



Kati v G4S Kenya Limited (Employment and Labour Relations Appeal E219 of 2022) [2023] KEELRC 2149 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E219 OF 2022
SC RUTTO, J
SEPTEMBER 22, 2023**

BETWEEN

EDWARD OMUNANI KATI APPELLANT

AND

G4S KENYA LIMITED RESPONDENT

RULING

1. By a Notice of Motion Application dated 16th March, 2023, brought under the provisions of Article 48, Article 50 of the [Constitution of Kenya, 2010](#), Section 1A,1B, 3, 3A, 78 (1) (d), 1 of the [Civil Procedure Act](#) and all enabling provisions of the law, the Appellant/Applicant seeks the following orders:
 - a. Spent
 - b. That the Applicant be granted leave to file additional evidence as pleaded in paragraph 4 of the Supporting Affidavit.
 - c. That the Applicant be allowed to file a Supplementary Record of Appeal attaching the additional evidence.
 - d. That the Respondent be allowed to cross examine the additional evidence.
 - e. That the costs of this Application be in the cause.
2. The Application is premised on the grounds that:
 - i. Judgment in the Lower Court was entered on 14th November 2022 and being aggrieved, the Appellant/Applicant lodged this Appeal.
 - ii. The Appellant wishes to adduce additional evidence in support of his case which evidence will assist the court to make a fair and just determination.



- iii. The Applicant was unable to adduce the attached additional evidence for reasons that he had misplaced it, he only erroneously presented sick sheets to his Advocate and inadvertently left out the medical report dated 9th October 2019 which is crucial in proving his case.
- iv. The medical record dated 9th October 2019 was in the custody of the Applicant, however when he was giving instructions to his Advocates, he had misplaced it.
- v. After losing his job, he was forced to relocate to his rural home and packed his belongings in several suitcases, the medical record was mistakenly misplaced in the confusion ensuing from relocating from his Nairobi home to Kakamega and he only got the medical report after viva voce evidence was already produced in the trial court and when the matter was pending judgement.
- vi. It is clear from the proceedings in the trial court that the Appellant testified of torture and produced sick sheets and left out the medical record. The issue of torture was pivotal to the Appellant's case since he was dismissed from employment ostensibly on a 'confession' which was obtained under duress when he was tortured. The medical record highlights the torture and is therefore a salient ingredient in his case.
- vii. The Applicant is not seeking to bring a fresh case on Appeal since the issue of torture was testified before the trial court, he only seeks to aid the court to arrive at a proper determination of the suit in a just and fair manner.
- viii. The suit in the trial court was majorly hinged on the medical report and the production of the medical record will have probative value in assisting to interrogate the dispute between the parties.
- ix. The Applicant in his list of documents produced before the trial court, captioned 'medical records' as Exhibit 4, this clearly shows his intention to produce the medical records as part of his evidence to support his case.
- x. The evidence is intended to shed light into pertinent issues in this case and the additional evidence would have a probative value in assisting the court arrive at a just and fair determination.
- xi. The Applicant concedes that he was in error in not producing the evidence in the first instance, however he pleads with this court to indulge the error as the same was inadvertent and non-intentional.
- xii. The Applicant seeks access to justice and if the evidence is not adduced then it may highly prejudice his case.
- xiii. Due to the Applicant's sudden dilemma of being required to relocate with his family upon loss of his job, the medical record was erroneously misplaced and such error was occasioned by his confused and distraught nature then.
- xiv. The Applicant pleads that he only intends to adduce only one document, he is okay with allowing the court to call the maker of the document for purposes of cross examination. The evidence is not broad in nature, it is directly relevant to the matter before the court, it is brief and the Respondent will be able to respond to it effectively.
- xv. Allowing the additional evidence will not prejudice any party as the Respondent may cross examine the evidence, it is brought in the interest of justice and may influence or impact upon



the result of the verdict as it removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit.

3. In the Supporting Affidavit sworn by the Appellant herein, Mr. Edward Omunani Kati on 16th March, 2023, he reiterates the grounds set out in the Application.
4. The Application was opposed by the Respondent which filed Grounds of Opposition through its Counsel on 12th April, 2023, contending that:
 - i. The prescriptions referred to under Section 78 of the *Civil Procedure Act* and as set out under Order 42 rule 27 of the *Civil Procedure Rules* have not been met in this case, the evidence sought to be adduced was not refused by the trial court, nor has this court called for it.
 - ii. There are no exceptional circumstances to warrant the exercise of this court's discretion to allow the admission of the evidence sought to be adduced by the Appellant at the appeal stage.
 - iii. The Appellant admits that the medical report sought to be produced was in his possession during the pendency of the proceedings in the trial court and that he misplaced it when relocating. The evidence was therefore in the Appellant's knowledge and in his possession during the pendency of the matter at the trial court.
 - iv. The explanation given by the Appellant does not demonstrate that the evidence could not have been obtained with reasonable due diligence for use at the trial, including obtaining a copy thereof from the doctor who prepared it.
 - v. The Appellant is attempting to remove lacunae and to fill in gaps that were exposed in the proceedings before the trial court. It is an attempt to strengthen the appeal. This is an abuse of the process of the court and offends the principle of finality to litigation.

Submissions

5. The Application was canvassed by way of written submissions. On the part of the Appellant, he invited this Court to exercise its discretion to allow evidence so as to meet the ends of justice in that the additional evidence was inadvertently omitted before the trial Court.
6. The Appellant further argued that the introduction of the additional evidence serves to dispel any vagueness or doubt surrounding the case as it directly pertains to the primary issue at hand. It was further submitted by the Appellant that the introduction of additional evidence is to assist this Court in establishing the true sequence of events.
7. It was the Appellant's further submission that granting the Application would serve the interest of justice as the evidence in question is necessary and crucial in arriving at a proper judicial determination regarding his alleged unfair termination. Placing reliance on the case of *Mohamed Abdi Mohamud vs Ahmed Abdullabi Mohamad & 3 others* (2018) eKLR, the Appellant urged that he had diligently fulfilled all the prescribed conditions in the said case.
8. On the Respondent's part, it was submitted that the Appellant has not met the test outlined in Order 42 Rule 27 and has not demonstrated that the trial Court refused to admit the evidence now sought to be admitted. The Respondent further urged that the Appellant has not met the basic requirements set out in the case of *Mohamed Abdi Mohamud vs Ahmed Abdullabi Mohamad & 3 others* (2018) eKLR.
9. The Respondent further contended that the Appellant by his own admission confirmed that he was in possession of the said medical report at the time of instituting the proceedings. Citing the case of *Cyrus Shakhhalaga Jirongo vs Soy Developers Limited & others* (2020) eKLR, it was the Respondent's



submission that even if the Court is to give the Appellant benefit of doubt, it is suspicious that while knowing he had intended to introduce the same in his bundle of documents, failed to notice that he had not produced it.

10. The Respondent further submitted that despite the Appellant knowing the existence of the said document, never attempted to obtain another copy from the doctor who had prepared it after realizing he had misplaced the same.
11. It was the Respondent's further submission that the medical report the Appellant seeks to adduce is not credible. Pointing out the inconsistency in the dates in the medical report and the date the Appellant was required to appear before the police, the Respondent argued that the same demonstrates an attempt by the Appellant to mislead the Court by presenting evidence that is not credible.
12. The Respondent further argued that the application to introduce the medical report is an attempt by the Appellant to patch up the weak points in his case as he did not produce any evidence to prove that he was tortured by the police into making a confession.

Analysis And Determination

13. Having considered the Application, the Respondent's Grounds of Opposition as well as the submissions by both parties and the authorities relied on, to my mind, the singular issue for determination is whether the Court should grant leave to the Appellant to adduce additional evidence.
14. The Application is grounded on Section 78 of the [Civil Procedure Act](#) which provides for powers of an appellate Court in appeals from a subordinate Court. The Section provides as follows:
 - (1) Subject to conditions and limitations as may be prescribed, an appellate court shall have power –
 - a) to determine a case finally;
 - b) to remand a case;
 - c) to frame issues and refer them for trial;
 - d) to take additional evidence or to require the evidence to be taken;
 - e) to order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
15. I also find Order 42 Rule 27 of the [Civil Procedure Rules, 2010](#), relevant. It provides as follows:
 1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
 - (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.



- (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.
16. The Supreme Court in *Mohammed Abdi Mobamud vs Ahmed Abdulabi Mobamad & 3 Others* [2018] eKLR laid down guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out as follows:
- “...We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
 - (b) it must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive;
 - (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
 - (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
 - (e) the evidence must be credible in the sense that it is capable of belief;
 - (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
 - (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
 - (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
 - (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;
 - (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;
 - (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”
17. The Appellant in the instant Notice of Motion seeks to produce a medical report which he says was misplaced while he was relocating from his Nairobi Home to Kakamega. According to the Appellant, the said medical report will substantiate his contention that he was subjected to severe torture compelling him to provide a coerced confession.



18. Ordinarily, the medical report the Appellant seeks to adduce at this stage, is a document that ought to have been in his possession. In this case, the Appellant has not satisfied this Court that despite reasonable diligence, he could not have obtained he said medical report. This is moreso noting the significance he says it has on the outcome of his case. As a matter of fact, the Appellant has not stated that he was unable to obtain the said medical report despite reasonable diligence.
19. If anything, he avers in his Supporting Affidavit that he was in error in failing to produce the medical report. According to the Appellant, the error was inadvertent and non-intentional. In his submissions, the Appellant has termed the omission as an oversight.
20. What I gather from the foregoing, is that failure by the Appellant to adduce the medical report he now seeks to adduce, was not on account of the fact that the same was out of his reach and he could not have been obtained the same with reasonable diligence for use at the trial, rather that he overlooked its adduction. Clearly, this falls outside the guidelines for admission of additional evidence before an appellate court.
21. On this issue I align myself to the holding by the Court of Appeal in the case of *Wanje & others vs Sakwa & others* (1984) KLR 275, thus:

“the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.”
22. The Appellant further avers in his Supporting Affidavit that he intended to produce the said medical record from the word go at the trial Court. However, I note that the Appellant’s list of documents before the trial Court, merely states in general terms, “medical records” as part of his intended exhibits. He then proceeded to exhibit three copies of sick sheets. He did not specifically mention the medical report, he now seeks to adduce at this stage.
23. Further, when cross examined at the trial Court regarding the existence of evidence to support his assertion that he confessed upon being tortured by the police, he indicated that he had no evidence of the said torture. As a matter of fact, he did not state let alone suggest that he had misplaced the medical report constituting his evidence that he was tortured.
24. In light of the foregoing, I cannot help but conclude that the Appellant is now seeking to adduce the said medical report as an afterthought and in a bid to strengthen his appeal.
25. In the case of *Wanje & others vs Sakwa & others* (*supra*), the Court of Appeal observed as follows:

“This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”
26. Over and above, it is notable from the record that the Appellant was required to present himself before the DCIO Langata on 14th October, 2019. He admitted as much during cross examination. However,



it is notable that the medical report he now seeks to adduce is dated 9th October, 2019 and therein, it is stated that the Appellant appeared at the said medical facility on 9th October, 2019. The medical report proceeds to state that the Appellant reported of being tortured by the police from 2nd October, 2019. If the Appellant's version is to be believed, it is only logical that his appearance at the medical facility, would have tallied with his appearance before the police. Indeed, the inconsistencies in the dates, cast doubt on the credibility of the medical report dated 9th October, 2019, which the Appellant now seeks to adduce.

27. Bearing in mind the circumstances of this case, the applicable law and the guiding principles, it is the finding of this Court that the Appellant has not made a case to warrant admission of additional evidence at this stage. Accordingly, the Application dated 16th March, 2023, is disallowed with an order that each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

STELLA RUTTO

JUDGE

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.

STELLA RUTTO

JUDGE

