University of Nairobi v Mayaka (Employment and Labour Relations Appeal E167 of 2021) [2024] KEELRC 2715 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2715 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E167 OF 2021

AN MWAURE, J

OCTOBER 25, 2024

BETWEEN

UNIVERSITY OF NAIROBI ..... APPELLANT

AND

LIVINGSTONE M MAYAKA ..... RESPONDENT

(Being an Appeal from the Judgment of the Honourable (PM) Mr. D. M Kivuti delivered on 25th October 2021 in Nairobi MCELRC No. 590 OF 2018)

JUDGMENT

1. The Appellant being dissatisfied by the entire judgment and decree of the Principal Magistrate Hon. D. M. Kivuti delivered on 25th October 2021 filed this appeal vide a memorandum of appeal dated 16th December 2021 on the grounds that:-

    1. The learned trial magistrate erred in law and in fact by delivering a judgment that was a gross variance with the proceedings.

    2. The learned trial magistrate erred in law and in fact by awarding the respondent gratuity under the KUDHEIHA CBA 2013-2017 when the same did not apply to the respondent having registered way after the respondent left employment.

    3. The learned Trial magistrate erred in law and in fact by finding that the KUDHEIHA CBA 2013-2017 applies retrospectively and awarding the respondent gratuity for 28 years without any basis whatsoever.

    4. The learned Trial magistrate erred in law and in fact by issuing a judgment that is contrary to established case law and precedent which had been cited before him.

5. The learned Trial magistrate erred in law and in fact in ignoring and failing to consider the issues by the appellant in its statement of defence, during cross-examination by its advocates, and in its submissions.

6. The learned trial magistrate erred in law and in fact wholly dismissing the appellant's defence despite the same being supported by evidence.

7. The learned trial magistrate erred in law and in fact by delivering a judgment inconsistent with the proceedings.

8. The learned trial magistrate erred in law and in fact in delivering a judgment contrary to the provisions of the law and settled authorities.

2. The Appellant prays for orders:

   a. The Appeal be allowed.

   b. The judgment of the lower court be set aside

   c. Costs of the Appeal

Appellant's submissions

3. The Appellant submitted that the first appellate court must evaluate and examine the record of the trial court and evidence presented before it and arrive at its own conclusion as set out in the case of Selle & Another VS Associated Motorboat Co. Ltd & Others [1968] EA 123.

4. The Appellant submitted that the trial magistrate's judgment was inconsistent with the proceedings. The respondent had abandoned its claim for underpayment of basic salary during the trial, but the magistrate still awarded him judgment for the claim which was contrary to the established facts, and the trial magistrate held thus; -

> "I find that the employer applied an erroneous formula in computing gratuity contrary to the parties agreement and it is therefore my take that the claimants claim is meritorious and the same succeeds in term of prayer no i and ii..."

5. The Appellant submitted that this Honourable Court reserves the findings of the learned trial magistrate allowing the claim for underpayment of basic salary at Kshs.251,027/=.

6. The Appellant submitted in its defence raised a preliminary objection that the respondent's claim was a continuing injury filed out of the statutory period, divesting the court of jurisdiction. The trial magistrate in his ruling dated 12th July 2019 held that some claims were not continuing injuries and awarded a portion of the claim.

7. The Appellant reiterated that the claim for uniform refund was a continuing injury and statute-barred, arguing the trial court acted outside its jurisdiction in awarding it.

8. In German School Society V Helga Ohany [2023] KECA 894 KLR the Court of Appeal held that the principle of continuing wrongs and recurring wrongs are relevant in service law disputes. A "continuing wrong" is a single act causing a continuing injury, while "recurring wrongs" occur periodically, each creating a separate cause of action.

9. The Appellant submitted that the respondent's claim for special damages was not proven, as the respondent failed to provide receipts for the uniforms. The respondent admitted in cross-examination

that the receipts were given to the finance office but were not part of the record and prayed that the court reverse the judgment awarding the respondent money for uniforms, claiming that the claim was time-barred.

10. It is in the Appellant's submissions that the CBA 2013 to 2017 was not applicable as the Appellant has already retired on 31st December 2016 while the CBA was registered in court on 6th August 2017 citing the case of Patrick Ouma Owinyo V Paper Converters Limited [2015] eKLR in support of that proposition.

11. The Appellant submitted that the Respondent did not provide evidence to dispute the registration of the Collective Bargaining Agreement (CBA) on 6th March, 2017. The Appellant requested the reversal of the Trial Magistrate's findings on gratuity, claiming that a CBA is enforceable only upon court registration and does not apply retrospectively.

12. The Appellant submitted that the trial magistrate in the judgment stated that the respondent received double benefits from the gratuity and pension which was contrary to the law citing the case of Board of Management of Ng'araria Girls Secondary V Kudheiha Workers in support of that proposition. The Appellant prays the court to overturn the judgment allowing gratuity, arguing the CBA was not applicable, as payments were made to NSSF and a Pension Scheme, and the Respondent received erroneous gratuity and additional sums upon retirement.

Respondent's submissions

13. The Respondent argued that according to the CBA clause 40 provided for gratuity which was payable upon retirement and cited ELRC No. 1191 of 2018 Reuben Ondigu Orodo V The University of Nairobi.

14. The Respondent submitted that no evidence was availed to show the calculation of Kshs.313,673.35 and paying gratuity and NSSF was double payment and was not proper. The Respondent further submitted that the Appellant did not enroll him in its pension scheme which would have precluded him from receiving a gratuity, However, the gratuity was a negotiated term which was a much more favourable benefit than NSSF relying on Section 35(5) of the *Employment Act*.

15. The Respondent submitted that the claim for uniform refund was not controverted as it was provided in the CBA, memos and the communique by the employer to confirm that the claim was due and the respondent is entitled to a refund as there was profoma as to how much the items cost.

16. In conclusion, the respondent submitted that the appeal lacks merit and prays that the same be dismissed with costs.

Analysis and determination

17. As the first appellate court, this court has a duty to consider the evidence adduced before the trial court and re-evaluate it so as to draw its independent conclusion and to satisfy itself that the conclusions reached by the trial magistrate are consistent with the evidence See Selle V Associated Motor Boat Company Ltd (Supra).

18. The court has carefully considered the judgment of the trial court, the record of appeal, the submissions by counsel as well as the authorities cited, and the law. The issues for determination can be summarized as follows:

    1. Whether the trial magistrate court erroneously made double payment for gratuity

    2. Whether the claim for a refund for uniforms is statutory barred

Issue No. 1 Whether the trial magistrate court erroneously made double payment for gratuity

19. The Respondent claim for gratuity is for twenty-eight (28) years at the rate of 31% per annum of the basic pay. The same was pegged on the CBA 2013 - 2017 but the respondent has gone back to past 2013 to the initial years of his employment. The Respondent retired on 31st December 2016. The CBA was executed in February 2016 but was in force from 2013 to 30th June 2017. Same was registered on 6th March 2017 as per the order of Justice Monica Mbaru of the even date.

20. In the cited case by the appellant in their submissions Patrick Ouma Owinyo -Vs- Paper Converters Limited (2015) eKLR the court held

    10. . In the cases cited by the Respondent, there is an exposition by Cockar J. that bears repeating. The learned judge stated thus

        "....the CBA becomes effective after it is registered by the Court and applies only to those employees who are in employment after the CBA has been registered. Those who left employment before the registration of the CBA are not entitled to any arrears as it is a principle of the law of contract that a person can only be bound by an agreement if he/she is privy to the contract."

        The Claimant was not an employee at the time the CBA was registered. Though the CBA was to take effect from 1st September 2011, the CBA was only to benefit those in employment as of the time the CBA was registered. The CBA was signed in March 2012 long after the Claimant had left employment. He cannot benefit from it even though it covers a period he was an employee. The Claimant's claim is thus fit for dismissal and I do so hold."

21. In National Bank of Kenya Ltd V. Pipeplastic Samkolit (K) Ltd & Samson K. Ongeri (2001) eKLR, the Court of Appeal stated as follows:

    " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

22. In this instant appeal, the respondent had entered into a CBA with KUDHEIHA for the years 2013 to 2017 which was to be immediately effective from 1st July 2015 and the respondent went on retirement on 31st December 2016 while the CBA was registered in March 2017.

23. On the other hand a more recent precedent ELRC NO. 1191 of 2018 Reuben Ondigo -vs- The University Of Nairobi the court held:

    33. .....That the claimant retired on 30/6/2017. That a Collective Bargaining Agreement once signed becomes a term of the individual contracts of employment in terms of Section 59(3) of the *Labour Relations Act*, (No. 14 of 2007). That Clause 40 of the Collective Bargaining Agreement became part of the contract of the claimant and was binding on the respondent in terms of Section 59(1) of *Labour Relations Act*. The Collective Bargaining Agreement was active between the years 2013-2017. Clause 40 on gratuity covers the entire period of service done by the claimant up to the date of retirement.

    34. The Court finds that the respondent fell into error by directing that the claimant's gratuity for the period 1/5/1992 up to 30/6/2015 be calculated at the rate of 28 days for every year of completed service. Gratuity is calculated

in terms of the contract/law applicable at the time of separation for the entire period of service.

24. The more accurate position in my very considered opinion is the holding in Reuben Ondingo Orodo (Supra) and therefore the respondent is entitled to the gratuity for the term he served the appellant. The appellant paid the respondent gratuity totaling Kshs.313,673.35 and he did not give specifications as to the period covered and the rate payable.

25. The court finds the issue of payment of gratuity to the Respondent is correct as ruled by the trial court and so this court will not interfere with the award of the trial court on this award.

Issue No. 2 Whether the claim for refund for uniforms is statutory barred

26. Section 90 of the *Employment Act* provides as follows:

> " Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

27. Section 109 of the *Evidence Act* provides as follows:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

28. However, the court finds the appellant had conceded to refund the respondent for their uniform as per their Memo of February 2015 and March 16th 2016. The Memo from the appellant clearly show the respondent was following the refund of his uniform and the appellant was always aware and willing to give him compensation for the uniform.

    It is only just and reasonable that the respondent be paid for his uniform and related costs as he had legitimate expectations that he should be paid for the same and appellate indicated they were always willing to pay him for the same.

29. In view of the foregoing and having considered the appellant's pleadings and submissions as well as the respondent's submissions and respective precedents the court holds that the appeal fails and the court upholds the judgment delivered by the trial Magistrate Hon. D.M. Kivuti.

30. In view of the award the court confirms the following awards:-

    a. Gratuity - Kshs.2,047,681.45

    b. Uniform refunds - Kshs.722,400/=

    c. Underpayment is removed as the respondent had dropped it - Kshs.251,027/=

    Total award - Kshs.3,021,108/44

    Less gratuity paid - Kshs.313,673/35

    Less paid underpayment - Kshs.251,027/=

    Total - Kshs.2,456,408/09

Interest will be at 14% per annum from date of this judgment till full payment.

Costs will be awarded to the respondent for the lower court costs and costs in this court's judgment based on this net award hereto.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE