



REPUBLIC OF KENYA



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**Butali Sugar Mills Limited v Lisungu (Employment and Labour Relations
Appeal E010 of 2022) [2023] KEELRC 595 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 595 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2022**

JW KELI, J

MARCH 2, 2023

BETWEEN

BUTALI SUGAR MILLS LIMITED APPELLANT

AND

HADSON LISUNGU RESPONDENT

JUDGMENT

1. The Appellant aggrieved by the Judgment and decree of Honourable E. Malesi Principal Magistrate delivered on the 12th April 2022 in Kakamega CM ELR No. 141 OF 2019 brought the instant Appeal vide Memorandum of Appeal dated 4th May 2022 seeking for the appeal to be allowed with costs and the judgment of the learned trial magistrate be set aside with costs.
2. The Appeal was premised on the following grounds:-
 - i. The Learned Trial Magistrate grossly, misdirected herself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.
 - ii. The Learned Trial Magistrate did not in the alternative consider or sufficiently consider the evidence adduced and the submissions filed by the Appellant .
 - iii. The Learned Trial Magistrate grossly misdirected herself in treating, the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 - iv. The Learned Trial Magistrate misdirected herself in ignoring the Principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.



- v. The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.
 - vi. The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove his case against the Appellant on a balance of probabilities while the onus of proof lay with the Respondent.
 - vii. The Learned Trial Magistrate erred in awarding a sum in respect of damages when liability had not been proved by the Respondent .
 - viii. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
3. The court directed that the appeal be canvassed by way of written submissions. The appellants written submissions drawn by L.G Menezes & Company Advocates were dated 5th December, 2022 and received in court on the 6th December 2022. The respondent’s submissions drawn by V.A Shibanda & Company Advocates were dated 16th December 2022 and received in court on the 24th January 2023.
- a. Background to the Appeal
 - 1. The respondent/claimant filed a suit in Kakamega CMCC CASE NO. 141 OF 2019 against the Respondent (Appellant) for unfair termination of employment vide statement of claim dated 21st July 2019 and amended on 13th October 2020 seeking the following reliefs:-
 - a. One month’s salary *in lieu* of notice
 - b. Underpayment of wages
 - c. Public holidays
 - d. Overtime for extra time worked
 - e. Rest days
 - f. Salary for February 2017
 - g. 12 months compensation salary
 - h. Costs of this suit
 - i. Certificate of service
 - j. House allowance
 - 2. The Respondent entered appearance and filed defence (pages 13-46).
 - 4. The trial proceeded on hearing with both parties calling witnesses and producing their evidence (proceedings at pages 72-75).
 - 5. The trial court rendered its judgment after the hearing and written submissions by the parties on the 12th April 2022(Judgment at pages 80-83)
 - 6. The trial court entered judgment for the Claimant against the respondent as follows:-
 - a. One month equivalent of wages in lieu of notice KES 7950



- b. 3 months compensation for wrongful termination KES 28850

DETERMINATION

Issues for determination.

7. The Appellants in their written submissions addressed the following issue for determination in their appeal :-
- a. Whether there was privity of contract between the appellant and the respondent
 - b. Whether the respondent is entitled to reliefs granted by the trial court
8. The Respondent in his written submissions addressed the same issues addressed by the appellant in their submissions.
9. The Court adopts the issues addressed by the parties in their submissions as follows:-
- a. Whether there was privity of employment contract between the appellant and the respondent
 - b. Whether the respondent is entitled to reliefs granted by the trial court
10. The Court sitting on appeal from trial court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948)EA123. In the instance appeal, the impugned ruling is on matters of facts and the law so the court will reconsider the evidence at trial court and re-evaluate the evidence and the law relied on in determining the case by the trial court.

Whether there was privity of employment contract between the Appellant and the Respondent.

11. The Appellant submits the "[*Hulsbury LAWS OF ENGLAND*](#)". 4TH Edition, Vol 9 (10 state, at paragraph 748:

“The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it , that is , persons who are not parties to it”.

The court of appeal had an opportunity to and deliberated on the doctrine of privity at length in *Savings & Loan (K) Limited -vs- Kanyenye Karangatita Gakombe & Another* (2015) eKLR . The court rendered itself as under:-

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party.

In *DUNLOP PNEUMATIC TYRE CO LTD -VS- SELFRIDGE & CO LTD* (1915) AC 847, Lord Haldane, LC rendered the principles thus:-

“ My lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it”.

In *Agricultural Finance Corporation v Lengetia* (1982-88) IKAR 772 the Court of appeal held that:



“ As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract”.

12. That from the foregoing , it is evident from the Appellant’s List of documents dated 4th November, 2019 which were produced at the trial court as Exhibits number 1 to 4 respectively, that the Respondent was not an employee of the Appellant but was an employee of Frodak Cleaning, Services which provided the Appellant with Cleaners, Mill cane, winch cane and seed cane loaders.
13. For that reason, the Appellant submits that there was no privity of contract between the Appellant and the Respondent and therefore the trial magistrate grossly misdirected himself by ignoring the evidence and submissions on liability hence arrived at a wrong conclusion.
14. That it was evident from the Appellant’s list of documents dated 4th November, 2019, produced as exhibits 1 to 4 respectively, the Respondent was not an employee of the Appellant but of Frodak Cleaning Services which provided the Appellant with cleaners, home care, winch care and seed care loaders. For that reason the Appellant submits there was no privity of contract between them and the Respondent. To buttress the foregoing facts which they state were based on evidence before trial court the Appellant relied on the decision in *Mbogo -vs- Shah* (1968) EAS93 where the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-“ I think it is well settled that this court will not interfere with the exercise of its discretion by the inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion”.

RESPONDENT’S SUBMISSIONS.

15. The Respondent submit that on first ground of the appeal under paragraph 3 of the Appellant’s submission dated 5th December 2022 was that the Respondent failed to prove that he was an employee of the Appellant and further the Respondent admitted to not signing an employment contract during cross examination and in his evidence.
16. In response the Respondent submits that he proved his employment status. Section 8 of the [Employment Act](#) provides for oral and written contracts . They submit the Respondent was an employee of the Appellant .
17. The Respondent submits that if the Appellant felt it was Frodak Cleaning Services who was the employee of the Respondent then they should have enjoined the said Frodak Cleaning Services as a third party. The Respondent further submits that he was not a party to the said contract between the Appellant and Frodak Cleaning Services. He was in employment and in this case the Appellant never provided any written contract to the Respondent.
18. In addition, the Claimant produced a sick off letter (plaintiff’s exhibit 3) which emanated from the Appellant Butali Sugar Mills Limited. The undersigned was one Andrew Masese.
19. DW1 testified and confirmed Andrew Masese was a Human Resource Manager, an employee of the Appellant who was in charge of issuing sick offs. It is on the strength of the said sick offs. The Respondent said he was employee of the Appellant. That he was not privy to said contract, he was not



- availed a copy of the contract, the respondent never signed the contract and was not a party to it and his name does not appear in the said contract.
20. That the purported contract does not meet threshold of section 10 of the Employment Act which enumerates what employment contract entails .
 21. That the Appellant relied on the decision in Agricultural Finance Corporation -vs- Leagetia (1982-88) 1 KAR 777 where the of Appeal had *inter alia*: “ a contract affects only the parties to it and cannot be enforced against a person who is not a party to it”.
 22. The Respondent relying on the same decision submits that he was not a party to the said contract, he was not aware of the contract, during cross examination the Appellant never asked the Respondent whether he was employed by Frodak Cleaning Services . The said Frodak Cleaning Services is a stranger to the Respondent. That he who alleges must prove. The Respondent questions why the Respondent was granted sick off and had his services terminated by the Appellant if he was employee of Frodak Cleaning Services.

DECISION

23. Applying the holding in Selle Case, I proceed to evaluate the evidence concerning the employment status of the Respondent in order to arrive at my own conclusion as to whether there was privity of contract between the Appellant and the Respondent.
24. The Claimant under paragraph 3 of the Claim stated he was at all material times of the cause employed by the Respondent on the 1st December 2016 as a cleaner earning a sum of Kshs.265/- per day paid every 2 weeks . That he served the Respondent diligently for months when his service were terminated without warning letter or show cause. That his services were terminated on 25th February 2017 without proper notice and no pay. That he was injured and on 21st February 2017 issued with sick off and when he resumed duty on 25th February 2017 he was told his services had been terminated.
25. The sick off letter by Andrew Masese, Human Resource Manager dated 21st February 2017 addressed to Hadson Lusungu reads: “Sick leave

Allowing him out for treatment for he has been injured while on duty on 21st February 2017” (page 11 of the record).
26. The proceedings of the trial magistrate court indicate the Respondent gave sworn evidence. In evidence in chief he stated he was employed by Butali and not Frodak. He produced as his evidence demand letter (exhibit 1) certificate of postage (exhibit 1) and sick off letter (exhibit 2).
27. During cross-examination the Respondent told the court he was employed by Butali. He stated that he had not produced contract of employment, stated he was employed by George, stated he had not produced payslip . Stated the sick off was genuine by Appellant, he was a cleaner and his services were terminated in February by the same George.
28. On re-examination, the respondent stated he knew he was employed by Butali Sugar . That he realised that George was from Frodak after he came from hospital. That he was given sick leave by Butali sugar. That he did not know the relationship between Butali Sugar and Frodak and had not seen the contract between the two.
29. Defence evidence was on 15th February 2022 (page 4) RWI was Daniel Nyaunga, the Finance Manager of the Appellant. He produced the list of documents with annexures and adopted his witness statements filed on 25th November , 2019 all as evidence of the Respondent.



30. On cross-examination RWI told the court he participated in employment of workers with the Human Resources reporting to him. That they issue employment contracts, that he had not produced list of employees, that Andrew Masese was their Human Resources Manager. That the contracts he produced were between Butali and Frodak. That contracts were not issued to contracted workers. That the Human Resource is in charge of welfare like issuing permission for workers to go to hospital.
31. On re-examination, RWI told the court Human Resource Department reported to him. That the Claimant was employed by Frodak. That the Claimant was not in any of Butali records.
32. The court in its judgement stated that the two contracts produced by the Appellants only related to can yard loaders and Mill cane, winch cane and seed cane loaders and none was on cleaners.
33. The court trial magistrate found that under paragraph 7 of each of the contracts, there was obligation on Frodak Kenya Limited to supply the Respondent (Appellant) with pictures and photocopies of Identity card of all its employees. The trial magistrate court found it was easy for the appellant to provide such documents to court to show the Respondent was an employee of Frodak Kenya which the failure compelled the court to find in favour of the Claimant who was in the employment of the Respondent as a cleaner.
34. The court found that Respondent's list of documents (page 21 of the record) were contract dated 26th February 2016 and contract dated 4th July 2016, copies of NHIF receipts, copies of NSSF receipts. Contract dated 26th February 2016 was for Cane Yard Loaders (38 Staff and 6 relievers). For period from 1st February 2016 to 31st December 2016.
35. The Second contract dated 4th July, 2016 between Butali & Frodak was for Mill cane, winch and seed cane loaders.
36. The Court in the circumstances, upholds the decision of trial court finding there was no contract produced in court for cleaners between Butali sugar Mills and Frodak.
37. The Court further upholds the finding of the trial court that the failure to produce the alleged cleaners contract compelled the trial court to find in favour of the claimant that he was in employment of the Respondent as a cleaner. The court finds under section 8 of the *Employment Act* contract of employment can be oral or written and the Appellant in the instant case having failed to issue written contract there was privity of oral contract between Appellant and the Respondent as their cleaner. The court finds the sick off leave (exhibit 2 of Claimant) was proof of employment relationship between the Claimant and the Respondent. There was no evidence before court to controvert that position.
38. The court finds privity of employment contract between the parties.

Whether the Respondent is entitled to reliefs granted by trial court.

39. The trial court found that the Respondent was unfairly terminated. That his statement that on resumption to duty after sick off of 21st February 2017, on 25th February 2017 his services were terminated was not controverted hence finding of Respondent having been wrongly terminated. The Court did not find fault with the finding which was consistent with requirement of Section 47 (5) of the *Employment Act*. The Employee having laid basis of allegation of unfair termination the burden of proof shifted to the Employer to prove valid reasons for the termination and that the process was fair as required under section 41 of the *Employment Act*.
40. The trial court awarded one month wages in lieu of notice applying the rate stated by Claimant of Kes.265 per day translating to Kes.7950 per month and further awarded 3 months gross pay for



wrongful termination total (Kes 28,850/-) . The Claimant was also awarded costs of the suit plus interest at a court rate from date of the judgement.

41. The court is guided by section 49 of the Employment Act in awarding on finding unfair termination. The Notice pay is legal and no issue. The court may award upto maximum of 12 months compensation on finding unfair termination. The factors to inform the award are stated therein and include length of service. In the instant case the Claimant had served for only 3 months and was awarded for 3 months and notice pay. The court finds that the compensation was excessive. The court reduces the compensation from 3 months to two months payment.
42. Consequently, the court enters judgment as follows:-
 - a. The finding of privity of contract of employment between the Respondent and Claimant is upheld. The Notice of pay *in lieu* 7,950/- is upheld.
 - b. The Award 3 months pay is set aside and substituted with award of two month pay total Kshs.16,142/-.
43. Appeal succeeds partially . Judgement of the lower court of 12th April 2022 in Kakamega MELRC CAUSE NO. 141 of 2019 is varied and hereby entered for the Respondent as follows:-
 - a. Notice pay of Kes.7950/-
 - b. Award for unfair termination at 2 months gross pay of KES.16,142/-.
 - c. Total Award of KES.24,092/- to be paid with interest at court rate from date of Judgement of trial court of 12th April, 2022 till payment in full.
 - d. Costs of the suit to the Respondent/Claimant.
 - e. No order as to costs in the Appeal.
44. It is so ordered.

DATED , SIGNED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF MARCH, 2023.

**J. W. KELI,
JUDGE.**

In the Presence of :-

Court Assistant : Brenda

For Appellant: Otieno Njoga

For Respondent: Shibanda

