Onyango v Bukuria Schools Limited (Appeal E077 of 2024)
[2025] KEELRC 1049 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1049 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E077 OF 2024

JK GAKERI, J

APRIL 3, 2025

BETWEEN

RICHARD ODONGO ONYANGO ..... APPELLANT

AND

BUKURIA SCHOOLS LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment of Hon. Moses Obiero SPM delivered on 30th April, 2024 at Kehancha in PMERLC No. E001 of 2023 Richard Onyango Odongo V Bukuria Schools Ltd.

2. The brief facts of the case are that the appellant was engaged by the respondent by word of mouth effective 1st April, 2022 as an Executive Manager of the School owned by one David Chacha Mathews, at Kshs.25,000 per month and was paid from April to November 2022 and dismissed in early January 2023 when he requested for the salary for December 2022 and handed over all school documents. The appellant produced copies of payslips under the respondent's name in support of his case.

3. The respondent's statement of Defence dated 18th April, 2023 comprised 13 paragraphs of denials and the Respondent did not file a witness statement.

4. The appellant admitted that the copies of payslips on record did not have a stamp of the respondent.

5. The respondent admitted that the school used to pay the appellant Kshs.1,000 per day but had no record of the payments, contract of employment or any evidence to show the witness was the proprietor or director of the school.

6. Advocates for the parties submitted on whether there was an employment relationship between the appellant and the respondent and the reliefs prayed for.

7. While the advocate for the appellant contended that there was an employment relationship, the advocate for the respondent argued that there was no valid contract of employment or agreement between the parties and no reliefs could issue in the appellant's favour.

8. After consideration of the evidence on record and submissions by the advocates, the learned trial Magistrate found that although the appellant was an employee of the respondent, the contract between the appellant and the respondent was unenforceable in law because it was unwritten. He also found that the termination of employment was not unprocedural and no remedies could issue and dismissed the suit.

   This is the judgment appealed against.

9. The appellant faults the trial Magistrate's decision variously and the Memorandum of Appeal outlines 9 grounds.

10. The trial court is assailed for having erred in law and fact by:

    1. Dismissing the appellant's case in its entirety.

    2. Failing to exercise discretion judicially.

    3. Holding that the appellant's contract of employment was unenforceable without precedent.

    4. Finding that the appellant's employment was not terminated unprocedurally.

    5. Finding that the appellant made no attempt to have a written contract of service in total disregard of the evidence.

    6. Making the decision that the appellant was working for the respondent as a volunteer without supportive evidence.

    7. Finding that the appellant was not entitled to the reliefs sought.

    8. Failing to appreciate the mitigating factors in respect of the circumstances in which the appellant's employment was terminated.

    9. Failing to apply the correct law and thereby arriving at an erroneous conclusion not grounded on evidence or the law.

11. In sum, the appellant is challenging every aspect of the judgment of the trial court.

Appellant's submissions

12. As to whether the trial court erred in dismissing the suit in its entirety counsel for the appellant submitted that the general rule is that courts should determine cases on the issues that flow from the pleadings subject to the recognized exceptions.

13. The decisions in Ann Wairimu Wanjohi V James Wambiru Mukabi [2021] eKLR, Galaxy Paints Co. Ltd V Falcon Guards Ltd 2000 2EA 385 and Standard Chartered Bank Kenya Ltd V Intercom Services Ltd & 4 Others [2004] 2 KLR 183 were cited in support of the submission.

14. Reliance was also placed on the sentiments of the Court of Appeal in Selle and another V Associated Motor Boat Co. Ltd & Others [1968] EA 123 on the role of the court in a first appeal. Placing reliance on the provisions of Section 8 of the *Employment Act* on oral and written contracts and the sentiments of Radido J in Mark Mugavi Okani V Everlady Security Guards [2019] eKLR, counsel submitted that the appellants evidence of payslips from the respondent was sufficient evidence of remuneration

by the respondent which is an essential element of a contract of employment as held in Shashikant Chandubhai Patel V Oriental Commercial Bank Ltd [2014) eKLR.

15. Counsel further submitted that the decisions cited confirmed the position of the appellant as an employee and his termination from employment was not conducted in the manner contemplated by the provisions of the *Employment Act*.

16. Counsel prayed for the setting aside of the Judgment and Decree of the trial court.

The respondent did not file submissions.

17. This being a first appeal the obligation of the court is essentially that of re-trial as a aptly captured in Selle & Another V Associated Motor Boat & Others [1968] EA 123 as follows:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 conclusions though it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect."

18. The facts of the instant case are fairly straight forward and brief.

19. The appellant's allegation that he was employed by the respondent effective 1st April, 2022 was supported by the copies of payslips produced by the appellant. The respondent's allegation that the appellant forged them was not backed by any evidence and in any case the respondent filed neither a witness statement nor any document in defence of its case.

20. In addition, the respondent's witness admitted on cross-examination that he had not provided the appellant with a written contract of service.

21. It is trite law that whether a suit is defended or not the person alleging to have been an employee is required to demonstrate that fact.

22. In Kenya Union of Commercial Food & Allied Workers V Mwana Blacksmith Ltd [2013] eKLR the court stated;

> "An employment relationship has serious implications on the parties. The court must therefore be fully satisfied that it actually exists. A claimant claiming employment rights must prove the existence of an employment relationship".

23. See also Mary Mmbone Mbayi V Chandubhai Patel & another Industrial Cause No. 761 of 2011, Transport Workers Union V Euro Petroleum Products & Another [2019] eKLR, Casmir Nyankuru Nyaberi V Mwakikar Agencies Ltd [2016] eKLR and Obondo V Shunjun [2020] eKLR.

24. Significantly, the respondent's witness admitted on cross-examination that they used to pay the appellant Kshs.1,000 per day but did not explain for what purposes. This admission, coupled with the payslips availed by the appellant which bore the respondent's name, postal and email address which the respondent did not contest establish beyond peradventure that there was an employment relationship between the parties as held by the trial court.

25. However, the trial court fell into error by holding that the contract was unenforceable on the ground that it had not been reduced into writing as provided by Section 9 of the *Employment Act*.

26. Section 3(1) of the *Employment Act* provides:

1. This Act shall apply to all employees employed by any employer under a contract of service.

27. Equally, Section 2 of the *Employment Act* is clear that a contract of service is an agreement and may be oral or in writing, express or implied. This provision is further reinforced by the provisions of Section 8 of Act.

28. While it is true that Section 9(1) of the *Employment Act* requires all employment contracts for a period or number of working days amounting in the aggregate to three months or more to be in writing, there is nothing in the Act or indeed any other written or unwritten law to the effect that contracts of service of three months or more that have not been reduced into writing are unenforceable. Such a law would be inconsistent and incongruous with the provisions of Section 2 of the *Employment Act* and the intention of the legislature in enacting the *Employment Act*.

29. Similarly, it would tantamount to failing to appreciate the dynamics at the work place and most significantly it would occasion inconceivable injustices as it would have done in the instant case, but for this appeal.

30. The rationale for the foregoing is that it is trite law that the obligation to keep and maintain employment records is that of the employer.

31. The provisions of Section 74(1) of the *Employment Act* are unambiguous on the records the employer must keep.

32. In Casmir Nyankuru Nyaberi V Mwakikar Agencies Ltd (Supra) the court expressed itself as follows:

> "This court is well aware that it is the responsibility of an employer to document the employment relationship and in certain respects the burden of proving or disproving a term of employment shifts to the employer..."

33. Finally, Section 10(7) of the *Employment Act* is clear that

> If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

34. Having availed copies of payslips showing that his salary was Kshs.25,000 the respondent was bound to disprove that fact but failed to do so.

35. Clearly, the learned trial Magistrate fell into error by holding that the appellant failed to demonstrate that he made any attempts to have the employment relationship reduced into writing for the simple reason that it was not his duty to do so.

36. Similarly, the trial court fell into error by finding that because the contract of service between the parties had not been reduced into writing he became a mere volunteer and was not protected by the provisions of the *Employment Act*.

37. This finding was antithetical to the evidence on record on account that the appellant had demonstrated his duties and was being paid, evidence the respondent did not controvert.

38. The foregoing analysis disposes off grounds 1, 2, 3, 5 and 6 of the Memorandum of Appeal.

39. On termination of the employment relationship, the appellant testified that his employment was terminated in early January 2023, by word of mouth and it was by one Mr. David Chacha Mathews, the proprietor of the school and it was occasioned by the conversation about the unpaid December

salary since the appellant remained behind in December 2022 to engage casual workers to improve the facilities in readiness for the inaugural Junior High School, testimony the respondent did not controvert.

40. More significantly, even if the appellant had not been left behind, he was still in employment and the December 2022 salary was due and payable to him under Section 17 of the *Employment Act*.

41. Mr. David Chacha Mathews, the respondent's witness did not demonstrate how and when and why the parties separated.

42. The employer is statutorily required to prove the reason or reasons for terminating the employment of an employee. See the provisions of Section 43 and 47(5) of the *Employment Act*.

43. As held by Ndolo J in Walter Ogal Anuro V Teachers Service commission [2013] eKLR and the Court of Appeal in Naima Khamis V Oxford University Press (EA) Ltd [2017] eKLR, for a termination of employment to pass the fairness test, it must be proved that the employer had a substantive justification to do so and conducted the termination accordance with a fair procedure.

44. Section 45 of the *Employment Act* states:

    1. No employer shall terminate the employment of an employee unfairly.

    2. A termination of employment by an employer is unfair if the employer fails to prove——

        (a) that the reason for the termination is valid;

        (b) that the reason for the termination is a fair reason-

            (i) related to the employees conduct, capacity or compatibility; or

            (ii) based on the operational requirements of the employer; and

        (c) that the employment was terminated in accordance with a fair procedure.

45. Clearly, under the law, a termination of employment, if not fair, may be substantively and procedurally flawed or either substantively or procedurally flawed. In either of the three scenarios, the termination of employment is characterised as unfair within the meaning of Section 45 of the *Employment Act*.

46. In the instant case the termination of employment was substantively unjustifiable and procedurally unfair.

47. In this case and as adverted to elsewhere in this Judgment the respondent adduced no evidence to demonstrate how the parties separated to rebut the appellant's evidence that the termination was verbal when he requested for the December salary and was neither given a letter of termination nor certificate of service.

48. In the courts view, the manner in which the appellant's employment was terminated cannot be said to have been in accordance with justice and equity.

49. Contrary to the findings of the trial court, the fact that the contract between the appellant and the respondent had not been reduced into writing, could not in any manner or form affect or implicate its termination process as the two are different aspects of an employment relationship and analogous to the contract of employment itself, a termination of employment or separation may be oral or in writing and both are legally recognized approaches of terminating an employment relationship.

50. The foregoing disposes off grounds number 4 and 8 partly, of the Memorandum of Appeal.

51. In the court's considered view, the learned trial Magistrate misconstrued the evidence before him, misapplied the law and arrived at an erroneous decision which justifies the court's interferences with the findings of the court.

52. Having found that the termination of the appellant's employment was unfair and contrary to the finding of the trial court that the appellant was not entitled to any relief, the court proceeds as follows:

53. First, the appellant prayed for a declaration that the dismissal was unprocedural, unfair and unlawful and having found as above, the declaration is merited.

54. Second, the prayer for compensation is also merited by dint of Section 49 of the *Employment Act*.

55. The court has taken into account the fact that the appellant was an employee for about 9 months which is a relatively short time and did not appeal the decision or demonstrate his wish to remain in the respondent's employment. The court has further considered the fact that the appellant did not contribute the termination of employment and had not been paid for the month of December 2022.

56. In the circumstances, the court is satisfied that the equivalent of 2 months gross salary is fair compensation, Kshs,50,000.00.

57. Third, the prayer for the unpaid salary for December 2022 is also merited as the respondent did not deny it or avail evidence of having paid it, and it is awarded, Kshs.25,000.00.

58. Fourth, one month's salary in lieu of notice is also merited as no notice of termination was given by the respondent or salary in lieu of notice paid, and it is awarded, Kshs.25,000.00.

59. Fifth, prorated leave for 9 months Kshs.13,125.00 is also merited and is awarded. The respondent did not deny the same or avail evidence to prove that the appellant proceeded on leave; Kshs.13,125.00.

60. Sixth, on house allowance, the respondent adduced no evidence to prove that the salary paid to the appellant was inclusive of housing allowance.

61. Relatedly, the copies of payslips on record availed by the appellant reveal that the Kshs.25,000.00 was basic pay and house allowance was unpaid.

62. It requires no emphasis that housing or house allowance is a statutory right of the employee under Section 31 of the *Employment Act* and the appellant was entitled to it and it is accordingly awarded at 15% of the basic salary as held in Grain Pro Inc Ltd V Andrew Waithaka Kiragu [2019] eKLR, where the Court of Appeal held:

> ...To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent..."

63. The appellant is entitled to a house rent of 15% of Kshs.25,000.00 for 9 months Kshs.33,750.00

64. Seventh, service pay is payable to an employee under Section 35(5) of the *Employment Act* which provides:

65. An employee whose contract of service has been terminated under subsection 1(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

66. As the percentage payable to an employee has not been prescribed by law, courts have often used 15 days each completed year of service in reliance with the provisions of Section 40(1)(g) of the *Employment Act* which provides for severance pay at that rate.

67. See Wycliffe Juma Ilukol V Board of Management Father Okodul Secondary School [2022] eKLR.

68. The court is persuaded that the rate of 15 days salary for every year worked is reasonable and is awarded, Kshs.11,250.00.

69. Finally, the appellant prayed for a certificate of service and the same is awarded by dint of Section 51 of the *Employment Act*.

70. In conclusion, the Judgment of the trial court is set aside in its entirety and in its place, Judgment is entered for the appellant against the respondent in the following terms:

    a. Declaration that termination of the appellant's employment was unfair and unlawful.

    b. Equivalent of two (2) months gross salary compensation, Kshs.50,000.00

    c. Unpaid salary for December 2022, Kshs.25,000.00

    d. Salary in lieu of notice, Kshs.25,000.00

    e. Prorated leave, Kshs.13,125.00

    f. House allowance, Kshs.33,750.00

    g. Service pay, Kshs.11,250.00

       Total Kshs.158,125.00

    h. Certificate of service.

    i. 50% costs of the lower court.

    j. Costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD DAY OF APRIL, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.