Githinji v Metro Logistics Kenya Limited (Appeal EO56 of 2021)
[2023] KEELRC 2715 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2715 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL EO56 OF 2021

K OCHARO, J

OCTOBER 19, 2023

BETWEEN

STEPHEN NDIRANGU GITHINJI ..... APPELLANT

AND

METRO LOGISTICS KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal by Stephen Ndirangu Githinji, the Appellant against the judgment of the learned Principal Magistrate Hon. D. M. Kivuti delivered in Milimani CMELRC No. 1523 of 2019 for 30th April 2021.

Background

2. The Appellant first came into the employment of the Respondent in the month of August 2017 in the position of Site Supervisor EABL at a monthly salary of KShs.30,000. He was confirmed into employment on the 1st of January 2018. A fixed term contract for one year ensued. At the lapse of this contract period, the Respondent allowed him to continue working without halting the employment contract on the appointed date.

3. The employer–employee relationship appears to have progressed well until 13th June 2019, when it got into headwinds. According to the Appellant, the Respondent served him with a suspension letter, placing him under an investigatory suspension for a period of one month. The suspension was on account that there was an accusation against him that he had been involved in a theft. Subsequently, the police who were handling investigations on the alleged theft exonerated him from any culpability. The exoneration was endorsed on the suspension letter by the Officer Commanding the station, Kasarani Police Station.

4. On the 19th of June 2019, the Appellant went back to the Respondent's Human Resource manager to convey the outcome of the Police Investigations. Surprisingly, he was served with a letter dated June 13th 2019, summarily dismissing him from employment. He was also issued with a Certificate of Service.

5. The Appellant contended that the summary dismissal was unfair and stirred by ulterior motives.

6. The Respondent's Legal Officer, Viviane Nelima Wafula (Nelima) testified before the trial court on behalf of the Respondent. She stated that the Appellant was suspended on June 13th 2019, to allow the conclusion of investigations by the police concerning his involvement in a theft matter that had been reported to them. On June 19th 2019, he was invited for a disciplinary hearing. Subsequently, it was decided that he be dismissed from employment.

7. The witness asserted that the Appellant was fairly dismissed. After the dismissal, his terminal dues were duly settled.

8. After reviewing the evidence, the trial Magistrate found as a fact that the Appellant was unfairly dismissed. Based on the finding, he awarded the Appellant, as relief a total sum of Kshs.403,000 made up of KShs.30,000- one month's salary in lieu of notice, Kshs.360,000-twelve months' gross compensation for unlawful termination, KShs.13,000- unpaid salary for the month of June, [13 days.]

9. Aggrieved, the Respondent has in this appeal challenged the Learned trial Magistrate's failure to award him certain reliefs that he had sought in his suit.

The appeal and submissions by Counsel

10. The appeal is based on the grounds that; the Learned Trial Magistrate misdirected himself by finding that the Appellant did not prove his entitlement for unpaid leave; pay for public holidays worked; compensation for overtime worked; and house allowance, to the requisite standards; the Learned Magistrate erred in law and fact, when he failed to correctly evaluate the evidence adduced before him; and misdirected himself by failing to follow binding judicial precedent.

11. The Appellant's counsel submitted that the Appellant placed before the Learned Trial Magistrate two leave forms sufficiently demonstrating the only instances when he proceeded for leave in the course of his employment with the Respondent. The Respondent did not put forth any evidence to rebut the Appellant's. In his view, the Appellant discharged his burden of proof. He cited the Court of Appeal decision in Demutila Wanyama Purumu vs. Salim Mohammed Salim (2021) eKLR, to buttress his submissions.

12. Additionally, he invited this court to consider the provisions of section 74 of the *Employment Act*, arguing that it places responsibility on the employer to keep records containing inter alia, any annual leave entitlements, days taken and days due. To support this, he placed reliance on the decisions in Reef Hotel Limited vs. Josephine Chivatsi (2021) eklr.

13. Leave is a statutory right for an employee. There is no law that supports the position that unutilized leave days are to be forfeited by the concerned employee. In support of this point, he placed reliance on the case of Rumba Mnyika Nguta vs. Southern Hills Development Agency Limited t/a Radio Kaya (2015) eKLR.

14. Counsel for the Respondent submitted that the Appellant failed to prove before the Learned trial Magistrate that he was entitled to pay for unutilized leave days, overtime and compensation for public holidays worked. The Learned Magistrate did not fall into any error when he dismissed the Appellant's claim for compensation for, unutilized leave days, public holidays worked and overtime worked. He

placed reliance on the case cited by the Appellant, Reef Hotel Limited vs. Josephine Chivatsi (2021) eKLR.

15. Counsel reminded this court that its role as a first Appellate Court is to re-evaluate re-assess and re-analyze the material that was placed before the trial Court and come to its own conclusion. The decision in Selle & Another vs. Associated Motor Boat Co. Ltd & Others (1968) E.A. 123 was cited.

16. Counsel for the Appellant submitted that the Appellant was particular as regards the dates when he worked during public holidays and the days he worked overtime without compensation. The Respondent was under a duty to tender evidence to discount his evidence. This he would do by producing a record for its employees. To buttress this point, support was drawn from the holding in John Ashirunga Mjengo vs. Roy Collins Kamau (2019) eKLR.

17. Counsel further submitted that house allowance is a statutory requirement, where it is argued that an employee's salary was consolidated and inclusive of the house allowance, which must flow from a contractual term. The Respondent did not demonstrate that the contract t of employment provided for a consolidated salary. In such a situation the Appellant was entitled to the relief of house allowance. The Learned Magistrate erred when he declined to award the same in favour of the Appellant. To buttress these submissions the Appellant's Counsel placed reliance on the decision in Yohanna Lumbasi vs. Heavy Vehicles and Plant Suppliers Ltd (2022) eKLR.

18. The Respondent's Counsel did not submit in rejoinder to the Appellant's submissions on house allowance. However, I note that he has submitted that the appeal is fatally defective as the record of appeal has omitted to include the two applications for stay of execution dated 13th July 2021 and 8th March 2022, and urged this court to strike it out.

Determination

19. I have considered the appeal and the submissions by Learned Counsel. There is only one issue that requires consideration whether the learned trial magistrate properly declined the reliefs of pay for unutilized leave days, overtime worked; public holidays worked and house allowance.

20. In addressing the issue, I am under a duty to review the evidence that was placed before the trial Court and draw my own conclusion[s] bearing in mind that I did not have the opportunity to hear and see the witnesses as they testified (see Seke vs. Associated Motor Boat Co. Ltd (1968) EA 123). It is with this lens that I will approach the appeal herein.

21. Considering the very brief manner in which the Learned trial Magistrate structured his judgment, it becomes imperative for this court to set forth elaborately the reliefs that the Appellant sought before the trial court. In the reliefs section of his pleadings, the Appellant stated and sought:

> " Reasons Whereof, the Claimant prays for judgment against the Respondent for:
>
> a. A declaration that the termination of the claimant's employment was unfair.
>
> b. Salary for the month of May 2019 --- KShs.30,000.00
>
> c. Salary for June 2019 – 13 days ---------Kshs.15,000.00
>
> d. 12 months salary being damages for unfair termination ----------Kshs.360,000.00
>
> e. Leave pay for 42.5 days ----------KShs.53,125.00
>
> f. Payment for public holidays worked (20 days)

g. Sunday overtime ..... KShs. 970,000

h. House allowance for 33.5 months

@ basic salary - KShs.101,250.00

i. Interest on (b), (c), (d), (e), (f), (h) and (i) at court rates from the day each payment fell due and payable until payment in full.

j. Cost of this suit."

22. In his judgment the Learned trial Magistrate held:

> " I therefore shall declare the termination unlawful and award as follows:
>
> 1. 1 month in lieu of notice Kshs.30,000
> 2. 1 year compensation for unlawful termination KShs.360,000
> 3. Unpaid salary for the month of June 2019 – 13 days
>
> The other prayers of the claim are dismissed for want of specific proof. Judgment is entered for Ksh. 403, 000....."

23. This court observes that in his written witness statement dated 22nd August 2019 that was filed before the lower court, the Appellant averred in plausible terms that at the date of termination of his employment, he had accumulated 32 leave days. He had utilized 10 days out of the 42.5 that he had earned. Subsequent to that rather elaborate statement, Nelima filed, with due respect of rather statements which surprisingly did not make reference to the specific reliefs which the Appellant had expounded in the witness statement as reproduced above. She only made a general statement that, "6. The Claimant's termination was lawful and fair and all his terminal dues were duly paid. (7) Any allegations of unfair unlawful and unprocedural termination of the Claimant's services and failure to pay terminal benefits to him are false, scandalous, ill-conceived and speculative. (emphasis added). The Court notes that in her testimony in court, she did not assert that the dues that the Appellant had elaborately put forth in his pleadings and statement were paid and state when.

24. The Appellant in demonstrating that he had only utilized 10 days out of the 42.5 that he had earned in the course of his employment with the Respondent, tendered as evidence before the trial Magistrate two application leave forms. He first sought for leave of 5 days (25.02.09 – 01/03/2019) and the second, of 22/10/2018 – 26/10/2018.

25. With this evidence and material placed before the Learned trial Magistrate by the Appellant – compared with the Respondent's generalized evidence in denial, the trial Court afforded to find the claim for leave pay, "not specifically proved."

26. At this point it becomes imperative to state that the rules of procedure require that a judgment exhibits reasons for the Court's finding(s). In my view the reason(s) must flow from an analysis and it should not be general and vague. No doubt the conclusion by the trial Magistrate that "the other prayers of the claim are dismissed for want of specific proof" did not find any fount in an analysis on the material that was placed before it on those specific reliefs he declined, inclusive pay for unutilized leave days.

27. The conclusion was omnibus. With respect, the Learned Magistrate did not rationalize or give reasons for the rejection of the reliefs.

28. One gets considerable difficulty to fathom what "want of specific proof" could mean in the circumstances of the matter. Once the Appellant asserted boldly and with specifics that he had earned a number of leave days, utilized a few and some remained unutilized, and even went further to tender unchallenged documentary evidence on the utilized days. In my view the evidential burden of proof shifted to the Respondent, requiring it to discount the Appellant's evidence on the used leave days and go further to demonstrate that he enjoyed all his leave days or was compensated for the untaken ones during his tenure.

29. Sight has not been lost of the fact that the Respondent boldly asserted but without proof that the Appellant was paid all his dues.

30. Considering the foregoing premises, and the statutory responsibility placed on employers, as shortly hereinafter demonstrated, I am persuaded that the Appellant did on a balance of probabilities establish before the trial Court that he had earned but unutilized leave days, for which compensation was entitled to. The Learned trial Magistrate fell in error when he declined to award the relief.

31. The Appellant contends that the learned Trial Magistrate erred when he did not grant him the relief for house allowance. Section 31 of the *Employment Act* provides:

> " 1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
>
> (2) This section shall not apply to an employee whose contract of service—
>
> (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
>
> (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

32. In the case of Kenya Union of Sugar Plantation & Allied Workers vs. Butali Sugar Mills Ltd (2021) eKLR, elaborating on an employee's statutory right to accommodation or pay in lieu thereof, and the employers corresponding obligation to afford employees accommodation or make payment in lieu thereof to enable the employee(s) secure housing accommodation the Court stated, and I agree, thus:

> " The requirement to provide housing or an allowance to cover rent, in the view of the court, is a general entitlement to all employees without distinction on type and nature of the contract; save for the exceptions on consolidation and agreement in a collective bargaining agreement as contemplated by section 31 (2) of the *Employment Act*, or in any other law".

33. The Appellant contended before the trial Magistrate that though his contract of employment under the Employment Contract dated 1st February 2018, was a fixed term contract for a period of one year the Respondent did not terminate the same at the appointed date. The Respondent allowed his employment to continue. In my view, the contract became a month-to-month contract of employment

terminable by a twenty eight days' notice. The Appellant was entitled to house accommodation or allowance even with this form of employment.

34. The Appellant having pleaded and asserted in her evidence before the trial Court that the Respondent did honour the statutory obligation of affording him housing accommodation, or, house allowance. It became the duty upon the; Respondent to demonstrate to the requisite standards that it either offered accommodation to him during the period of her employment or house allowance to take care of his rent or that the basic pay was contractually consolidated with the house allowance and; the Court to interrogate whether the Respondent had sufficiently so demonstrated, if at all.

35. I have carefully considered the material that was before the learned Magistrate, and hesitate not to find that the Respondent did not assert and prove; that contractually the basic pay was consolidated with house allowance; that it paid the Appellant house allowance or afforded him accommodation as contemplated by section 31 of the *Employment Act*. Further, the court notes that the one-year written contract did not provide for a house allowance. The Learned trial Magistrate did not interrogate these aspects at all. I am persuaded that the Appellant was therefore entitled to the relief of house allowance that he sought.

36. This court draws support from the decision in the Court of Appeal case of Grain Pro Kenya Inc. Ltd vs. Andrew Waithaka Kiragu (2019) eKLR, where the Court held:

> " We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer; the employee has no part in its preparation or even a place to sign for it. For the avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause "other benefits as required by law," in the contract to award house allowance, we would have applied section 31 (2) (a) of the *Employment Act* to exclude it."

37. In her witness statement, in paragraph 12 (f), the Appellant did elaborately set forth the specific public holidays on which he worked but for which work, there was no compensation. The Respondent did not besides the general statement, hereinabove referred to, make any effort to demonstrate by documentary evidence or any form of evidence either; that the Appellant did not work during the public holidays particularized, or that he was compensated for the work done during those public holidays. The court has not lost sight of the fact that the employment contract under clause (iii), specifically provided for separation for, work done during public holidays.

38. The Appellant's claim for compensation for work done during public holidays was not that general claim thrown to the court for interrogation, it had specifics, and the Respondent had a clear picture of what it was from the onset to enable it avail evidence in rebuttal. Surprisingly, the Respondent did not present any evidence to counter the claim.

39. The Appellant made the threshold that was set in the case of Reef Hotel Limited vs. Josephine Chivatsi (2021) eKLR on prove of a claim for compensation for working on public holidays thus;

> " An employee claiming compensation for working on public holidays is required to adduce evidence as to which particular holidays they worked. This position was affirmed by the

Court of Appeal in its decision in Rogoli Ole Manadiegi vs General Cargo Services Ltd (2016) eKLR in the following terms:

> " It is true the employer is the custodian of employment records. The employee in claiming overtime, however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in extra hours when he worked on public holidays or even rest days..... he did not justify the global figure claimed in the overtime showing specifically how it was arrived at ....."

The learned trial magistrate ought not to have declined the Appellant's claim under this head.

40. The Employment Contract provided inter alia;

> " Working hours will be from 8.00 a.m. to 5.00 p.m. with an hour break for lunch; from Monday to Saturday. You will however be required to work whatever reasonable hours in excess of normal working hours in order to fulfil your job requirements. Kindly note that the management may from time to time change the working hours at its discretion. It will also pay Authorized Overtime to employees for hours worked in excess of normal working hours in a specific month at the rate stipulated below:
>
> Monday – Saturday: 1.5. times the normal daily rate
>
> Sunday & Public holiday: 2 times the normal daily rate."

41. The Appellant did not with specificity place any material before the trial Court, demonstrating when he exactly started working outside the contractually stipulated days and time. Further the court notes that in the tables set forth in the witness statement, he only gives a number of overtime hours for various months. The tables do not identify the specific dates and days of the months when he worked overtime. To come up with the specific overtime hours worked in the various months, presupposes that the Appellant had in mind specific dates whence the hours were derived. The failure to put forth the dates would leave a judicial mind to deem the tables generalities and adversely infer that the hours were just set out without being delivered from any specific dates. The hours were made up specifically to suit the Appellant's case.

42. In the upshot, the Learned trial Magistrate did not err in concluding that the Appellant had not proved his claim under the head "overtime" both for the week days and Sundays.

43. By reason of the premises, the Appellant's appeal only succeeds partially. The learned trial magistrate's finding that he was not entitled to compensation for utilized leave days and unpaid house allowance is hereby set aside. This court finds that he was, to the extent;

    a. Compensation for unutilized leave days – KShs. 32,000

    b. Unpaid house allowance – KShs. 53,125.00

44. As the success is partial, each party to bear its own costs.

45. Orders accordingly.

READ, SIGNED AND DELIVERED THIS 19TH DAY OF OCTOBER, 2023.

.....

OCHARO KEBIRA

JUDGE

In presence:

Mr. Githinji for the Appellant

Ms. Swaka for Mr. Kimani for the Respondent.

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 has 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 1Bof the 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.

A signed copy will be availed to each party upon payment of court fees.

Ocharo Kebira

Judge

5| Page JUDGMENT ELRC APPEAL NO. E056 OF 2021