Endmor Steel Miller Limited v Shikanda (Appeal E053 of 2021)
[2023] KEELRC 1018 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1018 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E053 OF 2021

NJ ABUODHA, J

APRIL 28, 2023

BETWEEN

ENDMOR STEEL MILLER LIMITED ..... APPELLANT

AND

ABEL SHIKANDA ..... RESPONDENT

JUDGMENT

1. The Appellant, Endmor Steel Millers Limited, filed a Memorandum of Appeal dated 12th May 2021 appealing against the Judgment and/or orders of Honourable H. Onkwani (PM) delivered on 15th April 2021 in Mavoko CMEL No. 1 of 2019, Abel Shikanda Mutsoli vs Endmor Steel Millers Limited. The Appellant being aggrieved and dissatisfied with the above-named Judgment/Orders of the Honourable Trial Court, now appeals on the following inter-alia grounds:

    i. The Learned Honourable Magistrate erred in law and fact by entering judgment on in favour of the claimant against the appellant when on the contrary the Trial Court misapprehended and failed to properly evaluate written submissions by the appellant and evidence on record.

    ii. That the Learned Magistrate erred in failing to take cognizance of the fact that the voluntarily resigned from employment without any undue pressure or coercion.

    iii. That the Learned Honourable Magistrate erred in law by failing to find that there was no evidence of constructive dismissal which was the basis of the respondent's case.

    iv. That the Learned Honourable Magistrate erred in law by awarding maximum compensation to the claimant who had not worked for over 11 months.

v. That the Learned Honourable Magistrate erred in law and in fact in holding that the respondent had proved his claim for unfair and unlawful dismissal and compensatory damages on a balance of probabilities.

vi. That the Learned Honourable Magistrate erred in law by awarding the respondent 12 months' salary as compensation for unlawful termination when there was evidence that the respondent voluntarily resigned without undue pressure and/or coercion.

vii. That the Learned Honourable Magistrate erred in law and in fact by awarding the respondent Kshs. 31,633 as pay in lieu of notice contrary to the pleadings and evidence that the respondent's salary was at a daily rate of Kshs. 622 prescribed under the law.

viii. That the Learned Honourable Magistrate erred in law while assessing an amount of Kshs. 15,816 as unpaid salary for the month of October, 2018 whereas the evidence showed no salary' arrears.

ix. That the Learned Honourable Magistrate erred in law and in fact in failing to sufficiently appreciate that the respondent's evidence was purely based on falsehoods, gaps and hypothesis with no basis at all.

x. That the Honourable Magistrate erred in law and fact by making conclusions that are not supported by evidence on record.

2. The Appellant prays that the Appeal herein be allowed and the Judgment of the Honourable Court in Mavoko CMEL No. 1 of 2019, Abel Shikanda Mutsoli vs Endmor Steel Millers be set aside. Furthermore, that costs of the said suit and this Appeal be borne by the Respondent and for this Court to grant any other relief it may deem fit and just to grant in the interest of justice.

3. The Appeal was disposed of through written submissions.

Appellant's Submissions

4. The Appellant submits that the duty of a first appellate court was established in the Court of Appeal in *Selle vs Associated Motor Boat Company Limited* [1968] E.A 123, which was recently cited by Linnet Ndolo J in the case of *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR as follows:

> " 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 bound necessarily 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.....or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

5. The Appellant submits that it is trite law that parties are bound by their pleadings. That the Respondent herein alleged constructive termination from his employment and this court has succinctly pronounced itself on what amounts to constructive dismissal. That in the case of *Milton M Isanya v Aga Khan Hospital Kisumu* [2017] eKLR, Maureen Onyango J in dismissing the claimant's Claim with costs and finding no evidence of constructive dismissal in the case, stated that a constructive

dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders their resignation. It is the Appellant's submission that there is no evidence of constructive dismissal that was adduced by the Respondent in his pleadings and/or evidence on record in the Trial Court. That neither did the Respondent plead in his Memorandum of Claim, any specific acts by the Appellant herein if at all that forced him to resign. That the issue of unfair termination or otherwise, fair hearing and or justly termination decisions based on the same does not arise. That therefore this Appellate Court ought to find that the Respondent was neither terminated nor constructively dismissed from employment.

6. In support of grounds 4, 5, 6 and 7 of the Memorandum of Appeal, the Appellant submits that there is no evidence of the Respondent earning Kshs.7,300 per week that was availed to the court despite him admitting to being paid his salary via Mpesa whose statements he would therefore have provided. That the Regulation of Wages (General) (Amendment) Order (2017) provides for a daily rate of Kshs.622 translating to Kshs.18,660 per month, which the Respondent was duly paid. The Appellant further submits that section 45(3) of the *Employment Act* is very clear that an employee who has not been employed or worked for more than thirteen (13) months cannot raise a claim for unfair termination. That there was no proof adduced by the Respondent to confirm that he had worked for at least thirteen (13) months and therefore the Honourable Magistrate erred in law and in fact in failing to appreciate that the Claimant had worked for the Appellant company for less than thirteen (13) months. It is the Appellant's submission that the prayers sought by the Respondent in his Memorandum of Claim cannot thus be sustained having failed to prove constructive dismissal from employment.

Respondent's Submissions

7. According to the Respondent, the Appellant's ten grounds of appeal could be consolidated as follows:

    i. The learned Magistrate erred in law by considering the Respondent's case yet he had not worked for over 13 months contrary to section 45(3) of the *Employment Act*

    ii. The learned Magistrate erred in law and fact by failing to find that the Claimant voluntarily resigned

    iii. The learned Magistrate erred in law and fact in finding that the Respondent's termination was unlawful

    iv. The learned Magistrate erred in law and fact in awarding the Respondent, the reliefs she sought.

8. The Respondent submits that the constitutionality of section 45(3) of the *Employment Act* has been settled by the High Court which declared the said section unconstitutional in the case of *Samwel G. Momanyi v Attorney General & another* [2012] eKLR. That the effect of declaring a law or part of law unconstitutional was discussed in the case of *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR in which the Court stated that a law declared unconstitutional has no business remaining in the law books. It is the Respondent's submission that section 45(3) of the *Employment Act* is therefore not part of the *Employment Act* and which means that the Trial Court did not err in considering the Respondent's claim despite having not worked for more than thirteen (13) months.

9. The Respondent submits that he did not make a case for constructive dismissal in his pleadings before the trial court other than that he was verbally dismissed by the Human Resource Manager. That a perusal of the Appellant's response to the Claim (page 18 of the record of appeal) reveals that it failed to controvert his allegations. That since he mentioned the Supervisor and the HR, their testimonies

were needed so as to corroborate each other and controvert his claim but the Appellant chose to only call one witness who only indicated that the Respondent resigned. He submits that the allegation that he resigned cannot thus stand because the Appellant did not provide any evidence of his resignation and no witnesses were called to confirm that he resigned. That the Appellant keeps employee records pursuant to section 74 of the *Employment Act* but did not produce any material and therefore on a balance of probabilities, the only logical explanation why the Respondent was no longer working for the Appellant is because he was dismissed. Furthermore, that there was no material evidence adduced for the reason for dismissal as required under section 45(2) of the *Employment Act* and for procedure before termination as provided for under section 41. That the Trial Court was therefore right to find that he was unlawfully terminated.

10. It is the Respondent's submission that the Appellant has not demonstrated in its submissions herein why this Court should move to disturb or interfere with the award of the Trial Court and that the Appeal should thus be dismissed with costs.

Disposition

11. The brief facts of the matter before the Court is that the Respondent herein had claimed against the Appellant, unfair termination of his services and failure by the Appellant to pay his terminal benefits. In response, the Appellant denied having terminated the Respondent's services and averred that the Respondent voluntarily resigned from employment without any undue pressure or coercion and that he was paid all his dues. Upon hearing the parties, the Trial Court found that the Respondent had proved his case on a balance of probability as it could not be stated with certainty whether the Respondent resigned or his services were unlawfully terminated. The Trial Court then went on to award the Respondent unpaid salary, salary in lieu of notice, unfair dismissal, a certificate of service, and costs and interest of the suit.

12. Whereas the Memorandum of Appeal fronted ten grounds of appeal, the parties to this appeal submitted on the Learned Magistrate having erred in law and fact on the issues of applicability of section 45(3) of the *Employment Act* 2007 to the Respondent's case, constructive dismissal versus voluntary resignation, and the awards of notice pay and unpaid salary made to the Respondent by the Trial Court.

13. The Court notes that this is a first appeal. In the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, the Court observed that a first appeal behoves the court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In determining the Appeal herein, this Court shall similarly seek to reanalyse the evidence tendered before the Trial Court vis-à-vis the court's conclusion and disposition.

14. Section 109 of the *Evidence Act* casts an evidential burden upon any party who alleges the existence of a fact. In the case of *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR, the Court of Appeal at Mombasa held that:

> " Except where expressly provided under statute, the burden of proof in civil cases is always cast on the party who alleges (see. Sections 107-109 of the *Evidence Act* Cap 80 Laws of Kenya). It is for the party that alleges a fact to be true to prove the existence and veracity of that fact. This is under the basic principle of Evidence that 'he who asserts must prove' (see. *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR)"

15. As to whether the Respondent had a right to institute the claim for unfair termination considering he had not worked for the Appellant for more than eleven (11) months contrary to section 45(3) of the *Employment Act* 2007, this Court is aware of the High Court's decision in the case of Samwel G. Momanyi (supra) that declared the said provision unconstitutional. Since the Court is not aware of any appeal arising out of the aforementioned decision, applicability of section 45(3) of the *Employment Act* stands suspended. This consequently means that the Respondent had the right to bring a claim for unfair termination before the Trial Court.

16. From the Record of Appeal, the Respondent's pleadings and testimony before the Trial Court was that he was verbally terminated without notice. The Appellant's witness (DW1) on the other hand testified that he was informed by 'witnesses' that the Respondent had resigned verbally in the office but did not provide any documentary evidence to prove the same. DW1 further informed the Trial Court that it was impossible to get the number used to pay the Respondent's final dues through Mpesa. It is my opinion that the Appellant failed to prove to the Court that the Respondent had voluntarily resigned and that it had duly paid his dues. It is trite law that he who alleges must prove. This Court therefore agrees with the Trial Court that the Respondent proved his case on a balance of probability as required by law, that he was constructively dismissed from employment by the Appellant.

17. Pursuant to section 74 of the *Employment Act*, it is the duty of the employer is to keep employment records that would help the court assess the employment relationship between the parties in such a suit. Having made the conclusions above, the Trial Magistrate did not err in awarding the Respondent unpaid salary and salary in lieu of notice after the Appellant failed to provide records of the same. The Trial Magistrate did not therefore err in finding that he had no option but to believe the evidence of the Respondent after the Appellant failed to provide records of employment.

18. The appeal herein is therefore found without merit and is hereby dismissed with costs.

19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2023

ABUODHA J. N.

JUDGE

In the presence of:-

Towei for Kirimi for the Appellant

Okoth Odhiambo for the Respondent