



Kema Investment Ltd v Oroo (Employment and Labour Relations Appeal E024 of 2021) [2023] KEELRC 264 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 264 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E024 OF 2021
SC RUTTO, J
FEBRUARY 3, 2023**

BETWEEN

KEMA INVESTMENT LTD APPELLANT

AND

DANIEL OCHOKI OROO RESPONDENT

(Being an appeal from the Judgement of the Learned Principal Magistrate, Hon. L. Lewa, Milimani in CMEL No. 9229 of 2019)

JUDGMENT

1. The respondent filed a Memorandum of Claim dated June 11, 2019, at the Chief Magistrate's Court at Milimani being CMEL No 929 of 2019, through which he averred that he was employed by the appellant as a commercial driver with effect from July 23, 2007. That the appellant terminated his employment or about June 12, 2018 prematurely, unfairly, without any just cause and in complete disregard to the rules of natural justice. It is for the foregoing reason that the respondent sought against the appellant the sum of Kshs 817,707.00 being one month's salary in lieu of notice, compensatory damages, annual leave for 10 years and service gratuity payment for 15 days for 10 years.
2. The appellant filed a Statement of Response under protest, through which he denied the respondent's averments and put him to strict proof. The appellant termed the claim as misconceived, misplaced and untenable in law. It further denied owing the respondent the sum of Kshs 817,709.00. Consequently, the appellant asked the Court to dismiss the claim with costs.
3. A full hearing ensued at the trial Court, which saw the respondent testify in support of his case. From the record, the appellant did not call oral evidence. The trial Court delivered its Judgement on February 19, 2021, allowing the claim as follows:

' On this basis, I find that the only prayers amenable are: -



1. Certificate of service;
2. Leave allowance to the tune of Kshs 247,790.00
3. Costs and interests awarded at court rates.'

The Appeal

4. The decision by the trial Court aggrieved the appellant who filed a Memorandum of Appeal dated June 10, 2019, which was subsequently amended on February 25, 2022. The following are the Grounds of Appeal: -
 - a. The Learned Principal Magistrate erred in Law and fact by awarding the Respondent annual leave of KShs 247,790/= contrary to the pleadings and evidence before her and in so doing arrived at a wrong decision.
 - b. The Learned Principal Magistrate erred in Law and fact by regarding and/or ignoring the evidence, adduced by the Respondent on record that leave was not due as the same had been spent.
 - c. The Learned Principal Magistrate erred in Law and fact by not holding that the Respondent was bound by his pleadings and could not vary the same through evidence and/or submissions.
 - d. The Learned Principal Magistrate erred in Law and fact by holding through an assumption that KEMA limited and KEMA (EA) Limited are one.
 - e. The Learned Principal Magistrate erred in Law and fact by shifting the burden of proof to the Respondent contrary to the known principle of law; that he who alleges must prove.
 - f. The Learned Principal Magistrate erred in Law and fact by not dismissing the Respondent's claim in totality in view of the evidence on record.
 - g. The Learned Principal Magistrate erred in Law and fact by failure to apply the binding authority as cited by the Appellant and by so doing arrived at a wrong decision.
 - h. The Learned Principal Magistrate erred in Law and fact by awarding the Respondent the costs of the suit when he had only succeeded in one limb of the claim.
5. The Appeal was canvassed by way of written submissions.

The Submissions

6. The appellant submitted that the Learned Magistrate disregarded material evidence and assumed facts and evidence not on record to give a finding in favour of the respondent. That the Magistrate further committed a fatal error by shifting the burden of proof to the appellant and assuming facts not in evidence that KEMA Investment Limited and KEMA (EA) Limited are one and the same yet no such evidence had been produced. That further, it was upon the respondent to lead evidence to prove that the party in Court was his employer and or if the employer was KEMA (EA) Ltd, then he ought to have led evidence to show that they were one and the same thing. To buttress its argument, the appellant placed reliance on the cases of *Mbutia Macharia vs Annah Mutua & another (2017) eKLR* and *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another (2014) eKLR*.
7. It was the appellant's further submission that the only logical and inevitable determination that was to be arrived at after it was demonstrated that the wrong party was in Court, was dismissal of the suit. In support of this argument, the appellant cited the case of *Mediamax Network Ltd vs William*



Momanyi & 2 others (2022) eKLR. It further argued that so long as the employer KEMA (EA) Ltd was not before Court, the trial Court lacked jurisdiction to hear the suit and the proceedings and judgment amount to a nullity and should be set aside.

8. On the other hand, the respondent submitted that the company logo, company slogan, phone numbers, the physical address and email address of the appellant and KEMA (EA) Ltd, as can be seen from the letters produced by the respondent in the trial court, are the same, meaning that the appellant and KEMA (EA) are one and the same. That it is also strange that the appellant did not file an application to be struck out of the suit in the trial Court's proceedings and even went further to submit on whether the respondent was entitled to terminal dues and benefits.
9. The respondent further submitted that the appellant did not produce evidence in Court pertaining leave taken or not taken. To support its position, the respondent relied on the provisions of section 10(7) and 74 of the *Employment Act* and the case of *Joseph Ouko Lwambe vs Royal Garment Industries EPZ Limited (2018) eKLR*.

Analysis and determination

10. This being the first appellate court, my duty is to re-evaluate, re-analyze and re-consider the evidence and arrive at my own independent conclusion, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. Reaffirming this position, the Court of Appeal stated as follows in *Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR*:

' [A]n 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 allowances in this respect'

11. And further in *Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*, the Court reckoned 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'

12. I also find valuable guidance in the determination in the case of *Bwire vs Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment)* where the Court expressed itself as follows:

' A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of 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 the appellate 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. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.'



13. Therefore, this Court is enjoined to re-evaluate the evidence and conduct a rehearing on questions of fact and law. Having considered the entire record of appeal as well as the parties' opposing submissions and the law, the following two issues stand out for determination: -
- a. Whether the evidence established that the respondent was an employee of the appellant; and
 - b. Whether the trial Court erred in law and in fact in awarding the respondent leave pay for 10 years.

Whether the evidence established that the respondent was an employee of the appellant

14. This was one of the issues that was identified for determination by the trial Court. In this regard, the court found that the appellant did not adduce evidence or any testimony to contest their inappropriate joinder in the suit. That in fact, none was adduced to contest why KEMA Investment Limited was sued and not KEMA (EA) Limited. It was the Court's further finding that no evidence was tendered to contradict the linear assumption that both KEMA Investment Limited and KEMA (EA) Limited are one.
15. On record, is a letter dated July 1, 2007 referenced 'Offer of Employment'. The same which is signed by a Ms Alice Nyamweya from KEMA (EA) Ltd and is addressed to the respondent. There is also another letter signed by MO Nyamweya dated July 23, 2007 from KEMA Investment Limited, to the respondent, appointing him as a driver. Further, there is a pay slip in the name of the respondent which identifies the appellant as its issuer.
16. The question thus is whose employee was the respondent? It was the respondent's case that he was employed by the appellant on July 23, 2007. It is instructive to note that the appellant has not contested issuing the letter of July 23, 2007 through which the respondent was appointed as a commercial driver. The same reads in part:

' Re: Appointment As A Driver

Further to your application letter and subsequent interview, I am glad to inform you that you have been granted a job as a driver with effect from July 24, 2007.'

I take this opportunity to wish you well as you join the organisation.'

17. In his testimony before Court, the respondent reiterated the averments in his claim that he was employed by the appellant on July 23, 2007. The respondent's evidence was corroborated by his letter of appointment dated July 23, 2007, which I have reproduced in part.
18. In light of the foregoing, I am satisfied that the respondent proved on a balance of probabilities before the trial Court that he was an employee of the appellant. I therefore find no reason to interfere with the finding of the learned Magistrate in that regard.

Whether the trial Court erred in law and in fact in awarding the respondent leave pay for 10 years

19. The trial Court awarded the respondent leave allowance for 10 years. In his Memorandum of Claim, he stated that he was entitled to not less than 24 working days leave with full pay as per the provisions of section 28 of the *Employment Act*. That this was not done for the 10 years and 3 months of his employment.
20. In defending the award, the respondent has relied on the provisions of section 10(7) and 74 of the *Employment Act*.



21. Section 74(f) of the Employment Act which is relevant in this case, provides as follows:

- ' (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—
- (a)
- (f) Of an employee's annual leave entitlement, days taken and days due specified in section 28;'

22. It is notable that the appellant did not exhibit any leave records at the trial Court to demonstrate the leave days taken by the respondent and those outstanding.

23. Be that as it may, pursuant to section 28(4) of the Employment Act, the respondent can only recover leave days for 18 months preceding his exit from the appellant's employment. Section 28 (4) of the Employment Act provides as follows:

- ' The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.' Underlined for emphasis

24. From the record, the respondent left the appellant's employment on June 12, 2018. Therefore, in absence of leave records to evidence the respondent's outstanding leave, he is only entitled to leave pay for the 18 months preceding June 12, 2018. Therefore, his claim dating back to July, 2007 until January, 2017 is unsustainable.

25. Accordingly, the compensation for leave allowance in the sum of Kshs 247,790.00 is set aside and substituted with a sum of Kshs 26,017.84.

Orders

26. In the final analysis, the Appeal partially succeeds in the following terms: -

- a. The award for annual leave for 10 years is set aside and substituted with an award of leave for 18 months. The award is therefore revised downwards from Kshs 247,790.00 to Kshs 26,017.84.
- b. Interest on the amount in (a) at court rates from the date this Judgement until payment in full.

27. As the appeal has succeeded partially, I direct that each party will bear their own costs in this Court and at the trial Court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Appellant Mr. Manyara

For the Respondent Ms. Mideva

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.

