Isinya Roses Limited v Kyalo (Appeal E109 of 2022)
[2024] KEELRC 133 (KLR) (5 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 133 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E109 OF 2022

JK GAKERI, J

FEBRUARY 5, 2024

BETWEEN

ISINYA ROSES LIMITED ..... APPELLANT

AND

ALEXANDER PETER KYALO ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgement of Hon. Irene Kahuya in CMEL Case No. 10A of 2020 at Kajiado Alexander Peter Kyalo V Isinya Roses Ltd delivered on 26th January, 2022.

2. By way of background, the Claimant sued the Respondent by a Statement of Claim dated 21st August, 2020 alleging unfair termination of employment.

3. The Claimant's case was that he was employed by the Respondent on 3rd December, 2018 as an ICT Support Assistant at Kshs.41,546/= per month which subsequently rose to Kshs.70,280/= and the contract was renewed effective 3rd March, 2019 to 2nd March, 2020 and served diligently.

4. That the Respondent issued him with a notice to show cause on 12th May, 2020 for undisclosed misconduct and he responded vide letter dated 12th May, 2020 indicating that the alleged misconduct was unclear and was dismissed from employment on 15th May, 2020.

5. The Claimant faulted the termination for want of specific allegations and procedural fairness.

6. On 13th July, 2021, the Respondent did not attend the mention at the Registry and a pre-trial conference was scheduled for 18th August, 2021 on which date the Claimant/Respondent's counsel prayed for a hearing date.

7. The court directed service on the Respondent and scheduled a mention on 8th September, 2021 when none of the parties was present and a further mention was slated for 13th October, 2021 on which date

only the Claimant's counsel was present. The trial court directed service on the Respondent and fixed a hearing date 15th December, 2021.

8. On 15th December, 2021, the Claimant's counsel reported that the Respondent had been served but was absent.

9. The trial court ruled that as the Affidavit of Service was on record, the Respondent was aware of the hearing but was absent and hearing would proceed ex parte.

10. The Claimant adopted his witness statement and produced his exhibits and the Claimant's case was closed.

11. Judgement was slated for 24th January, 2022 but was postponed to 26th January, 2022 owing to the Magistrate's indisposition.

12. From the proceedings, it is evident that the Respondent made an application dated 11th March, 2022 under Certificate of Urgency and the court granted prayer Nos. 1 and 2 pending inter partes hearing on 13th March, 2022.

13. There is no record as to what transpired thereafter.

14. Evidently, the Respondent/Appellant did not respond to the Claimant's claim.

15. The learned trial Magistrate awarded all the reliefs sought in the Statement of Claim as prayed for namely;

    a. 12 months compensation Kshs.843,360/=

    b. Unpaid salaries for;

        i. March 2020 Kshs.30,455.00

        ii. April 2020 Kshs.32,797.00

        iii. May 2020 Kshs.70,280.00

        iv. 2 days leave Kshs.6,280.00

    c. One month's salary in lieu of notice, Kshs.70,280.00.

    d. Service pay for the period worked Kshs.35,140.00.

    e. Certificate of service.

    f. Costs of the suit.

    g. Interest at court rates from date of filing of the case till payment in full.

16. This is the judgement the Appellant is appealing against.

17. The appellant faults the learned trial Magistrate on several grounds;

    a. Finding that the suit was undefended yet there was a statement in response to the Counter-claim filed electronically on 20th January, 2021 and served on 21st January, 2021.

    b. Failing to find that the appellant was not informed of the pre-trial conference.

    c. Failing to find that the inter partes hearing date of 15th December, 2021 was not served on the appellant.

d. Delivered an erroneous judgement in law and fact contrary to equity and judicial precedent.

18. The appellant prays that the appeal be allowed and the judgement in CMEL Case No. 10A of 2020 be set aside and be heard de novo by another Magistrate.

19. The appeal was canvassed by way of written submissions.

Appellant's submissions

20. Counsel addressed several issues touching on whether the Claimant's suit was defended, compliance with Order 11 of the Civil Procedure (Amendment) Rules, 2020, service of hearing date on the appellant and exercise of discretion in proceeding ex parte on 15th December, 2021.

21. As to whether the suit was defended, counsel urged that the Respondent's response to the claim and the witness statement of one Lucas Otieno were filed as reflected in the Record of Appeal and the Memorandum of Appeal stated so.

22. Reliance was made on Article 50(1) of *the Constitution* of Kenya, 2010 on the right to fair hearing to urge that the trial court erred as it did not allow the Appellant/Respondent have its day in court and it suffered immensely.

23. On case management, counsel urged that the Respondent requested and fixed the pre-trial date ex parte on 13th July, 2021 and requested for a hearing date on 18th August, 2021 and there was no evidence of service of the pre-trial date and on 18th September, both parties were absent for the mention.

24. Counsel faults the trial court for not satisfying itself that service was effected and thus it did not comply with Order 11 of the Civil Procedure (Amendment) Rule, 2020.

25. As regards the hearing on 15th December, 2021, counsel faulted the trial court for not ensuring that the hearing was fair and parties had complied with pre-trial directions. Counsel cited the sentiments of the court in United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd (1985) eKLR to urge that the judgement was erroneous in law and fact.

26. Reliance was also made on the provisions of Section 1A (1) and (2) of the *Civil Procedure Act* on the objective of the Act to urge that the overriding duty of the court was to ensure that justice was done to both parties.

Respondent's submissions

27. Counsel submitted that the trial court rightly found that the appellant had not filed a response to the claim and was aware of the hearing date having been duly served and entered appearance as the trial court noted upon reliance on the proceedings.

28. That on 18th August, 2021, the trial court noted that the appellant had not filed its documents as evidenced by the court record.

29. Counsel urged that the Record of Appeal provided no evidence to prove that the Respondent filed a response to the claim such as email, invoice, payment of fees or other record.

30. Reliance was made on the sentiments of the court in Mombasa Cement Ltd V Speaker, National Assembly & another (2018) eKLR on payment of filing fees to urge that the appellant had failed to prove that it responded to the claim as he who alleges must prove.

31. Counsel submitted that it was self-defeating for the appellant to argue that it was denied the right to be heard yet the court record was clear that it did not respond to the claim or attend the hearing despite service of the hearing date.

32. Counsel further urged that the appeal herein is premature as the appellant should have invoked Order 10 Rule 11 of the Civil Procedure Rules, 2010 to have the default judgement set aside.

33. That the appellant's indolence in court attendance was evident and equity aids the vigilant not the indolent as held in Samuel Gathu Kamau V Peter Kaniu Gathungu (2006) eKLR.

34. As to whether the appellant was aware of the pre-trial dates, counsel submitted that the relevant dates were served but the appellant failed to attend as the court confirmed service of the hearing notice before hearing took place.

35. Counsel urged that if the appellant was contesting service, it ought to have filed an application to set aside the court proceedings and an order to cross-examine the Process Server but did not do so and it was too late in the day and the Record of Appeal shows that service was effected and there was a presumption to that effect and the burden of proving otherwise is borne by the party questioning it.

36. Counsel submitted that service was not an issue before the trial court.

37. As to whether the judgement is based on facts, law and precedent, counsel submitted that trial court considered the evidence on record and found the notice to show cause sketchy and scanty, suit was undefended and the Respondent was not heard and the Claimant's evidence was uncontroverted as. Reliance was made on the decisions in Interchmie EA Ltd V Nakuru Veterinary Center Ltd HCCC No. 168b of 2000, Janet Kaphiphe Ouma & another V Marie Stopes International Kenya Kisumu, HCCC No. 68 of 2017 citing Edward Muriga Through Stanley Muriga V Nathaniel D. Schulter Civil Appeal No. 23 of 1997 to urge that the trial court's judgement was anchored on the evidence before the court, relevant law and precedent.

38. Finally, counsel submitted that the appeal was not merited and did not warrant interference with the decision of the trial court as held in Mohamed Mohamoud Jabane V Highstone Butty Tongoi Olenja (1986) eKLR.

Determination

39. As correctly submitted by the Respondent's counsel and held by the Court of Appeal, in Selle & another V Associated Motor Boat Co. Ltd & another (1968) EA 123, the duty of the first appellate court is to re-evaluate the evidence before the trial court as well as the judgement and make its own conclusions, bearing in mind that it neither saw nor heard the witnesses first hand. In essence, a first appeal is a re-trial.

40. I will address the four grounds of appeal as set out in the Memorandum of Appeal dated 7th July, 2022.

41. As regards the trial court's finding that the suit was undefended, counsels have adopted contrasting positions though both base their contentions on the Record of Appeal.

42. The appellant states that it filed the response, witness statement, list of witnesses and list of documents all dated 18th January, 2021. However, as submitted by counsel for the Respondent, the appellant filed no shred of evidence of the alleged electronic filing of the documents as none of the documents has a filing date.

43. There is nothing on record to show that the documents in the Record of Appeal were actually filed and served and when the same took place. The appellant provided no indication in support of the electronic filing of the documents.

44. Contrary to the counsel's assertion that the averment of electric filing was uncontroverted, being one of the grounds of appeal, it behoved the appellant to demonstrate that indeed the documents were filed and the learned trial Magistrate erred in finding that the suit was undefended.

45. It was incumbent upon the appellant to disprove the trial court's finding of fact.

46. In her judgement dated 26th January, 2022, the learned trial Magistrate found that;

> " The Respondent was served and they entered appearance but did not file a Response to the statement of claim . . ."

47. Being the trial court, the trial Magistrate relied on the documentation she had on record and the finding could only be interfered with through the availment of credible evidence to demonstrate that the suit was defended.

48. Having failed to provide any material to show that the documents in the Record of Appeal were indeed filed in court electronically as alleged, the court has no basis to interfere with the finding of the learned trial Magistrate.

49. As to failing to find that the appellant was unaware of the case management conference, the appellant's counsel faults the trial court for not satisfying itself that service was effected as the Respondent's counsel fixed the pre-trial date ex parte.

50. From the record, it is evident that the Civil Registry fixed the pre-trial date on 13th July, 2021 and the appellant's counsel was absent. The pre-trial date was 18th August, 2021 on which date the appellant was absent and the court directed that service be effected and scheduled a mention on 8th September, 2021.

51. Although Counsel argues that the record does not show that the pre-trial date was served, court records seldom reflect service as the evidence is in the court file which the court relies upon.

52. The fact that the trial Magistrate did not record that service had been effected, is not in the court's view an error.

53. Significantly, the appellant had a counsel on record.

54. Strangely, none of the parties appeared in court on 8th September, 2021 and a further mention was slated for 13th October, 2021 on which date the Respondent was absent and the trial court gave a hearing date and for a second time directed that the appellant be served.

55. As adverted to elsewhere in this judgement on 15th December, 2021, the appellant was absent.

56. Counsel for the Respondent informed the court that the appellant had been served and was absent.

57. The learned trial Magistrate found that the Respondent had been served and an Affidavit of Service showing that service was effected on 19th October, 2021 pursuant to the court's directions on 13th October, 2021 filed.

58. The learned trial Magistrate found it justifiable to proceed ex parte.

59. Having satisfied itself that service had been effected as previously directed, the trial court was of the view that the appellant was aware of the hearing date.

60. Strangely, the appellant has not accused its former counsel of any mistake or error. It has not alleged that its counsel on record did not inform it about the hearing or other court processes.

61. In sum, the court record is clear that although the Respondent's counsel may have sought the date for the pre-trial conference ex parte on 13th July, 2021, the learned trial Magistrate did not proceed with the pre-trial conference as she wanted to ensure that the appellant had been served and directed service on 18th August, 2021 and pre-trial did not proceed until 13th October, 2021 as both parties were absent on 8th September, 2021.

62. From the recorded proceedings, it is discernible that contrary to the appellant's contention, the trial court did not deny the appellant an opportunity to have its day in court for the pre-trial conference.

63. The appellant has not placed sufficient material before the court to demonstrate that the learned trial Magistrate acted contrary to the provisions of Order 11 Rule 2 Sub-rule 2(d) of the Civil Procedure (Amendment) Rules, 2020.

64. Having directed service of the pre-trial conference date on 18th August, 2021, there is nothing on record to suggest that the Respondent's counsel on record did not as court directions ought to be complied with and lack of service would have disadvantaged the Respondent.

65. As regards service of the inter partes hearing date, the appellant faults the learned trial Magistrate for failing to find that service had not been effected.

66. As adverted to elsewhere in this judgement, the court record is unambiguous that on 13th October, 2021, the trial court directed the Respondent's counsel Mr. Lesaigor, who was in court, to serve the Respondent the hearing date on 15th December, 2021 on which date the court satisfied itself that service was effected and an Affidavit of Service was on record.

67. The record reveals that notice of the hearing date was served on 19th October, 2021, almost 2 months earlier.

68. The trial court noted that the appellant was absent.

69. As correctly submitted by the appellant's counsel, the trial court was obligated to ensure that the hearing slated for 15th December, 2021 was fair.

70. However, the contention that the court had to ensure that the parties had complied with pre-trial directions before the hearing date was fixed is not reasonable as it would stall legal proceedings.

71. Filing of court documents is a time bound process and it is not the duty of the court to ensure that all parties have complied with pre-trial directions before a hearing date is set. Such a scenario is tantamount to surrendering of court proceedings to the parties which is untenable in an adversarial system. Such a situation would ran contra to the principal objectives of the *Employment and Labour Relations Court Act*, 2011 to facilitate just, expeditious, efficient and proportionate resolution of disputes governed by the Act.

72. Did the trial court deny the appellant its right to a fair hearing?

73. Based on the Record of Appeal and the judgement of the trial court, the court is not so persuaded.

74. Needless to emphasize, the appellant was aware of the pre-trial conference date on 13th October, 2021 and the hearing on 15th December, 2021 but for unknown reasons opted not to attend.

75. Finally, although counsel for the appellant has not stated so in his submissions, the law firm came on record vide a Notice of Change of Advocates dated 28th November, 2022, more than 10 months after the trial court delivered the impugned judgement.

76. Finally, as to whether the trial court delivered an erroneous judgement in law and fact contrary to equity and judicial precedent, counsels for the parties have opposing postulations with the appellant's counsel arguing that the judgement stems from erroneous proceedings, absence of fairness and in contravention of Section 1A of the *Civil Procedure Act*.

77. Having addressed ground 2 and 3 of the Memorandum of Appeal and thus delved into some of the issues raised by the appellant, principally the proceedings and the right to fair hearing, the court proceeds as follows.

78. Section 1A of the *Civil Procedure Act* provides that;

    1. The overriding objective of this Act and the rules made hereunder is to facilitate just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

    2. The court shall, in the exercise of its powers under this Act, or in the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

79. Counsel for the appellant assails the impugned judgment on the ground of service and fair hearing and as adverted to elsewhere above, the court is satisfied that the learned trial Magistrate did what the law required her to do, namely; service of pre-trial date upon the Respondent, which the trial court directed on 18th August, 2021 and service of hearing notice which the trial court directed on 13th October, 2021.

80. Although the right to be heard is a cardinal principle of the administration of substantive justice and courts are enjoined to endeavour to ensure that parties are accorded the opportunity to present their case, this right cannot be insisted on after the fact where it is evident that the party was afforded the opportunity but failed to utilize it.

81. At the risk of repeating itself, the court is not persuaded that the learned trial Magistrate acted in contravention of Section 1A of the *Civil Procedure Act*.

82. As regards the findings and decision of the trial court, it is discernible that the learned trial Magistrate relied on the evidence on record which was uncontroverted.

83. Fortunately, in this case, the Respondent did not adduce oral testimony. He merely adopted the witness statement and produced the exhibits.

84. The trial Magistrate relied on the Respondent's written statement, hook, line and sinker and found that the termination of employment violated the provisions of Section 41 and 45 of the *Employment Act*, 2007 and awarded the prayers sought.

85. The trial court found that the particulars of the alleged misconduct were not particularised.

86. The notice to show cause dated 11th May, 2020 accused the Respondent of the following;

> " Within the limits of facts of commission and/or omission of misconduct whose particulars are well known by yourself, your aforementioned acts are quite wanting.

Your above refusal, failure or neglect offends operational, planning and decision making and cannot be tolerated . . ."

87. In his response dated 12th May, 2020, the Claimant pleaded that he was unaware of misconduct as stated in the notice to show cause.

88. Puzzlingly, the letter of termination of employment dated 15th May, 2020 refers to a statement dated 17th March, 2020 where the Respondent had indicated that he was on leave.

89. From the two documents, it is unclear to the court as to the reason why the Respondent's employment was terminated.

90. The trial court cannot be faulted for its finding that the particulars of the alleged misconduct were not disclosed.

91. It is common ground that the Respondent was not accorded a hearing.

92. Although the Respondent's evidence before the trial court was uncontroverted and unchallenged, the Respondent was still bound to prove his case to the required standard, the fact that the suit was undefended notwithstanding, as ordained by the provisions of Section 47(5) of the *Employment Act*, 2007 and as echoed by Abuodha J. in Nicholus Kipkemoi Korir V Hatari Security Guards Ltd (2016) eKLR as follows:

> " This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings which are not backed by any evidence and expect the court to find in his or her favour."

93. The Respondent's evidence before the trial court may be faulted on its cogency and supportive documentation.

94. It need not be gainsaid that an appellate court may interfere with the judgement or finding of a trial court in certain defined circumstances.

95. In United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd (Supra), cited by the appellant's counsel, Madan JA (as he then was) stated as follows;

> " The Court of Appeal is only entitled to interfere if one or more of the following matters are established; first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken into account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one is plainly wrong."

96. From the evidence before the trial court and the judgement, the court is persuaded that trial court misapprehended certain facts, misdirected herself on the law in at least one aspect in relation to the reliefs and failed to take account of considerations of which the court ought to have taken account of or took into account irrelevant considerations to warrant interference of this court.

97. On unpaid salaries, it is clear that the Respondent prayed for the full salary for May 2020 and his employment was terminated effective 27th May, 2020.

98. Secondly, the written statement makes no reference to why the Respondent was claiming part of the salary only, an acknowledgement either that he was not rendering services or was paid for the days worked.

99. In the absence of such evidence, the prayer for Kshs.30,455.00 for March 2020 and Kshs.32,797/= for April was not proved and ought not to have been awarded.

100. As for the 2 days leave, the written statement makes no reference as to when they accrued. The prayer was unsustained.

101. As regards service pay, the judgement makes no reference to the fact that the Respondent was not a member of the National Social Security Fund (NSSF). Production of a blank NSSF statement is sufficient evidence that the employee's NSSF dues were not being remitted as membership is mandatory. The Respondent's payslip would also have revealed his membership status.

102. The trial court did not address itself to the issue of membership of the NSSF by virtue of Section 35(6)(d) of the *Employment Act*, 2007 before awarding service pay.

103. Finally, on compensation, the trial Magistrate awarded maximum compensation under Section 49(1)(c) of the *Employment Act*, 2007 without assigning any reason or justification as held in Ol Pejeta Ranching Co. Ltd V David Wanjau Muhoro where the Court of Appeal stated as follows;

> ". . . The trial judge did not at all attempt to justify or explain why the Respondent was entitled to the maximum award. Yes, the trial judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on sound judicial principles. We would have expected the judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial judge in considering the award took into account irrelevant considerations or failed to take into account relevant considerations, which act then invites our intervention . . ."

104. The foregoing applies on all fours to the circumstances in this case.

105. The court deems the equivalent of 6 months gross salary appropriate.

106. From the impugned judgement, it is decipherable that the learned trial Magistrate did not address herself to any of the parameters set out in Section 49(4) of the *Employment Act*, 2007 on which to found the exercise of discretion.

107. Since the Respondent was an employee of the Appellant for about 1 year and 5 months, a fairly short time, had a notice to show cause on record, did not appeal the Respondent's decision which he regarded as unfair or express his wish to continue on the Respondent's employment and the appellant failed to comply with the provisions of Section 41 and 45 of the *Employment Act*, 2007, the court is satisfied that an award of 6 months gross pay amounting to Kshs.421,680/= would be appropriate.

108. In the end, the appeal is partially successful as follows;

a. The award of Kshs.843,360/= as 12 months compensation is set aside and substituted with an award of Kshs.421,680/=.

b. The award of service pay of Kshs.35,140/= is set aside.

c. The award of Kshs.30,455/= as unpaid salary for March 2020 and Kshs.32,797.00 for April 2020 is set aside.

d. The award of 2 days leave balance Kshs.6,280/= is set aside.

109. Each party to bear its own costs in this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF FEBRUARY 2024

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.

DR. JACOB GAKERI

JUDGE