



REPUBLIC OF KENYA



Njoki t/a Aberdare Electronics v Elem (Employment and Labour Relations Appeal E005 of 2023) [2024] KEELRC 132 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 132 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2023
ON MAKAU, J
JANUARY 30, 2024**

BETWEEN
REBECCA NJOKI T/A ABERDARE ELECTRONICS APPELLANT
AND
JOHN ELEM RESPONDENT

(Being an Appeal against the Judgment and decree of Hon. James Macharia SPM delivered on 15th November, 2022 in Nyeri CMELRC No.63 of 2019)

JUDGMENT

1. By a Memorandum of Appeal dated 24th May 2023, the appellant seeks for setting aside of the trial court's judgment rendered on 15th November, 2022 for the following reasons: -
 - a. That the learned Trial Magistrate erred in law and in fact, in finding that the Respondent had served the Appellant for the appointed hearing date, proceeding in her absence, despite her pleading being non-suited in her Memorandum of Response, and thereby prevented her from tendering pertinent evidence in support, and condemned her unheard.
 - b. That the learned Trial Magistrate erred in law and in fact, by not adjourning for the Appellant's response, who was unaware of the appointed hearing date, her counsel having let her down in their professional duty.
 - c. That the learned Trial Magistrate erred in law and in fact, in nevertheless entering judgment against the Appellant, while a contract of employment was non-existent, the balance of probability titling in her favour.
 - d. That the learned Trial Magistrate erred in law and in fact, in not making an order on costs, yet the court eventually assessed costs at Kshs 105,770, issuing a Certificate of costs therefor.



Factual background

2. The appellant was sued by the respondent before the trial court for unfair and unlawful termination of employment, and failure to pay him terminal dues plus compensation for the unfair termination. The appellant denied the existence of any employment contract between her and the respondent and put him to strict proof. Therefore, she averred that the suit did not disclose any cause of action against her and prayed for the suit to be dismissed with costs.
3. The suit was heard on 5th July, 2022 at 11AM in the absence of the appellant and her counsel and after considering the case, the trial court (Hon.J.Macharia-SPM) rendered the impugned judgment whereby he awarded the claimant Kshs 47,704.00 being the equivalent of one months' salary, as compensation for unfair termination, plus all the other reliefs as prayed.

Before this court

4. The appeal was canvassed by written submissions. The appellant collapsed his appeal into two grounds:
 - a. Whether valid contract of employment existed between the parties.
 - b. Whether the impugned decree should stand.
5. On the 1st ground, the appellant submitted that the respondent never produced sufficient evidence to prove that he was employed by her and/or dismissed by her. She further submitted that the Mpesa statement produced by the respondent is not sufficient prove of employer-employee relationship.
6. The appellant further submitted that she was condemned unheard due to her counsel's mistake. She contended that the failure to attend court was not deliberate and as such she should not be punished for a mistake of his counsel. She contended that the trial court did not pronounce itself on that cardinal issue or even interrogate the same.
7. The respondent, on the other hand submitted that the appellant was served with a hearing notice and an Affidavit of service was filed. Consequently, he submitted that the allegation that the appellant was condemned unheard is unfounded.
8. As regards the issue of existence of employment contract, the respondent submitted that employment relationship exists when a person performs work or services under certain conditions in return for remuneration. He relied on section 2 of the [Employment Act](#) which defines an employee as a person employed for wages or a salary.
9. He submitted that there existed employment contract between him and the appellant for a monthly salary of Kshs 6,060 as evidenced by Mpesa statement produced as exhibit.
10. Finally, the respondent submitted that the award of costs of the suit by the court was right because it was among the prayers sought and granted by the court. For the above reasons, he prayed that the appeal be dismissed and the impugned judgment upheld.

Analysis and determination

11. The mandate of this court in a first appeal is well cut out and it remains what was pronounced by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 1 thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below.
An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial



and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself 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, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Accordingly, I have perused the record of Appeal and the submissions by counsel in this appeal. The issues that fall for determination are: -
 - a. Whether the appellant was condemned unheard by the trial court.
 - b. Whether there existed employment contract between the parties herein.
 - c. Whether the impugned decree should stand.

Whether condemned unheard

13. The appellant faulted the trial court for condemning her unheard, and failing to consider that issue in the impugned judgment. The respondent was however emphatic that the appellant was aware of the suit and her counsel then on record was served with a hearing notice for the day fixed for hearing.
14. I have perused the court record. The suit was fixed for hearing by the respondent's Advocate on 4th May, 2022 in the absence of the appellant's counsel. The hearing date fixed was 5th July 2022 and on the said date, the matter was listed before Hon.J.Macharia SPM. Mr.Warutere Advocate appeared for the respondent while Ms.Lucy Mwai held brief for Mr.Kingori for the appellant. Ms.Mwai asked for time allocation for hearing because Mr.Kingori was ready for the hearing. The court allocated them a slot at 11.00AM for hearing.
15. The record further shows that the appellant and her counsel did not appear for the hearing but the respondent did. The suit proceeded to hearing without the attendance of the appellant and thereafter both parties filed written submissions then the court rendered the impugned judgment. Having considered the evidence before the court, I am satisfied that the appellant was never condemned unheard since her counsel was aware of the hearing date but deliberately failed to attend the hearing.

Existence of employment contract

16. Section 2 of the [Employment Act](#), 2007 defines contract of service as:-

"An agreement whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learner."
17. In this case, the respondent adduced evidence that he was employed by the appellant from February, 2016 to December 2018 as security guard and his salary was Kshs 6060 per month. He produced Mpesa statement showing that the appellant paid him Kshs 3030 in April and June 2017. There is no proof that the payment was salary. The respondent did state how he was paid the rest of his salary during the alleged service of two years.
18. Without documentary evidence to prove existence of employment contract, the respondent should have called persons as witness who saw him work for the respondent. He did not, and therefore I



agree with the appellant that the evidence on record is not sufficient to prove existence of the alleged employment contract between him and the appellant.

19. Having found that the evidence on record is not sufficient to prove existence of employment contract on a balance of probability, the appeal must succeed. It follows that the trial court erred in finding that the respondent had proved his case on a balance of probability without any evidence to base the said finding. Consequently, the impugned judgment and the consequential decree is hereby set aside and substituted with an order dismissing the lower court suit. Each party will bear own costs both in the appeal and the court below.

DATED, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

