



**Golden Biscuits (1985) Limited v Otieno (Appeal E228 of 2022)
[2024] KEELRC 1222 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1222 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E228 OF 2022
NZIOKI WA MAKAU, J
MAY 21, 2024**

BETWEEN

GOLDEN BISCUITS (1985) LIMITED APPELLANT

AND

JULIUS OCHIENG OTIENO RESPONDENT

(Appeal from the Judgment of the Chief Magistrate's Court at Milimani Nairobi (Delivered on 5th December 2022 by Principal Magistrate Honourable E. Kagoni) in CMEL No. 38 of 2019)

JUDGMENT

1. Being dissatisfied with the Judgment of Hon. E. Kagoni (Mr.) in CMEL No. 38 of 2019 delivered on 5th December 2022, the Appellant Company filed a Memorandum of Appeal dated 22nd December 2022 appealing against the whole Judgment on the following grounds:
 - a. The Learned trial Magistrate erred in fact and law in decreeing that the respondent is still in the employment of the appellant and yet the same was never pleaded nor raised at trial.
 - b. The Learned trial Magistrate erred in fact and law in determining matter on the basis of non-pleaded matters.
 - c. The Learned trial Magistrate erred in fact and law in not determining the issues raised from pleadings and evidence namely; whether the respondent deserted work or was unfairly terminated and whether the respondent is entitled to the reliefs sought.
 - d. The Learned trial Magistrate erred in law in disregarding the precedents on the issues raised from the superior court which are binding to the lower courts.
2. The Appellant prays that the Appeal herein be allowed and that the Judgment delivered on 5th December 2022 be set aside and substituted with an Order that the Respondent did not prove their



claim on a balance of probability. Lastly, it prays for any further or other alternative relief and or order that this Court may deem fit and just to grant.

3. The matter was disposed by way of written submissions.

Appellant's Submissions

4. The Appellant submitted that the issues for determination by this Court are as follows:
 - a. Whether the Learned trial Magistrate erred in fact and law in decreeing that the Respondent is still in the employment of the Appellant and yet the same was never pleaded and thus determined the matter on the basis of non-pleaded matters.
 - b. Whether the trial Magistrate fell in error in decreeing that the Respondent/Claimant is still in the employ of the Appellant/Respondent and yet it had decreed that he failed to attend the disciplinary meetings.
5. It was the Appellant's submission that the duty of the appellate court is to reconsider the evidence, evaluate it and draw its own conclusion taking into account the fact that it has neither seen nor heard the witness and further, that it was not bound to follow the trial judge's findings of fact as succinctly stated by the East Africa Court of Appeal in *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, 126.
6. As regards the first issue on non-pleaded matters, the Appellant cited the case of *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR in which the Court of Appeal affirmed inter alia that a judge had no power or jurisdiction to decide an issue that had not been pleaded unless the pleadings were suitably amended. That similarly, the Court of Appeal in the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR (Civil Appeal No. 76 of 2014) was instructive that it is well established in our jurisdiction that the court will not grant a remedy which has not been applied for and will not determine issues which the parties have not pleaded. The Appellant noted that in the instant case, the parties' pleadings clearly indicates that what was in dispute was whether the Appellant had illegally terminated the Respondent herein, and none of the parties pleaded or argued that the Respondent was still in the employ of the Appellant. That therefore, the trial Court should have rendered a judgement on the basis of the issues raised in the pleadings namely; whether the Respondent had been terminated unlawfully and thus entitled to the reliefs sought. The Appellant contended that the trial Court therefore erred in determining the matter on the basis of un-pleaded matters and granting reliefs not sought.
7. The Appellant submitted that a look at pages 5 and 6 of the Judgment and pages 123 and 124 of the Record of Appeal shows that the trial Court fell into error when it found that the Respondent/Claimant is still in the employ of the Appellant/Respondent, yet it had decreed that the Claimant failed to attend the disciplinary meetings. That the trial Magistrate thus arrived at the wrong conclusion. It was the Appellant's submission that considering the foregoing, the Appeal herein is for allowing as prayed.

8. Respondent's Submissions

The Respondent noted that the trial Magistrate found in his favour and made the following Orders:

- a. The claimant is awarded payment of his salary from 1st September 2018 – 30th November 2022 computed at Kshs. 717,060/-
- b. Parties to proceed to mediation to determine how they proceed from this point, taking into account that, the claimant is still an employee.



- c. Both parties will bear the costs of mediation equally.
 - d. The award is subject to statutory deductions.
 - e. There are no orders as to costs.
 - f. Interests on (a) at court rates, from the date of judgment.
9. It proposed the following to be the issues for determination by this Court:
- i. Whether the trial Magistrate erred in granting reliefs that had not been sought.
 - ii. Whether the Respondent was terminated by the Appellant and/or whether he deserted employment and, if he was terminated, whether such termination was unfair.
 - iii. Whether or not the Respondent was granted annual leave to entitle him to salary in lieu of leave.
 - iv. Whether this being a 1st appeal, this Honourable Court has jurisdiction to go through the evidence and substitute the Judgment of the trial Court with its own judgment.
10. It was the Respondent's submission that the issue of employment was not disputed. That he, at page 114 of the Record of Appeal informed the trial Court that he did not leave on his own accord but was asked to leave by the General Manager after being accused of theft. That this position was confirmed by the Appellant/Respondent's witness who stated under cross-examination that the Respondent/Claimant was suspended by the Manager though he did not indicate the duration of the suspension. According to the Respondent, this evidence supported his case that he was forced out of employment by the Appellant's Manager. Further, the Respondent submitted that there is no way he would have done the demand letter dated 13th September 2018 if he had not been terminated or at the very least, if he believed that he was still under the employment of the Appellant. That his evidence that he was terminated on 1st September 2018 is well collaborated by the documents before Court while the Appellant's evidence that the Respondent was still its employee is not supported by any documents despite the said documents being in their custody. That the Appellant even further indicated that he had deserted employment, which position was untrue. The Respondent affirmed that it is trite law that for an employer to enjoy a defence of desertion, they must show and prove that the employee deserted duty and must demonstrate efforts made to establish the whereabouts of the employee. That at the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on ground of desertion is being considered. He noted that in the instant case, the Appellant waited until it received a demand notice from the Respondent's lawyers for it to spring into action by inviting him for a meeting whereas it did not know his whereabouts between 1st September 2018 and 12th October 2018 when the demand letter was received. The Respondent submitted that since the Appellant did not prove that it made effort to contact him by way of a letter, telephone call or any other form of contact, the Appellant was therefore not entitled to a defence of desertion and the Respondent was indeed unfairly terminated. He relied on the cases of *Dickson Matingi v DB Schenker Limited* [2016] eKLR, and *Mombasa ELRC Cause No. 743 of 2017, Javan Kisoi Mulwa v S.A.A Interstate Traders (K) Ltd* [2018] eKLR.
11. On the issue of annual leave, the Respondent submitted that he told the trial Court that for the entire duration he worked for the Appellant, he was neither granted leave nor paid salary in lieu of leave for the ten years he worked for it. That section 74(1)(f) of the *Employment Act* of 2007 provides that an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under the Act containing the particulars of an employee annual leave entitlement, days taken and days due. Moreover, section 28(3) of the Act provides that annual leave must consist of at least two



uninterrupted working weeks. It was the Respondent's submission that the burden of proving that he had taken leave was on the Appellant, who ought to have kept record of the time and the number of days taken, but it did not prove the same.

12. As regards the allegation on un-pleaded matters, the Respondent invited this Court to consider the holding in the case of *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123 on the principles upon which an appellate court acts. He thus asked the Court to evaluate the evidence before it and make its own independent conclusion and that if necessary, substitute the lower Court Judgment with its own judgment on all the issues raised before it. The Respondent urged the Court to dismiss the Appeal with costs to the Respondent as the same has no merits.
13. The Court on first appeal has to consider the evidence, re-evaluate it and come to its own conclusion. It must however warn itself that it neither saw nor heard the witnesses. This was ably stated by De Lestang VP sitting with Duffus and Law JJA in the case of *Selle & another v Associated Motor Boat Company Ltd & others* (supra) at page 126 letter G when discussing the role of the first Appellate court as follows:-

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"
14. Having made the said allowance and warning myself I never saw nor heard the witnesses testify, I proceed to deal with the appeal before me. The Appellant was the employer of the Respondent who was the Claimant in the matter before the Learned Principal Magistrate. The Court will for ease of reference refer to the employer as Appellant and the Respondent herein as the Claimant. The Learned Principal Magistrate found in favour of the Claimant and granted the following reliefs in the judgment handed down on 5th December 2022:-
 - a. Payment of his salary from 1st September 2018 – 30th November 2022 computed at Kshs. 717,060/-
 - b. Parties to proceed to mediation to determine how they proceed from this point, taking into account that, the claimant is still an employee.
 - c. Both parties will bear the costs of mediation equally.
 - d. The award is subject to statutory deductions.
 - e. There are no orders as to costs.
 - f. Interests on (a) at court rates, from the date of judgment.
15. It is against the decision that the appeal was preferred. It was found at page 6 of the decision contained in the record of appeal that the Claimant was still an employee of the Appellant herein. It was determined that the Claimant was therefore entitled to salaries for the period in question. The matter was also referred to mediation. In my reading of the decision, I note that at page 5 of the decision, the Learned Principal Magistrate found that the Claimant had failed to attend the disciplinary meeting called. Having failed to attend the disciplinary meeting, the Claimant was deemed by the employer to



have deserted his employ. Is such a person still an employee? Under section 44(4) of the Employment Act the law provides as follows:-

- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if: -
 - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

16. The Claimant was stated to have been absent from his workplace and did not provide any service to the Appellant. As such, the provisions of section 44(4)(a) applied to the circumstance of the case. In the finding of this Court there was cause for dismissal in terms of section 44(4)(a) of the Act. The Appellant also attacks the decision as having been made in excess of the prayers the Claimant sought. A careful reading of his pleadings before the Learned Magistrate at page 6 of the Record of Appeal indicates the Claimant sought the following:-

- a. One month's salary in lieu of notice 703x 20 days – Kshs. 14,060
- b. Damages for loss of employment 703x20 x 12 months – Kshs. 168,720/-
- c. Leave earned for the years 703x18days x 19 years – Kshs. 240,425/-

17. The remedies the Learned Principal Magistrate granted excluded the items enumerated in paragraph 16 above. As such, the question one asks is whether the Claimant therefore, was entitled to the relief he obtained. In my considered view he was not entitled to grant of salaries from 2018 to date of judgment because he never pleaded nor sought the relief awarded. The Learned Principal Magistrate correctly ascertained the Claimant was not entitled to compensation. He also found the Claimant was not entitled to leave or notice. The remedy available was to dismiss the suit with or without costs. The finding of the Learned Principal Magistrate that the Claimant was an employee and therefore entitled to salary means the Appellant is correct in its surmise that the Learned Principal Magistrate erred in law and in fact by finding as such in favour of the Claimant in the suit before him contrary to the weight of evidence before the court. There was no basis to award what was not proved or pleaded and the only recourse is to vacate the Judgment of the Learned Trial Magistrate and substitute the Judgment and Decree issued in the case with a Judgment dismissing the entire suit No. CMEL No. 38 of 2019 – Julius Ochieng Otieno v Golden Biscuits [1985] Limited with no order as to costs. The reference to mediation is also vacated as there is no employment relationship subsisting between the parties and no mediation will be of any avail to the parties. The appeal is allowed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY 2024

NZIOKI WA MAKAU

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JUDGE

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

