



REPUBLIC OF KENYA



KENYA LAW
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Dena v Ngugi (Appeal 145 of 2023)
[2024] KEELRC 13411 (KLR) (11 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13411 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 145 OF 2023
K OCHARO, J
DECEMBER 11, 2024

BETWEEN

KAINGU KAMBI DENA APPELLANT

AND

PETER WANGO NGUGI RESPONDENT

(Being an appeal against the Decree and Judgment delivered on 16TH November 2023 by Hon. D. O. MBEJA (PM) in Mombasa CMELRC No. 49 of 2022)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 15th February 2018 the Appellant challenges the Judgment and Decree of the Learned Principal Magistrate in the above-mentioned cause, on the principal grounds that he erred in law and fact;
 - (a) By shifting the burden of proof to the Appellant who had established a prima facie case that he was employed by Respondent and dismissed unfairly from his employment.
 - [b]. By finding that the Appellant was not an employee of the Respondent despite the Respondent admitting that he had a residential house at Sabasaba area within Mombasa County where the Claimant was working as a caretaker.
 - [c]. By finding that there was no employer-employee relationship between the Appellant and the Respondent despite the Appellant producing a Mpesa statement and the Respondent admitting that he sent money to the Claimant though by mistake.
 - [d]. In finding that the Appellant failed to produce the Mpesa statements in Court yet the same were filed in Court and even the Respondent admitted sending money to the Appellant.



- [e]. By failing to appreciate that the Respondent was the custodian of all documents regarding the Appellant's employment and bore the high responsibility of producing the same other than transferring the same responsibility to the Appellant.
 - [f]. In finding that the Appellant failed to produce any document yet the law recognizes oral contracts which documents may not be available.
 - [h]. By Proceeding on wrong principles on arriving at the finding that the Appellant was not an employee of the Respondent.
 - [g]. By disregarding overwhelming evidence tendered by the Appellant to prove that he was entitled to terminal dues upon unlawful dismissal.
 - [i]. By disregarding the Appellant's Counsel's submissions.
2. The Appellant consequently sought that: -
- 1. This Appeal be allowed.
 - 2. That the Judgment of the subordinate Court dated 16th November 2023, be set aside, and substituted with one of this Court allowing the Appellant's claim.
 - 3. The costs of this Appeal be awarded to the Appellant.
3. This appeal was canvassed by way of written submissions.

The case before the Trial Court

- 4. It was the Appellant's case before that he was employed by the Respondent as a caretaker on the 4th day of May 2017 and was assigned duties at his house located in Majengo, Sabasaba within Mombasa County. His monthly salary was KSHS. 8000, a salary that was below the minimum wage prescribed by the law for general Labourers.
- 5. On 2nd November 2021, the Respondent terminated his said employment unprocedurally and without any justifiable reason.
- 6. The Appellant asserted before the Trial Court that throughout his service of employment to the Respondent, the latter never allowed him to proceed for leave. He wasn't paid any house allowance. Further, the Respondent didn't remit any NSSF contributions to the relevant authority on his account.
- 7. By reason of the unfair termination of employment and in the circumstances of the matter, he was entitled to;
 - I. One month's salary in lieu of notice..... KSHS. 13, 572.90
 - II. House allowance for 54 months at the rate of 15% of the basic salary KSHS. 109, 940.49.
 - III. Salary underpayments..... KSHS. 300, 000
 - IV. Unpaid overtime.....KSHS. 196, 506.00
 - V. Compensation for unlawful termination..... KSHS.162,874.80.
 - VI. Service pay KSHS. 27,145.80
 - VII. Unpaid NHIF KSHS. 27,000.00



8. He asserted that he was not given any written employment contract. The only proof that he had, to demonstrate that he was an employee of the Respondent, was the Mpesa statement, which showed that the latter did send some money to his mobile phone number.
9. The Respondent contended that he never employed the Appellant as he alleged or at all. As such, his claim was unfounded. There wasn't any employer-employee relationship between him and the Appellant at any time.
10. The Mpesa transaction that the Appellant was placing reliance on, was between the Appellant and Vincent Adesa Kivai, latter a stranger to him.

The Judgment by the Lower Court.

11. After hearing the parties on their respective cases, the Learned Trial Magistrate held that the Appellant hadn't established that there existed an employer-employee relationship between the Respondent and him. Consequently, the reliefs that he had sought couldn't be availed to him. His case was fit for dismissal and it was.

The Appeal.

12. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal, on the grounds set out herein above.

Analysis and Determination

13. The Appeal before this Court emanates from a judgment of the Lower Court. It is now trite, that the role of a first Appellate Court is to subject the evidence and material that were placed before the trial court to fresh scrutiny, allowing it to come to its own independent findings and conclusions. This position was aptly elaborated in the case of *Selle -vs- Associated Motor Boat Co.* [1968] EA 123) where the Court held: -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not necessarily bound to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

14. In the *German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal held that: -

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then



assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, we did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212).”

15. Bearing in mind its mandate as aforesaid, this Court has carefully considered and analyzed the material that was placed before the Learned trial Magistrate, the submissions filed and authorities relied on and notes that the grounds of appeal as brought out in the Memorandum of Appeal were unnecessarily over split and repetitive, something which affronts the canons of good draftsmanship of memorandums and petitions of appeal, and which carries with it the risk of a blurred analysis of the same by the Court charged with the responsibility to. Counsel and litigants alike should be worried about the risk.
16. With great respect to the Learned trial Magistrate, the Judgment missed out on a pivotal component, identification of the issues that emerged for determination in the case before him and consequently the determination thereon and the reasons therefore. Identification of issues for determination by the Court sends out the deserved impression that the Court appreciated the dispute before it fully and helps the Court to render a reasoned and concise Judgment. It is a practice that should be embraced by all the Courts.
17. Having stated as I have hereinabove I now turn to the grounds of appeal. The Appellant complains that the Learned trial Magistrate failed to consider his submissions fully, therefore reaching an erroneous conclusion, and thereby occasioning a miscarriage of justice. I have carefully analyzed the lower Court’s Judgment, true, there is no mention that the submissions by the parties were considered. However, without appearing to encourage Lower Courts to ignore considering submissions by the parties, a failure to consider them, will more often than not, not lead to setting aside their Judgment on appeal.
18. Considering this Court’s role as a first Appellate Court, I am not convinced that the unexplained failure by the Learned Magistrate can be a ground to unseat the Judgment assailed in this appeal.
19. The Appellant’s appeal herein largely revolves around the Learned Trial Magistrate’s failure to hold that the Appellant was at all material times an employee of the Respondent. In fact, this appeal shall turn on this point.
20. From the onset it is imperative to state that, as correctly submitted by Counsel for the Appellant a contract of employment can be orally or in writing entered into. The Appellant contended that at all material times, he was an employee of the Respondent. He was the one asserting, he bore the duty to prove the assertion.
21. I have carefully considered the M-pesa statement that was presented before the Learned Trial Magistrate by the Claimant, and note that on 16th May 2020, the Respondent did send an amount of KSHS. 530, to the Appellant’s number. In his evidence under cross-examination, he admitted that the transaction of that time as can be discerned from the statement reveals that he did. However, the money could have been sent erroneously. The question that springs up then is, could this transaction attract a conclusion that the Appellant was an employee of the Respondent? I fear not.
22. The Appellant in his testimony before the Trial Court didn’t assert that the amount that was sent to his phone was part of his salary. He alleged that it was a gift from his employer, the Respondent. In a bid to fortify his assertion that the Respondent was his employer, and discount the latter’s position that he wasn’t, the Appellant has posed a question in his submissions, how could the Respondent have known his mobile phone number? I can only say that it is common place and I take judicial notice that sometimes money sent via Mpesa can stray to an unintended recipient.



23. The Appellant submitted that he did discharge the legal burden under section 47[5] of the *Employment Act*. That he prima facie established that he was an employee of the Respondent. I am not persuaded that this provision of the law speaks to the standard of proof and prove of assertions, like the one the Appellant raised before the Learned Magistrate. The provision has everything to do with unfair termination and dual burdens of proof for the employee and the employer. Therefore, as regards the assertion that he was an employee of the Respondent, the standard of proof was on a balance of probabilities.
24. The Learned Trial magistrate didn't shift a burden of proof to the Appellant as submitted. The attack that he did, is in my view erroneous and informed by the misapprehension of the provisions of section 47[5], and ignorance of its scope by the Appellant.
25. In the upshot, I conclude that the Learned Trial Magistrate correctly found that the Appellant hadn't on a balance of probabilities established existence of an employer-employee relationship between the Respondent and him. Resultantly, the reliefs sought could not be available and cannot be to him. Consequently, the Appellant's appeal is hereby dismissed with costs.

READ, DELIVERED AND SIGNED THIS 11th DAY OF December 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Mungo'ma for the Appellant.

Mr. Ondieki for the Respondent

