



REPUBLIC OF KENYA



KENYA LAW
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**Frodak Kenya Limited v Makunda (Employment and Labour Relations Appeal
E005 of 2023) [2024] KEELRC 820 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 820 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2023**

JW KELI, J

APRIL 16, 2024

BETWEEN

FRODAK KENYA LIMITED APPELLANT

AND

PHILIP LUMANYASI MAKUNDA RESPONDENT

*(An Appeal from Part Judgment and Decree of Hon. Reuben Sang (SPM),
Butali, delivered on 13th June 2023 in Butali MC ELR case No. 2 of 2018)*

JUDGMENT

1. The Appellant, being dissatisfied with Part Judgment and Decree of Hon. Reuben Sang (SPM), Butali, delivered on 13th June 2023 in Butali MC ELR case No 2 of 2018 between Philip Lumanyasi Makunda and Frodak Kenya Limited filed a Memorandum of Appeal dated 3rd July 2023 and Record of Appeal received in Court on the 8th August 2023, seeking the following orders: -
 - a. This Appeal be allowed with costs to the appellant
 - b. The court, being the first appellate court, does re-evaluate the evidence and find that the Respondent was a piece-rated employee, entitled only to certain benefits under the *Employment Act*.
 - c. The Trial Magistrate's awards underpayment, severance pay, leave allowance, overtime and public holidays be set aside and their place, this court does find that the Respondent was paid all that was due to him.
2. The Appeal was premised on the following grounds:



1. The Learned Trial Magistrate grossly misdirected himself in ignoring the principles and tenets of law applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant thus arriving at a wrong conclusion of the same.
 2. The Learned Trial magistrate grossly erred and misdirected himself when he failed to consider the fact that all the documents produced in evidence, and particularly the bundle of pay reports and contracts in addition to the Respondent's own admission while under cross-examination, pointed to the fact that the Respondent was a piece-rated employee and as such was therefore not entitled to some of the reliefs sought in the Claim.
 3. The Learned Trial Magistrate erred in law and fact when he allowed a claim for severance pay at Kshs 56,976/- against the Appellant, when there was no evidence in proof of the same and despite his own finding that the Respondent's employment was not terminated on account of Redundancy but lawfully by the effluxion of time.
 4. The Learned Trial Magistrate erred in law and fact when he relied on NHIF/NSSF deductions and uninterrupted earnings as a basis for awarding a claim for underpayment, while at the same time ignoring the character of piece-rate employment as prescribed before him and the Respondent's acknowledgment of having been paid all that was due to him.
 5. The Learned Magistrate, further erred in principle by reducing himself to the arena of negotiations of terms of employment between the Appellant and the Respondent, when he relied on terms and allowed benefits that were not provided for under the Respondent's contract of employment.
 6. That the Learned Trial Magistrate grossly erred and misdirected himself in fact and law when, he allowed the claims for leave allowance, overtime and public holidays, when no firm basis for such awards had been established (Pg. 6-8 of the Record).
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Okong'o Wandago & Co. Advocates were dated 20th December 2023 and received in court on 16th January 2024. The Respondent's written submissions drawn by Mukabane & Kagunza Advocates were dated 4th March 2024 and received in court on 6th March 2024.

Background to the appeal

7. The Respondent filed a suit Butali CMELR E062 of 2020 against the Appellant for unlawful and unfair termination through the Memorandum of Claim dated 18th August 2018 and filed on 24th August 2018, seeking the following reliefs: -
 - a. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the Claimant is entitled to compensation of her terminal dues as outlined herein above;
 - b. The sum of Kshs 1,480, 240/- as set out herein above;
 - c. Certificate of service;
 - d. Cost of this suit and interests as court rates from time of filing the suit until payment in full.
 - e. Any other further and better relief the Honourable Court may deem just and fit to grant.
8. The Statement of Claim was supported by the Verifying Affidavit of 18th August 2018 and accompanied by the Respondent's List of issues for determination dated on even date, the



Consolidated List of Witnesses and Documents dated on even date, the Respondent's witness statement dated 18th August 2018, his List of Documents of even date, and his Bundle of Documents (page 7-24 of the record is the Respondent/Claimant's case- (mis-numbered).

9. The Appellant entered appearance in the lower court on 21st April 2022(Memorandum of Appearance dated 13th April 2022- pg. 25 of the Record) and filed the Response to Claim dated 22nd April 2022 received in court on 5th May 2022. The Response to the claim was accompanied by the Appellant/ Respondent's List of witnesses dated 22nd April 2022; the Witness statement of George Onyango Ager dated 21st April 2022, the appellant/Respondent's List of Documents dated 22nd April 2022(Pages. 26-97 of the record).
10. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with him as the only witness on the 28th of December 2022. The defence case was heard on the 25th of April 2023 with George Onyango Ager as the defence's only witness (Proceedings were in the lower court file and not in the record of Appeal).
11. The parties filed submissions in the lower Court after the closure of the defence. The Plaintiff's submissions were dated 23rd May 2023 and filed on 24th May 2023 (in the lower court file and not in the record of Appeal). The Appellant/Respondent filed written submissions (pages 98-111 of the Record).
12. The trial Court (Hon. Reuben Sang, SPM.) delivered its judgment on the 13th of June 2023 (in the lower court file and not in the record of Appeal) and held that the Respondent's contract had expired by effluxion of time thus he was terminated fairly, but entered judgement in favour of the Respondent for reliefs of leave allowance(calculated as a difference of the sums already paid to the respondent), severance pay and underpayment(to be calculated as per records kept of the claims).

Determination

Issues for determination.

13. The Appellant in his written submissions submitted that the trial magistrate erred in awarding the Respondent reliefs of Leave Allowance; public holidays, overtime, severance pay, and underpayment, yet the Respondent was a piece-meal employee.
14. The Respondent in his submissions identified the following issues for determination in the appeal: -
 - a. Whether the appeal is fatally defective
 - b. Whether the claimant was an employee of the respondent and if so whether his dismissal from employment by the respondent was unlawful and unfair
 - c. Whether the respondent was employed on piece rate basis
 - d. Whether the appeal on award for overtime and public holidays is misplaced.
 - e. Whether the respondent/claimant was entitled to leave allowance and underpayment.
15. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1948) EA123.
16. The court guided by *Selle's decision*, that the court sitting at first appeal has to evaluate the facts and evidence before the trial court as relates to the grounds of the appeal while making allowance of not



having seen the witnesses to reach their own conclusion. finds the issues for determination in the appeal are as follows: -

- a. Whether the appeal is competent
If (a) above in the affirmative:-
- b. whether the claimant/respondent was a piece rate worker
- c. whether the reliefs granted by trial magistrate court of Leave Allowance; public holidays, overtime, severance pay, and underpayment,

Whether the appeal is competent

17. The Respondent submits that section 79G of the *Civil Procedure Act* strictly requires a record of appeal to have a decree or order while the appeal herein is without a decree which renders it fatally defective. That the record lacks the decree, judgment, claimant's submissions, typed and certified proceedings, and other relevant documents set out under section 42 Rule 13(4) of the Civil Procedure Rules rendering the appeal fatally defective and request for dismissal of the appeal with costs to the respondent.
18. The Court examined the record of appeal filed in court on the 8th of August 2023 and established that the submission by the Respondent was true. The appellant annexed a letter dated 3rd July 2023 addressed to Executive Officer Butali Magistrates Court requesting for typed and certified proceedings and judgment (page 113 of the Record). The record had no typed and certified copies of the decree, judgment, trial proceedings, and the claimant's submissions.
19. Section 79 G of the *Civil Procedure Act* states:- "79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against." Thus the decree is compulsory to be part of the record together with other pleadings and documents stated under Order 42 (13) (4) of the *Civil Procedure Rules* namely: -"
 - a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;
 - g. Provided that— (i) (ii) a translation into English shall be provided of any document not in that language; the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."
20. The court believes that according to the provisions of section 79 G of the *Civil Procedure Act* as read together with the provisions of Order 42 (13) (4) of the Civil Procedure Rules, the Decree appealed against must be in the record of appeal. The decree, judgment and typed proceedings of the trial court are not in the record.



21. Faced with a similar situation Justice Ombwayo in *Lucas Otieno Masaye v Lucia Olewe Kidi* [2022] eKLR held:- “The Appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the Respondent.” I uphold the decision. Justice Ombwayo relied on the decision of higher courts in arriving at his decision which I uphold.
22. The Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR held as follows at paragraph 41: “Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the *Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”
23. The Court of Appeal in *Chege v Suleiman* [1988] eKLR firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus: “But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the *Civil Procedure Act* which confers a right of appeal from the High Court to this Court from “decrees and orders of the High Court”. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.”
24. Applying the foregoing jurisprudence of the Superior court and Order 42 Rule (13)(4) of the *Civil Procedure Rules*, the record of appeal filed on 8th August 2023 is held as incompetent for failure to include the copy of certified judgment and Decree relied on and is struck off with costs.

DATED, SIGNED, AND DELIVERED ON THE 16TH DAY OF APRIL 2024 IN OPEN COURT AT KAKAMEGA

J.W. KELI

JUDGE

In the presence of

C/A Lucy Macheso

For Appellant: Ms. Odhiambo h/b Ms. Achieng

For Respondent: Kagunza

