Githinju v Elsamere Conservation Centre (Employment and Labour Relations Appeal E032 of 2023) [2024] KEELRC 979 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 979 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E032 OF 2023

HS WASILWA, J

APRIL 30, 2024

BETWEEN

WILSON GIKARIA GITHINJU ..... APPELLANT

AND

ELSAMERE CONSERVATION CENTRE ..... RESPONDENT

JUDGMENT

1. This appeal arose from the Judgement of the Chief Magistrates Court at Naivasha Honourable Nathan Lutta, in Naivasha CMELRC No. E005 of 2022, delivered on 4th October, 2023. The grounds of the Appeal are as follows; -

    1. That The Honourable Magistrate erred in law and in fact by failing to consider the claimant's evidence and then critically analyze the same and accord it due weight to the extent that the claimant was able to prove his case.

    2. That the Honourable learned Magistrate erred in law and in fact in purporting to put into perspective materials and facts not contained in the evidence and exhibits.

    3. That the learned Magistrate erred in law and in fact by showing a clear bias to the Respondent in stating in the judgement that the claimant did not dispute the Respondent's averments that he worked on his own terms without supervision, while the question of the claimant working with the supervision of the CEO was admitted by the Respondent's manager in cross-examination, in documents filed in Court and clearly stipulated in the claimant's submissions.

    4. That the learned Magistrate erred in law and in fact in not following the claimant's pleadings by stating that the claimant employment ended on 21/12/2021 while in the pleadings its clearly states that the claimant's employment ended on 23/12/2021. The period was admitted by the Respondent's manger in Court.

5. That the learned Magistrate erred in law and in fact by finding that there was no element of control, while the same was admitted in Court by the Respondent's manager during cross examination and in the Respondent's reply to the demand letter where it was stated that 'Unfortunately the CEO, he was reporting to has since left the organization'.

6. That the learned Magistrate erred in law and in fact by ignoring the precedents set in the Authorities cited via the claimant's submissions and only following what was presented by the Respondent's counsel submissions.

7. That the learned Magistrate erred in law and in fact by ignoring the various tests the Court is expected to check in determining whether there was an employer-employee relationship.

8. That the learned Magistrate erred in law and in fact by finding that the claimant was earning a salary and going on to find that the claimant was an independent contractor despite quoting section 2 of the *Employment Act* that stated that; 'an employee is someone employed for a salary in the same judgement'.

9. That the learned Magistrate erred in law and in fact by disregarding the claimant's assertions that he negotiated for his salary Net as evidenced by the claimant's Bank statement. The magistrate stated in the Judgement that 'his salary was only subject to withholding tax of 5%, while no evidence was presented to that effect and the Respondent's supplementary list of documents was disputed by the claimant in his submissions.

10. That the trial Court erred in awarding costs in favour of the Respondent.

2. The Appellant sought for the following orders; -

a. That this appeal be allowed and the judgement of the trial subordinate Court be set aside with costs.

b. That the judgement delivered on 4th October, 2023 in the Chief Magistrate Court CMELRC NO. E005 OF 2022, be reviewed and the judgement entered in favour of the Appellant against the Respondent in terms of prayer 1,2,3 and 4 of the Memorandum of claim.

c. That the Respondent do bear the costs of the Appeal.

d. Such further or other Orders as this Honourable Court may deem just.

Brief facts.

3. The summary of the trial Court case as pleaded in the claim dated 25th March, 2022 is that the claimant was employed verbally by the Respondent on 28th September, 2020 as an accountant, earning a salary of Kshs 45,000 which was increased to Kshs 67,500 from July, 2021 and earned the same until termination on 23rd December, 2021. He added that the statutory deductions were not made and remitted to the requisite statutory bodies, thus he did not enjoy the benefits of the said deductions.

4. The Appellant avers that he was terminated abruptly without any reasons advanced, neither was he subjected to disciplinary hearing as such that the termination was unfair and prayed for the Court to find the termination was unfair and award him compensation for the unfair termination.

5. In response to the Claim, the Respondent stated that the Appellant herein was a consultant engaged to undertake some accounting work and since he was paid Kshs 45,000 per month, he is the one that requested to be engaged as consultant to avoid paying PAYE and instead pay the 5% withholding tax.

6. It is averred that the consultancy fee was increased to Kshs 67,500 and in December, 2021 the consultancy contract expired. The Respondent stated that after expiry of contract, they noted that the Appellant was debiting the Respondent's account with the 5% withholding tax instead of debiting to his Account for onward transmission to KRA. Also that the attempted to issue himself a cheque of Kshs 200,000 purportedly being terminal dues and cart away with an office file and records relating to his consultancy on a mission to erase the records therein, a move that the Respondent termed as dishonest and fraudulent.

7. On that basis, the Respondent maintained that the Appellant was engaged as a consultant and not an employee under the *Employment Act* and therefore is not entitled to any benefits sought in the Claim.

8. The matter was heard and the trial Court made its decision by the Judgement of 4th October, 2023 that the Appellant herein was an independent contract and not an employee and therefore not entitled to any terminal dues and the suit was dismissed with costs to the Respondent.

9. It's the dismissal of this Suit that led to the filling of the Appeal herein, which direction were taken on 8th February, 2024 for the Appeal to be canvassed by written submissions. The Appellant filed their submissions on 23rd February, 2024, while the Respondent filed their submissions on 14th March, 2024.

Appellant's Submissions.

10. The Appellant begun by submitting that this being a first Appeal, this Court has the powers to reaffirm or reverse the finding of the trial Court as was held in Mursal and Another V Munene (Suing as the legal administrator of Dalphine Kanini Manesa)[2020] KEHC 82 [KLR].

11. On the first issue, it was submitted that the trial Court erred in purporting to consider materials not contained in evidence i.e. referring to payroll that was not provided in Court.

12. On the second issue, it was argued that the trial Court showed clear bias in alleging that the Appellant herein did not dispute the Respondent allegations that he was working on his own terms, when the said issue never came up during hearing. On the contrary that the Appellant herein was under supervision of the Respondent's CEO as confirmed by the email 27th July, 2021.

13. The Appellant submitted further that the erroneous capturing of his last day as 21/12/2021 instead of 23/12/2021 was another demonstration of bias by the Court, because, the Court linked the allegations that the Appellant attempted to pay himself terminal dues by a cheque of Kshs 200,000 which was alleged to have been issued on the last day of work on 21/12/2023, when the proper last day worked was 23/12/2021.

14. On the issuance of the said cheque, the Appellant submitted that the CEO of the Respondent was the one that issued the cheque to the claimant in presence of the manager as admitted in Court, a clear indication that the allegations of fraud by the Respondent were not justified. He added that the said cheque was stopped and never paid to him, thus his dues remain unpaid.

15. On whether the Appellant was an employee or an independent contractor, the Appellant argued that he was directly under the directions and supervision of the Respondent's CEO and did no at any one-point work as an independent contractor. In fact, that the letter by the Respondent addressed to Kituo cha Sheria dated 25th February, 2022 at the last paragraph indicate that the Appellant herein was reporting to the CEO. Therefore, that the Court erred in finding that there was no element of control in how the work was done by the Appellant herein. To support these argument, the Appellant relied on the case of Lydia Limbe V Akili dada Cause No. 876 of 2016 and the case of Kapa Oil Refineries Limited V Kenya Revenue Authority, Civil Appeal No. 305 of 2012.

16. The Appellant gave several other scenarios where he was required to ask for permission from the CEO including by the email of 10th November, 2021, when he was asking for off days, the email of 15th December, 2021, where the Appellant is seen seeking for guidance from his CEO in handling some work given.

17. The Appellant dispelled the allegations that he used to work less days in a month and at times at night and argued that the work load of the Respondent was at times so much that he was forced to work beyond the working hours, which does not justify the allegations that he was an independent contractor.

18. To further buttress its argument that he was an employee, the Appellant argued that it is uncontroverted that the Respondent provided him with housing at the lodge, provided him with all tools of trade, given an office which was the only place he operated from. In this, he cited the decision by Manani J, in Robert Muguro *Mungai Vs Avion Limited Cause No. 972 of 2016*, where the Court gave the parameters of measuring control to include; the hours, time & place of work, the manner of executing the task at hand and provision of the tools for executing the task. It was argued further that the Respondent conceded to the fact that the accounting function carried out by the Appellant is an integral position in the organization, thus cannot be given to an independent contractor.

19. It was submitted further that the Appellant was taking instructions and being supervised by the CEO, earning a monthly salary, adhering to reporting times like all other employees, worked full time at the Respondent, received salary, bonus and increment as other employee, being part of the staff welfare, attended management meeting, sought for leave and off days and the fact that he has some of the staff reporting to him, showed clearly that he was an employee of the Respondent and not an independent contractor.

20. The Appellant argued that had the Court considered its submission, it would have arrived at a different conclusion, because the issue on the parameters of identifying an employee over an independent contract was well laid out in the submissions filed before the trial Court. In this he urged this Court to rely on its own decision in David Odwori Namuhisa V Magnet Ventures Limited[2017] eklr where this Court relied on ILO convention No. 198 and found that the claimant was an employee, for being a salaried employee among other factors.

21. On the payment of withholding tax, the Appellant stated that he negotiated his salary that was duly paid by the Respondent and since he was an account, he was directed to have him and another new employee called Jared to pay withholding tax to avoid paying normal tax as the company was experiencing cash flow problems. In fact, that all the other employees employed before Covid-19 pandemic were on half salary pay which was only increased to 75% in July, 2021. In any event that the payment of withholding tax instead of PAYE by itself does not make an employee an independent contract as was held by Onyango J in Kollengode Venkatachala Laksminarayan V Intex Construction Limited [2020] eklr and reiterated by the Court in Lydia Limbe Vs Akili Dada Cause 876 of 2017.

22. In conclusion, the Appellant urged this Court to review the decision by the trial court and find that indeed, he was an employee of the Respondent and allow the Appeal as prayed.

Respondent's Submissions.

23. The Respondent also submitted on the grounds of Appeal as submitted by the Appellant and on the the first issue, it was argued that the Appellant alleged that the court cited material that was not produced, when the Court erroneously used the word 'payroll' instead of Muster Roll, which was exhibit as evidence before the trial Court. therefore, that the typo cannot be considered as bias.

Additionally, that the reference by the Court to 21/12/2021 instead of 23/12/2021 was another typo that cannot be used to suggest the Court was biased towards the Respondent. He argued that typos are human errors that can be made by any party, that in fact the Appellant stated in their Appeal submissions at paragraph *6* that the employment ended on 23rd December, 2023, instead of 23rd December, 2021, a further demonstration of a typo, that underscores that everyone is susceptible to committing typographic errors that does not necessary indicate bias or favoritism. To Support this, the Respondent relied on the case of Edison Jambo Kalembe V Republic [2008] eklr where the Court held that;-

> " I have looked at the original record which shoes plea was taken on 24-4-06 and the date in the typed copy of proceedings reading 24-5-06 as date of plea is a typing error which can be resolved in favour of the prosecution without affecting the material substance of the case and I so resolve."

24. On whether the Appellant was an employee or an independent contractor, the Respondent submitted that the Appellant was employed as an independent contractor from the onset. In this the Respondent cited the case of Elijah Moranga v John Leinsly Irene Onderi [2014]eKLR where Radido J distinguished an independent contractor from employing by citing the case in Mombasa Cause No.229 of 2013, Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd), the Court observed that;-

> " An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th Cheque and so on."

25. Based on the definition by the Court, the Respondent submitted that the Appellant satisfied the hallmarks of independent contractor because; Firstly, he was engaged from the onset as a contractor, secondly, that he would manage his time and submit work at a time convenient to him. Thirdly, that he was not subjected to the usual statutory deductions but paid withholding tax of 5% and Fourthly that he was not listed in the muster roll where all employees were listed. These, he argued is a clear indication that he was not recognized as an employee.

26. The Respondent submitted that the Appellant in the emails tendered as evidence before court is seen to be discussing prioritizing various financial obligations and operational matters, that indicates a level of independence and authority over critical aspects of the Organization functioning. In support of this, the Respondent relied on the case of *Omusamia v Upperhill Springs Restaurant (Cause 852 of 2017)* [2021] KEELRC 3 (KLR) where the Court held that;-

> " Control included the power of deciding the things to be done, the way in which they had to be done, the means to be employed and in doing them, the time and place where they were to be done."

27. On the award of costs, it was argued that the ward was made in line with section 12(4) of the *Employment and Labour Relations Court Act*. He then urged this Court to refrain from interfering with award of costs as was held in United India Insurance Co. Ltd V East African Underwrites (Kenya)

Ltd [1985] E. A, unless special grounds have been presented before the Court for such interference, which none has been shown herein.

28. In conclusion, the Respondent submitted that it is evident that the Appellant was an independent contractor and not an employee, therefore that the trial Court was justified in finding against him.

29. He urged this Court not to interfere with the Judgement of the trial Court and instead dismiss the Appeal with costs for lacking merit.

30. I have considered the evidence and submissions of the parties herein. As this is a 1st appeal to this court, I have reevaluated the evidence of the parties from their pleadings and evidence from the lower court.

31. The claimant stated that he was employed by the respondent on 25th September 2020 as an accountant at as salary of 45000/= per month. He stated that in July, 2021 the salary was increased to 67000/=. That he served the respondent with loyalty and diligent until December, 2021, when the respondent terminated his service unlawfully and wrongfully. He stated that the respondent terminated him without payment of his terminal dues.

32. The respondent in their response aver that the claimant was engaged as a consultant to undertake some accounting work. That the claimant requested to be engaged as a consultant because he wanted flexibility and he was to pay tax holding of 5%. The consultancy fees was increased to 67,500/= under the same term and that his contract expired in December, 2021.

33. During the hearing the claimant produced his bank statement as evidence of the monthly pay. He also exhibited his periodic communitions with the respondent in the course of his duty and his performance appraisal during the same period.

34. During the same period however, the consultancy agreement the respondent indicated they entered into with the claimant was never produced in evidence.

35. From the judgment of the lower court, it is apparent that the court found as a fact that the clamant engaged in fraudulent activities which was not an issue brought out during the pendency of the engagement and which issue was not a determining factor in his termination. In evidence of alleged consultancy, section 10 (7) of the Act 2007 states as follows.

> "If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection, the burden of proving or disproving an alleged term of employment stipulated in the Contract shall be borne by the employer.

36. The law is clear that when an employer employs an employee they should issue him with a letter of employment contract and where there is no such contract the burden of proving as alleged term of employment shall be borne by the employer.

37. In this case, the respondent never produced any written contract. It is therefore the appellants word against the respondent which burden the appellant didn't discharge that the respondent was an independent consultant as opposed to an employee.

38. It is indeed true as submitted that the trial court failed to be guided on this fact and reached an erroneous decision that the appellant was not an employee of the respondent and therefore dismissed the claim.

39. Having considered these issues, it is my finding that the appellant was an employee of the respondent and circumstance of his termination not being guided by the law in particular section 41 of the *Employment act* 2007, I find that indeed the appeal has merit and is allowed.

40. In the circumstances the Hon. Chief Magistrate's judgement in ELRC no E005 of 2022 is set aside and substituted with judgement in favour of the appellant as follows.

    1. 1 month salary is in lieu of notice = 67,500/=
    2. Service pay as pleaded 33,750/=
    3. Compensation of 6 month salary as damages for unfair termination 6x75,000=405,000/=
    4. leave pay 67,500/=

       Total = 573,700/=

       less statutory declaration. The respondent will pay cost of this appeal

JUDGEMENT DELIVERED VIRTUALLY ON 30TH APRIL, 2024.

HELLEN WASILWA

JUDGE

In presence of:-

No appearance for the Respondent

No appearance for the Appellant

Fred- Court Assistant