Wambugu v Mini Bakeries (NBI) Limited (Appeal E027 of 2022)
[2024] KEELRC 1618 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1618 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E027 OF 2022

K OCHARO, J

JUNE 24, 2024

BETWEEN

SAMSON WANDERI WAMBUGU ..... APPELLANT

AND

MINI BAKERIES (NBI) LIMITED ..... RESPONDENT

(Appeal from the judgment delivered in Chief Magistrate's Court at Milimani in CMCC ELRC No. 2314 of 2019, by Honourable Principal Magistrate D. M. Kivuti (Mr.) on 28th January, 2022)

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated 16th December 2019, the Appellant initiated a claim against the Respondent, contending that at all material times he was an employee of the Respondent, but whose contract of service, the latter terminated on the 26th August 2019, unlawfully and unfairly. The Appellant sought for various reliefs against the Respondent, cumulatively in the sum of Kshs.4, 013,125.76.

2. The Respondent resisted the claim through a memorandum of Reply that it filed on 28th March, 2023.

3. After hearing both parties on their respective cases, the Learned Trial Magistrate rendered himself on the matter through his judgment dated 28th January 2022. The Learned Trial Magistrate found that the termination of the Appellant's employment was on account of gross misconduct, and therefore substantively justified, and in accord with due process, therefore procedurally fair. He dismissed the Appellant's case, as a result. The appeal herein is against the dismissal.

The Case Before the Trial Court

i. The Appellant's case

4. It was the Appellant's case before the trial court, that he first came into the employment of the Respondent in April, 2014 as a driver of a heavy commercial vehicle. At this point his contract of employment was oral. His salary was KShs.22,000/- plus house allowance of KShs.6,000/=. The remuneration was subjected to statutory deductions such as NSSF, NHIF and PAYE. Later, on the 1st May 2016, the Respondent issued him with a letter of employment. The letter indicating his date of appointment as 1st May 2016. This despite the fact that he had continuously worked.

5. The Appellant stated that on the 26th July 2019, he was instructed by the Respondent to fuel one of its motor vehicles KCL 064A at Kayole Total Service Station, and the following morning to deliver the said vehicle, at the Respondent's Meru Branch. As soon as he arrived at the said branch, the vehicle ran out of fuel and 20 litres of diesel had to be added.

6. He further stated that later, on 30th July 2019, he was informed that the fuel detector system indicated that he had not fuelled the vehicle at the Kayole Service Station, an allegation he vehemently denied.

7. Following the denial, the Respondent's managers went to the Petrol Station to ascertain whether or not the vehicle was fuelled there. They demanded for CCTV footage to enable them ascertain. The footage revealed that the motor vehicle was indeed fuelled at the station.

8. Immediately thereafter the Respondent issued him with a show cause letter requiring him to show cause why a disciplinary action could not be taken against him on the account that he had not fuelled the motor vehicle at the Petrol Station.

9. He rendered a response to the show cause letter maintaining his innocence. Subsequently, he was summoned to appear before a five member Shopsteward Committee. The Committee held that indeed he had fuelled the vehicle, therefore vindicating him. However, they condemned him that he was negligent as he did not alight from the motor vehicle to monitor the fueling.

10. The Committee recommended that he be sanctioned by either a warning or a suspension as a result. Despite the recommendation, the Respondent served him with a letter of termination on the 26th August, 2015. The letter wrongly indicated that his service with the Respondent ran from 1st May 2016, to 31st August 2019. It omitted two years of his service.

11. The Respondent paid him one month's salary in lieu of notice, August salary, prorated leave compensation and leave travelling allowance, all totalling to KShs.64,200/=.

The Respondent's Case

12. Respondent presented, Jack Otieno, its operations manager to testify on its behalf. The witness testified that the Appellant first came into the employment of the Respondent on 1st August 2016, as a driver, and his assertion that he did in April 2014, was factually incorrect.

13. The witness stated that on the 27th July 2019 at 6.30 p.m. the Appellant was given instructions to drive the Respondent's motor vehicle registration number KCL 046A to its Meru Branch 1. At all material times, drivers could be assigned company vehicles with enough fuel to drive to designated work stations. If the vehicles ran out of fuel, they could be re-fuelled at designated fuel stations with which the company had prior arrangements.

14. The vehicle had 47 litres of diesel when it was assigned to him. The Appellant was instructed to add another 40 litres of diesel to enable him drive non-stop to Meru 1.

15. The Appellant drove the motor vehicle to Kayole Junction Total fuel station at about 7p.m. purportedly to add the fuel, but he did not.

16. The witness asserted that at the Petrol Station, the fuel nozzle was merely inserted into the fuel tank, but the fuel was not dispensed. The Respondent's card was swiped purportedly showing that the Appellant had drawn the 40 litres.

17. However, the system fuel marks report, did not show any increase of fuel in the fuel tank. According to the witness, the fuel mark system report is generated by the Respondent's audit department using the tracking device which is installed in the fuel tank for purposes of monitoring fuel usage. The fuel mark system did not detect any additional fuel on 27th July 2019 at 7.02 p.m.

18. A report from the Petrol Station (SSF Transmission Report) for sales, showed that there was no 40 litres of fuel that was dispensed between the 17.55 hours and 19.28 hours on the 27th July 2019, the day the Appellant alleged to have fueled the motor vehicle.

19. The witness further stated that the Petrol Station refunded the Respondent cash for the defrauded fuel.

20. He further stated that owing to the misconduct, the Appellant was subjected to a disciplinary process. He was issued with a Notice to show cause by a memo dated 9th August 2019. In addition, he was formally invited to appear for a disciplinary hearing by a letter dated 10th August 2019. In the said invitation letter, he was informed and advised to be accompanied by an employee of his own choice.

21. The disciplinary hearing was held on 28th August 2019. The Appellant attended the hearing accompanied by a witness David Muhindi. He was given an opportunity to defend himself. In his defence, he stated that he did not leave the vehicle to check if the fuel was actually dispensed into the fuel tank.

22. The explanation was not reasonable. As a trained driver of the Respondent, he was required to confirm if the fuel had actually been dispensed into the vehicle before swiping the vehicle's fuel card.

23. Out of the disciplinary hearing, it was concluded that the Appellant had not fueled the vehicle at Kayole Total Petrol Station and that he defrauded the company. He engaged in acts of gross misconduct.

24. Subsequently, he was issued with a memo on termination of contract. The memo stipulated the reasons for the termination.

25. The Claimant was paid all his dues at the termination.

26. The witness further stated that the Appellant was a member of a Union. His wages were subject to the terms of the Collective Bargaining Agreement.

The Appeal

27. Aggrieved with the dismissal of his case, the Appellant sought to unseat the same through the appeal herein, setting forth the following principal grounds:

    a. The learned trial magistrate erred in law and fact by failing to consider the 2 years the appellant worked as a casual.

    b. That the Learned Trial Magistrate erred in law and fact by failing to take cognizance of the monies deducted as security deposit.

c. That the Learned Trial Magistrate erred in law and fact by taking their evidence that was computer generated document instead of the original ones from the claimed petrol station.

Submissions

28. To support his appeal herein the Appellant filed his written submissions on the 31st July 2023. However, it is pertinent to point out at this juncture that the submissions dwelt largely on matters not the subject any of the grounds raised in the memorandum of appeal. Thus, I will ignore those that are not relevant to the grounds of appeal.

29. The Appellant submitted that that he was employed as a casual worker on 2nd Aprill 2014, and his daily wages were subjected to deductions of Kshs.200/= per each day on what the Respondent termed as "security deposit". The deductions were understood to be sums set aside to be utilized as compensation to the Respondent in case the casual worker damaged any property in the course of his or her employment.

30. It was further submitted that for deductions that were effected at all material times, he could be issued receipts. He tendered the receipts as evidence before the trial court. Culmunatively, the Respondent deducted him more than KShs.100,000/- but at the separation, it paid him only KShs.28,000/=.

31. The Learned Trial Magistrate erred when he did not make any findings on the deposit and or consider the documentary evidence that the he placed before him.

32. The Appellant further submitted that he served the Respondent for two years as a casual employee, a fact that the Learned Trial Magistrate failed to consider and render himself on.

The Respondent's submissions

33. In answer to the first ground of appeal, the Respondent submitted that in his memorandum of claim, the Appellant alleged that he was employed by the Respondent through a letter of appointment dated 12th April, 2016. Further, the letter stated that the date of commencement of Employment was 1st May, 2016.

34. In its defence, the Respondent asserted that although the Appellant was engaged as casual worker, he worked intermittently as and when work was available. The Respondent's witness confirmed this in his evidence under cross-examination.

35. The Appellant did admit before the Trial Magistrate that he had no documentary proof to demonstrate that he worked continuously as a casual worker.

36. There was no basis therefore for consideration of the alleged two years.

37. On the ground that the Learned Trial Magistrate erred in law and fact when he failed to take cognizance of the monies deducted as security deposit, the Respondent submitted that in his memorandum of claim, the Claimant had sought inter alia KShs.18,200/= as refund of security deposit. At separation, this amount was paid and it was part of the KShs.27,000/= that the Appellant signed for as his final dues. Having signed the clearance form and received the dues, it cannot be available to him to claim that he is entitled to the security deposit again.

38. On the last ground, the Respondent submitted that it at all material times disclosed the existence of the electronically generated evidence through its list of documents and witness statement and that it would rely on the same as its evidence before the trial court.

39. The Appellant was represented by Counsel during the entire proceedings, prior and during the hearing neither the Appellant nor his counsel raised an objection to the production and reliance of the assailed evidence.

40. Having not raised the issue before the trial court, the issue cannot be raised on appeal for the first time. To support this submission, the Respondent placed reliance on the case of Livestock Research Organization vs. Okoko & Another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022).

Analysis & determination

41. As a first appellate court, the law obligates me to re-evaluate the material that was placed before the Trial Court, with the liberty of coming up with a different conclusion from that of the trial court if the justice of the matter so demand. However, I remind myself not to lose sight of the fact that I neither saw or heard witnesses testify. See Kenya Ports Authority vs. Kunstan (Kenya) Ltd (2009) 2EA 212.

42. I have carefully considered the Appellant's memorandum of claim, and it emerges that at no point thereof did he plead that he was in the employment of the Respondent as a casual worker for two years or at all. In paragraph 3 of the statement of claim, the Claimant stated;

> " The Claimant was employed by your company as a driver of a heavy commercial vehicle, on or about April, 2014 and received official letter appointment on 1st May, 2016 with a basic salary of KShs.30,103.50/= which he was earning before issuance of the said appointment letter."

43. In my view, the Learned Trial Magistrate could not be enjoined to consider a matter that was not pleaded by the parties and packaged in a manner that could require him to consider it as an issue for determination.

44. In support of the second ground, the Appellant submitted that in the course of his employment, the Respondent deducted more than KShs.100,000/= (one hundred thousand) as security deposit. That though he tendered evidence to demonstrate this, the Learned Trial Magistrate did not consider the evidence. However, the Appellant is not clear on what outcome he expected assuming the Learned Magistrate was to consider the evidence.

45. In my view, the pleadings reflects two categorizes of reliefs, those that were expressed to be flowing from the unfair termination claim and those from outside the claim. The Appellant's claim for security deposit fell under the latter category.

46. I have carefully considered the Learned Trial Magistrate's judgment and note that he did not approach the matter in the manner aforestated. He handled the same as though all the reliefs that were sought were wholly anchored on the unfair termination claim.

47. Undeniably, the Appellant did seek for payment of amounts that the Respondent deducted from his salary under what it termed "security deposit". The court notes that he specifically pleaded for KShs.18,300/=. It would not be reasonable and justified of him to expect the trial Court to grant him amounts that he did not plead. In my powers as the first Appellant Court, I could grant the KShs.100,000/= under the head "security deposit", if this amount had been specifically pleaded, and proved through the material that was placed before the Learned Magistrate. However, as there was no pleading for the amount, in cannot in Capital Fish Kenya Ltd vs. Kenya Power & Lighting Company Limited (2016) eKLR, the Court of Appeal held that it is a legal requirement that apart from pleading special damages they must be strictly proved with as much particularly as circumstances permit.

48. This court agrees with the Respondent's position on the issue as regards the propriety of the production of the electronic evidence that the Appellant raises in ground three of this appeal. The Appellant did not at all during the proceedings in the trial court challenge the production. He cannot be allowed to raise the issue at an appellate forum, for the very first time.

49. By reason of the foregoing premises, I find the Appellant's appeal herein lacking in merit. It is hereby dismissed with costs.

READ, SIGNED AND DELIVERED THIS 24TH DAY OF JUNE, 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Ms. Khisa for Respondent

No appearance for Appellant

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE