Peho v Diani Reef Beach Resort & SPA (Appeal E132 of 2024)
[2025] KEELRC 384 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 384 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E132 OF 2024

M MBARŨ, J

FEBRUARY 13, 2025

BETWEEN

HAMISI CHOYA PEHO ..... APPELLANT

AND

DIANI REEF BEACH RESORT & SPA ..... RESPONDENT

(Being appeal from the judgment of Hon. L. T. Lewa delivered in Kwale CMELRC No.E007 of 2022 on 24 May 2024)

JUDGMENT

1. This is an appeal from the judgment delivered on 24 May 2024 in Kwale CMELRC E007 of 2022. The appellant seeks that the judgment be set aside and orders issued to allow his claim.

2. The background of the appeal is a claim filed by the appellant before the trial court on the basis that he was employed by the respondent on 30 October 2018 as an animator grade 5, earning ksh.24 817 and a house allowance of Ksh.9, 356 per month. On 30 March 2020, the respondent informed the appellant and other employees that it would be closing down due to the COVID-19 pandemic, but this was done unprofessionally without notice or payment of terminal due, resulting in unfair termination of employment. Due to emotional distress caused by the termination of employment, the appellant continued reporting to work in April 2020 with the hope that his wage arrears would be paid. The appellant claimed that the procedures applied to terminate employment were contrary to the law and claimed the following dues;

3.

    a. Salary for March 2020 Ksh.12,435.50;

    b. House allowance for March 2020 Ksh.4,678;

    c. Remainder of the contract term of April 2020 Ksh.24,817;

d. House allowance for April 2020 Ksh.9,356;

e. Notice pay Ksh.24,817;

f. Severance pay Ksh.12,408.50;

g. 12 months compensation Ksh.297,804;

h. Certificate of service;

i. Costs of the suit.

4. The respondent filed a response and admitted that the appellant was employed on a fixed-term contract dated 30 October 2018, which expired on 31 January 2019. Due to the seasonal nature of the hotel industry, the appellant was contracted under a fixed-term contract, which expired on 30 April 2020. The appellant was sent on unpaid leave with other employees following the outbreak of COVID-19 on 15 March 2020, 25 March 2020, and 6 April 2020 to protect and curb the spread of the virus. On 23 March 2020, there was a joint meeting between COTU, Kenya Association of Hotels and Caterers, KUDHEIHA, and the hospitality sector to look for ways to address the pandemic. It was agreed that there was a need to protect employees and employers. The government issued directives on travel social distancing and the closure of hotels. On 25 March 2020, the respondent was forced to close operations, and on 6 April 2020, further directions were issued to enhance measures put in place by the government. There was an immediate cessation of movement by road, air, and sea. The respondent's business was purely in hospitality, and residents in Kwale were zoned off for quarantine due to the pandemic. There was an indefinite shutdown of the business. Employees were sent on unpaid leave, including the appellant, who was a member of KUDHEIHA, and part of the government initiated an agreement to close operations to curb the spread of the pandemic.

5. The response was also that the respondent prepared a draft tabulation to the union, KUDHEIHA, of which parties were in the process of reconciliation when the claim was filed in court. The appellant donated his powers to his trade union, KUDHEIHA, to negotiate with the respondent as the employer. Based on ongoing negotiations, payments due shall be agreed upon, considering that the employment contract was due to expire on 30 April 2020. There is a Recognition Agreement between the respondent and KUDHEIHA, and the appellant is a union member. The claims made are an abuse of the court process.

6. The learned magistrate delivered judgment on 24 May 2024, holding there was no unfair termination of employment as alleged and dismissed the claim with costs to the respondent, save for the award of a Certificate of Service.

7. Aggrieved by the judgment, the appellant filed this appeal on the basis that the findings by the trial court that there was no unfair termination of employment were in error and the termination of employment could not be categorized as a redundancy under Section 40 of the *Employment Act*. The finding that the appellant failed to prove his claim of redundancy whilst it was clear that the employment contract did not make provisions on force majeure was in error. The court failed to consider that section 10(5) of the *Employment Act* only permits changes to the employment contract upon consultations with the employee. Hence, the salary due under the fixed-term contract that was to run from 1 February to 30 April 2020 was not served in full, and the due benefits should have been awarded with costs.

Parties addressed the appeal through written submissions.

8. The appellant submitted that his employment under a fixed-term contract was terminated prematurely on 8 April 2020 instead of 30 April 2020 without payment of his terminal dues. The response that this was due to the pandemic did not stop the respondent from tabulating terminal dues. The argument is that the respondent negotiated with the claimant's trade union, KUDHEIHA, but no dues have since been paid.

9. The appellant was not the only one affected by the respondent's termination of employment. Similar suits were filed by affected employees in Mombasa MCELRC/E109 of 2023—David Mulai & Others v Diani Reef Beach Resort & Spa.

10. In this case, the trial court failed to address the principles of law and arrived at a wrong finding in dismissing the appellant's claim. The appeal should be allowed with costs.

11. The respondent submitted that the appellant was a member of the trade union KUDHEIHA. Upon the appellant's stoppage of employment due to the pandemic, following government directions to close hotels to curb the spread, the respondent and union agreed to negotiate the payment of terminal dues. This was not a redundancy. None was declared or notice issued as defined in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR.

12. Before the trial court, the respondent called evidence that the government issued directives for closure and cessation of movements in April 2020. A curfew was declared, affecting the respondent area and business. The appellant's employment contract ended on 30 April 2020, and with his union, there were negotiations to pay his terminal dues. His case cannot be defined as a redundancy since it had a clear start and end date, and his claims are not justified, as held in Transparency International – Kenya v Omondi [2023] eKLR. The respondent also relied on the case of Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho [2017] eKLR.

Determination

13. This is a first appeal. The court is required to reevaluate and reconsider the evidence on record, allowing room for the lack of an opportunity to see and hear the witnesses firsthand and draw conclusions and inferences.

14. The duty of a first appellate court was established by the Court of Appeal in Selle v Associated Motor Boat Company Ltd [1968] E.A 123 in the following terms:

> 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 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 necessarily bound to follow the trial judge's findings of fact if it appears either that he has failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

15. The issues which emerge for determination are whether the findings that there was no unlawful and unfair termination of employment were justified and whether the remedies sought by the appellant should be allowed.

16. However, an issue of jurisdiction that ought to have been addressed was omitted. Neither party raised it. As a court of record, this must be addressed first.

17. The appellant opted to file his case before the lower court. It is not in dispute that he was unionized under KUDHEIHA during his employment with the respondent. His payment statement, pleadings, and evidence testify to this fact. His employment relations with the respondent were regulated under his employment contract, under which there existed a Recognition Agreement with the union, KUDHEIHA.

18. In donating jurisdiction to hear employment claims to the magistrate's courts, the Chief Justice in Legal Notice No.6024 of 10 June 2018 singled out labour relations as being outside the jurisdiction of such court.

19. A labour relations dispute is defined under the *Labour Relations Act* (LRA) as a dispute regulated under such statute. Under Section 62 of the LRA, a trade union is required to report a dispute to the Minister to allow for negotiations before filing suit with the court. Employee unionization secures their rights on the shop floor and allows the mechanisms addressed under the LRA to come to fruition.

20. Hence, for any dispute that is not resolved on the shop floor, the court with original jurisdiction to address it is the court, not the magistrate's court.

21. To move as the appellant did and file his case with the magistrate's court was to attend the wrong forum without jurisdiction. A court not clothed with the requisite jurisdiction has no legal or constitutional basis to proceed. It must down its tools as held in In re Estate of Seif Abdallah Mohamed (Deceased [2024] KECA 1826 (KLR) and the case of Kenya National Examination Council v Republic; Teachers Service Commission (Interested Party) [2024] KECA 1180 (KLR) that Jurisdiction is everything and without it, a court is obliged to down its tools and cease from acting, for any decision arising therefrom amounts to a nullity.

22. Under Legal Notice No.6024 of 10 June 2018, the magistrate's courts are only allowed to hear employment disputes, not labour relations disputes. The Chief Justice clearly defines such mandates in the published notice.

23. To this extent, the trial court lacked the requisite jurisdiction to hear and determine a claim based on labour relations and the fact that the appellant was unionized under KUDHEIHA. The ongoing negotiations between the respondent and KUDHIHA on his behalf were lawful and legitimate. If the appellant felt that his union was not addressing his needs and demands appropriately, recourse was not to urge his case without resignation from his union to free himself from the mandate he had donated to his trade union by joining and agreeing to be bound by the recognition upon which KUDHIHA was engaging the respondent as the employer.

24. The claim by the appellant before the trial court ought to have been struck out.

25. Whether or not there was a proper redundancy, the appellant was bound under a fixed-term contract. He did not end his contract due to events leading to the closure of business operations due to the pandemic. This is admitted by the respondent. Out of it, his union, KUDHEIHA, engaged the respondent proactively to have his terminal dues paid. He opted to file suit before the engagements and negotiations could be completed.

The claims made are premature.

26. The appeal seeking that the various awards be allowed is not justified. The suit before the trial court should have been struck out instantly to avoid wasting time. The basis of the appeal is lost and is hereby dismissed with costs to the respondent.

    Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF FEBRUARY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet