



REPUBLIC OF KENYA



KENYA LAW
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**Singh & another v Ndeda (Appeal E019 of 2022)
[2024] KEELRC 1463 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1463 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E019 OF 2022
CN BAARI, J
JUNE 13, 2024**

BETWEEN

PRITH PANDAL SINGH 1ST APPELLANT

SANDEEP PANDAL 2ND APPELLANT

AND

JANE ADISA NDEDA RESPONDENT

*(Being an appeal from the Judgment of Hon. K. Cheruiyot (SPM) Kisumu
delivered on 8th June, 2022 in Kisumu CMELRC CAUSE NO. E59 OF 2019)*

JUDGMENT

1. Jane Adisa Ndeda (the Respondent) sued Prith Pandal Singh and Sandeep Pandal (the Appellants) before the Kisumu Chief Magistrate’s Court, alleging unfair termination and non-payment of terminal dues. She sought pay in lieu of notice, underpayments, damages for wrongful termination, unpaid leave days and service pay.
2. In a Judgment delivered on 8th June, 2022, the Trial Court found that the Claimant had been unlawfully terminated and awarded her a total of Kshs 466,928.20/=.
3. The Appellants being aggrieved by the decision of the Trial Court, lodged a memorandum of appeal dated 7th July, 2022, premised on the following grounds: -
 - i. That the learned Trial Magistrate erred in fact and in law when he failed to make a finding that the Appellants were not privy to the employment contract between the Respondent and her employer Malkit Singh Pandal who is now deceased.
 - ii. That the learned Trial Magistrate erred in law and fact when he failed to appreciate that no rights and or obligations can possibly emanate from an employment contract to which the



Appellants are not privy to when he awarded the sum of Kshs 466,928.20/= in favour of the Respondent.

- iii. That the learned Trial Magistrate erred in fact and law when he failed to find that the Respondent did not adduce evidence to prove the existence of an employment contract between herself and the Appellants, and instead merely based his decision on the Respondent's allegation that she continued working even after the death of the 1st Appellant's father hence arriving at a decision unsustainable in law.
 - iv. That the learned Trial Magistrate misdirected himself in ignoring the law and or applicable principles under the doctrine of privity of contract, and contracts in general in the circumstances thereby making a wrong finding on application of the same.
 - v. That the learned Trial Magistrate erred in law and in fact in failing to sufficiently consider the evidence, submissions and the relevant authorities cited in the written submissions presented and filed by the Appellants as a whole.
 - vi. That the learned Trial Magistrate erred in law and in fact in otherwise failing to exercise his discretion in a proper manner resulting in injustice to the Appellants.
 - vii. That the learned Trial Magistrate grossly misdirected himself in treating the Appellants' evidence and submissions before him superficially and consequently came to a wrong conclusion on the same.
 - viii. That the learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered by the Appellants and thereby arrived at a decision unsustainable in law.
4. It is the Appellants' prayer that their appeal is allowed with costs and the judgment of the Learned Trial Magistrate set aside.
 5. The appeal was prosecuted through written submissions and submissions were filed for both parties.

The Appellants' Submissions

6. In support of their appeal, the Appellants submit that the Trial Magistrate did not base his decision on any evidence.
7. It is the Appellants' submission that the Respondent's employment contract was frustrated by the death of Malkit Singh Pandal. They contend that they were not administrators of the estate of Malkit Singh Pandal, hence no claim could lay against them. They had reliance in *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR, where the court stated that an employment contract may be closed on account of death of either party or frustration of contract.
8. In buttressing frustration, the Respondents cite an edict from the Kenya Airways case (supra) where the court stated as follows; -

“..the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the



control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.”

9. The Appellants further submit that the Respondent had not proven her case to the required standard. They specifically contend that the Respondent did not provide evidence of who employed her, who terminated her, the burns she suffered, the salary she earned, whether she was employed by the Appellants and the specific salary she earned.
10. The Appellants cite the case of Stephen Wasike & Another v Security Express Ltd [2006] eKLR where the court highlighted the importance of a party placing all material evidence before court to enable the court arrive at a decision in the party’s favour.
11. The Appellants submit that the Trial Magistrate’s judgment amounted to unjust enrichment having awarded compensation for monies already paid.
12. The Appellants urge the court to exercise proportionality in awarding damages taking into account the broadness of socio-economic rights. The Appellants submit that the Respondent did not lay any evidentiary basis for annual leave. The Appellant’s further submission is that notice could not be served as Malkit Singh Pandal was deceased.
13. On compensation, the Appellants urge the court to exercise its discretionary powers under Section 49 judiciously. They sought to rely in Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR where the Court stated that: -

“The court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.”
14. The Appellants reiterate that the Respondent is not entitled to compensation as she was not dismissed. It is their further submission that no particulars were availed to support the claim for overtime. They sought reliance in Rogoli Ole Manadegi v General Cargo Services Limited (2016) eKLR where the court stated that a Claimant must justify overtime notwithstanding the fact that the employer is the custodian of records.
15. The Appellants pray that the Appeal be allowed with costs.

The Respondent’s Submissions

16. In opposition to the Appeal, the Respondent submits that she had proven her case to the required standard. It is her submission that she sustained a burn on 30/04/2017 and when she later asked for treatment money from the Appellants, they informed her that she had already been replaced.
17. The Respondent further submits that the death of Malkit Singh Pandal is neither here nor there as the Appellants did not declare her redundant after the death. She placed reliance in the case of Lucy Nyandia Mwangi v Mathenge and Muchemi Advocates [2013] eKLR where the court stated: -

“if the respondent was convinced after the death of G.K. Mathenge that it did not wish to proceed with the old employees, then it ought to have come out openly and advised the employees it considered the contracts terminated by reason of death or restructuring, and proceed to offer redundancy benefits under section 40 of the *Employment Act*. It was not



sufficient to tell the employee that her contract had automatically lapsed by reason of death. It ought to have declared redundancy and offered redundancy package.”

18. It is the Respondent’s submission that she was not accorded an opportunity to be heard and neither was she given reasons for dismissal as required by the *Employment Act*.
19. The Respondent submits that she is entitled to underpayments as her salary ranged between Kshs 4,000 to Kshs 7,000/=. She contends that the Regulation of Wages produced were concrete evidence of underpayment. The Respondent further submits that she is entitled to salary in lieu of notice as there was no notice, and unpaid leave allowance as she never proceeded on leave. She cites the case of Kennedy Moss Cheptum v Geothermal Development Company [2019] eKLR where the court placed the burden of disproving non-payment of annual leave on the employer.
20. In conclusion, the Respondent submits that she had established an employer-employee relationship having worked for the Appellants from 2010 to 2018. She sought to rely in the case of Lucy Nyandia Mwangi v Mathenge and Muchemi Advocates [2013] eKLR to buttress this position.
21. The Respondent prays that the appeal is dismissed with costs.

Analysis and Determination

22. Upon careful consideration of the record of appeal and the rival submissions, the following issues arise for determination: -
 - i. Whether the Respondent was employed by the Appellants; and if so
 - ii. Whether the Respondent’s termination was fair;
 - iii. Whether she is entitled to the remedies sought.
23. The role of a first appellate court was succinctly elucidated upon in the case of Abok James Odera t/ a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR where the court stated: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
24. This being a first appeal in this matter goes to say that this court has the duty to re-evaluate, re-assess and re-analyse the record so as to arrive at the decision of whether or not to uphold the Trial Court.

Whether the Respondent was employed by the Appellants

25. The Appellants denied that an employment relationship existed between themselves and the Respondent. They contend that she was employed by Malkiat Singh Pandal -their father, who has since died. The Respondent on her part avers that the Appellants were her employers as they paid her salary and that she worked at their residence.
26. The Appellants in their pleadings have vividly described the Respondent’s job description, her working hours and even the date she allegedly left their employment. This in my view, are details only an employer would know.



27. The Appellants response to claim and the witness statement filed therewith, is further prove that the Respondent worked for the Appellants going by the averments therein.
28. Further, the 1st Appellant in his oral testimony, admitted that he lived with his now deceased father, in the same house where the Respondent worked, and which again is confirmation that the Respondent was in the service of the Appellants.
29. An employee is defined under Section 2 of the [Employment Act](#) as:
- “An employee is any person employed for wages or salary and includes an apprentice or indentured learner.”
30. An employer on the other hand, is defined thus: -
- “employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;”
31. In finding that there was an employer/employee relationship, the magistrate noted that the Appellants lived with the deceased Malkit Singh. The court also took into consideration the 1st Appellant’s testimony that the Respondent was paid for the services she offered. The Magistrate equally alluded to evidence that the Respondent worked for the Appellants even after the deceased’s death.
32. In the case of *Lucy Nyandia Mwangi v Mathenge and Muchemi Advocates* [2013] eKLR, also cited by the Respondent, the existence of an employer-employee relationship was aptly described in the following words: -
- “Any person, public body, firm, corporation or company, who or which has entered into a contract of service to employ any individual and includes the agent, the foreman, manager or factor of such person, public body, firm or corporation. “This makes it possible for other persons. Acting for the principal employer to be held to be employers themselves. (emphasis own) Managers, agents and factors in businesses can be employers. An associate or manager in a law firm can be an employer. An associate or manager who exercises decisional control; defines the work to be done by the employees; controls the tools of trade of the business; and who perhaps even pays the employees their salaries, can be deemed to be an employer...”
33. In reaching that conclusion, the Trial Court considered the testimony and the level of control the Appellants had over the Respondent.
34. In the circumstances, this court finds no reason to interfere with the Trial Court’s finding as the record clearly demonstrates existence of an employer-employee relationship between the parties herein, and I thus proceed to uphold the decision of the Trial Court in this respect.

Whether the Respondent’s termination was fair

35. The question of whether the Respondent was an employee of the Appellants having been answered, takes me to the second issue of whether the Respondent was unfairly terminated.
36. The Appellants’ assertion is that the Respondent deserted duty and was thus not unfairly or otherwise terminated. The Respondent on her part, admitted leaving the Appellants’ employ in May, 2017 to seek treatment. She again confirmed that she only called the Appellants in early 2018 to ask whether she could return to work, when she was informed that her services were no longer required.



37. What can be gleaned from the foregoing, is that there is an unexplained period between May 2017 when the Respondent went to the hospital and early 2018 when she reached out to the Appellants. By her own admission the Respondent decided to go home to recuperate.
38. I note from the Respondent's own evidence that she was away from work for over six (6) months and nothing shows that she had kept communication lines open with the employer during the period she sought treatment. In *Javan Kisoi Mulwa v SAA Interstate Traders (K) Ltd* [2018] eKLR, absconding is described as a situation where an employee fails to seek permission before absenting himself or herself from work.
39. In as much as the employer/Appellants is enjoined to prove that they tried to reach out to the Respondent, the circumstances of this case are different as the Respondent by her own evidence acknowledges having deserted duty.
40. Section 47 (5) of the *Employment Act* places the burden of proving that an unfair termination has occurred on the employee. The Respondent has not discharged this burden. By unilaterally deciding to proceed to her ancestral home to recuperate without informing the Appellants, the Respondent was to say the least the author of her own misfortune.
41. It would in my view, be too much to ask of an employer to allow employees to leave and return to work at will. This will certainly set a dangerous precedent that will leave employers not knowing what to do when an employee absconds duty.
42. It is my considered opinion that the Respondent having admitted deserting duty, cannot now claim to have been unfairly terminated.
43. I thus return that the Respondent was not unfairly terminated and the finding of the Trial Court in this respect is set aside.

Whether the Respondent is entitled to the remedies sought.

Compensation for wrongful termination

44. Having found that the Respondent absconded duty and that her termination was not unfair, an award under this head becomes legally untenable. In the premise, the award of compensation for the unfair termination is set aside.

Salary in lieu of notice

45. The Respondent is equally not entitled to an award under this head as the Respondent was not unfairly terminated.

Underpayments

46. The Respondent claimed underpayments from August 2010 to April 2017 all amounting to Kshs 177,463.6/-. Under Section 90 of the *Employment Act* underpayments are classified as continuing injury, a claim for which should be commenced within 12 months of cessation.
47. From her memorandum of claim the exact date of the Respondent's dismissal is not decipherable. She only talks of her services having been terminated in the year 2018. The suit herein was filed on 24th May 2019.



48. In the absence of an exact date of Respondent's alleged separation it is impossible for the court to make a determination as to whether the underpayments were within the 12-month provided in section 90 of the *Employment Act*. The claim for underpayments thus remains unproven.
49. In the final analysis, the appeal succeeds and the judgment of the Trial court is set aside and substituted with a dismissal of the claim with no orders on costs.
50. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF JUNE, 2024.

CHRISTINE. N. BAARI

JUDGE

Appearance:

N/A for the Appellant

Ms. Ochieng present for the Respondent

Anjeline Wanjofu - C/A

