Matoke v Suchak (Appeal E046 of 2022)
[2023] KEELRC 2393 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2393 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E046 OF 2022

BOM MANANI, J

OCTOBER 5, 2023

BETWEEN

LILIAN BUYAKI MATOKE ..... APPELLANT

AND

VANDANAH SAKET SUCHAK ..... RESPONDENT

JUDGMENT

Background

1. The parties to this appeal had an employment relationship until early July 2019 when they separated. The Appellant asserts that the Respondent terminated her services after allegedly getting a suitable replacement for the Appellant. As a result, the Respondent allegedly told the Appellant not to report to work.

2. Conversely, the Respondent denies terminating the Appellant's contract of service. According to the Respondent, the Appellant absconded from duty thereby terminating her contract.

3. The parties were heard by the trial court where-after the court returned a verdict dismissing the Appellant's claim. According to the trial court, the Appellant had failed to establish her case as required in law.

The Appeal

4. Aggrieved by the trial court's decision, the Appellant filed this appeal. The appeal has a total of eight grounds. The grounds can be summarized into the following: -

    a. That the trial court's decision was at variance with the evidence and submissions tendered by the parties.

b. That the trial court erred in law and fact in failing to find that the Appellant had tendered sufficient evidence to establish her case for unfair termination of her contract of service.

c. That the trial court erred in failing to award the Appellant the reliefs sought in her Statement of Claim.

d. That the learned trial magistrate disregarded the law and existing case law on the dispute.

Brief Facts

5. The record shows that around April 2017, the Respondent engaged the services of the Appellant as a house help. The parties stayed in this relation until early July 2019 when they separated.

6. According to the Appellant, she was taken ill on 8th July 2019. As a result, she sought the Respondent's permission to be away from duty in order to seek medical attention. The Appellant asserts that the Respondent acceded to this request thus allowing the Appellant to stay away from work until 13th July 2019.

7. The Appellant contends that when she reported back to work on 13th July 2019, the Respondent told her that her services were no longer required. The Appellant states that the Respondent told her that a suitable employee had been sourced to take over her work.

8. The Appellant states that the decision to terminate her services was without reason. Further, the Appellant avers that the Respondent did not afford her a hearing in contravention of the law. The Appellant further contends that she was released from employment without being paid her terminal dues.

9. The Appellant avers that during the term of her service, she was required to work during public holidays without compensation. Further, she was not granted her leave days. The Appellant also alleges that the Respondent did not pay her for the days she worked in July 2019.

10. On her part, the Respondent admits that the Appellant was indeed her employee as a house help. However, the Respondent denies terminating the Appellant's contract of service.

11. According to the Respondent, the Appellant left employment in early July 2019 without reason. The Respondent asserts that the Appellant did not return to work thereafter.

12. The Respondent confirms the Appellant's assertion that the contract of service between them was oral. According to the Respondent, the Appellant had been guilty of persistent absenteeism from duty.

13. Despite the Appellant asserting that she was not paid: salary for the days worked in July 2019; accrued leave days; overtime pay; and salary for work performed on public holidays, the Respondent did not contest these claims in her written witness statement. The only matter that the Respondent addressed in the said witness statement related to the non issuance of a Certificate of Service. According to the Respondent, she did not issue the Appellant with this certificate because she was not able to trace her.

14. However, in her oral testimony, the Respondent stated that the Appellant had taken her leave days. Strangely, the Respondent was to later contradict herself on this matter through her final written submissions when she admitted that the Appellant was entitled to annual leave pay but limited to 70% of her monthly salary for the two years of her service.

15. On house allowance, the Respondent stated in her oral testimony that the Appellant's salary was consolidated. It was the Respondent's case that the Appellant's salary included house allowance.

16. After hearing the parties and taking their submissions, the trial magistrate dismissed the Appellant's case. According to the trial magistrate, he saw no evidence that would have enabled him to allow Appellant's case. Accordingly, he dismissed the claim.

Analysis

17. This is a first appeal. Therefore, this court is required to evaluate the record of the trial court in its entirety and arrive at its own conclusion on the issues in dispute. However, the court must remain alive to the fact that it neither saw nor heard the witnesses who appeared before the trial magistrate. Thus, allowance must be made for this reality. As a matter of law, the appellate court is not entitled to depart from the trial court's findings of fact unless it is evident that the said findings are contrary to the evidence on record (Jackson Kaio Kivuva v Penina Wanjiru Muchene [2019] eKLR).

18. It is perhaps important to point out that although the appeal is premised on several grounds of appeal, the said grounds are intertwined. As such, it is not necessary to address the grounds distinctly. Consequently, the court will address the issues raised in the grounds jointly.

19. I have read the brief decision by the trial court which comprises of two pages. The decision, without appearing to demean the trial magistrate, is incomprehensible. It is impossible to discern with any measure of certainty, the reasons that informed the decision.

20. Ordinarily, a court decision ought to provide a coherent analysis of the evidence that was presented before court and the basis for the court's finding (Francis Barasa Lurare & another v Denis Nyongesa Maloba [2020] eKLR). The decision on record lacks these critical ingredients.

21. There is no suggestion from the record that the trial court made any effort to analyze the evidence on record before he arrived at his verdict. Similarly, there is no evidence that the trial court considered the case law that was presented before him in arriving at his verdict.

22. Despite the Respondent conceding some of the claims in her final submissions, the trial court did not consider these concessions. Instead and without assigning cogent reasons for his decision, the magistrate dismissed the entire of the Appellant's case.

23. With respect to whether the parties separated in accordance with the law, the court was expected to have analyzed the evidence on record against the applicable law. The record does not show that this was done.

24. The law that regulates closure of contracts of service is set out in the *Employment Act*. Under section 41 of the Act, an employee's contract of service can only be terminated for lawful reason and in accordance with due process. The law requires that before an employer terminates a contract of service for an employee, he (the employer) must: notify the employee of the reasons for his proposed action; and allow the employee an opportunity to be heard in his own defense.

25. Under sections 43 and 45 of the *Employment Act*, the employer must justify the decision to terminate a contract of service. In addition, he must prove the reason for the decision. He must demonstrate that the employee was accorded due process.

26. It is true that section 47 of the Act obligates an employee to prove that termination of his contract of service was unfair. It is also true that the section limits the employer's obligation in this respect to justifying the decision to terminate the contract. However, the burden is greater on the employer to justify the validity of the decision to terminate (Freight In Time Limited v Rosebell Wambui Munene [2018] eKLR).

27. The record shows that the Appellant stated that she was allowed permission to be off duty following her alleged sickness. On the other hand, the Respondent's case was that the Appellant absconded from duty. What is apparent from the two versions by the disputants is that the two eventually separated. Therefore, what the court was called upon to do was to consider whether the separation was lawful.

28. Where an employee is said to have absconded from duty, the employer has a duty to demonstrate that he sought an explanation from the employee regarding his absence from work. There must be evidence that the employer notified the employee that his continued absence from duty was likely to result in his dismissal from work.

29. In effect, the employer must demonstrate that he took steps to afford the absconding employee an opportunity to explain his absence. This process is undertaken through a disciplinary session under section 41 of the *Employment Act*.

30. As was observed in Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] eKLR an absconding employee does not dismiss himself from employment. The employer must take steps to close the contract between the parties through the mechanism contemplated under section 41 of the *Employment Act*.

31. The record before the trial court does not show that after the Appellant allegedly absconded from duty, the Respondent took steps to subject her to a disciplinary process that is contemplated under section 41 of the *Employment Act*. There is no evidence to show that the Respondent notified the Appellant of the intention to terminate her services due to her alleged absenteeism. There is no evidence to demonstrate that the Respondent asked the Appellant to explain her alleged absenteeism.

32. If the record before me is anything to go by, all that the Respondent alluded to is that the Appellant absconded from duty. There was no evidence that the Appellant was subjected to disciplinary action before her contract of service was deemed closed.

33. The Respondent may have had valid reason to consider closing the employment relation between her and the Appellant. However, this should have been done in compliance with sections 41, 43 and 45 of the *Employment Act*. This was not the case. The trial court's finding that the Appellant's contract was validly terminated is not supported by the evidence on record. The decision is evidently flawed.

34. The decision is therefore set aside. In its place, this court returns a verdict that the Appellant's contract of service was improperly and therefore irregularly terminated.

35. The Respondent has relied on the decision of Alice Ndinda John v Birdi Singh [2019] eKLR to urge the court to find that the failure by the Appellant to report to work was sufficient to terminate her contract of employment. This may be correct in so far as it presents a reason to terminate the contract. However, in addition to demonstrating the presence of a reason to terminate the Appellant's contract, the Respondent ought to have demonstrated that she observed due process in processing the termination.

36. Whilst the learned judge in Alice Ndinda John v Birdi Singh (supra) considered the first limb of the twin requirements for a valid termination of a contract of service, it is clear that he did not consider the procedural requirements under sections 41, 43 and 45 of the *Employment Act*. For this reason, I decline to rely on the decision to uphold the termination of the Appellant's contract.

37. The evidence on record shows that the parties entered into their contract of service in April 2017. The contract was terminated in July 2019. This was more than two years after the contract had been concluded.

38. Under section 9 (1) of the *Employment Act*, such contract ought to have been reduced into writing. Under section 9 (2) of the Act, the responsibility of ensuring that the contract was reduced into writing rested with the Respondent as the employer.

39. Under section 10 of the Act, a written contract of service should provide details of various matters including the remuneration of the employee, his leave entitlement, hours of work, public holiday entitlement, holiday pay details among others. Under section 10 (6) of the Act, the employer has a duty to keep record of the various matters addressed under section 10 of the Act for a period of at least five (5) years after closure of the contract of service. Under section 74 of the Act, the employer is duty bound to secure these records and produce them for inspection whenever required.

40. Section 10 (7) of the *Employment Act* provides that whenever a dispute arises regarding fulfillment of a term of a contract of service which was required to have been reduced into writing but was not, the burden of proving or disproving the disputed term rests with the employer. In Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR, the Court of Appeal reiterated this position.

41. In the case before the trial court, the Respondent failed to reduce the contract of service between the parties into writing despite the fact that the contract had been in force for a period that exceeded two years. From the record, it is clear that the dispute between the parties related to whether the Appellant's: accrued leave; public holiday pay; overtime; salary arrears; and house allowance had been settled. In terms of the legal position expounded above, the burden lay with the Respondent to provide the trial court with evidence to show that the Appellant was not entitled to the various terminal dues that she had claimed.

42. Addressing this matter, the Court of Appeal in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune (supra) stated as follows:-

> " On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of Section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the *Employment Act*.
>
> On the issue of underpayment, the first consideration would be the determination of the salary that was paid to the respondent. In light of the fact that the appellant failed to produce evidence on the terms of the respondent's engagement as envisioned under Section 10(7) of the *Employment Act*, we, like the ELRC, are inclined to accept the respondent's version, that is, that she was paid a monthly salary of Kshs. 4000."

43. The record shows that the Respondent conceded the Appellant's claim for leave pay in her final submissions. Having regard to this reality, there was no basis for the court to have dismissed this claim. In the premises, the decision of the trial court in this respect is set aside and in place thereof, judgment is entered for the Appellant for Ksh. 18,200.00 being equivalent to the Appellant's leave entitlement for 42 days for the two years she had worked. As a matter of fact, this figure had been conceded by the Respondent.

44. In any event, the Respondent was under obligation to provide records to demonstrate that the Appellant's claim for accrued leave had been settled or was otherwise not tenable. This is because the

Respondent was ordinarily the one that was in custody of the employment records between the parties. Under section 112 of the *Evidence Act*, the Respondent, having custody of these records, is considered as having special knowledge on the issue. Therefore, the burden of proof lay with the Respondent to disprove the Appellant's claim for accrued leave dues. The fact that the burden of proof in this respect rested with the Respondent is fortified by the Court of Appeal decision in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune (supra).

45. The Appellant also claimed for pay for the period she had worked in July 2019. The record shows that the Appellant stopped reporting to work on 8th July 2019. At the very least, she was entitled to be paid for the eight (8) days that she had worked in July 2019. As a matter of fact, the Respondent conceded this claim in her final submissions. There was thus no basis for the court to have dismissed this claim. Consequently, I set aside the trial court's decision in this respect and in place thereof enter judgment for the Appellant for the eight (8) days worked in July 2019 to wit, Ksh. 3,466.00.

46. Although the Appellant has claimed pay for work done on public holidays, she did not provide particulars of the specific public holidays that she worked. This evidence was necessary to enable the court determine exactly which public holidays were under consideration (Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEIHA) v Fatuma Mohamed [2015] eKLR). In the absence of these particulars, the court is unable to award any compensation in this respect. Consequently, the trial court's decision dismissing the claim for pay for public holidays worked is upheld.

47. The Appellant claimed for house allowance. On her part, the Respondent alleged that the Appellant's salary was consolidated to include house allowance. However, this evidence was not supported by the Respondent's pleadings. There is nothing in the Statement of Defense that was filed by the Respondent which suggests that this is the defense that she proposed to pursue on this aspect of the Appellant's claim. All that the Respondent did was to deny that the Appellant was entitled to house allowance.

48. Importantly, section 31 of the *Employment Act* obligates an employer who has consolidated an employee's salary to cover house allowance to include an express statement in this respect in the employee's contract of service (Njuki V Roche Kenya Limited (Cause 311 Of 2019) [2023] KEELRC [1850] (KLR)). The Respondent did not provide evidence of compliance with this requirement.

49. As mentioned earlier, the Respondent having failed to reduce the contract between the parties into writing, the burden lay with her to provide cogent evidence to disprove the Appellant's assertion that her house allowance was not paid. She did not. Consequently, I set aside the trial court's decision in this respect and enter judgment for the Appellant for unpaid house allowance for the period between April 2017 and July 2019 at 15% of the Appellant's gross monthly salary, that is to say, Ksh. 1950.00 x 27 months= Ksh. 52,650.00.

50. The Respondent has suggested that because the Appellant was being paid Ksh. 13,000.00 which was above her minimum wage, the excess covered house allowance. This argument is flawed. The law permits parties to negotiate terms and conditions of service that are better than the minimums that are set by statute and regulations there-under. The fact that the Appellant was receiving higher pay of Ksh. 13,000.00 is not evidence that she was being paid house allowance. This reality does not provide a basis for the court to make an assumption, absent cogent evidence, that what the employee was receiving over and above the minimum wage was intended to cover his/her house allowance (Vipingo Ridge Limited v Swalehe Ngonge Mpitta [2022] eKLR).

51. The Appellant also claimed for service pay under section 35 of the *Employment Act*. The Appellant stated that for the duration she served the Respondent, she had not been enrolled in any provident

fund. The Respondent did not provide evidence to controvert this position by the Appellant. As such, the Appellant was entitled to service pay at the rate of salary for fifteen (15) days for every year worked.

52. The trial magistrate did not provide cogent evidence why he dismissed this claim. Consequently, the decision by the trial court in this respect is set aside. In its place, judgment is hereby entered for the Appellant for service pay for fifteen (15) days for each of the two (2) years that she worked for the Respondent. This works out to Ksh. 13,000.00.

53. The Appellant also gave evidence that she used to report to work from 6.00 am until 5.30 pm every day from Monday to Saturday. The evidence on record shows that the Respondent did not rebut the Appellant's case in this respect.

54. As was observed in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune (supra), the Respondent having failed to reduce the contract between the parties into writing, the burden rested on her to disprove the Appellant's claim that she was subjected to overtime. The Respondent did not lead evidence in discharge of this burden.

55. Under regulation 5 of the Regulation of Wages (General) Order 1982, an employee is required to work for a maximum of fifty two (52) hours spread over six (6) days in a week. From the evidence on record, the Appellant was working an average of 11.5 hours every day for six (6) days in a week. This works out to 69 hours in one week. Therefore, the Appellant had overtime of 17 hours per week and 68 hours per month.

56. The record shows that the Appellant worked for the Respondent between 6th April 2017 and 13th July 2019. In effect, the Appellant had put in an average of fifteen (15) months at the time her contract was terminated. This translates to 1,020 hours in overtime.

57. Under regulation 6 of the Regulation of Wages (General) Order 1982, an employee who works overtime is entitled to be paid an amount that is equivalent to one and half of his hourly salary for every hour worked overtime. The record shows that the Appellant's salary was Ksh. 13,000.00 per month. Therefore, her daily rate was Ksh. 433.00. This translates to hourly rate of Ksh. 54.00. Her overtime pay for 1,020 hours is therefore, Ksh. 81.00 x 1,020 hours = Ksh. 82,620.00. Accordingly, I set aside the decision of the trial court dismissing the Appellant's prayer for overtime. Instead, I enter judgment for the Appellant for overtime for Ksh. 81,620.00.

58. Before I pen off on this aspect of the case, I note that the Respondent has argued that because the Appellant was engaged in a house that was largely not busy, her claim for overtime ought to fail. The fact of the matter is that the Appellant was required to remain at work between 6.00 am and 5.30 pm between Mondays and Saturdays. Whether the workplace was with little work is immaterial. What is material is the time the Appellant was forced to commit to the Respondent. In the premises, I am not persuaded that the reasoning by my brother in Elizabeth Muthoni Muriithi v Joseph Muchina Muriuki & another [2019] eKLR provides a firm basis upon which I should deprive the Appellant of this benefit.

59. The Appellant also claimed for compensation for wrongful termination. As I have indicated in this decision, the trial court's decision rejecting the Appellant's claim was not supported by the evidence on record. The evidence shows that the Appellant's contract of service was irregularly terminated. As a consequence, the Appellant is entitled to compensation for wrongful termination of her employment.

60. I have considered the factors that I am obligated to consider under section 49 of the *Employment Act* as I determine the kind of compensation to grant the Appellant. I note that the parties had worked together for just over two years before they separated. This was a fairly short period of time. Further, there is no evidence that the Appellant took steps to mitigate her loss after her contract was terminated.

Taking these factors into account, I award the Appellant compensation that is equivalent to her gross salary for six (6) months, that is to say, Ksh. 13,000.00 x 6 = Ksh. 78,000.00.

61. I award the Appellant interest on the amount awarded at court rates from the date of the decision by the trial court till payment in full.

62. The amount awarded is subject to the applicable statutory deductions.

63. The Respondent to issue the Appellant with a Certificate of Service.

64. The Appellant shall have costs of both this appeal and the case before the trial court.

Summary of Decision

65. The court finds that the trial court erred in arriving at the conclusion that the Appellant's contract of service was regularly terminated. The trial court's finding in this respect is set aside. Instead, this court enters a verdict that the Appellant's contract of service was terminated improperly and therefore irregularly.

66. Appellant is awarded:-

    a. Accrued leave pay for Ksh. 18,200.00.

    b. Salary for eight (8) days worked in July 2019, that is to say, Ksh. 3,466.00.

    c. House allowance of Ksh. 52,650.00.

    d. Service pay of Ksh. 13,000.00.

    e. Overtime pay of Ksh. 81,620.00.

    f. Compensation for unfair termination of Ksh. 78,000.00.

67. The trial court's order declining the prayer for pay for work on public holidays is upheld.

68. The Appellant is awarded interest on the amount awarded at court rates from the date of the trial court's decision till payment in full.

69. The award is subject to the applicable statutory deductions.

70. The Respondent to issue the Appellant with a Certificate of Service.

71. The Appellant is granted costs of both the lower court case and this appeal.

DATED, SIGNED AND DELIVERED ON THE 5TH DAY OF OCTOBER, 2023.

B. O. M. MANANI

JUDGE

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M Manani