



Mutiso v Oshwal Educationa Relief Board (Employment and Labour Relations Appeal E118 of 2022) [2024] KEELRC 570 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 570 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E118 OF 2022**

BOM MANANI, J

MARCH 14, 2024

BETWEEN

BENARD NZYUKO MUTISO APPELLANT

AND

OSHWAL EDUCATIONA RELIEF BOARD RESPONDENT

JUDGMENT

1. The Appellant was an employee of the Respondent until 30th November 2017 when he was summarily dismissed from employment for absenteeism from duty. He was first engaged by the Respondent on 13th January 2014 to teach English and Literature. His starting salary was Ksh. 70,000.00.
2. The Appellant's contract was subsequently renewed on 18th June 2016. His salary was reviewed upwards to Ksh. 77,170.00 per month. This amount was later revised to Ksh. 81,800.00 as from 6th October 2016.
3. Around 23rd October 2017, the Appellant asked for time off to sit his Advocates Training Program (ATP) examinations. Apparently, this request was not granted, at least formally.
4. According to the Respondent, the request was lodged too late in the day at a time when its students were undertaking examinations. Therefore, it was not possible to release the Appellant.
5. The Respondent states that the Appellant was asked to seek for the postponement of the ATP examinations but failed to do so. Yet, he proceeded to grant himself leave of absence without its (the Respondent's) concurrence to sit the said examinations. As a result, he was dismissed from employment for unauthorized absenteeism.
6. The Appellant's position was that although he did not secure written approval to be away from duty, he was given verbal permission to go and sit the examinations. He also asserted that the decision to terminate his contract was arrived at before he was heard.



7. After hearing the parties, the trial magistrate arrived at the conclusion that the Respondent had valid reason to terminate the contract between the parties. Further, he found that the decision was processed in accordance with fair procedure. Therefore, he dismissed the Appellant's case save for orders that:
 - a. The Respondent issues the Appellant with a Certificate of Service.
 - b. The Respondent pays the Appellant costs of the action.
8. Aggrieved by this finding, the Appellant lodged the instant appeal. The appeal sets out several grounds of appeal namely:-
 - a. That the learned trial magistrate erred in law and fact in arriving at the conclusion that the Appellant's dismissal from employment was fair and lawful.
 - b. That the learned trial magistrate failed to consider the Appellant's evidence and misapprehended the law in arriving at his decision.
 - c. That the learned trial magistrate erred in law and fact in holding that the Appellant was accorded an opportunity to be heard before his contract was terminated.
 - d. That the learned trial magistrate erred in law and fact in finding that the Respondent had fair and valid reason to terminate the Appellant's contract of service.
 - e. That the learned magistrate erred in law and fact in failing to award the Appellant the reliefs that he sought.

Analysis

9. Being a first appeal, I am obligated to re-evaluate the evidence on record and arrive at my own findings on the disputed issues. That notwithstanding, I am required to keep in mind that unlike the trial court, I did not have the benefit of hearing the witnesses and studying their demeanor. Therefore, I am not to depart from the trial court's findings unless it is apparent that they are unsupported by the evidence on record or are evidently inconsistent with the applicable law (*Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus* [2020] eKLR).
10. Section 29 of the *Employment and Labour Relations Court Act* provides as follows:-
 - i. The Court shall ensure reasonable, equitable and progressive access to the judicial services in all counties.
 - ii. For purposes of subsection (1), the Chief Justice may designate a Judge in a county as a Judge for the purposes of this Act.
 - iii. The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country.
 - iv. Subject to Article 169(2)(a) of *the Constitution*, the magistrates appointed under subsection (3) shall have jurisdiction and powers to handle:-
 - a. disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations;
 - b. any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.



11. On 10th June 2018 and pursuant to the powers donated to him under the aforesaid provision of statute, the Chief Justice of the Republic of Kenya issued Gazette Notice No. 6024. Through this notice, his Lordship directed as follows:-

“In Exercise of the powers conferred by section 29 (3) and (4) (b) of the [Employment and Labour Relations Court Act](#), 2011, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction.

A. Disputes arising from contracts of employment (excluding trade disputes under the [Labour Relations Act](#), 2007) where Employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.

B. Matters relating to the following specific areas:-

- i. offences under the [Work Injury Benefits Act](#), 2007
- ii. offences under the [Employment Act](#), 2007
- iii. offences under the [Labour Institutions Act](#), 2007
- iv. offences under [Occupational Safety and Health Act](#), 2007; and
- v. offences under the [Labour Relations Act](#), 2007.

The conferment under Gazette Notice No. 9243 is revoked. Dated the 10th June, 2018.”

12. From the foregoing, it is apparent that the magistrate’s court is entitled to entertain only the following labour disputes:-

- a. Disputes involving employees whose individual gross monthly salary does not exceed Ksh. 80,000.00. However, this excludes trade disputes under the [Labour Relations Act](#).
- b. Disputes relating to alleged criminal offenses created under the various pieces of legislation set out in the Gazette Notice.

13. This reality has been affirmed in various judicial pronouncements. In [AVC Management Limited v Emmanuel Mwamunye Jilani](#) [2022] eKLR, the court made the following observations on the matter:-

QUOTE{startQuote “}

The jurisdiction of the Magistrate’s Court to handle employment and labour relations disputes arises from the power donated to the Chief Justice under section 29 of the [ELRC Act](#) to gazette magistrates to handle these matters. Pursuant to this power, the Chief Justice issued Gazette Notice No. 6024 of 2018 mandating magistrates of the rank of Senior Resident Magistrate and above to hear, with some exceptions, disputes arising from employment contracts where the employee’s gross monthly salary does not exceed Ksh 80,000/= . The gazette notice provides that the magistrates will handle matters that fall within their areas of jurisdiction.”

14. In the instant dispute, the Appellant’s salary on appointment fell below the above threshold. However, at the time of termination of his contract of service, his salary stood at Ksh. 81,800.00. This was above the aforesaid statutory threshold.



15. This fact is confirmed by the Appellant at paragraph 32 of the Memorandum of Claim and the Respondent at paragraph 47 of its Memorandum of Response. It is also confirmed by the Appellant's pay slips for October 2017 and December 2017 appearing at pages 130 to 131 of the Record of Appeal. It is further confirmed by the letter of review of the Appellant's salary dated 6th October 2016 (page 135 of the Record of Appeal).
16. Neither of the parties raised the issue of the jurisdiction of the trial court to entertain the claim that gave rise to the instant appeal. However, jurisdiction cannot be conferred by consent or acquiescence of the parties (*Agnes Ngendo Wanyoike v Kenya Pipeline Company Limited* [2019] eKLR).
17. Although the parties did not raise the issue of jurisdiction, the court can take it up suo moto even on appeal. Further, once the court considers that its jurisdiction to entertain a matter is in doubt, it must address the issue in priority to all else.
18. In *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* [2020] eKLR, the court quoted with approval the observations on jurisdiction by the court in the decision in *Lemita Ole Lemein v Attorney General & 2 Others* [2020] eKLR. In the latter case, the trial court had expressed itself on the matter as follows:-

“In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal.”

19. Having regard to the foregoing, I am satisfied that I am entitled to interrogate the issue of jurisdiction in this matter notwithstanding that it had not been raised by the parties during trial. And neither has it been taken up on appeal.
20. As pointed out earlier, the Appellant's gross monthly salary on exit was Ksh. 81,800.00. In terms of the aforesaid gazette notice, this placed the claim beyond the monetary jurisdiction of the Magistrate's Court. Thus, the matter ought to have been filed before the Employment and Labour Relations Court as opposed to the Magistrate's Court.
21. When a matter is filed before a court which has no jurisdiction to entertain it, the action is a nullity (*Rob De Jong & another v Charles Mureithi Wachira* [2012] eKLR). Thus, any decision flowing from it is a nullity and of no legal effect. That is the fate of the judgment that informed the instant appeal.

Determination

22. Consequently, I find that the suit that was presented before the trial court was a nullity ab initio for want of jurisdiction. As a result, the impugned judgment that was rendered on 21st June 2022 is declared a nullity for want of jurisdiction.
23. The impugned judgment is thus set aside for want of jurisdiction and in its place the following orders are hereby issued:-



- a. Chief Magistrate's Court Case No. CMEL 227 of 2019, Milimani Commercial Courts, between Bernard Nzyuko Mutiso and Oshwal Educational Relief Board is struck out for want of jurisdiction.
- b. Each party to bear own costs both before the trial court and in the appeal.

DATED, SIGNED AND DELIVERED ON THE 14TH DAY OF MARCH, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M MANANI

