Boilers Technologies Engineering Ltd v Mutuku & 5 others (Civil Appeal E131 of 2022) [2023] KEELRC 2597 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2597 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E131 OF 2022

L NDOLO, J

OCTOBER 26, 2023

BETWEEN

BOILERS TECHNOLOGIES ENGINEERING LTD ..... APPELLANT

AND

JACKSON MUTUKU ..... 1ST RESPONDENT

EDWIN NGIGI IRUNGU ..... 2ND RESPONDENT

MICHAEL KURIA ..... 3RD RESPONDENT

EUNICE WANJIKU KIBEITHI ..... 4TH RESPONDENT

WELLINGTON KAMONI ..... 5TH RESPONDENT

ALEX WACHIRA NJOKI ..... 6TH RESPONDENT

(Appeal from the Judgment of Hon D.W Mburu, SPM delivered on 8th July 2022 in Nairobi CMEL Cause No 2127 of 2019 consolidated with CMEL 2124 of 2019, 2125 of 2019, 2126 of 2019, 2128 of 2019 & 2129 of 2019)

JUDGMENT

1. By a Judgment delivered on July 8, 2022, the trial court returned a verdict in favour of the respondents (claimants in the lower court) and directed the appellant (respondent in the lower court) to pay the respondents compensation for unlawful dismissal, notice pay and salary arrears.

2. The appellant was dissatisfied with the judgment by the trial court and therefore filed the present appeal.

3. In its Memorandum of Appeal dated July 28, 2022, the appellant raises the following grounds of appeal:

a. That the learned trial Magistrate erred in law and fact when he proceeded to make a determination on the consolidated claims relying on the evidence of only one claimant;

b. That the learned trial Magistrate erred in law and fact by failing to appreciate that the circumstances surrounding the termination of the employment of each of the claimants was peculiar and independent of the co-claimants;

c. That the learned trial Magistrate erred in law and fact by awarding damages that are excessive considering the circumstances of the termination of the claimants' employment;

d. That the learned trial Magistrate erred in law and fact by disregarding the Respondent's defence to the claim entirely;

e. That the learned trial Magistrate erred in law and fact by failing to dismiss the claims with costs to the respondent.

4. This is a first appeal and the duty of a first appellate court is to reconsider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind that it did not have the opportunity to see and hear the witnesses first hand (see *Kenya Ports Authority v Kuston Kenya Limited* [2009] eKLR and *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR).

5. The appellant raises five (5) grounds of appeal, which may be condensed into the following segments:

a. Consolidation of the claims and mode of trial;

b. The respondent's defence to the claims;

c. Quantum of awards.

6. Before commencement of the trial, the respondents moved the Court by way of Notice of Motion dated October 30, 2020, seeking an order for consolidation of CMEL Nos 2124 of 2019, 2125 of 2015, 2126 of 2019, 2127 of 2019, 2128 of 2019 and 2129 of 2019.

7. By a ruling delivered on January 15, 2021, the trial court allowed the respondents' plea and selected CMEL No 2127 of 2019 as the lead file. According to the record, the appellant did not appeal this ruling and this issue was therefore settled before the trial.

8. The appellant however faults the learned trial Magistrate for not taking the testimony of all the respondents. In this regard, the appellant erroneously states that only one respondent testified, while the record is clear that in fact two respondents, Eunice Wanjiku and Jackson Mutuku, testified before the trial court.

9. What is more, there is evidence that the termination transaction was one and the only difference in the consolidated cases had to do with the employment dates and salaries paid to the respondents. To my mind, these differences are matters of fact that were well canvassed by the documents filed in court, to which the Respondent did not object.

10. In his judgment dated July 8, 2022, the learned trial Magistrate states:

> "From the evidence on record, it is not in dispute that each of the claimants have been employed by the respondent for various durations and remunerations".

11. In the result, I find no reason to fault the learned trial Magistrate on account of consolidation of the matters and the trial by selection of a lead file.

12. The appellant complains that the trial court did not take into account its defence to the claims. In his judgment dated July 18, 2022, the learned trial Magistrate states as follows:

> " Each of the claimants was summarily dismissed after issuance of a warning letter on account of absenteeism and a termination letter on account of desertion both dated June 4, 2019. The respondent acknowledged owing the claimants two months' salary arrears for each of the claimants."

13. In its analysis, the trial court states:

> " The claimants' employment was terminated on alleged grounds of misconduct. Their common warning letters and termination letters were issued on 4th June, 2019 terminating their services with immediate effect. The claimants state that they had not been issued with written, verbal warnings or complaint prior to termination. No such warning letters were produced in evidence."

14. From the foregoing, it is evident that the trial court considered the appellants' defence but did not agree with it. I find no reason to fault the trial court on this ground.

15. Regarding the limb on quantum, the appellant states that the awards made in favour of the respondents were excessive. As held by the Supreme Court of Kenya in its decision in *Kenfreight (E.A) Limited v Benson K.Nguti* [2019] eKLR an award of compensation under section 49 of the *Employment Act* is an exercise of judicial discretion, which ought not to be interfered with on appeal, save in exceptional circumstances.

16. This principle was well articulated by Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A in the following terms:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

17. I have examined the decision by the learned trial Magistrate against the foregoing parameters and find nothing to cause me to interfere with his award, which in my view, was made judiciously.

18. This appeal is therefore without merit and is dismissed with costs to the Respondents.

DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023

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JUDGE

Appearance:

Mr. Gachomo for the Appellant

Mr. Mungai the Respondents