



**Ready Consultancy Co Ltd v Wanyonyi & another (Appeal E043 of 2022)
[2024] KEELRC 159 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 159 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E043 OF 2022
AK NZEI, J
FEBRUARY 8, 2024**

BETWEEN

READY CONSULTANCY CO LTD APPELLANT

AND

ALFAYO WAFULA WANYONYI 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 CMC – ELR Case No. 785 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 at Mombasa on 6/5/2022 in Mombasa CMC ELR Case No. 785 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. 785 of 2019) whereby the 1st Respondent in this appeal (Alfayo Wafula Wanyonyi) had sued the 2nd Respondent herein (Mombasa Maize Millers Limited) claiming:-
 - a. A declaration that termination of the 1st Respondent’s employment was unfair and unlawful.
 - b. 12 months’ salary in compensation for unfair and unlawful termination.....ksh. 187,200
 - c. Payment in lieu of notice.....ksh. 15,600
 - d. Accrued annual leave (for the 4 years worked)..ksh. 62,400



- e. House allowance (4 years worked) @ 15% (ksh. 2,340x12 months x4 years)ksh. 112,320
 - f. Severance pay (7,800x 4 years).....ksh. 31,200
 - g. Costs of the suit and interest at Court rates.
3. The 1st Respondent herein, being the Claimant in the lower Court suit, had pleaded:-
 - a. that he was engaged by the 2nd Respondent as a loader on 1/6/2018, and that he retained continuous employment as such until 10/7/2019 when his employment was terminated.
 - 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 worthy 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 -vs 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 -vs- Associated Motor Boat Co. Ltd & Another* [1968] E.A. 123 and in *Peters -vs- Sunday Post Ltd* [1958] E.A. page 424.”
 6. Echoing on the aforestated 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 the Court, being a first appellate Court, to review, to re-evaluate and to consider in determining the merits or otherwise of the appeal herein. The appeal is hollow and incompetent and must, therefore, fail.
9. For record purposes, it is worthy noting that whereas the memorandum of appeal is shown to have been filed on 7/6/2022 without any of the documents referred to in Rule 8(4) of this Court's Rules, the incomplete record of appeal herein was filed on 25/4/2023, over ten months 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. Having stated that, and having considered written submissions filed on behalf of the Appellant and the 1st Respondent, I hereby dismiss the appeal.
11. Each party will bear its own costs of the appeal.
12. The Court file herein shall be closed forthwith.

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

