



**Paul v West Kenya Sugar Co. Ltd (Employment and Labour Relations Appeal
8 of 2023) [2023] KEELRC 2532 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2532 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 8 OF 2023**

**JW KELI, J
OCTOBER 18, 2023**

BETWEEN

CHRISTOPHER LWANDA PAUL APPELLANT

AND

WEST KENYA SUGAR CO. LTD RESPONDENT

*(An Appeal against the Judgment and Decree of Hon. J.R. Ndururu
(PM) delivered on the 13-10-2022 at Kakamega CMEELRC No. E42/2020
between Christopher Lwanda Paul v West Kenya Sugar Company Limited)*

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and Decree of Hon. J.R. Ndururu (PM) delivered on the 13-10-2022 at Kakamega CMEELRC No. E42/2020 between himself and West Kenya Sugar Company Limited filed Memorandum of Appeal dated 30th March 2023 and record of appeal filed in court on the 27th April 2023 seeking the following orders:-
 - a. That this honorable court be pleased to set aside the judgment delivered on the 13/10/2022 and all consequential orders thereto.
In The Alternative That:-
 - b. That this Honorable court finds that the claimants claim is seeking for reliefs for unlawful termination
 - c. That this Honorable court finds that the claimant was employed and unlawfully terminated by the respondent and therefore award the reliefs sought as prayed.
 - d. That the respondent do pay costs of this appeal
 - e. That such further relief as may appear just to the Honourable court.



2. The Appeal was premised on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact in finding that the subordinate court did not have jurisdiction,
 - ii. That the learned trial Magistrate erred in law and fact in failing to consider the claimant's statement of claim which sought for several reliefs on account of unlawful termination.
 - iii. That the learned trial Magistrate erred in law and fact in finding that the claimant's claim was time barred.
 - iv. That the learned trial Magistrate erred in law and fact by finding that the claimant's claim was for continuing injury.
 - v. That the learned trial Magistrate erred in law and fact by dismissing the entire suit based on a wrong assumption that the claimant's gate pass did not bear the logo or name of the respondent yet the said gate pass bore the logo and name of the respondent.
 - vi. That the learned trial Magistrate erred in law and fact by issuing orders that costs be awarded to the respondent.
3. The court directed that the Appeal be canvassed by way of written submissions. The appellant's written submissions drawn by V.A Shibanda & Company Advocates and dated 8th August 2023 were received in court on the 9th August 2023. The respondent's written submissions drawn by O& M Law LLP Advocates and dated 3rd October, 2023 were received in court on even date.

Background To The Appeal

4. The Appellant filed a suit Kakamega CMELRC Cause No. E42 of 2020 against the Respondent for alleged unfair termination of employment and seeking the following reliefs of April salary, notice pay of one month, prorate leave, underpayment of wages, public holidays, overtime for extra hours worked, rest days, 12 months compensation salary, costs of the suit and certificate of service.
5. The claimant in addition filed uncommissioned verifying affidavit dated 18th November 2020, his statement of even date, list of documents and the bundle of documents.
6. The Respondent entered appearance and filed memorandum of response dated 29th September 2021, list of witnesses and witness statement of Duncan Abwawo dated 11th February 2022, list of documents together with the bundle of documents.
7. The Appellant's case was heard by the trial court on the 12th May 2022 where it is recorded the appellant testified on oath and was cross examined by counsel for the respondent. The appellant was the only witness of his case.
8. The respondent's case was heard by the trial court on the 28th July 2022 where Duncan Abwawo testified on oath as the only defence witness and was cross-examined by counsel for the appellant.
9. The parties filed written submissions on close of defence case and judgment was delivered on the 13th October 2022 dismissing the claim with costs to the respondent.



Determination Of Appeal

Issues For Determination.

10. The Appellant in their written submissions did not identify the issues for determination and the court on perusal of the said submissions found the following issues:-
 - a. Whether the learned trial magistrate erred in decision that the suit was time barred for the reason that the claim was one of continuing injury (ground 1).
 - b. Whether the learned trial magistrate erred in concluding the claimant was not an employee of the respondent.
 - c. Whether the learned trial magistrate erred on decision on unfair termination.
11. The appellant on other hand summarised the grounds of appeal and addressed the following issues in its submissions:-
 - a. whether the subordinate court erred in law and in fact on finding that the suit was time barred for the reason that the claim was one of continuing injury.
 - b. Whether there was an employment relationship between the appellant and the respondent.
 - c. Whether the appellant's dismissal was unfair,unlawful and without valid reasons
 - d. Whether the appellant is entitled to the prayers sought in the appeal.
12. The court taking into consideration the issues addressed by the parties and the decision of the Learned Magistrate was of the considered opinion that the issues placed by the parties before it for consideration at the appeal were as follows:-
 - a. Whether the learned trial magistrate erred in decision that the suit was time barred for the reason that the claim was one of continuing injury
 - b. Whether there was an employment relationship between the appellant and the respondent.
 - c. If (b) above is in the affirmative, Whether the appellant's dismissal was unfair, unlawful and without valid reasons
 - d. Whether the appellant is entitled to the prayers sought in the appeal.
13. The Court sitting on appeal at the first instance is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948)EA123.

Issue (a) Whether The Learned Trial Magistrate Erred In Decision That The Suit Was Time Barred For The Reason That The Claim Was One Of Continuing Injury

14. The appellant submits that his employment was terminated on or about April 2019. The case was filed on the 23rd December 2022. That 1 year and 8 months later the employment relationship having been severed this could not be a case of continuing injury but unlawful termination of employment whereby the limitation of time is 3 years and not one year as stated by the subordinate court. The Appellant further submits that the issue of the suit being time barred was not pleaded hence the subordinate court erred in making findings on the same. The appellant submits that the claim was not



of continuing injury hence not time barred. The appellant to buttress his appeal on that ground relied on the decision of the court of Appeal in *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* (2015)e KLR where the court defined continuing injury and expressed themselves on unpleaded issues thus:- “According to the Black’s Law Dictionary, continuing injury is defined as:- “An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory.” (emphasis added). This definition connotes an injury that continues to happen at the time the claim is lodged and/or ongoing. In the context of an employment relationship, it presumes that the parties are still on a continuous engagement at the time of claim. What comes to mind is where for example, the dispute pertains to an industrial strike and one of the parties has moved court on account of an injury that continues to be suffered during the subsistence of the employment and /or strike. However, in this case, it is not in dispute that at the time the claim was lodged, the employment relationship had already been severed. Indeed, it is the termination that gave rise to the course of action. Any claims arising therefrom could therefore no longer be termed as continuing injury.’ The appellant submits that the question whether the claim was continuing injury or time barred was not pleaded hence the trial court erred in making such a finding and further placing reliance on the *Mary Kitsao* case (supra) where the court observed :- “That said, we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of Section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. The jurisdiction of an appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is exactly what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury.”

15. The respondent on this issue submits that the learned magistrate court in his judgment contrasted the validity of the suit being filed on time vis a vis other claims that amounted to a continuing injury which had been filed outside the one year limitation period by the Appellant and therefore time barred.
16. That jurisdiction is a preliminary issue that must be considered by the court either suo moto or on an application by a party and relied on the land mark decision of Nyarangi JA as he then was in Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Ltd to the effect that a court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. The respondent submits that the holding of the court was supported by precedent to wit Peter O Magero v Board of Governors, St. Augustine Soysambu Secondary School & another [2017] eKLR.
17. The learned magistrate on this issue held at page 3 of his judgement:-, “in the statement of claim the claimant averred that the employment was terminated on 5th April 2019, the claim was filed on 23rd December 2020. If this is correct, then the claim for the purported unfair dismissal would have been filed within three years. However the other claims that amount to continuing injury would have been filed outside the one year limitation period and therefore time barred. By virtue of S. 90 , this court now lacks jurisdiction to hear and determine those claims.” The learned magistrate identified the time barred claims to be in relation to leave, underpayments, public holidays, rest days, house allowance and unremitted deductions.
18. I have considered the decision of the court of appeal relied on by the Appellant in *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* (2015)e KLR where the court observed that the trial court could not have been said to have erred on an issue not canvassed before it. While I have no issue with the decision I find that the facts are different. It is my opinion that the issue of time limitation is an issue of jurisdiction and the court must satisfy itself of the same whether suo moto or vide application consistent with the decision by Nyarangi JA in Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Ltd. The



court holds that the learned magistrate was right to deal with the issue of time limitation for continuing injury claims as an issue of jurisdiction.

b. Whether There Was An Employment Relationship Between The Appellant And The Respondent.

19. The appellant challenged the finding of the learned magistrate on the existence of employer employee relationship. The appellant submits that the learned magistrate erred in finding the gate pass was a forgery. That it was trite law whoever alleged fraud must prove. That the respondent never pleaded fraud or gave details of the fraud. The appellant submitted that fraud must be strictly pleaded and proved as held in *Vijay Morjoria V Nansingh Madhusingh Darbar & Anotehr (2000)* e KLR and several other decisions to same effect.
20. The appellant submits that the burden of proof of allegation of fraud is on the one who alleges as held in *Ndolo v Ndolo (2008)* IKLR and *Urmilla w/o Mahendra Shah v Barclays Bank International Ltd & another (1979)* KLR where the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. The appellant cited several other authorities which the court appreciated to be of the same effect as those outlined above.
21. The appellant submits that the learned Magistrate erred in holding that the claimant produced a fraudulent gate pass, which allegation was not raised in the pleading and trial. That the claimant produced a gate pass written WESOL which meant West Kenya sugar company limited, the gate pass did not bear name Hassan who DW1 recognised as contractor, DW1 stated he knew Hassan as one of the employees contracted by the respondent but produced no evidence of the contract with Hassan. That Hassan was not called as a witness or enjoined as third party to the suit. The appellant submits that he was employed by Hassan in his capacity as employee of the respondent. That the appellant proved he worked for the respondent and the person in charge was Hassan who also worked for the respondent as confirmed by DW1. That according to DW1, it was Hassan vested with role to issue gate passes and the appellant confirmed it was the said Hassan who issued him with the gate pass.
22. The respondent on this issue submits that section 107 (1) of the *Evidence Act* provides:- “section 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The appellant relied on the decision of the court of appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another (2005)* 1 EA 334 where the court appreciating provision of section 107 of the *evidence Act* noted that further evidential burden lay on that party alleging a fact to prove any particular fact which he desires the court to believe in its existence as captured in sections 109 and 112 of the Act. The appellant also invoked section 47(5) of the *Employment Act* to wit:- “47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
23. The respondent summarised the evidence before the trial court for the claimant and for the respondent to extent that DW1 was emphatic the gate pass was a fake if not forgery and did not bare name of the respondent nor was it written that the Appellant was a sugar packing man, there was no employment contract and the gate pass was not proof of employment, there was no evidence of the alleged payment per month , the claimant contradicted himself on dates of termination and said he was at home at the time of termination and had not appealed. The gate pass according to DW1 did not indicate the name of the contractor, the document did not emanate from the company and had no logo, it did not indicate activity carried out by the worker, the worker’s name, ID number or signature of the employee, the document was for security access for entry into the company premises, DW1 produced the list of



casuals and the name of the Appellant did not appear and that the Appellant did not produce evidence to corroborate his claim of employment .

24. The Respondent relying on the evidence as summarised above submitted there was no employer employee relationship. To buttress their position the Respondent relied on the decision by Marete J in *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia (2021)e KLR* to the effect that section 47(5) of the *Employment Act* (supra) from the outset binds the Claimant to bring out the case of unlawful termination from employment to which the Respondent shall adduce evidence in justification failing which the claim is lost even without rebuttal. The respondent further relied on the decision Ndolo J in *Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited (2016) e KLR* where the court observed as follows: - ‘11. This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.’
25. The jurisdiction of the employment court to award for unfair termination is premised on the existence of employer-employee relationship. The Appellant to prove this relationship relied on the gatepass(P-exhibit 1) and his oral testimony as his evidence. The gate pass was produced under the list of documents dated 18th November 2020 as a job card. The said document had the name of the appellant, his ID number and stated contractor and sugar packing Pass.
26. On face value I find the document “P-exhibit 1” was not a job card but a gate pass to access premises as it was written:- “Return to security as the main gate at departure”. The court agreed with DW1 that this was a document to access the premises to sugar packing. The appellant testified that he got a pass every month but this particular document had no dates hence could not support his evidence of monthly employment.
27. The respondent as the alleged employer had duty to produce employment records and it did so for its casual workers within the period.
28. The court evaluated the evidence and found as follows:- The statement of claim stated the Appellant was employed on 1/1/2018 as a sugar packaging man and that his employment was terminated on 5th April 2019, the claimant’s statement at paragraph 2 stated he was employed 1/1/2019 as a helper and dismissed on April 2019. In oral testimony at cross examination the appellant stated he was doing sugar packing and worked from 1/1/2019 to 16/5/2019 and was not given employment documents. He stated the gate pass did not bear name West Kenya Sugar Company. He had colleagues and did not know whether they had employment contracts. DW1 stated he was the custodian of employment records for casual workers of the respondent and that Hassan was their contractor last 6 years in sugar packing. That he did not know the document gate pass produced by the claimant which was a copy. He said the contractor kept copies of the gate passes.
29. Having examined the document(P-exhibit 1) relied on by the appellant, I found it was a copy, had no dates, was not signed by the appellant or the contractor, did not have name of West Kenya Sugar Company limited but had initials WEKSOL which could have meant anything. The court noted the exhibit was a laminated copy. The claimant did not justify why he produced a copy and not the original document. Primary evidence is always the best. The court found the P-exhibit 1 was a gate pass for access to the premises of the respondent and was to be surrendered at security main gate on departure.



30. The foregoing findings coupled with the contradiction on the dates of employment in the pleadings, that is ,by the claim indicating date of employment as 1/1/2018 and the witness statement of the claimant indicating 1/1/2019 as his date of employment. At the hearing the claimant further gave different accounts on the termination dates. The court holds that employment relationship is not equivalent to working together. The contractor bringing its workers on site of the company for a specific job such workers cannot claim to be employees of the company. In the instant case the document (P exhibit 1) may not have been a forgery but was definitely not proof of employment. I agree with the trial court there were other ways to prove the employment like the alleged consistent payments or oral testimony of a fellow employee. The gate pass which the court holds was tantamount to access permit and notca job card, and the appellant’s contradictory evidence on the employment dates and termination dates supports the finding of the trial court. The court upholds the holding of the learned magistrate that for failure to prove employment by the respondent there could not exist a claim for unfair dismissal.
31. Having so held, I find it is moot to delve into the other issues. Where the court finds there was no employer employee relationship , at that instant it must down its tools for want of jurisdiction. I so do.

Conclusion

32. The Court holds that there was no employer employee relationship and the appeal lacks merit. The Court upholds the judgment of Hon. J.R Ndururu(PM) dated 13th October 2023. Costs follow the event and the award on costs is upheld. Since the claim was brought by a stranger I also award costs of the appeal to the Respondent.
33. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH OCTOBER 2023.

JEMIMAH KELI
JUDGE.

