



**Mdari v Mastermind Tobacco Kenya Limited (Appeal E088 of 2021)
[2023] KEELRC 2728 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2728 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E088 OF 2021
MN NDUMA, J
OCTOBER 31, 2023**

BETWEEN

JULIANA KATINI MDARI APPELLANT

AND

MASTERMIND TOBACCO KENYA LIMITED RESPONDENT

*(Being an Appeal arising from the judgment and/Decree of Hon. D.O. Mbeja (Mr.)
Principal Magistrate delivered on the 27th day of July, 2021 in Milimani CMCC 1 of 2012)*

JUDGMENT

1. The appeal is from the judgment of Hon D O Mbeja, Principal Magistrate delivered on 27th July, 2021 at Milimani CMCC 1 of 2022 in which the Court entered judgment in favour of the respondent against the appellant for the sum of Kshs 293,100 plus Kshs 50,000 in regard to tuition fees paid to Strathmore University and the Laptop loan.
2. The Court further granted the respondent Kshs 650,000 in respect of the amount secured by the executed Staff Bond after the appellant having resigned from employment before finishing her studies and failing to work for 36 calendar months after completing her studies. The judgment was entered with interest at Court rates from date of filing suit till payment in full and costs.
3. The crux of the Appeal is set out in the Memorandum of Appeal dated 24th August, 2021 as follows:-
 1. That the Honourable Magistrate erred in law and fact by admitting and/or relying upon secondary evidence adduced by one Joseph Kere instead of Primary evidence from Audrey Wanja and/or Patrick Murugu Murungi.
 2. That the Honourable Magistrate erred in law and fact by admitting in evidence and/or relying upon email dated 7th June, 2020 and 23rd June, 2010 contrary to the provisions of Section 106A and 106B of the *Evidence Act* [Chapter 80 of the Laws of Kenya.]



3. That the Honourable Magistrate erred in law and fact by relying upon and/or admitting in evidence the Staff Bond (Exhibit 1) that was executed involuntarily by the Appellant under Duress and Coercion.
 4. That the Honourable Magistrate erred in law and fact by relying upon and/or admitting in evidence the Staff Bond (Exhibit 1) that was executed by the Appellant as a blank Form whereafter blanks were filled without the Consent form or agreement by the Appellant.
 5. That the Honourable Magistrate erred in law and fact by relying upon and/or admitting in evidence a Petty Cash Voucher for Kshs 50,000 for purchase of Laptop which was executed involuntarily by the Appellant under Duress and Coercion.
 6. That the Honourable Magistrate erred in law and fact by enforcing the Staff Bond which was usurious, unconscionable and tantamount to modern day slavery contrary to the Doctrine and Principles of *laissez faire* in Labour Relations in a Free Market Liberal Economic System.
 7. That the Honourable Magistrate erred in law and fact by awarding a sum of Kshs 993,100 in favour of the Respondent without proof of computation or determination of the amount.
4. This being a first appeal, the Court is guided by the principles enunciated in *Selle v Associated Motor Boat Company Limited* [1968] EA 123 where Sir Clement De Lestang stated as follows:-

“This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.

However, 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 on probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

5. The respondent relied on the testimony of R.W.1, Joseph Kere a Finance Manager of the respondent who joined the company in May, 2016 whereas the Appellant worked for the respondent from 13th July, 2006 to June, 2010 when she resigned. P.W.1 relied on the company records and testified that the appellant approached the respondent on or about May, 2009 with a duly filled Petty Cash Voucher to be paid Kshs 293,100 towards her school fees at Strathmore University for a Master of Science degree in Information Systems. That the loan was to run from 2009 till 2011.
6. That the appellant executed a staff bond to work for the company for at least 36 calendar months upon completion of her studies, failure to which she would compensate the company to the tune of Kshs 1,500,000.
7. That the respondent through one Patrick Murugu Murungi, who was the Chief Accountant of the respondent authorized payment of the sum to the appellant.
8. R.W.1 testified further that the appellant on or about 6th November, 2011 was advanced by the respondent Kshs 50,000 to purchase a laptop. A Petty Cash Voucher was used to advance the money to the Appellant.
9. R.W.1 testified also that the Appellant sent an email to the respondent on 7th June, 2010 communicating her immediate resignation from the respondent without notice.



10. That the appellant also sent an email dated 23rd June, 2010 to the respondent acknowledging her indebtedness to the respondent.
11. Under cross-examination, R.W.1 admitted that he did not work for the respondent at the time the matter in dispute arose and so he did not have first-hand information and did not author or receive the documents he adduced in evidence on behalf of the respondent in the matter. That he was in custody of those documents as the successor in office of the former officers who had dealt with the appellant.
12. PW1 told the Court that he did not have the voucher of Kshs 293,100 allegedly, presented by the appellant to the respondent on the basis of which a sum of Kshs 293,100 was advanced to the appellant as school fees. P.W.1 denied that this was a gift to the appellant by the respondent. P.W.1 denied that the appellant had executed the staff bond under duress. P.W.1 said that the respondent demanded Kshs 993,000 payment from the appellant and that Kshs 663,000 was a prorated value of the entire bond. P.W.1 admitted that there was no agreement for the prorated value of 1.5 million. P.W.1 said that he had a document of Kshs 650,000. P.W.1 said he was not aware if the respondent withheld the shares of the appellant. P.W.1 insisted that the amount advanced to the appellant was a loan and not a gift and the appellant acknowledged her indebtedness in the email and so should pay accordingly.
13. D.W.1, the appellant testified that she was a house wife and worked with a Non-Governmental Organization (NGO) called Kristat International. She said she was employed by the respondent on 18/7/2006 as a System Analyst at a salary of Kshs 45,000 which was later increased to Kshs 100,000. That they had installed an Enterprise Resource Planning System at the respondent and trained all the employees and as a result they were offered rewards by the Director. That her reward was to undertake a MSIF course at Strathmore University at a cost of Kshs 507,000. That the respondent paid Kshs 100,000 and that she did not sign a voucher of Kshs 293,000. That Kshs 50,000 was for purchase of a laptop. That she had made a request to the Director, Madam Audrey and the amount was not loan advance.
14. That upon her resignation from the respondent, the company rejected her resignation. That the working environment was abusive hence her decision to resign. That Madam Audrey had uncontrollable anger and verbally abused the appellant. That the appellant suffered stress and sickness as a result hence her decision to resign. She had developed High Blood Pressure. That she had heavy work load due to high staff turnover. That she had signed the staff bond under duress. That she was not paid any terminal benefits and was still unemployed. D.W.1 admitted that she signed the staff bond. That she was only advanced Kshs 100,000 in cash. That the payment voucher given was for Kshs 100,000 upon which she was given the money. D.W.1 said she did not repay the money as it was a gift. That she was later forced to sign the Bond as the company feared it would lose her. That when she signed the bond document, it was blank and it had no figures. That she wrote an email admitting to repay the money under duress and upon receiving a demand letter from Kiogora & Associates.
15. In the judgment of the learned magistrate, the magistrate found as a fact that the appellant had made a request to be advanced Kshs 293,100 to cater for her school fees for a Masters Degree at Strathmore University. The magistrate also found as a fact that the Appellant was advanced a loan of Kshs 50,000 towards purchase of a laptop for her personal use. That the Appellant executed a bond of Kshs 650,000 to guarantee her serving the respondent for a minimum period of 36 months from the date of completing her masters degree. That the appellant was bound to repay Kshs 1.5 million if she did not complete the 36 months bond term. That on 7th June, 2010, the Appellant voluntarily and without notice left the employment of the respondent and left a balance of Kshs 993,100.00 which is the basis of the claim.



16. In conclusion, the learned magistrate found that the appellant was indebted to the respondent in the sum of:-
 - (a) Kshs 293,100 advance fees.
 - (b) Kshs 50,000 advance for laptop purchase and
 - (c) Kshs 650,000 in respect of the staff bond having resigned from employment of the respondent before finishing her studies and the 36 calendar month work load.
17. The appellant submits that the magistrate erred gravely in relying on secondary, hearsay evidence of P.W.1 who was not a party to the transaction between the Appellant and the respondent. That only the erstwhile Director, Audrey Wanja and/or the Chief Accountant Patrick Murugu Murungi could adduce admissible evidence regarding the matters which were directly in their knowledge.
18. That the evidence adduced by P.W.1, Mr. Joseph Kere is no evidence at all, and there being no corroboration on the matters he had testified upon the Court had no choice but to dismiss the claim. That the appellant had admitted receipt of Kshs 100,000 school fees and Kshs 50,000 for purchase of a laptop as a gift from Audrey. That only Audrey could refute the truthfulness of her testimony and therefore the magistrate made a judgment against her based on no evidence at all and had erroneously disregarded her credible evidence. That the staff bond of Kshs 650,000 was signed as a result of duress to avoid losing her job and that when she signed the document, it had blanks that had not been filled and that she was not bound to repay the sum of Kshs 650,000 on the prorated rate of 1.5 million as alleged by the respondent or at all.
19. The Court notes that PW1 did not have the alleged petty cash voucher of Kshs 293,100 in respect of advance payment to the appellant. Provided this amount was contested by the appellant, it could only be proved upon tangible documentary proof by presenting a voucher in the sum of Kshs 293,100 duly signed by the Appellant. In the absence of such evidence, the trial Court was wrong to find that the appellant had proved on a balance of probabilities that it had advanced the appellant a loan of Kshs 293,100. In the absence of any loan agreement in respect of the transaction, the Court wrongly disregarded the testimony by the appellant that she was gifted by her director for good work done a sum of Kshs 100,000 in school fees and a laptop purchase amount of Kshs 50,000. There was no tangible basis for disregarding this testimony by the claimant.
20. PW1 had no capacity to produce documents he did not participate in crafting nor was he a recipient of the same. The trial Court could only rely on primary evidence of Audrey Wanja and/or Patrick Murugu Murungi on these matters. Their failure to testify in the matter was not explained in the judgment of the trial Court.
21. The trial Court further disregarded without justification testimony by the appellant that she was coerced to execute blank bond forms. That she had signed the same under duress but denied having willingly accepted to serve the respondent for a term of 36 months in consideration of Kshs 150,000 which she admitted was gifted to her by Director Audrey Wanja for good work done.
22. This Court finds that the trial magistrate was wrong in treating the email by the appellant to the respondent which does not contain any figures of the loan allegedly adduced to her as evidence that she was indebted to the respondent to the extent the trial Court found in its judgment. The trial Court could not on the basis of the evidence before it establish that clauses 1, 2 and 3 of the Staff Bond had been filled at the time the appellant allegedly signed the same. PW1 did not adduce any admissible evidence for the Court to arrive at the conclusion, it did in favour of the respondent against the appellant.



23. PW1 could not equally discount the testimony by the appellant that the sum of Kshs 150,000 she admitted having received from Audrey Wanja was a gift but a loan. The Court had equally no basis for finding that the appellant was indebted at all to the respondent in respect of the money paid to her in respect of fees and laptop.
24. The indebtedness was not proved to the standard required or at all. PW1 did not satisfy the requirements of Section 35(1) of the *Evidence Act* as alleged by the respondent or at all.
25. In conclusion, this Court finds that the respondent did not prove that the appellant was indebted to the company in respect of all the reliefs sought by the company against the appellant, in the absence of any credible primary evidence adduced by the respondent.
26. Accordingly, the appeal is upheld and the suit by the respondent is dismissed. The entire judgment and decree by the trial Court is set aside. The respondent to bear the costs before the trial Court and this Court.
27. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 31ST DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Jaoko for Appellant

Ms Omwenga for Respondent

Mr. Ekale: Court Assistant

