143 leave days, 11 days salary in lieu of notice, overtime, and 6 years severance pay which was paid through his bank account. That factual information does not seem to be contested.

11. What was in dispute, however, was whether the appellant continued to work after the lapse of the fixed contract, until 30th September, 2011 when he claimed his extended services were terminated unfairly/unlawfully which is the basis for a claim of overtime worked, service pay, leave allowance, three months' salary in lieu of notice and compensation for unlawful termination. In support of this claim, the appellant maintained that he continued working after the fixed term contract lapsed by signing an attendance register which was completed manually. This is what the appellant stated while testifying before the trial court in his own words;

"After the lapse of the contract for the mechanic I continued with work without a written contract. I used to work up to 4pm and thereafter it was overtime. If I worked on my off days, public holidays I earned double overtime. I have filed (sic) forms which we used to fill at the end of the month depending on the clock in time at the gate. The forms were kept by the watchman at the gate and after filing (sic) I retained one copy and the other copy went to the head office for payment of my overtime. Without pay slips one cannot tell whether I was paid for all my overtime. On 30th September, 2011, I attended work as usual but I was stopped at the gate by the watchman at the gate who told me that I was barred entry until further notice. I asked the supervisor Gideon about the matter and he confirmed..."

11. The above evidence was contrasted with that of the respondent's human resource manager who disowned the overtime forms produced

by the appellant as evidence to support the fact that he continued working beyond the fixed term contract when he stated as follows:-

“I see the overtime forms filed (sic) by the claimant. The forms are genuine forms but the information there is not. The procedure is that the employee fills the forms and gives HOD to check and signs and then forward the same to HRM to approve and forward for payment. The forms herein were never signed by any officer of the respondent.”

The learned trial Judge disbelieved the evidence by the appellant and especially the authenticity of the documents that he relied on and further his failure to call any witness to support his contention that he continued working beyond the contractual period. On the other hand the Judge believed the respondent and accepted the payroll that was adduced in evidence to show the appellant did not continue as an employee beyond September, 2008.

12. On our part, we are unable to fault the Judge because the burden of proving that an unfair termination of employment or wrongful dismissal has occurred is upon the employee, while it is the responsibility of the employer to demonstrate the existence of justifiable ground(s) for termination. In other words, the evidential burden was borne by the appellant to establish that his employment was unlawfully terminated and only then would the burden shift to the respondent to establish that the termination was not unlawful. Additionally, according to the **Evidence Act**, he who alleges must prove and in particular **Section 107** is explicit that the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he depends upon existed. This is known as the legal burden which is succinctly described in a leading Text book *Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14*: as thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied.”
(Emphasis added)

In this case, the Judge was not persuaded that the overtime forms produced by the appellant were genuine. This, tied with the fact that the appellant did not call any other evidence to show that he continued working disadvantaged his case. While on the part of the respondent, they produced the payroll from September 2008 to August 2011 which did not show that the appellant continued in employment.

13. On the finding that the claim was time barred, the Judge relied on the provisions of **Section 90** of the **Employment Act** which stipulates that no civil action or proceedings based or arising out of the 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 of in the case of continuing injury or damage within twelve months next after the cessation thereof. The evidence that passed the test was that the contract of employment was terminated in September, 2008 whereupon the appellant was paid all his dues through his bank account. It is also significant that the claim was specific and none of the claims was on a continuing injury which could be filed after 3 years. We note that this claim was filed nearly 5 years later in July, 2014 which as the Judge rightly held was outside the period provided in the statute as the claim emanated from a contract of service. For the aforesaid reasons, we find no merit in all the grounds of appeal which must of necessity fail.

14. The respondent filed a cross-appeal on one issue of costs. It is trite that awarding of costs in employment and labour matters is an exercise of discretion by the Judge pursuant to the provisions of **Section 12 (4)** of the Employment and Labour Relations Court (ELRC) which provides:-

“In proceedings under this Act, the court may, subject to the rules, make such orders as to costs as the court considers just.”

Generally, judgments coming from the ELRC have eschewed from awarding costs which can be attributed to the underlying principle under **Rule 29** of the **Employment and Labour Relations Court (Procedure) Rules, 2016** which provides as follows:

“1) The Court shall be guided by section 12(4) of the Employment and Labour Relations Court Act and the Advocates (Remuneration) Order in awarding costs.

2) The Court may order reasonable reimbursements of money spent by litigants in the course of litigation.

3) Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the Court orders that the amount claimed or part of the amount be paid to the claimant, it may, in addition to that order, direct that interest be paid on the liquidated amount awarded at Court rates.”

15. The above, entreats a Judge to be reasonable and to award costs that are just. A practice that is generally informed by the uneven power relations between the employee and the employer and the desire not to set the parties against each other after employment. What is more fundamental is that determination of costs is left to the discretion of the Judge. Counsel for the appellant was emphatic that an award of costs would deter the influx of unmeritorious claims which we agree with, but are of the view it was a matter that ought to have been argued before the Judge. We have considered this matter along the above parameters and are of the view that although the Judge should have given reasons for declining to award costs, awarding of costs in ELRC matters is matter of an exercise of discretion. We are therefore reluctant to interfere, more so bearing in mind this employer-employee relationship should come to an end. We therefore disallow the cross appeal on costs.

16. In the upshot, both the appeal and the cross appeal are dismissed and each party is ordered to bear their own costs of the appeal and before the ELRC.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR