



REPUBLIC OF KENYA



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Maina & 12 others v Good Hope Nyahururu Nursing Home (K) Limited (Appeal E008 of 2021) [2024] KEELRC 2858 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2858 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E008 OF 2021
DN NDERITU, J
NOVEMBER 14, 2024

BETWEEN

JANE WANJIRU MAINA 1ST APPELLANT
DAVID KARIUKI KIRUTHU 2ND APPELLANT
STEPHLINE KWAMBOKA MOKAYA 3RD APPELLANT
FRANCIS MWANGI KIMARU 4TH APPELLANT
REHEMA MUMBI MUIRU 5TH APPELLANT
ELIZABETH WATAHI MWANGI 6TH APPELLANT
MERCY WAIRIMU NJERI 7TH APPELLANT
LYDIA WANGUI KAGURU 8TH APPELLANT
MARY WANGUI ICHUNGO 9TH APPELLANT
HANNAH NJERI MUNIU 10TH APPELLANT
ALICE NAFULA MATERE 11TH APPELLANT
BETH NJOKI KABII 12TH APPELLANT
ANN WANGUI KIMONDO 13TH APPELLANT

AND

GOOD HOPE NYAHURURU NURSING HOME (K) LIMITED .. RESPONDENT

(Being an appeal from the judgment delivered in Nyahururu Chief Magistrate's Court ELRC Cause No. 3 of 2019 by Hon. C. Obulutsa(CM) delivered on 22nd July, 2021)



JUDGMENT

I. Introduction

1. The appellants herein (the claimants in the lower court) commenced Nyahururu CM ELRC Cause No. 3 of 2019 by way of a memorandum of claim dated 9th August, 2019 filed in court on 13th August, 2019 wherein the following reliefs were sought –
 - a. This honourable court make a declaration that the services of claimants were unfairly terminated.
 - b. This Honourable court order the respondent to pay the claimants' accrued salary arrears, notice pay, severance pay and annual leave amounting to Kshs 2,837,118 as tabulated in paragraphs 24 to 36 of this memorandum of claim.
 - c. This honourable court order the respondent to pay each claimant 12 months' salary in compensation for unfair termination totaling to Kshs2,634,000.
 - d. The respondent do issue the claimants with a certificate of service.
 - e. The respondent be ordered to bear the costs of this suit.
 - f. The respondent be ordered to pay the outstanding arrears and costs in prayers 1,2 and 3 above together with interest.
2. The appellant herein (the defendant in the lower court) defended the suit.
3. In a judgment delivered on 22nd July, 2021 the court dismissed the appellants' claim as follows –

‘The claim presented is for a specified damage. It has to be pleaded and specifically proved. The court has considered the authorities cited by the parties. The claimants having not proved they were employed by the respondent or that they were being paid by the respondent as shown above, they have failed on a balance of probability to prove their claims.

The cause is hereby dismissed with costs.

Right of appeal of 30 days.’
4. Dissatisfied with the above judgment, the appellants through Wachira Wanjiru & Co. Advocates commenced this appeal by way of a memorandum dated 20th August, 2021 raising the following grounds of appeal –
 1. That the learned magistrate erred in law and fact when he sidestepped the provisions of the [Companies Act, 2015](#) (Cap 486) by holding that the registrar of companies should have testified notwithstanding that the provisions of the [Companies Act](#) Cap 486 are clear on the number of shareholders being more than 2.
 2. That the learned magistrate erred in law by failing to consider the provisions of the [Employment Act](#), the [Employment and Labour Relations Court Act](#) and the Rules therein.
 3. That the learned magistrate erred in law by relying on the provisions on the [Civil Procedure Act](#) and Rules to determine an employment dispute before it.



4. That the learned magistrate erred in law and in fact when he held that the claimants were not employees of the respondent.
 5. That the learned magistrate misdirected himself on the law when he failed to consider evidence that was tendered before him regarding the claimants' employment under the meaning of Section 2 of the *Employment Act*.
 6. That the learned magistrate misdirected himself on the provisions of employment law when he held that the claimants should have produced employment contracts.
 7. That the learned magistrate erred in fact and law when he totally ignored the evidence and submissions presented by the claimants' witnesses and the respondent's director when he made his judgment.
5. The appellants are seeking the following reliefs –
1. That this appeal be allowed.
 2. That the Judgment of the Honourable Charles Obulutsa delivered on 22nd July 2021 be reversed and set aside.
 3. That the court find in favour of the appellants and award them the prayers sought in the memorandum of claim.
 4. That the Appellants be awarded costs of this appeal.
6. The respondent opposed the appeal through Gakuhi Chege & Associates Advocates.
7. By consent the appeal was canvassed by way of written submissions. Counsel for the appellants, Mr. Aziz, filed written submissions on 7th November, 2023 and the respondent's counsel, Miss Muigai, filed on 6th December, 2023.

II. Submissions By Counsel

8. On the one hand, counsel for the appellants condensed all the grounds raised in the memorandum of appeal into five issues– Whether the respondent was properly sued and if the appellants were employees of the respondent; Whether the respondent is liable; Whether the appellants' termination was fair and lawful; Whether the appellants are entitled to the reliefs sought in the trial court; and, Who should pay costs of the Appeal.
9. On the first issue, it is submitted that the trial court erred in fact and law in finding that the appellants had failed to prove that they were employees of the respondent in the absence of appointment letters, yet the appellants produced bank statements to prove that their salaries were processed through the respondent's various bank accounts. It is submitted that pursuant to Section 10(7) of the *Employment Act* (the Act) an employer bears the burden of disproving an alleged employment, which the respondent failed to disprove. Counsel cited *Joseph Kaitano Ikobwa V Khetia Garment Limited* (2016) eKLR where the court held that the failure by an employer to disprove an alleged term of employment by merely denying, worked in favour of the claimants therein to find that they were employees.
10. It is further submitted that the trial court erred in finding that failure to have appointment letters meant that the appellants were not employees yet under Section 2 of the Act an employment contract may be oral. It is submitted that the trial court misdirected itself in finding that the entities named Good Hope Medical, Good Hope Hospital, Good Hope Medical Centre, and Good Hope Medical Hospital



appearing in the appellants' bank statements were distinct from the respondent. The appellants submit that the respondent operated accounts in different names for ulterior motives. It is submitted that the appellants worked under the respondent's initial directors Bilha Nyawira Huihu, who held 750 shares, and Daniel Kariuki Huihu who held 250 shares, in the respondent, as evidenced by the Business Registration Service letter dated 6th November, 2018 – see page 110 of the record of appeal.

11. It is submitted that sometimes in January 2019, the respondent's shareholding was changed and transferred to Peter Ndirangu Githuna as the sole director at the time the appellants were terminated. It is submitted that through a letter from Bilha Huihu to the County Labour office dated 12th February, 2019, she confirmed that there was an intended change in ownership – see pages 113-113 of the record of appeal.
12. It is submitted that the respondent produced a Business Registration Service report dated 29th May, 2019 evidencing different shareholding, yet the registration date of 22nd April, 2014 and registration number of CPR/2014/140559 remained the same as that appearing in the report of 6th November, 2018 produced by the appellants.
13. It is further submitted that correspondence between the county labour officer and the former director of the respondent, Bilha, indicated the intention to change ownership through a sale, in a bid to settle all outstanding debts including salaries owing to the appellants. It is submitted that the transfer of a business as a going concern does not affect the rights of employees, as a company is a separate legal personality from its shareholders as per the principle in *Salomon v Salomon & Co Ltd* [1897] AC 22. The court is urged to consider the reasoning in *Nasir Ibrahim Ali & 2 others v Kamlesh Mansukhlal Danji Pattni* (1998) eKLR to find that shareholding in a company only relates to the moveable property in a share capital of the company and not in the immovable assets of the company. Citing *Njoroge Njihia V K-Rep Bank Limited* (2015) eKLR, it is submitted that the respondent was sold as a going concern through a share sale, and in the absence of proof that the respondent intended to sell its assets, it does not matter what the internal structures or composition of shareholders and directors is, and a decree can be passed against the respondent.
14. It is submitted that contrary to RW1's testimony that he was the respondent's sole director as of 22nd April, 2014, Section 4 of the Repealed *Companies Act* mandated that the formation of a company was to have a minimum of two directors and there was no way RW1 could have been the sole director before 2015 when the new *Companies Act* (Cap 486) came into force. It is submitted that the current shareholder of the respondent is conveniently abusing the process to denounce the appellants as employees.
15. It is further submitted that under Section 3 of the Transfer of Business Act (Cap 500) any transfer of a business with or without goodwill, notwithstanding any agreement, should make a transferee liable for all the liabilities incurred in the business by the transferor unless due notice is given.
16. It is submitted that the intended transfer notice pursuant to Section 4 of the Transfer of Business Act must be published in the gazette or a newspaper circulating in Kenya, whether before or after a transfer of a business, providing the particulars of the transferor; the nature of business transferred; the name and address of the transferee; and a statement as to whether the transferee would assume the transferor's liabilities.
17. It is submitted that the respondent's first director confirmed that she was going through financial difficulties, but no notice was issued to indicate that her intended sale to the new shareholders would include the adoption of the respondent's liabilities. Citing *New Kenya Cooperative Creameries Limited V John Kahiatu Bari & Another* (2020) eKLR, where the court found that a transferee was



absolved of liability to pay terminal dues of former employees where a notice had been issued, the court is urged to find that no notice was issued in the gazetted or the dailies in this instance. In absence of such notice the respondent was liable for the liabilities existing before transfer especially where such transfer resulted in redundancies.

18. On the second issue, it is submitted that the appellants were declared redundant. It is submitted that under Section 40 of the Act before an employee is declared redundant, an employer must issue a notice to declare redundancy and then proceed to issue individual redundancy notices to the affected employees. It submitted that the respondent's previous director had on 7th February, 2019, without any notice, laid off the appellants, and subsequently transferred shareholding in the respondent to a third party. It is submitted that the dispute was reported to the County Labour Office, the respondent was directed to pay to the appellants their terminal dues vide the letters dated 12th February, 2019 and 4th March, 2019 but the respondent failed and or refused to settle the same. The court is urged to be guided by the reasoning in Kenya Airways Limited Aviation & Allied Workers Kenya & 3 Others (2014) eKLR as cited in Anne Waceke Makori & 2 Others V Faulu Microfinance Bank Limited (2021) eKLR and find that the appellants were not invited to discuss their intended redundancy and were only informed of the redundancy verbally without any notices. It is submitted that the redundancy amounted to unfair termination.
19. Citing Prisca Japngetich v Generation Careers Readiness Social Initiative Limited(2021) eKLR it is submitted that the trial magistrate erred in relying on the provisions of the Civil Procedure Act to find that PW1 and PW2 could not testify on the appellants' behalf, yet Rule 9 of the Employment and Labour Relations Court(ELRC) Rules, 2016 (now repealed by ELRC Rules, 2024) allows a suit to be instituted by one party on behalf of others who have a similar cause of action, as long as a letter of authority is signed by all the intended parties and particulars of all the claimants such as their address, wages, and particulars of the breach are outlined for each.
20. It is further submitted that the trial magistrate erred in holding that an officer from the company's registry was required to testify on the status of the respondent, bearing in mind that there was no change in the form and status of the respondent only shareholding changed. It submitted that the change was evidenced by the CR 12 and the letters from the Registrar of Companies who is a public officer. It is submitted that the aforesaid documents are public documents confirming the status of the respondent pursuant to Sections 79(1)(a)(iii) &(b), 80, 81 & 83 of the Evidence Act and thus disregarding them was contrary to the law. To buttress this assertion counsel cited Republic v Judicial Service Commission & 2 others Exparte Erastus M Githinji (219) eKLR where a certificate of birth issued by the Registrar of Births was found to be genuine in the absence of proof that to the contrary.
21. On the reliefs, the court is urged to find that the appellants' redundancy was wrongful and grant to them the reliefs sought under Sections 49(1) & 50 of the Act. It is submitted that the computation of the reliefs ought to be based on the pleading in the claim.
22. On costs, it is submitted that the respondent is not entitled to costs in the lower court or on appeal and that the same ought to be awarded to the appellants.
23. On the basis of the foregoing, it is urged that the appeal be allowed as prayed and costs be granted to the appellant.
24. On the other hand, counsel for the respondent submitted that as a first appellate court this court has a duty to re-evaluate the evidence on record and make its own conclusions based on the principles set out in *Selle V Associated Motor Boat Co. Ltd* (1968) E.A 123.



25. It is submitted that the appellants' witnesses, Francis Mwangi Kimaru(PW1) and Rehama Mumbi Muiro(PW2) testified and produced bank statements as the only proof of their employment with the respondent. It is submitted that the appellants sued the wrong party as the respondent was not the appellants' employer pursuant to Section 2 of the Act as the bank statements bore different names such as GoodHope Medical, GoodHope Medical Centre, GoodHope Medical, GoodHope Hospital or GoodHope Nyahururu, GoodHope Medical Hospital, or GoodHope, while the respondent goes by the name Good Hope Nyahururu Nursing Home (K) Limited. Citing Agricultural Finance Corporation V Lengetia Limited & Jack Mwangi (1985) eKLR, it is submitted that there was no privity of contract between the appellants and the respondent.
26. Citing Zarika Adoyo Obondo v Tai Shunjun & another (2020) eKLR, it is submitted that even if the court were to find the appellants were the employees of the respondent based on the testimonies by PW1 and PW2 there is no evidence of the monthly wages payable to each appellant. It is submitted that the monthly amounts received by the appellants, as evidenced in the bank statements, varied from month to month and it could not be ascertained how much each appellant earned monthly, a fact that was not explained during the hearing. It is submitted that there was no proof that PW1 was employed in 2013 as the bank statements produced only related to the period of 1st November 2017 to 31st December 2018. It is further submitted that PW2 testified that she started working in March 2015 yet the bank statements were for the period from 1st October 2017 to 31st December 2018. It is submitted that the appellants failed to serve a production notice on the respondent to avail any records such as work attendance sheets to prove their employment and apart from the bank statements, no other evidence was adduced to prove employment.
27. It is submitted that the allegation that the appellants received their salaries from the respondent is false and that the appellants failed to prove their case on a balance of probability.
28. The court is urged to uphold the decision of the lower court and dismiss the appeal with costs.

III. Issues For Determination

29. The court has perused the record of appeal, including but not limited to the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, the following issues commend themselves to the court for determination –
 - a. Was the respondent wrongly sued by the appellants?
 - b. Was there an employer-employee relationship between the respondent and the appellants?
 - c. If (b) is in the affirmative, was the appellants' termination unfair and unlawful?
 - d. What are the appropriate orders that the court should make in regard to the above issues?
 - e. Costs.

IV. The Respondent

30. As a first appellate court, this court is obligated to evaluate the evidence adduced in the lower court and arrive at its own conclusions bearing in mind that it did not hear and record the evidence in the trial – See *Selle V Associated Motor Boat Co. Ltd* (1968) E.A 123.
31. The issue as to whether the respondent was the proper party sued was addressed by both parties. The appellants sued the respondent, is a private limited liability company with an address in Nyahururu.



The respondent in paragraph 2 of its reply to the claim admitted being a duly registered Limited Liability company operating in Nyahururu but denied being an employer of the appellants – See page 119 of the record of appeal.

32. Peter Ndirangu Githuna(RW1) testified that he is the sole director of the respondent since its incorporation. The respondent’s name is Good Hope Nyahururu Nursing Home(K) Ltd as per the respondents exhibit 1 – the Certificate of Incorporation and exhibit 2 the CR12 for the company dated 29th May 2019 – See pages 125 & 126 of the Record of appeal.
33. The appellants on the other hand produced a company’s copy of records dated 6th November, 2018 (appellants exhibit 9 – See Page 110 of the Record of appeal) exhibiting a different shareholding to the company records produced by the RW1 dated 29th May, 2019. The copy of the records produced by the appellants indicated Bilha Nyawira Hiuhu (Bilha) holding 750 shares and Daniel Kariuki Hiuhu holding 250 shares in the respondent. The said document was produced with no objection to its production from the respondent. The said document bears a similar registration name and registration number as the CR12 produced by the RW1. There were no allegations or proof of forgery of the said document. It follows that the respondent’s shareholding changed in the intervening period between 6th November, 2018 and 29th May, 2019. Although RW1 alleged that he was the sole director of the company since its incorporation, he did not object to the production of the said records by the appellants which indicate that the respondent had a different shareholding prior to the RW1 becoming a shareholder.
34. Consequently, the court finds that the respondent properly sued, and holds no objection was raised in the production of the copy of records bearing the same certificate of registration number and date of registration as the respondent. The trial court misdirected itself in finding that Bilha was a director of a different company distinct from the respondent, based on the ground that the respondent had presented a different copy of the records issued on a different date –See page 208 of the record of appeal. The trial magistrate failed to appreciate the nature of share transfers in companies, which are only exhibited through a CR12 for subsequent changes.
35. In any event, the above records are public documents as envisaged under Sections 79 to 83 of the [Evidence Act](#).

V. Employment

36. It is in dispute as to whether the respondent engaged the appellants as its employees. In the lower court the appellants pleaded that they were employed in various capacities by the respondent. The 1st appellant pleaded that he was engaged as a clinical officer in July, 2016; the 2nd appellant as a clinical officer since August 2008; the 3rd appellant as a pharmacist since 2015; the 4th appellant as a security guard since 2013; the 5th appellant as a laboratory technician since March, 2015; the 6th appellant as a Laboratory technician since December, 2013; the 7th appellant as a clinical officer since May, 2018, the 8th appellant as a receptionist since January, 2013; the 9th Appellant as a receptionist since January 2000; the 10th appellant as a nurse since July, 2018; the 11th appellant as cateress since January 2000, the 12th appellant as a cleaner since March, 2013; and the 13th appellant as a cleaner since September, 2014. They alleged they were all terminated on 7th February, 2019 – See pages 16 to 20 of the record of appeal.
37. The appellants further pleaded that the respondent delayed their salaries in November, 2017 and they reported the matter to the County Labour Office, Nyahururu on 6th August, 2018. The appellants pleaded that the labour office wrote to the respondent vide letters of 6th August, 2018, 20th August



- 2018, 3rd September, 2018, and 17th September, 2018 directing the respondent to pay the appellants' arrears, but the arrears were not paid – See pages 106 to 109 of the record of appeal.
38. Subsequently, the appellants were informed by the respondent's director that due to financial constraints, the hospital would close down. The appellants' case is that they later learned that the hospital had been sold and was under new management. They again reported the matter to the County labour office, Nyahururu and the labour office wrote to the respondent again vide the letters dated 12th February, 2019 and 4th March, 2019 directing the respondent to pay the appellants' terminal dues and arrears – See pages 112-116 of the record of appeal.
39. The appellants' case is that through an undated letter received on 9th January, 2019, the respondent's director, Bilha, confirmed that all the salary arrears would be cleared once the sale of the respondent was complete –See page 111 of the record of appeal.
40. The appellants assert that the respondent is still operating and the new management has reinstated some of the previous staff under new terms.
41. The appellants through PW1 and PW2 relied on the bank statements evidencing that they had received salaries from the respondent as proof of employment. The payer of the salaries in the aforesaid bank statements is indicated simply as either GoodHope Medical, GoodHope Medical Centre, GoodHope Medical, GoodHope Hospital or GoodHope Nyahururu, GoodHope Medical Hospital, or GoodHope. –See pages 50-105 of the record of appeal.
42. In their testimonies PW1 and PW2 stated that indeed Bilha had informed them that the hospital was closing down and they were later laid off. PW2 testified that Good Hope Medical and Good Hope Nursing are the same, as after her termination in February, she was called after three months to go back to work by the director Patrick Maina Ndegwa(RW1) – See page 192 of the record of appeal.
43. From the record, the appellants acknowledged that one Bilha had sent a letter that was received on 9th January, 2019 by the County Labour office, Nyahururu, confirming that the facility was sold and she would pay all outstanding debts inclusive of salary arrears – See Page 111 of the record of appeal.
44. While the appellants might have known the previous director of the respondent, Bilha, there was no proof that they had been employed by her as they alleged. Her name did not appear in the bank statements produced by the appellants to prove their employment by her or whether she was the one who had paid them. There was no admission either that the appellants had been the respondent's employees. The Letter from Bilha allegedly received on 9th January, 2019, did not acknowledge any of the appellants as employees either. Furthermore, the National Social Security Fund statement of Ichungo W. Mary – (See page 91 of the record of appeal) also bore the name Goodhope Medical Centre which is distinct from the Respondent's name. There was no proof by the appellants that GoodHope Medical, GoodHope Medical Centre, GoodHope Medical, GoodHope Hospital, GoodHope Nyahururu, GoodHope Medical Hospital, or GoodHope all referred to the same entity the respondent.
45. The appellants' suit was filed on 13th August, 2019. The Appellants alleged that the letter from Bilha received on 9th January, 2019 indicated that the respondent had been sold and that Bilha would pay off outstanding debts. Without any proof thereof that the alleged salary arrears were due to the appellants and without an admission that the appellants had been employed by the respondent, nothing prevented the appellants from enjoining Bilha Hiuhu as a co-respondent in their suit. The appellants testified that it was Bilha who had informed them that the hospital would close down and that she was the one who had employed them. The appellants therefore did not exercise enough



diligence to enjoin the proper party to elicit a response to their issues. The alleged Bilha was better placed to clarify the appellants' employment status.

46. The appellants alleged to have worked for the respondent variously from 2000 to 2019 – see Pages 16 to 20 of the record of appeal. RW1 testified that the respondent was incorporated on 22nd April, 2014. There was no way that the 2nd, 4th, 6th, 8th, 9th, 11th, and 12th appellants could have been employed by the respondent before it was incorporated on 22nd April, 2014. Those appellants (2nd, 4th, 6th, 8th, 9th, 11th, 12th) pleaded that they were employed before the respondent was incorporated. No explanation was proffered during the hearing in the trial court for the anomaly.
47. No evidence, documentary or otherwise was called to prove or demonstrate an employment relationship spanning the years the appellants allege to have worked for the respondent. The bank statements and the NSSF statements availed by the appellants bore different names from that of the respondent. Without proof that GoodHope Medical, GoodHope Medical Centre, GoodHope Medical, GoodHope Hospital or GoodHope Nyahururu, GoodHope Medical Hospital, or GoodHope referred to one and the same legal entity, the respondent, the court shall not assume that all the respondent herein was the employer. This is more so as the appellants alleged that they were employed long before the respondent was incorporated.

VI. Dismissal

48. As rightly held by the trial court, there is no evidence demonstrating existence of an employment relationship between the appellants and the respondent. In the premise, there was no basis to determine if the appellants were unfairly terminated and or if they were entitled to the reliefs sought. The court agrees with the trial court that the appellants failed to prove an employer-employee relationship with the respondent and the trial court was right in dismissing the claim.
49. Having held as above the court need not consider the other grounds of appeal raised in the memorandum of appeal. The appeal is disallowed and dismissed.

VII. Costs

50. The court orders that each party shall meet own costs both in the lower court and for this appeal.

VIII. Orders

51. The court issues the following orders-
 - a. This appeal is disallowed and dismissed.
 - b. Each party shall meet own costs for the trial in the lower court and in this appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 14TH DAY OF NOVEMBER, 2024.

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DAVID NDERITU

JUDGE



