



**Mini Bakeries (Mombasa) Ltd v Mwanguya (Appeal E092 of 2022)
[2023] KEELRC 2566 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2566 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E092 OF 2022
AK NZEI, J
OCTOBER 19, 2023**

BETWEEN

MINI BAKERIES (MOMBASA) LTD CLAIMANT

AND

MICHAEL MWAGOSHA MWANGUYA RESPONDENT

*(Being an Appeal from the judgment and resultant decree of the
Chief Magistrate's Court at Mombasa – Hon. Mburu -SPM
delivered on 18th November 2022 in Msa CM ELRC No. 407 of 2019)*

JUDGMENT

1. The Respondent herein was the Claimant in Mariakani Principal Magistrate's Court ELR Cause No 407 of 2019 whereby he had sued the Appellant vide a memorandum of claim dated 6/5/2019 and filed in Court on even date. The Respondent sought the following reliefs against the Appellant:-
 - a. one month salary in lieu of notice.....Kshs 23,296
 - b. unpaid salaries for (September-December 2018..23,296X4)Kshs 93,184
 - c. compensation for unfair termination (23,296X12).....Kshs 279,552
 - d. unpaid leave (21 days X896).....Kshs 18,816
Total 414,848
 - e. a declaration that the Respondent's termination was unfair, unjust and wrongful.
2. The Respondent pleaded that he was employed by the Appellant as a mixer from August 2017 and was unfairly terminated in December 2018 after sustaining an injury at work on 30/8/2018. That he



- was not allowed to resume work after treatment as the Appellant insisted that the injury had reduced the Respondent's productivity.
3. The Respondent had further pleaded that the Appellant did not pay him the salary for the months of September, October, November and December 2018, and that this amounted to constructive dismissal. That the dismissal was unfair and unjustified; and contravened Sections 30,35,41,43,45 and 49 of the *Employment Act*.
 4. Other documents filed by the Respondent in the lower Court suit included his witness statement dated 6/5/2019 and an evenly dated list of documents listing some 12 documents. All the listed documents were in respect of the Respondent's injury and treatment, save for a copy of his national identity card.
 5. The Appellant entered appearance on 17/5/2019 and filed a Response to the memorandum of claim on 8/1/2020. The Appellant admitted having employed the Respondent as pleaded by him, but denied having unfairly terminated his employment. The Appellant further pleaded:-
 - a. that it never asked the Respondent to stay away (from work) as alleged by him, but referred him to an orthopedic who recommended several injections, for which the Respondent refused to present himself, save for one.
 - b. that the Respondent returned to work and was requested to present a certificate from a medical doctor, either confirming his fitness to work or inability to work.
 - c. that the Claimant never presented the certificate as requested or at all, but instead issued a demand notice on 22/2/2019.
 - d. that the Appellant paid for all the Respondent's medical bills and paid his remuneration in accordance with the law and the applicable Collective Bargaining Agreement.
 - e. the Appellant denied the Respondent's allegations and claim, and put him to strict proof thereof.
 6. The Appellant also filed a witness statement of one Catherine Kariuki dated 20/1/2020 and an evenly dated list and bundle of documents, listing 4 documents. The listed documents included a bundle of payment vouchers for October, November and December 2018, copies of a Petty Cash Voucher dated 13/12/2018 and a receipt dated 10/12/2018, a copy of a demand letter dated 22/2/2019 and a copy of the Appellant's response dated 14/3/2019.
 7. The record of appeal herein, which includes the trial Court's proceedings, shows that the trial Court did not hold any trial. What I see on record is that on 5/7/2022, Counsel for both parties appeared before the trial Court and told the Court that they had agreed that parties would rely on pleadings and on submissions. The Court ordered parties to file submissions, and thereupon delivered a Judgment on 18/11/2022, awarding the Respondent a total of Kshs 205,184 made up as follows:-
 - a. one month salary in lieu of notice.....Kshs 23,296
 - b. three(3) months' pay as compensation for unfair termination of employment.....Kshs 69,888
 - c. leave pay.....Kshs 18,816
 - d. unpaid salaries.....Kshs 93,184
 8. The Respondent (who was the Claimant in the lower Court suit) was also awarded costs of the suit.



9. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-
- a. the Learned Magistrate erred in law and fact in finding that the Respondent's employment had been converted from casual to permanent, when that was not the Respondent's pleaded case.
 - b. the Learned Magistrate erred in law and fact in finding that the Respondent's employment had been converted from casual to permanent, despite evidence to the contrary before him.
 - c. the Learned Magistrate erred in law and fact in finding that the Appellant had terminated the Respondent's employment, and unlawfully so.
 - d. that the Learned Magistrate erred in law and fact in finding that the Respondent was entitled to the reliefs sought.
10. The Appellant sought the following reliefs:-
- a. that the appeal be allowed, and the judgment and decree of the subordinate Court delivered on 18th November 2022 be set aside in its entirety.
 - b. that there be substituted in its place an order dismissing the suit with costs.
 - c. costs of the appeal be awarded to the Appellant.
11. This is a first appeal. The duty of a first appellate Court was set out in *Mursal & another v Manese* [2022] eKLR as follows:-
- “A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
12. The Court went on and stated as follows:-
- “A first appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing, both on questions of fact and law....
- A first appellate Court is the final Court of fact ordinarily, and therefore a litigant is entitled to a full fair and independent consideration of the evidence at the appellate stage. Anything less is unjust.”
13. As already stated in this judgment, there was no trial in the subordinate Court. No evidence was adduced in proof of the allegations made in the Respondent's memorandum of claim. This despite the fact that the Appellant had denied the Respondent's claim and allegations, and put him to strict proof thereof. Indeed, the Respondent did not plead to his employment matters as basic as his monthly salary; only mentioning the word “salary” in the prayers/reliefs sought in the suit. In the absence of evidence, and in view of denial of liability by the Appellant, it is not clear how the trial Court arrived at a finding that termination of the Respondent's employment was unfair, and how the sum awarded was computed and/or arrived at. There is absolutely nothing on record for this Court to re-evaluate or to scrutinize.



14. It is to be noted that filed witness statements are not evidence. They are unsubstantiated statements of fact, just like the pleadings, and do not become evidence/a party's testimony until the statements are adopted on oath by a witness, who must be the author of that statement. Further, evidence cannot be substituted with submissions, written or oral. Submissions are meant to firm up or to buttress a party's already presented case, as each party tries to convince the Court that their case carries more weight, and that scales of justice in the case should tilt in their favour.
15. Any judgment that is not founded on pleadings as proved by evidence is founded on quick sand, and cannot stand.
16. Indeed, Rule 15(1) of the *Employment and Labour Relations Court (Procedure) Rules 2016* is clear on the fact that in cases filed in this Court, evidence can only be adduced orally or by affidavits. The Rule provides as follows:-

“ 15.

- (1) The parties to a suit shall, within fourteen days after the close of pleadings or such other period as the Court on application may direct, move the Court to hold a scheduling conference to ascertain:
 - (a) points of agreement and disagreement;
 - (b) the possibility of alternative dispute resolution or any other form of settlement;
 - (c) whether evidence is to be oral or by affidavit;
 - (d) whether legal arguments shall be written or oral, or both;
 - (e) the estimated length of the hearing; and
 - (f) any other matters the Court may deem necessary.”

17. In view of the foregoing, there can never be anything like determination of a case based on pleadings and submissions. Determination of a suit based on pleadings, filed witness statements (without calling the witnesses to testify) and legal arguments (submissions) can only be a mistrial. Enough said on that.
18. It is my finding that the lower Court's Judgment is not a valid judgment. The same is hereby set aside. I will, however, not dismiss the lower Court's suit. A fresh trial is hereby ordered before a Magistrate at Mariakani Principal Magistrates Court other than Honourable D.W. Mburu. The trial shall be on priority basis.
19. Each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH OCTOBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.



AGNES KITIKU NZEI
JUDGE

