Ekhuya & 2 others v Golden Sport Bar & Restaurant (Employment and Labour Relations Appeal E063 of 2019) [2023] KEELRC 377 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 377 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E063 OF 2019

SC RUTTO, J

FEBRUARY 10, 2023

BETWEEN

MARK EKHUYA .... 1ST APPELLANT

HERMAN ATSYAYA MAGAMBA .... 2ND APPELLANT

DAVID WAINAINA .... 3RD APPELLANT

AND

GOLDEN SPORT BAR & RESTAURANT .... RESPONDENT

(Being an appeal against the Judgement of the Chief Magistrate at Nairobi by Hon. G. A Mmasi, Senior Principal Magistrate, delivered on 5th November, 2019, at Nairobi in MC ELRC No. 173 of 2018)

JUDGMENT

1. Through a Memorandum of Claim filed on September 11, 2018 at the Chief Magistrate's Court at Milimani being CMEL Cause No 173 of 2018, the appellants averred that they were employed by the respondent with effect from April 11, 2006 and were terminated without notice and for no reason on April 1, 2018. That in the course of the employment relationship, the respondent engaged in unfair labour practice in that; the appellants worked for long hours without compensation; the respondent deducted Kshs 300 from their monthly salary to cater for any breakages whether or not they broke anything that month; the respondent did not pay PAYE to the Kenya Revenue Authority on behalf of the appellants; the respondent did not register the appellants for or remit NSSF or NHIF as required under the law; the respondent did not use a master roll for salaries but instead used loose foolscaps on which they signed as they were paid their salaries; the appellants were not allowed to go on leave.

2. The appellants further averred that their termination from employment was malicious, unlawful and irregular hence jointly claimed against the respondent the sum of Kshs 2,062,984.00 being notice pay,

overtime pay, public holidays worked but not paid, service pay, annual leave, compensatory damages and wrongful deductions.

3. The respondent filed a Response to the Statement of Claim through which it termed the appellants as strangers. To this end, it denied ever employing the appellants and averred that it was strange to the allegations contained in the Statement of Claim. Consequently, it asked the Court to dismiss the claim with costs.

4. The matter was canvased through oral evidence and production of exhibits and subsequently, written submissions. Following close of the hearing, the trial Court evaluated and analyzed the record and delivered its Judgement on November 5, 2019, thereby dismissing the appellants' suit with no orders as to costs.

The Appeal

5. The appellants were aggrieved by the Judgment of the trial Court hence instituted the instant Appeal through which they raise the following eight grounds: -

    1. That the learned trial magistrate erred in law and in fact in holding that the appellants' case was not proved, contrary to the evidence on record and the applicable law.

    2. That the learned trial magistrate erred in law and in fact in failing to hold that the respondent unfairly and irregularly terminated the employment of the appellants.

    3. That the learned trial magistrate erred in law and in fact in failing to properly apply the law of evidence to the case at hand, hence leading to erroneous conclusion on the applicable law.

    4. That the learned trial magistrate erred in failing to hold that the appellants discharged their burden of proof whereas the respondent failed to discharge its burden of proof, as provided under the *Employment Act* and the *Evidence Act*.

    5. That the learned trial magistrate erred in law and in fact in misconstruing the evidence and the applicable law.

    6. That the learned trial magistrate erred in law and in fact in failing to consider submissions filed by the appellants.

    7. That the learned trial magistrate erred in law and in fact in failing to properly analyse the case and the evidence, and to apply the relevant law.

    8. That the learned trial magistrate erred in dismissing the appellants' case against the weight of the evidence on record and without any basis in law.

The Submissions

6. The Appeal was canvassed by way of written submissions. It was the appellants' submission that their oral testimony that they were employees of the respondent was valid evidence hence they discharged their burden of proof and it was upon the respondent to discharge its evidential burden. It was further submitted by the appellants that the respondent was in a better position to produce documentary evidence from their records to support the claim that they were not its employees. That further, the appellants' case was corroborated by oral testimony in Court and was not controverted by the respondent. In support of its submissions, the appellants placed reliance on several authorities including *Jane Achieng & another vs University of Nairobi (2015) eKLR*, *Milano Electronics Limited vs*

Dickson Nyasi Muhaso (2021) eKLR and *Peter Ngunjiri Kariuki vs Board of Management Magomano Secondary School (2022) eKLR*.

7. It was the appellants' further submission that the respondent did not prove that the termination was fair. That the trial Court erred in failing to hold that the respondent irregularly and unfairly terminated their employment. to this end, reliance was place on the case of *Peter Ngunjiri Kariuki vs Board of Management Magomano Secondary School (2022) eKLR*.

8. The appellants further argued that the trial magistrate erred in dismissing their case against the weight of the evidence on record and without any basis in law.

9. On its part, the respondent submitted that it was incumbent upon the appellants to first prove that they were its employees before the issue of unfair termination could be dealt with. That the appellants did not produce an iota of evidence that they were its employees. It was further submitted that the burden of proof did not shift to the respondent during trial. In support of its arguments, the respondent invited the Court to consider the determinations in the cases of *Casmir Nyankuru Nyaberi vs Mwakikar Agencies Limited (2016) eKLR*, *Transport Workers Union vs Euro Petroleum Products & Pabari Distributors (2019) eKLR*, *Kenya Hotels and Allied Workers Union vs Crescent Hotel (2019) eKLR.*

Analysis and determination

10. This being the first appellate court, it has the duty to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. In so doing, the Court is cognizant that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was reaffirmed in *Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*, as follows:

> ' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.'

11. Being mindful of the role of the Court at this juncture and upon considering the entire Record of Appeal as well as the submissions by the parties and the law, three issues stand out for determination, thus: -

    a. Whether an employment relationship has been established between the appellants and the respondent;

    b. If employees of the respondent, were the appellants' termination unfair and unlawful?

    c. Whether the appellants are entitled to the remedies sought.

Existence of an employment relationship?

12. As stated herein, the respondent denied the existence of an employment relationship from the outset.

13. The appellants averred that they were all employed by the respondent as cooks with effect from April 11, 2016 and were terminated from employment on April 1, 2018. This translates to roughly two years in employment.

14. The appellants testified that they signed contracts of employment which were retained by the respondent. That further, they were signing for their salaries on a voucher which the respondent would also retain.

15. From the record, the respondent did not call oral evidence during the trial.

16. As stated herein, the respondent's main line of defence is that it did not have any employment relationship with the appellants. It is trite law that he who alleges the existence of a fact must prove. This age long principle is to be found under Sections 107 and 108 of the *Evidence Act*. Therefore, the party who alleges must prove. The said burden remains with the alleging party until it is shifted by sufficient evidence that supports the existence of the alleged fact or set of facts.

17. In this regard, the appellants having alleged that they were employees of the respondent, were required to prove this fact. This was very essential to their case bearing in mind that the respondent had disowned them from the word go. The fact that the respondent elected not to tender any evidence did not help their case either and most certainly, did not shift the burden. It was still incumbent upon them to call evidence in support of their assertions.

18. The appellants only exhibited copies of letters from the Ministry of Labour. By all means, that piece of evidence is not sufficient to establish and demonstrate that there was an employment relationship between them and the respondent.

19. As it is there was no evidentiary material before the trial Court proving a connection in the nature of an employment relationship between the appellants and the respondent. A court cannot assume a non-existent fact. It arrives on its findings upon evaluating the facts and evidence presented before it.

20. Further, it is worth noting from the record that during reexamination, the 1st appellant testified that for two months, he was paid through the Kenya Commercial Bank. This is a crucial piece of evidence that he could have produced to prove the existence of an employment relationship with the respondent. But he failed to do so, hence his assertions and those of his co-appellants remained unsupported by evidence.

21. In as much as it may be true that the respondent never issued the appellants with employment contracts or pay slips, they could have employed other means to prove their case. For instance, they could have sought the assistance of the court to compel the respondent to produce employment records in its possession. In terms of Section 69 as read together with section 68 (a) of the *Evidence Act*, a party may require production of specific documents that are in the possession of the other party whom the document is sought to be proved. Such production is normally preceded by a Notice to Produce.

22. In this case, the appellants have stated that the respondent retained their contracts of employment and payment vouchers. Why didn't they seek to compel the respondent to produce the same?

23. In stating as above, I am cognizant of the obligations laid on an employer under sections 10 (6) and (7) and 74 of the *Employment Act* with regards to maintenance of certain records and the burden of proof. However, it is essential to note that this obligation only arises where there is no dispute with regards to an employment relationship or where an employment relationship has already been established. My thinking on this issue aligns with that of the Court in the case of Casmir Nyankuru Nyaberi vs Mwakikar Agencies Limited [2016] eKLR where it was held that: -

> ' This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from

the burden of proving their case. Even where an employment 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.'

24. Over and above, the appellants could have called oral evidence through a former coworker who had knowledge of their employment relationship with the respondent. Being alive to the gaps in their own case, the appellants ought to have gone an extra mile to prove to the requisite standard that they were indeed, employed by the respondent.

25. In the circumstances, I am not persuaded that the appellants established to the requisite threshold, the existence of an employment relationship with the respondent, moreso noting that the same was fundamental as it lay a foundation for proving unfair termination.

26. Having found as such, the other issues fall by the wayside and cannot be logically determined.

27. Accordingly, I find that this Appeal has no merit and is hereby dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of February, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Appellant Ms. Githii

For the Respondent Ms. Akinyi

Court Assistant Abdimalik Hussein

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 had 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 *Civil 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.