Kenya Union of Sugarcane Plantation and Allied Workers v Othira (Appeal E005 of 2023) [2024] KEELRC 843 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 843 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E005 OF 2023

CN BAARI, J

APRIL 18, 2024

BETWEEN

KENYA UNION OF SUGARCANE PLANTATION AND ALLIED WORKERS ..... APPELLANT

AND

JACOB OCHICH OTHIRA ..... RESPONDENT

(Being an appeal from the Judgment of Hon Ezekiel. A. Obina (PM) Kisumu delivered on 17th January, 2023 in Kisumu CMELRC CAUSE NO. 12 OF 2021)

JUDGMENT

1. Jacob Ochich Othira the Respondent herein, sued the Kenya Union of Sugar Plantation Workers (the Appellant) before the Kisumu Chief Magistrate's Court alleging unlawful termination and non-payment of terminal dues.

2. In a judgment delivered on 17th January, 2023, the Magistrate found that the Respondent had been constructively dismissed and awarded him 1 months' salary in lieu of notice, 6 months' salary compensation for wrongful dismissal and underpayments from September, 2016 to September, 2019, all amounting Kshs 619,097/=.

3. The Appellant being dissatisfied with the decision of the lower court, lodged the instant appeal on 9th February, 2023, premised on the grounds THAT: -

    i. The Learned Trial Magistrate erred in law and fact in holding that the Claimant was constructively terminated and therefore entitled to damages for wrongful dismissal.

    ii. The Learned Trial Magistrate erred in law and fact by making a finding that the Claimant was being underpaid.

iii. The Learned Trial Magistrate erred in law and fact by making award for underpayments when there was no evidence to prove that the Claimant was entitled to the same.

iv. The Learned Trial Magistrate erred in law and fact by making an award for salary in lieu of notice when there was no evidence that the Claimant was terminated.

v. The Learned Trial Magistrate erred in law and fact by making an award for wrongful dismissal of six months' salary which was too high and not in consonant with the law.

vi. The Learned Trial Magistrate erred in law and fact by using a minimum wage to calculate dues to the Claimant when there was no evidence that the Claimant was subject to the Minimum Wage Regulations.

vii. The Learned Trial Magistrate erred in law and fact by using minimum wage regulations when the same was not adduced as evidence in court.

viii. The Learned Trial Magistrate erred in law and fact by entering a judgment which was against the weight of evidence in court.

ix. The Learned Trial Magistrate erred in law by failing to consider and analyse the submissions and the authorities of the Respondent thereby arriving at a wrong decision.

x. The Learned Trial Magistrate erred in law and fact by considering extraneous factors hence arriving at a wrong decision.

xi. The Learned Trial Magistrate erred in law and fact by allowing the claim against the weight of the evidence.

4. The Appellant prays that the appeal be allowed and the Judgment and Decree of Trial Magistrate delivered on 17th January, 2023, be set aside and/or varied and be substituted with an order dismissing the prayers sought in the memorandum of claim dated 21st January, 2021.

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

The Appellant's Submissions

6. The Appellant submits that the Respondent has not met the threshold for constructive dismissal as to be considered to have been constructively dismissed. It sought to rely in the case of Enid Nkirote Mukire vs Kenya Yearbook Editorial Board [2022] eKLR for the holding that: -

> " Constructive dismissal occurs where an employee terminates his/her employment because of frustration by the employer, either by the employer breaching fundamental terms of employment contract or making the environment at work unbearable to the employee, thus forcing the employee to terminate the contract. The circumstances of this case do not lend themselves to any interpretation of constructive dismissal."

7. It is the Appellant's submission that the indefinite leave the Respondent was sent on, did not amount to a dismissal. It asserts further that the leave was necessitated by hard-economic times brought about by the Covid 19 pandemic.

8. The Appellant contends that it was the Respondent's prerogative to prove wrongful dismissal per Section 47(5) of the *Employment Act*. The Appellant placed reliance in the case of John Kebaso Mose vs Uchumi Supermarket Kericho ELRC No. 43 of 2017 where the court stressed the employee's duty as espoused by section 47(5) of the *Employment Act*.

9. In respect of salary underpayment, the Appellant affirms that the Respondent was employed as an Organizing Secretary and not as a sales man. It thus asserts that the wages order does not apply to him. It is its submission that it does not engage in sale of goods and could thus not engage the services of a salesman.

10. The Appellant submits that the magistrate's finding of underpayment was contrary to Section 48 of the *Labour Institutions Act*. It is its further assertion that the Respondent negotiated his salary and accepted the terms. It sought reliance in the case of Miguna Miguna vs Attorney General Industrial General Industrial Cause no 473 of 2011, where the court had this to say: -

> " Given that the claimant was offered this appointment and he took it up and continued to receive the salary, allowances and benefits attached to it, he cannot turn around and deny that he accepted the offer given to him. Had he declined to take up the appointment at that time, then he could have seen a situation where the contract may have been renegotiated. However, having taken up the appointment as it was and on terms as per the appointment letter, the claimant cannot turn around and demand what was not in this, letter."

11. In response to the award of salary in lieu of notice, the Appellant submits that it is only payable in cases of wrongful termination, which was not the situation in this case. It submits that the award of pay in lieu of notice by the magistrate was contrary to Section 35 of the *Employment Act*, and was thus without legal basis.

12. It is the Appellant's submission that no reason(s) were given by the Trial Court in making an award of 6 months for unfair termination as required by Section 50 of the *Employment Act* and pray that this award be set aside.

13. The Appellant urges the Court to allow the appeal and dismiss the Respondent claim before the lower court.

The Respondent's Submissions

14. The Respondent's submission is that he was sent on indefinite leave which is still subsisting, and that it is this state of limbo that necessitated the filing of suit, as the status of an employment contract should be clear and unequivocal to the employee. He relies on the case of Ben Murage Njogu vs Ramani Warehouse Limited [2021] eKLR for the holding that:

> " An employer must give an employee clear and unequivocal instruction on the status of the Employee's contract. it cannot be that an employee is told to go home; would be recalled at an appropriate time; and that should the employee find alternative employment, he is free to take it. The Employment relationship must be made clear. This fluidity of the relationship advanced by the Respondent does little in defining the parties' mutuality of obligations. What is the status of the contract made by the parties on 17th April 2020? Is it subsisting or has it been terminated? What are the obligations of the parties today?"

15. He contends that the Appellant was non-committal on the status of his employment and never made any effort to reach out to him. He submits that the Appellant was in breach of contract for sending him on compulsory leave without complying with Section 10 (5) of the *Employment Act*, to the effect that revision of employment contracts should be done in consultation with the employee. He placed reliance in Emmanuel Wambua Muthusi & 6 others vs Khoja Shia Ithna Ashari Education Board t/ a Jaffery Academy [2020] eKLR where it was held that Section 10(5) of the *Employment Act*, did not

necessarily require that consultations end up in an agreement, but while changing terms of the contract the employer should in the very least consult the employee.

16. It is the Respondent's submission that the unilateral decision to send him on indefinite unpaid leave, amounted to breach of contract and of *the Constitution*. He further submits that the facts of his case meet the threshold for constructive dismissal per the holding in the case of Coca Cola East and Central Africa ltd vs Maria where the court found that "constructive dismissal" occurs where the employer's behaviour is so intolerable that it makes it considerably difficult for the employee to continue working.

17. On whether the Learned Magistrate erred in making an award for compensation for unlawful termination, the Respondent submits that given his 10 years of service, the 6 months compensation was warranted. Furthermore, he avers that he was entitled to 1 months' pay in lieu of notice as per Section 36 of the *Employment Act*.

18. The Respondent submits that he was underpaid between the year 2009 to 2019, having been a salesman whose role entailed recruitment of members to the Appellant union. It is his submission that the Appellant had not assigned him a job description.

19. It is his final submission that the Minimum Wage Orders are statutory provisions, hence it was not a must that they be produced in evidence.

Analysis and Determination

20. Having considered the record and the rival submissions, the 11 grounds of appeal coalesce into the following three grounds: -

    i. That the Learned Trial Magistrate erred in law and fact in holding that the Claimant was constructively terminated, and therefore entitled to damages for wrongful dismissal.

    ii. The Learned Trial Magistrate erred in law and fact by allowing the claim against the weight of the evidence.

    iii. The Learned Trial Magistrate erred in law and fact by using a minimum wage to calculate dues to the Claimant when there was no evidence that the Claimant was subject to the Minimum Wage Regulations.

21. In the case of Okeno v Republic [1972] EA, 32, the then East African Court of Appeal had this to say on first appeals: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R, [1957] EA 336) and for the appellate court to make its own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] EA 424."

22. The finding of the Trial Court is that the Respondent was constructively dismissed premised on the letter dated 11th September, 2019, sending him on unpaid indefinite leave. The Respondent in his submissions avers that his case meets the threshold for constructive dismissal set in the case of Coca

Cola East and Central Africa ltd vs Maria, where the court found that "constructive dismissal" occurs where the employer's behaviour is so intolerable that it makes it considerably difficult for the employee to continue working.

23. The question for this court is whether the Respondent was constructively dismissed. The principle of constructive dismissal is a presumptive concept developed by common law and the courts to address instances when an employer, in all circumstances of the case, conducts himself in a manner to infer termination. (George Ogembo, Employment Law Guide for Employers, Second Edition (2022)-Law Africa)

24. In Kenya today, there is no law defining with clarity when a constructive dismissal should be deemed to have occurred. It has however been largely applied by courts tied to the law of contract under the doctrine of discharge by breach.

25. The first element that must be present for constructive dismissal to be construed, is that the employee has to have resigned from the service of the employer, and the resignation must be by reason of the employer creating working conditions that leave the employee with no option but to resign.

26. Lord Denning, MR in the case of Western Excavating (ECC) Ltd v. Sharp (1978) ICR 222 stated thus: -

> " If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essentials of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave instantly without giving any notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

27. The Respondent herein did not resign. He was instead, send on an indefinite compulsory. In Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721 constructive dismissal was defined as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee, to such an extent that the employee has no other option available but to resign.

28. For a constructive dismissal to be construed, there must be resignation. Resignation is viewed as communication of the intolerability of the employer's conduct. In the absence of resignation, it is safe to draw an inference that the employee has acquiesced to the employer's intolerable conduct. (See Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR).

29. For reason that the Respondent herein did not resign, his separation with the Appellant cannot be construed to amount to a constructive dismissal.

30. The upshot therefore is that the Learned Magistrate erred in finding that the Respondent was constructively dismissed, and so I hold.

31. Having said that, and this being a first appeal, this court has a primary role to re-evaluate, re-assess and re-analyse the extracts on the record and make its own conclusion on the matter.

32. The Respondent was issued a letter sending him on unpaid compulsory leave for an indefinite period, ostensibly owing to financial constraints.

33. The Appellant's witness in his testimony before the Trial Court, intimated that the decision to send the Respondent on compulsory leave was reached by the Board of the Appellant and communicated to the Respondent by the Executive Secretary.

34. Section 10 (5) of the *Employment Act*,2007 states:

> " Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."

35. The Appellant's evidence is that there was no consultation whatsoever with the Respondent in relation to the compulsory leave, and that the decision was made unilaterally by the Board of the Appellant, and communicated to him. In Ben Murage Njogu vs Ramani Warehouse Limited [2021] eKLR also cited by the Respondent, the court held:

> " An employer must give an employee clear and unequivocal instruction on the status of the Employee's contract. It cannot be that an employee is told to go home; would be recalled at an appropriate time; and that should the employee find alternative employment, he is free to take it. The Employment relationship must be made clear. This fluidity of the relationship advanced by the Respondent does little in defining the parties' mutuality of obligations. What is the status of the contract made by the parties on 17th April 2020? Is it subsisting or has it been terminated? What are the obligations of the parties today?"

36. In view of the Appellant's failure to consult the Respondent on the changes to his contract, I deem the Respondent unlawfully and unfairly terminated, and so I hold.

37. On the awards made by the Trial Court, the record supports the Appellant's assertion that the Respondent served in the position of organizing Secretary and not sales man as alleged. In the premise, the Minimum Wage Regulation does not apply to his position, hence the salary payable is that agreed upon between the parties.

38. For this reason, the award of underpayment by the Trial Court is set aside, and the claim for under payment dismissed.

39. The termination having been held unfair, entitles the Respondent to compensation in accordance with Sections 49 and 50 of the *Employment Act*, 2007.

40. The Trial Court awarded the Respondent 6 months salary for the unfair termination. Considering that the Respondent put in 10 long years of service with the Appellant and the manner in which his termination was executed, I hold that he has made a case for maximum compensation. In Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR the Court held that in granting 12 months of salary compensation for unfair termination, it considered the Claimant's long service.

41. In the premise, the award of six months salary as compensation for unfair termination is set aside and substituted therewith 12 months salary for unfair termination.

42. It is evident that other than the letter of compulsory leave, no notice or pay in lieu thereof was issued to the Respondent, even when it became clear that he would not be recalled back to the service of the Appellant. This in my view, entitles him to pay in lieu of notice and the award by the trial court on this account is upheld.

43. In whole, I make the following orders: -

a. The award on account of underpayment is set aside in its entirety.

b. The award of 6 months' salary is set aside and substituted with 12 months' salary for unfair termination at Kshs. 115,800/-

c. The award of one-month salary in lieu of notice is upheld at Kshs. 9,650/-

d. The Appellant shall bear the costs of the suit both at the lower court and for this appeal.

44. Judgment of the Court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18TH DAY OF APRIL, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Bagada present for the Appellant

Ms. Raburu h/b for Mr. M.M. Omondi for the Respondent

Erwin Ongor - C/A