



**Ready Consultancy Co. Ltd v Ogola & another (Appeal E040 of 2022)
[2024] KEELRC 168 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 168 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E040 OF 2022
AK NZEI, J
FEBRUARY 8, 2024**

BETWEEN

READY CONSULTANCY CO. LTD APPELLANT

AND

EVANS ODHIAMBO OGOLA 1ST RESPONDENT

MOMBASA MAIZE MILLERS LTD 2ND RESPONDENT

(Being an appeal against the judgment of Hon. Lesootia Saitabau [Principal Magistrate] delivered on 6th May 2022 in CM – ELR Case No. 782 of 2019- Mombasa)

JUDGMENT

1. The appeal herein is shown to have been instituted vide a memorandum of appeal dated 7/6/2022 and filed in this Court on even date. The appeal is expressed to be against the judgment of Hon. Lesootia Saitabau (Principal Magistrate) delivered on 6/5/2022 in Mombasa CMC ELR Case No. 782 of 2019.
2. The Appellant herein, Ready Consultancy Company Ltd, is shown to have been the Third Party in the aforementioned lower Court suit (Mombasa CMC ELR Case No. 782 of 2019) wherein the 1st Respondent herein (Evans Odhiambo Ogola), had sued the 2nd Respondent in this appeal (Mombasa Maize Millers Limited) seeking the following reliefs:-
 - a. A declaration that termination of the Claimant’s employment was unfair and unlawful.
 - b. 12 months’ salary in compensation for unfair and unlawful terminationksh. 187,200.
 - c. Pay in lieu of notice.....ksh. 15,600
 - d. Annual leave (for 2 years).....ksh. 31,200



- e. House allowance (4 years worked) @ 15% (ksh. 2,556x12 months x 4 years).....ksh. 56,160
 - f. Severance pay (ksh. 8,520x4 years).....ksh. 15,600
 - g. Costs of the claim and interest at Court rates.
3. The 1st Respondent herein, being the Claimant in the said lower Court suit, had pleaded:-
 - a. that he had been engaged by the 2nd Respondent as a loader from 1/10/2016, and that he retained continuous employment until 10/7/2019 when his services were terminated by the 2nd Respondent.
 - b. that the 1st Respondent's initial and terminal earnings were ksh. 15,600 per month, and that termination of his employment was abrupt and unlawful, and contravened the provisions of Sections 41,43 and 44 of the Employment Act 2007. That the 2nd Respondent did not act in accordance with justice and equity in terminating the 1st Respondent's employment.
 4. From what can be gathered from the incomplete record of appeal filed in this Court, the 2nd Respondent, who was the sole Respondent/defendant in the primary suit, filed response to the 1st Respondent's claim/suit and subsequently took out Third Party proceedings against the Appellant. Judgment is shown to have been delivered against the Third Party (the Appellant herein) on 6/5/2022. The present appeal is shown to be against the said judgment. It is worth noting that proceedings taken before the trial Court, which would ordinarily contain the evidence presented before the trial Court by the parties herein, were not included in the record of appeal filed in this Court by the Appellant; and that this Court has neither seen nor perused the same. The record of appeal is incomplete, and the appeal is incompetent.
 5. There is no evidence before this Court for its review, re-evaluation and consideration, this being a first appeal. As stated in Mursal v Manese [2022] eKLR:-

“A first Appellate Court is mandated to re-evaluate the evidence presented before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first Appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd & another* [1968] E.A. 123 and in *Peters v Sunday Post Ltd* [1958] E.A. page 424.”
 6. Echoing on the aforesaid conventional duty of a first Appellate Court, Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides as follows:-

“A memorandum of appeal shall be accompanied by a copy of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the Appellant shall file such copies as soon as possible, and within a reasonable time.”
 7. In any first appeal, proceedings of the trial Court are so pivotal such that the merits or otherwise of the appeal cannot be considered or determined without them.



8. In the absence of the trial Court's proceedings, there is absolutely nothing on record for this Court, being a first appellate Court, to review, to re-evaluate and to consider in determining the appeal herein. The appeal is hollow and incompetent and must, therefore, fail.
9. For record purposes, it is worth noting that whereas the memorandum of appeal is shown to have been filed on 7/6/2022 without any accompanying documents pursuant to Rule 8(4) of this Court's Rules, the incomplete record of appeal was filed on 6/6/2023, over one year down the line, and without the trial Court's proceedings. The Appellant had all the time to present a complete record of appeal, but did not.
10. In view of all the foregoing, and having considered written submissions filed on behalf of the Appellant and the 1st Respondent, the appeal is hereby dismissed.
11. Each party will bear its own costs of the appeal.
12. The Court file shall forthwith be closed.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

