



REPUBLIC OF KENYA



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West Kenya Sugar Company Limited v Karakacha (Employment and Labour Relations Appeal E001 of 2023) [2024] KEELRC 1383 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1383 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023**

**JW KELI, J
JUNE 13, 2024**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPELLANT

AND

SHEMU BURUTI KARAKACHA RESPONDENT

(An Appeal from the Judgment of the Honourable E. Malesi, PM dated 27th February 2023 and delivered on 8/3/2023 in Kakamega Cause CMELR No. 200 of 2019)

JUDGMENT

1. The Appellant, being dissatisfied with the ruling of the Honourable E. Malesi, PM, dated 27th February 2023 and delivered on 8/3/2023 in Kakamega Cause CMELR No 200 of 2019 Between Shemu Buruti Karakacha versus West Kenya Sugar Company Limited, filed the Memorandum of Appeal dated 18th March 2023 and Record of Appeal dated 16th January 2024 and received in Court on the 17th January 2024, seeking the following orders: -
 - a. The judgment by Hon. E. Malesi (PM) dated 27th February 2023 and delivered on the 8th day of March 2023 and the consequential orders of 29th July 2022 be set aside.
 - b. The costs of this Appeal and those in the Employment and Labour Relations Court be granted to the Appellant.
 - c. Any such other or further relief as the Honourable Court may deem just and fit to grant in the circumstances of this Appeal.
2. The Appeal was premised on the following grounds: -
 - i. The Learned Trial Court erred in fact by making a finding that it was an undisputed fact that the parties had a contract of service existing between them.



- ii. The Learned Trial court erred in fact and in law by shifting the burden of proof to the Appellant (Employer) to prove that the Claimant (employee) was terminated.
 - iii. The Learned Trial Court erred in law and in fact by finding and issuing an order that the Claimant be awarded Kshs. 45,268.20 and which award is erroneously pegged on non-existent facts and facts not pleaded by either party.
 - iv. The Learned trial court erred in law by making an award and tabulating the same based on an unknown and unspecified law/regulation.
 - v. Any other grounds and reasons to be adduced at the hearing hereof.
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by O & M Law LLP were dated 19th February 2024 and received in court on 23rd February 2024. The Respondent's written submissions drawn by V & A Shibanda & Company Advocates were dated 5th April 2024 and received in court on 11th April 2024.

Background to the appeal

4. The Respondent/Claimant filed a suit before the trial court in Kakamega CMELR Cause No 200 of 2019 against the Appellant for unfair termination. Through the Statement of Claim dated 15th October 2019 and filed on 26th November 2019, the Respondent/Claimant sought for the following reliefs: -
- a. House allowance
 - b. One month's salary in lieu of notice
 - c. Prorate leave
 - d. Underpayment of wages
 - e. Public holidays
 - f. Overtime for extra hours worked
 - g. Rest days
 - h. 12 months compensation salary
 - i. Costs of this suit
 - j. Certificate of service
- (pages 13-15 of the record is the Respondent's claim).
5. The Statement of Claim had been supported by the Verifying affidavit sworn by the Respondent on 15th October 2019 and accompanied by the Respondent's Witness statement dated 15th October 2019, the Respondent's list of documents of even date and the Respondent's documents (Page 16 to 24).
6. The Appellant/Respondent entered appearance on 18th December 2019(Pg.25) and on 9th January 2019 filed a Memorandum of Defence dated 16th December 2019 (pg. 26-30 of the Record).
7. The Respondent/Claimant filed a Reply to the Memorandum of Defence dated 4th January 2020 and received in court on 15th January 2020(pg. 31 of the Record).



8. The Appellant/Respondent on 18th May 2020 filed a Notice of Change of Advocates from Messrs. Ogenjo, Olendo & Company Advocates to O& M Law LLP (pg. 32 of the Record).
9. The Appellant/Respondent on 11th August 2020 filed the Appellant's List of witnesses dated 27th July 2020, the witness statement of Duncan Abwawo dated 27th July 2020, the Appellant's list of Documents dated 27th July 2020 and the Appellant's bundle of Documents (Page 33 to 45 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 9th November 2021. The Defence case was heard on the 30th August 2022 with the Duncan Abwawo as the Appellant's only witness (pages 108-113 of the record).
11. The parties filed written submissions in the lower Court after the closure of the defence. (The Respondent/Claimant's submissions at pages 46-64 of the Record). (The Appellant/Respondent filed written submissions at pages 65-104 of the Record).
12. The trial Court (E. Malesi, PM.) delivered its judgment on the 27th of February 2023 (pages 117-122) partially in favour of the Respondent/Claimant finding that the Respondent was wrongfully terminated and awarded the Claimant the equivalent of 6 months' salary of Kshs. 45,268.20/-, and half costs of the suit.

Determination

Issues for determination.

13. The Appellant in its submissions identified the following issues for determination in the appeal: -
 - a. Whether the Trial Court erred in law by shifting the burden of proof of termination to the Appellant.
 - b. Whether the Trial Court erred in law in making an award and tabulations based on an unspecified and unknown law.
14. The Respondent did not identify specific issues for determination but submitted in response to the issues raised by the Appellant.
15. The Court sitting at first 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, finds the issues for determination in the appeal are as follows: -
 - a. Whether the Trial Court erred in law by shifting the burden of proof of termination of employment to the Appellant.
 - b. Whether the Trial Court erred in law in making the compensation award.
 - c. CostsWhether the Trial Court erred in law by shifting the burden of proof of termination of employment to the Appellant.
17. The Appellant submits that the Trial Court cited unspecified decision and from the citation proceeded to hold as follows:- 'It was incumbent upon the respondent to show how they disengaged with the



claimant. The omission on the part of the Respondent to show how the contract of service between them and the claimant (sic...) makes it incumbent upon us to hold the position by the claimant that he was unfairly terminated.” The appellant submits that the import of the foregoing holding was that the Trial Court laid the burden upon the employer to prove that the employee’s contract was terminated.

18. The Appellant submits that the burden of proof is on both employee and employer and is to be proved as per sections 43 and 45(7) of the Employment Act to wit:-

43

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

47

- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

19. The Appellant contends that from the above provisions of the law the burden of proof of unfair or wrongful termination lies with the employee to extent the employee must prove he was employed and thereafter prove the employment was unfairly terminated. To buttress the foregoing position, the Appellant relied on the decision by Justice Marete in Protus Wanjala Mutike v Anglo African Properties t/a Imabo Mutara Lodge Laikipia [2021] eKLR where the court held that the burden to prove unlawful termination lay with the Claimant as per section 47(5) of the Employment Act. The appellant further relied on decision in Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited [2016] eKLR where the court also upheld the burden of the claimant to prove its case and in part stated:- “ even where the contract is oral in nature , the claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More, importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”

The Response

20. The Respondent submits that the Appellant told the trial court that the Claimant did not report back to work and that is how his employment was terminated. That the Respondent did not wish his employment to be terminated and stated before the Trial Court it was one Mr. Matioli, the transport manager who told him his employment had been terminated contrary to the Appellant’s submission that he had not been terminated. The Appellant relied on the decision in Mboo Wambua & 29 others v Export Trading Company limited [2018] eKLR cited in Moses Mugira Rimbera v Bosky Industries Limited [2018] eKLR where Justice Maureen Onyango cited from the case as follows:-“ it is the opinion of the court that as long as the work is available with the piece work arrangement the employer would need to follow due process and show reasonable justification why the employment is to be terminated. It is further the court’s opinion that if indeed the work becomes genuinely unavailable,



then the employer in such arrangement will be entitled to terminate the contract of service within the minimum statutory contractual terms ‘

21. On the position by Appellant that the Respondent failed to return to work, the Respondent submits that amounted to absconding and he was entitled to notice and fair hearing as held in several decisions being *Nyabiba v Apak company limited* [2023] eKLR and in *Judith Otieno Owour v Sameer Agriculture and Livestock Ltd.*

Decision

22. The issue for the court to address is whose burden it was to prove termination of employment and whether the same was proved on a balance of probabilities.
23. In response the Respondent did not dispute he had the burden of proof on the issue of termination as submitted by the Appellants. The court agreed with the Appellant that the burden of proof in employment claims is as stated under section 47(5) of the *Employment Act* to wit:- ‘47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.’ The court further upholds the decision of Justice Marete in *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* [2021] eKLR where the court held that the burden to prove unlawful termination lay with the Claimant as per section 47(5) of the *Employment Act*.
24. The Court holds that the Learned Trial Magistrate erred in law by holding in paragraph 17 of his judgment that it was incumbent upon the Appellant to show how they disengaged with the Respondent. The Respondent had to first discharge the burden of proof of the employment, termination and that the termination was unfair. It was only after that the burden of proof would shift to the Appellant as the employer to prove the existence of valid reasons for the termination and procedural fairness.

Whether the trial court erred in law in making the award for unfair termination

25. The Appellant submits that the Respondent alleged in his claim to have been dismissed on the 12th June 2017 but gave no details of the alleged dismissal. He did not even state who terminated his service. On their part, the Appellant contended that they produced evidence in the form of a loader cane haulage report and payment report to indicate the Claimant/ Respondent worked intermittently and was paid upto 21st June 2017 and never showed up at work after that. They submit that the Respondent/ Claimant never proved his case on a balance of probabilities.
26. The Respondent submits that the Appellant told the trial court that the claimant did not report back to work and that is how his employment was terminated. The Respondent did not wish his employment to be terminated and had stated at trial that it was one Mr. Matioli, the transport manager, who told him his employment had been terminated contrary to the Appellant’s submission that he had not been terminated

Decision

27. The court in this issue was invited to re-evaluate the evidence before the trial court to establish whether the Respondent proved his claim of unfair termination on balance of probability and whether the burden shifted to the Appellant to justify the reasons for the termination under section 43 of



the Employment Act. The burden of proof has already been held to be as per section 47(5) of the Employment Act.

28. In the statement of claim in paragraph 3 the Respondent/ Claimant pleaded he was employed as a cane loader sometime in 2012 earning a sum of Kshs. 240 per day paid every two weeks (page 13). That on 12th June 2017, his work was terminated without notice. In paragraph 8 of his witness statement, the Respondent/Claimant stated the management unfairly dismissed him(page 17).
29. During cross-examination the Respondent told the Trial Court that he was employed in the transport department of the Appellant. That he was issued with a number but misplaced the same, he was paid vide mobile number by the transport manager but he had not produced the M-PESA statement, he had a gate pass which was destroyed and he did not claim a replacement gate pass, he registered for NSSF and NHIF personally and was the one who supplied details of his employment, the welfare was chaired by one Makokha who they elected, they used to hand over farmer's slips and the company never weighed the sugar cane, sugarcane was available throughout and he was sacked by Matioli, the transport manager(page 109).In re-examination the Respondent/Claimant told the Trial Court that the registration for NSSF and NHIF could not be done before the employment.
30. Before the Trial Court the Appellant produced a record of cane loaders and evidence of how the Respondent was engaged on piece rate and paid per work done. At cross-examination, this evidence was not challenged. In the cross-examination of defence witness the questioned by the Claimant's counsel on the manner of engagement of cane loaders (page 112). It was the evidence of the defense that cane loaders were members of the welfare and that there was no master roll of the loaders.
31. In re-examination, the defense witness relied on its report on work done by the Respondent and the payment which this court found was not challenged at cross-examination. (see pages 112-113 of the record of appeal)
32. The court then agreed with the Trial Court that the Respondent was a piece- rated worker.
33. On procedural fairness of termination, the court finds that there was evidence before the Trial Court that the Respondent/ Claimant was at work on the 21st of June 2017. The Respondent pleaded to have had his work terminated on the 12th of June 2017. According to the record of work and payment record produced by the Appellant at the Trial Court, the Respondent was at work on the 17th, 18th, 19th, 20th and 21st of June 2017 a total of 5 days after the alleged termination (page 41). This evidence was not challenged at cross-examination.
34. The court holds that parties are bound by their pleadings. The Respondent 's alleged date of termination was rebutted by the record of the Appellant showing he worked 5 more days thereafter. The court finds that the claim was not proved on a balance of probabilities. The burden of proof to justify the termination never shifted to the Respondent.
35. The Court holds that other than proving termination of employment, which the Respondent failed to do, where an employee on piece rate work fails to turn up for work the employer has no obligation to issue notice to show cause. The employee is deemed to have left work on his own accord. A similar holding exists in Charles Kitbuka & 19 others v DPL Festive limited [2022]eKLR where the court held the claimant's employment was not terminated as they left on own accord and hence no compensation due.
36. The definition of the work clearly distinguishes piece-rate work from the contract of service where the employee is engaged for some time. Section 2 of the Employment Act defines the two types of employment as follows:- "piece work" means any work the pay for which is ascertained by the amount



of work performed irrespective of the time occupied in its performance; “contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;” It is the opinion of this court that a notice to show cause would only be reasonably expected where the employer was the one stopping the piece rate worker from working. The contrary was demonstrated in the engagement report produced by the Appellant which indicates many gaps in the days worked by the Respondent (page 41). The court concluded the Respondent was free to come in and go as he pleased as long as work was available.

37. The Trial Court found unfair termination which the court set aside for the foregoing reasons and the consequent compensation which the Court holds was not merited.

Conclusion

38. The Court holds that the claim dated 15th October 2019 was not proved on a balance of probabilities and sets aside the compensation award by the Learned Magistrate. The appeal is allowed. The Court sets aside the Judgment by Hon. Eric Malesi dated 27th February 2023 and delivered on 8/3/2023 in Kakamega Cause CMELR No 200 of 2019 between the parties and in place enters judgment that the claim dated 15th October 2019 is dismissed with costs.
39. The Court taking into consideration that the claim arose from employer employee relationship and to temper justice with mercy makes no orders as to costs at the appeal.
40. It is so Ordered.

DATED, SIGNED, AND DELIVERED ON THE 13TH DAY OF JUNE 2024 IN OPEN COURT AT KAKAMEGA

J.W. KELI

JUDGE

In The Presence Of

C/A Lucy Macheso

For Appellant: Otieno Advocate

For Respondent: Shibanda

