



REPUBLIC OF KENYA



KENYA LAW
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Chauvel v Charo (Appeal E010 of 2023)
[2024] KEELRC 1488 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 1488 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E010 OF 2023
M MBARÚ, J
JANUARY 31, 2024

BETWEEN

NINA CHAUVEL APPELLANT

AND

PURITY KADZO CHARO RESPONDENT

*(Being an appeal from the judgment of Hon. J. Ongondo
issued on 18 April 2023 in Malindi CMELRC No.33 of 2021)*

JUDGMENT

1. The appeal herein arises from the judgment in Malindi CMELRC No.33 of 2021 delivered on 18 April 2023.
2. The background of the appeal is a claim filed by the respondent herein, Purity Kadzo Charo against the appellant on the grounds that she was employed as a house help in the year 2009. On 24 July 2021 she was dismissed from her employment without good cause. The appellant deducted Kshs. 3,000 from her wages for no good cause. NSSF payments were only paid from January 2018 and there were no remittances for March 2018 and March to July 2021. Her claim was for the following;
 - a. Compensation for unfair termination of employment at 12 months Kshs. 180,000;
 - b. One month notice pay Kshs. 15,000;
 - c. Service pay at 15 days for each year worked 2009 to 2017 at Kshs. 60,000;
 - d. Refund of unremitted NSSF deductions Kshs. 1,600;
 - e. Illegal salary deduction July 2021 Kshs. 3,000; and
 - f. Costs of the suit.



Total claim at Kshs. 259,600.

3. In response to the claim, the appellant denied the employment relationship and that the respondent was employed by Murthadaw Athman Isaa who was married her. Afterwards, employment was terminated in the year 2018, and a company called One of Us Lamu Limited employed the respondent as a house help. The company, One of Us Lamu Limited required very high level of integrity but the respondent failed to comply and caused violence and breach of peace by engaging in physical fights with fellow workers. This interfered with work performance. She then absconded duty and left her work premises without permission. The appellant asked the trial court to dismiss the claims with costs.
4. The appellant also raised preliminary Objections on the grounds that under Section 15 of the *Civil Procedure Act*, the trial court lacked territorial jurisdiction as the cause of action arose in Lamu but the case was filed in Malindi.
5. In judgment delivered on 18 April 2023, the learned magistrate made a finding that termination of employment was procedurally unfair and that the respondent was entitled to the reliefs sought in the Memorandum of Claim all at Kshs. 259,000.
6. Aggrieved by the judgment, the appellant filed the instant appeal on 8 grounds. These grounds are that the trial court erred in finding that the appellant was the employer of the respondent whereas employment was with One of Us Lamu Limited by virtue of the NSSF, NHIF and the payslips adduced. The Labour Officer's report dated 17 October 2021 was not considered. The report established that the respondent was not dismissed and had asked to take some time off so as to settle her family issues and resume duty later. The Labour officer had established that the respondent and her husband were refighting while at work which prompted the appellant as the director of One of Us Lamu Limited to ask them to take off so as to settle their differences.
7. Further grounds of appeal are that the learned magistrate erred in finding that the respondent was entitled to service pay from the year 2009-2017 when in fact there was no evidence. Termination of employment was due to fighting while at work which forced the appellant to give the respondent time off but she failed to resume duty. The respondent was issued with a show cause notice dated 26 September 2021 but failed to respond. The awards made were therefore not justified and the judgment of the lower court should be set aside with costs.
8. Both parties attended and addressed the appeal by way of written submissions.
9. The appellant submitted that the learned magistrate failed to address its objections on the grounds that there was no territorial jurisdiction pursuant to Section 15 of the *Civil Procedure Act*. The cause of action arose in Lamu but the matter was filed in Malindi without good cause.
10. The appellant submitted that based on the facts, the trial court failed to render a sound judgment particularly with regard to the employment relationship. There was no contract submitted and the respondent was an employee of One of us Lamu Limited and not the appellant. Only within the employment relationship could the respondent claim any rights as held in *Serraco Limited v Attorney General* [2016] eKLR. In this case, the evidence of Jamal Hussein, Solestina Charo and Murtadhaw Athman Mohamed confirmed that the respondent was not the employee of the appellant. The claim was a nullity ab initio.
11. The finding that there were no reasons given for the termination of employment was in error. The appellant issued the respondent with a notice to show cause dated 26 September 2021 but she failed to respond. In application of Section 41 and 45 of the *Employment Act*, 2007 the appellant discharged its duty as held in *Josephine Ndungu & others v Plan International Inc.* [2019] eKLR. The



- employee should be issued with notice and allowed to attend to make a response. Notice issued but the respondent did not attend and which justified termination of her employment.
12. The appellant being a person separate from the company that employed the respondent should not have been held personally liable as held in *Salomon v Salomon & Company Limited* [1897] AC. In response, the appellant admitted that the employer was One of Us Lamu Limited but the respondent failed to address and the case should have been dismissed.
 13. On the record, there are no written submissions by the respondent. this is despite representation son 5 December 2023 that the respondent had filed the same on 4 December 2023. None are available in the physical file on the eFiling Case Tracking System (CTS).

Determination

14. This being a first appeal, the court is required to re-evaluate the entire record and finding and arrive at own conclusions and taken into account that the lower court had the opportunity to hear the parties in evidence.
15. The issues for determination are whether the findings by the trial court are sound and whether the orders issued are justified.
16. The issue of objections raised by the appellant with regard to the territorial jurisdiction of the trial court seem not to have been addressed in the judgment or before hearing commenced. The same relates to the application of Section 15 of the *Civil Procedure Act* which allow for objections to be raised where a suit is filed outside where respondent resides or cause of action arises. The law hence requires that a claimant do file the claim at the closest court where the employer resides and particularly where the cause of action arose as held in *Bud and Blooms Ltd v Jonathan Balongo Okumu* [2021] eKLR.
17. To secure justice for everyone in terms of Article 48 of the *Constitution*, 2010 and in adherence to Section 29(3) and (4)(b) of the *Employment and Labour Relations Court Act*, 2011 the Chief Justice, in ensuring access to justice is allowed to designate magistrates of the rank of Senior Resident Magistrate to hear disputes relating to employment disputes. Through Legal Notice No.6024 of 10 June 2018, the Chief Justice designated lower courts of such rank to hear employment claims where an employee earns up to Kshs. 80,000 per month.
18. In the Memorandum of Claim paragraph (2), the respondent admitted that she was a resident of Lamu Island. In her employment she was earning Kshs. 15,000 per month. In response, the appellant admitted these facts.
19. The matter was heard at Malindi Magistrates Court by Hon. James Ongondo, Senior Resident Magistrate. The appellant has not made a case that there was an equivalent Magistrate at Lamu Island. Putting this into account, the Superior Court nearest to where the parties reside is ELRC Malindi. The court has original jurisdiction to hear employment and labour relations claims within the entire Republic.
20. With regard to challenged employment relationship, the appellant's case is that the respondent was employed by Murthadaw Athman Isaa her husband and afterwards, her employment was terminated in the year 2018. The respondent became the employee of a company called One of Us Lamu Limited as a house help. This employment is confirmed by NSSF remittances, a notice to show cause dated 26 September 2021 and notice of summary dismissal dated 7 October 2021.
21. In the Memorandum of Appeal, the appellant under ground (3) defines herself as a director of the appellant company. In the Response to the Claim, she defines herself as married to Murthadaw



- Athman Issa. In her evidence before the lower court on 15 February 2023 she confirmed that she is a director of One of Us Lamu Limited. There was no contract issued to the respondent.
22. Section 2 of the *Employment Act*, 2007 (the *Act*) defines an employer to include;
“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;
 23. An agent or manager of a company is defined as the employer. A director of a company who is so closely associated with a company is one such employer as they carry agency, management and affairs of the company. The findings by the learned magistrate that the appellant was the employer of the respondent cannot be faulted.
 24. With regard to the remedies awarded, the claim was based on facts that employment terminated without any justified cause. In response, the appellant made a case that the respondent absconded duty and was of gross misconduct. There are work records filed in this regard as required under Section 10(6) and (7) of the Act. These includes the notice to show cause dated 26 September 2021 where the respondent was called to explain her gross misconduct and failed to attend. As a result, through notice dated 7 October 2021, the appellant summarily dismissed the respondent from her employment.
 25. Indeed, an employee who is of gross misconduct and absents herself from work or engages in other criminal conduct like fighting other employees and the matter is reported to the police, is of gross misconduct as defined under Section 44(4) of the *Act*. Upon notice to show cause in terms of Section 41(2) of the *Act*, and the employee fails to attend, the employer is justified to issue notice terminating employment. The employer in such a case has discharged its duty in law.
 26. The subject employee cannot turn back and assert that there was no justified cause leading to terminating of employment. In the case of *Daniel Otieno Okun v Kenyatta University* [2020] eKLR, the court held that an employee who squanders the opportunity given to attend a disciplinary hearing or show cause why her employment should not be terminated and fails to attend cannot turn around and blame the employer for the sanction issued. In the case of *Omenda v Gurudumu Sacco Society Limited* (Cause 2588 of 2016) [2023] KEELRC 727 (KLR) (16 March 2023) (Judgment), the court emphasised the need for an employee who is issued with a notice to show cause to attend and defend his actions before the employer. To avoid such a procedure only gives credence to the actions alleged and the employee squanders the opportunity allowed under Section 41 of the Act.
 27. In this regard, where the respondent was allowed by the appellant to take time off to attend to her family issues and particularly her fighting with her husband while at work, a matter reported to the police, the lapse in addressing the notice issued by the employer resulted in a justified summary dismissal. The findings by the trial court that there was procedural unfairness which warranted a general award of all claims is without legal foundation.
 28. Notice pay and compensation are not available in a case of justified summary dismissal.
 29. Service pay is only payable where during employment, the employer fails to deduct and remit statutory dues to the statutory body. Failure to effect such deductions and remittances does not result in a refund to the employee.
 30. The employment of the respondent was on oral terms. There is no contract of employment. Under the provisions of Section 37 of the *Act*, the respondent’s employment became regulated under the law with rights and benefits under the Act. With payment of statutory dues from 2018 onwards until employment terminated, she cannot go back to the period of 2009-2017 and make a claim which



ordinarily ought to have been addressed as a continuing injury in terms of Section 90 of the *Act*. The appellant having complied with the requirements of Section 35 (5) and (6) of the Act cannot be faulted and ordered to pay service pay or make a refund of any deductions thereof.

31. The claim for Kshs. 3,000 deductions are not addressed by the appellant. In her written submissions before the trial court, the respondent has given a breakdown of this claim and that for 6 days not at work from 26 to 31 July 2021 there was a deduction of Kshs. 6,290 and based on her due wages, she was owed Kshs. 3,000. Without any challenge to this claim, the same was properly awarded.
32. On costs, ordinarily in employment and labour claims, where the employee is paid her owed dues, costs remain discretionary for the court to award. In this case, the appeal largely successful, each party should bear own costs of the lower court and this appeal.
33. Accordingly, on the above analysis, the appeal is partially allowed with the following Orders;
 - a. The trial court had jurisdiction to hear the claim;
 - b. Parties had an employment relationship;
 - c. The appellant shall pay the respondent Kshs. 3,000 deducted from her wages, if there is no payment to date;
 - d. Orders in Malindi CMELRC No.33 of 2021 are hereby set aside; and
 - e. Each party to bear own costs of the appeal and the lower court proceedings.

DELIVERED IN OPEN COURT AT MALINDI THIS 31ST DAY OF JANUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Nasra

..... and

