Katana v Kwale Water And Sewarage Company Limited (Appeal E0124 of 2023) [2024] KEELRC 941 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 941 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E0124 OF 2023

M MBARŨ, J

APRIL 18, 2024

BETWEEN

AUGUSTINE NGALA KATANA ..... APPELLANT

AND

KWALE WATER AND SEWARAGE COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. M. L. Nabibya in Mombasa CMELRC No.597 of 2021 delivered on 28 September 2023)

JUDGMENT

1. The appeal herein arises from the judgment in Mombasa CMELRC No.597 of 2021 delivered on 28 September 2021 and seeking that the judgment be set aside and the same be substituted with an order for compensation for underpayments as outlined in the claim. The appellant is also seeking payment of costs.

2. The appellant filed his claim before the trial court on the grounds that in July 2007 he was employed by the respondent as a revenue collector supervisor until December 2016 when he retired. Upon appointment through a letter dated 27 August 2007, his wage was ksh.27, 486 per month but in breach of the employment letter, the same was not effected. He claimed the following dues;

   Amount paid;

   1. July 2007 to October 2013 Ksh.8,860;
   2. November 203 to November 2015 Ksh.10,315;
   3. December 2015 to December 2016 Ksh.18, 200.

   Amount payable

   1. July 2007 to June 2008 Ksh.27,486

2. July 2008 to June 2009 Ksh.28,224;

3. July 2009 to December 2016 Ksh.31,586

Outstanding amount Ksh.3, 506,760 less paid Ksh. 1,167,835 and unpaid Ksh.2, 338,925. The interest due and total due Ksh.4, 420,568.25.

3. In response, the respondent admitted that the appellant was appointed and posted on 1st February 2005 from Mombasa to Kwale as a revenue cashier and not as a revenue collector supervisor as alleged. The appellant was supposed to write a letter accepting the offer by the respondent but he failed to do so. Parties tried to resolve the matter amicably but the appellant got annoyed and left the meeting before conclusion hence making it difficult to resolve the matter. The appellant was paid all his dues. The appellant was suspended from work on 1st July 2008 and reinstated on 8 December 2008 since he failed to disclose material information. He was suspended after collecting money belonging to the respondent and failing to account for it. Upon reinstatement, ksh.12, 000 had to be deducted from his salary which he owed due to gross misconduct. From 1st April 2008 to 9 June 2008 the appellant absconded duty and the claim that there was work from July 2007 to December 2016 is not true. The respondent had on 16 December 2012 called the appellant for a salary harmonisation but he failed to attend which amounts to gross misconduct.

4. In the judgment delivered on 28 September 2021, the trial court dismissed the claim on the grounds that there was no proof of underpayment of wages as claimed.

Aggrieved, the appellant filed this appeal on the grounds that;

The trial magistrate erred in law and fact in failing to appreciate that there existed a contract of employment between the parties and that the evidence on record was not properly analysed to establish that the respondent frustrated the contract of employment. There was no determination on the validity of the contract. The legal principle in the case of Rose and Frank Co. v JR Crompton & Bras Ltd 1923 [2KB] were not applied by the trial court where the common intention of the parties to enter into legal obligation, was mutually communicated expressly or impliedly.

5. Other grounds of appeal are that the trial court erred in making a finding that there was no acceptance of the offer by the appellant despite evidence that he served an entire term of employment until attaining retirement. Failing to determine that the appellant was entitled to be compensated during the tenure of employment was in error, and the underpayments should be awarded with interests as claimed.

To the appeal, the respondent filed Grounds of Opposition that the same is an abuse of court process. The judgment in CMELRC No. 571 of 2021 was fair and just based on a contract the appellant failed to honour. The appeal is filed in bad faith and should be dismissed with costs.

6. Both parties attended and agreed to address the appeal by written submissions. Only the appellant filed his written submissions.

7. The appellant submitted that the law of contract in Kenya is premised on Section 3 of the *Law of Contract Act* which proves that the valid contract must be evidenced in writing. This is further defined under Civil Appeal 14 of 2019 G. Percy Trentham Ltd v Arbitral Luxfer Ltd [1993] 1 LR. The practice of law is to preserve the objectives of the parties under reasonable expectations. There must be an offer and acceptance but not with regard to a contract already in existence as a result of performance. Where the transaction is executed rather than executory it is a consideration of the first important number of levels the fact that there was no intention to enter into legal relation. And where a contract comes into

existence during and as a result of the performance of the transaction it will frequently be possible to hold that the contract impliedly a respective cover pre-contract performance.

9. The appellant submitted that in his case, there is evidence that he was employed by the respondent and he served the entire period of employment until he attained retirement age. While in service he was promoted and there was no termination for any gross misconduct.

   He served a full term.

10. Contrary to the finding by the trial court that there was no contract of employment between the parties, such fact was not denied by the respondent as the employer.

11. Section 119 of the *Evidence Act* provides that the court may presume the existence of any fact that it thinks likely to have happened regarding any common course of natural events. By the conduct of the respondent, the fact of a contract of employment is not denied. In the case of Total Kenya Limited v D Pasacom General Construction and Electrical Service Civil Appeal, 119 of 2019 the Court of Appeal held that the lack of a local purchase order issued to the appellant did not in any way render the oral contract between the parties void.

12. In this regard, there was a contract between the parties regardless of the appellant not signing the letter of offer and not signing the acceptance letter. The underpayments claimed should be awarded with interests and costs.

    As noted above, the respondent only filed Grounds of Opposition to the appeal. Determination

13. It is now settled law that the first appellate court must re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its findings and conclusions. The Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424 held that The appropriate standard of review established in cases of appeal can be stated in three complementary principles;

    ... First, on the first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its conclusions;

    In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

14. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it had been hearing the matter for the first time.

15. The uncontested facts discerned from the pleadings and evidence of the parties are that the appellant was employed by the respondent following a letter of offer of employment dated 27 August 2007. He worked until December 2016 when he retired.

16. The claims made relate to alleged underpayments arising during employment from July 2007 to December 2016.

    Employment between the parties ceased in December 2016.

17. The appellant filed his Memorandum of Claim before the trial court on 14 September 2021. This is 4 years 9 months and 14 days after the fact of cessation of employment.

18. In response, the respondent admitted the offer of employment to the appellant through a letter of offer and his posting on 1st February 2005 from Mombasa to Kwale.

19. The response is also that the employment of the appellant had ups and downs; He was offered a letter of employment but declined to accept;

20. On 1st July 2008, he was suspended from duty;

    On 8 December 2008 he was reinstated and surcharged Ksh.12, 000 for gross misconduct;

    From 1st April to 9 June 2008 the appellant absconded duty and the claim that he worked from July 2007 to December 2016 is not true.

21. On 16 November 2012, the respondent called the appellant for a salary harmonisation but he walked out of the meeting.

22. These events as outlined above are necessary to create a picture of the employment relationship.

23. The respondent filed work records and indeed through a letter dated 14 February 2005 the appellant was deployed to Kwale as a revenue cashier.

24. There are minutes of a meeting held between the appellant and the respondent on 3 July 2019 which related to his Ukulima Shares, NSSF dues, and Salary Scale. The meeting confirmed that the appellant was employed through a letter of appointment dated 23 August 2007 at a basic wage of Ksh.27, 486. He was requested to accept the offer of employment but failed to address it. He was hence paid a wage of Ksh.10, 315 which increased to Ksh.18, 200.

25. This meeting of 3 July 2019 was confirmed by the respondent's witness Susan Mlamba as held between the claimant and the respondent whereby Coast Water Works Development Authority was acting as the mediator on the 3rd July 2019, however, the applicant walked out of the meeting before conclusion because of anger.

    The employment relationship terminated effective December 2016.

26. The appellant should and ought to have filed any claims he had against the respondent within the provisions of Section 90 of the *Employment Act*, 2007 (the Act). Time to file his claims, if any, ought to have been lodged in court on or before November 2019. Whatever actions were taken seeking payment of his alleged underpayments during employment including the arbitration meetings should have factored the time limits for filing employment claims based on his employment relationship with the respondent.

27. Even though this matter was not raised before the trial court and the core issue was the nature of the contract, an employment relationship is regulated under the Act, the forum for litigation is regulated under the *Employment and Labour Relations Court Act*, 2011 and the power bestowed upon subordinate courts to hear employment disputes. The application of the Law of Contract is removed from this court as this relates to commercial disputes and areas under the exclusive jurisdiction of the High Court.

28. To urge the court under the employment relationship, Section 90 of the Act is couched in mandatory terms. It provides as follows;

    Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (cap. 22), no civil action or proceedings based or arising out of this act or a contract of service, in general, shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

29. A claim based on a contract of employment or labour relations must be filed within 3 years. This Court is denied jurisdiction to extend the time to file suits not lodged with the court within 3 years from the

date the cause of action arose. The same applies to subordinate courts conferred with the power to hear employment disputes such as the trial court.

30. The assertion by the appellant that there was underpayment of his wages from July 2007 to December 2016 which accrued within the employment relationship, any such claim ought to have been addressed as a continuing injury within 12 months or as an employment benefit within 3 years. Failure to address such benefit, the window of 3 years ought to have applied to consolidate all dues accruing and unpaid as held in G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR that any suit by an aggrieved party must be filed within twelve months of such cessation of injury/damage or termination of employment. See Johnson Kazungu v Kenya Marine & Fisheries Research Institute [2021] eKLR, John Kiiru Njiiri v University of Nairobi [2021] eKLR.

31. The learned magistrate assessed the claim as based on the law of contract with a finding that the appellant was issued with an offer but declined to accept. On this basis, the claim was dismissed. However, the dispute before the court was not a commercial dispute but an employment claim regulated under the Act. The record and facts pleaded by the parties are clear to this extent. The time to address an employment claim cannot be enlarged by any negotiations, arbitration or conciliations.

32. Any conciliations, arbitration or negotiations should be undertaken within the 3 years contemplated under Section 90 of the Act. In the case of Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Ltd [2015] eKLR the court held that the 3 years is the outer limit and a party desirous of commencing legal action even where conciliation has gone beyond the 3 years must be alert that any action is commenced in time. Section 15 of the *Employment and Labour Relations Court Act*, 2011 allow a party to file a claim and then seek referral to arbitration of conciliation. Such secure any ongoing negotiations without compromise to the time limitations set in mandatory terms under Section 90 of the Act.

33. Effectively, having filed his claim outside the limitation period of 3 years from the date employment ceased, the claim before the trial court was time-barred. This denied the court jurisdiction. To proceed and urge his case and the instant appeal renders the entire process academic.

34. Even in a case where the appellant was owed any dues in underpayment, his admission that he was offered employment and failed to accept, the foundation of his claim for underpayments is lost. Without accepting the letter of offer of employment, his employment was regulated as a general labourer, if at all.

35. The claim being time-barred, the court is without jurisdiction. No party raised these legal issues. The appeal is dismissed. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18 DAY OF APRIL 2024.

M. MBARŨ JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....

The Judiciary of Kenya