



Mwazame v University of Nairobi (Employment and Labour Relations Appeal E095 of 2022) [2024] KEELRC 572 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 572 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E095 OF 2022**

BOM MANANI, J

MARCH 14, 2024

BETWEEN

HERMAN MWAZAME APPELLANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

Background

1. The Appellant was employed by the Respondent as a driver until April 2017 when he resigned. Upon resignation, he lodged a claim for overtime pay against the Respondent through Cause No. 281 of 2018 at the Chief Magistrate's Court. The suit was filed on 28th September 2018. The record shows that the Respondent entered appearance and filed a defense and counter-claim.
2. The matter proceeded to hearing and the trial court delivered its judgment on 10th June 2022 dismissing the claim. However, the Respondent's counter-claim for pay in lieu of notice was allowed.
3. The crux of the trial court's judgment was that the Appellant's claim was time barred. As a result, it failed on this account. The trial court delivered itself on the issue as follows:-

“The Claimant resigned in April 2017. He then filed this suit on 28th September 2018. This was over one year later. Going by the authorities cited above the claim by the claimant in as much as it accrued, the same is statute barred.

It is for this reason that the entire claim by the claimant is dismissed with costs.”

4. Aggrieved by the judgment, the Appellant has filed the instant appeal. In the Memorandum of Appeal, the Appellant set out the following eight (8) grounds of appeal:-



- a. That the learned trial magistrate erred in law and fact by delivering a judgment that was at gross variance with the proceedings.
- b. That the learned trial magistrate erred in fact in finding on one hand that the Appellant had proved his case against the Respondent for overtime but on the other hand failed to award the same.
- c. That the learned trial magistrate erred in fact and law in failing to make a finding and award for meal allowance which had been admitted by the Respondent in cross examination.
- d. That the learned trial magistrate erred in law and fact by issuing a judgment that is contrary to established case law and precedent.
- e. That the learned trial magistrate erred in fact and law by disregarding the Claimant's evidence thus arriving at an erroneous award.
- f. That the learned trial magistrate erred in law and in fact in wholly dismissing the appellant's claim despite the same being supported by evidence.
- g. The learned trial magistrate erred in law and fact by delivering a judgment inconsistent with the proceedings.
- h. The learned trial magistrate erred in law and fact in delivering a judgment that is contrary to the provisions of the law and settled authorities.

Analysis

5. This is a first appeal. As such, the court is required to reconsider the record and come up with its own decision. However, in doing so, the court must have regard for the principles on pleadings generally as will be demonstrated below. As noted earlier, the trial court dismissed the Appellant's case on the premise that the action was time barred by virtue of section 90 of the *Employment Act*. An examination of the grounds of appeal demonstrates that the Appellant has not overtly challenged the court's decision in this respect.
6. Although the Memorandum of Appeal contains broad and general grounds that suggest that the decision by the trial court was contrary to law, this does not directly challenge the finding by the court that the suit was time barred. If the Appellant wished to challenge the trial court's finding on limitation of actions, nothing prevented him from doing so explicitly. Such ground cannot be deemed to arise by implication from the general grounds of appeal aforesaid.
7. When the appeal came up for hearing, the court directed that it be canvassed by way of written submissions. The parties filed their submissions as directed.
8. In his submissions, counsel for the Appellant has faulted the decision of the trial court mainly on the question of limitation of actions. According to counsel, the trial court erred in finding that the Appellant's case fell in the category of continuing injury claims which must be lodged within twelve (12) months of cessation of the injury or damage.
9. In counsel's view, the claim for overtime comprised a benefit which was enforceable within three (3) years of the cause of action arising. Therefore, the Appellant was entitled to file his suit within three (3) years of his resignation.



10. The question of limitation which counsel has founded his submissions on has not expressly been pleaded in the eight (8) grounds of appeal as per the Memorandum of Appeal on record. At the same time, there was no effort made to amend the Memorandum of Appeal to explicitly raise the ground.
11. As mentioned earlier, every ground of appeal must be explicitly set out in the Memorandum of Appeal. It cannot arise by implication. It is impermissible for a party to frame generalized grounds of appeal only for him to raise a pointed attack at the stage of submissions. If the court were to permit this kind of practice, it will be countenancing trial by ambush which is highly undesirable.
12. The purpose of pleadings is to notify the opponent the cause of action; defense; or ground of appeal with certainty in order to enable him offer a pointed response. Therefore, pleadings must be precise to enable a precise response. In deliberating on the issue, the Court of Appeal in *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR stated as follows:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

13. Parties are bound by their pleadings including on appeal. A party cannot seek to establish a cause of action, defense or ground of appeal that has not been expressly pleaded without first amending his pleadings. Commenting on this, the court in *World Explorers Safaris Limited v Cosmopolitan Travel Limited & another* [2021] eKLR stated as follows:-

“The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un-pleaded issues as having been fully investigated. The need for pleadings to be precise cannot be doubted.”

14. In the instant appeal, the Appellant raised several grounds of appeal none of which directly challenged the trial court’s finding on limitation of actions. During the urging of the appeal, the Appellant did not address any of the eight (8) grounds of appeal. Instead, he ingeniously tried to introduce and argue a new ground of appeal touching on limitation of actions under the guise of consolidating and arguing the eight (8) grounds of appeal together. This is unacceptable.

Determination

15. The upshot is that I find that the grounds of appeal as presented have not been proved.
16. In the premises, the appeal fails with costs to the Respondent.

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.

