



Atege v Monda (Appeal E007 of 2022)
[2023] KEELRC 2816 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2816 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E007 OF 2022
CN BAARI, J
NOVEMBER 9, 2023

BETWEEN

EDWIN ORINA ATEGE APPLICANT

AND

GEORGE NYARIKI MONDA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Mr. E. A. Obina, Principal Magistrate (PM) delivered on 15th June, 2021 in Kisii CMELRC NO. 1 OF 2020)

JUDGMENT

1. This appeal arises from a Judgment delivered on 15th June, 2021, where the Trial Court dismissed the Appellant’s claim on the basis that he had failed to prove his case on a balance of probability. Parties were further ordered to bear their own costs of the claim.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 11th March, 2022.
3. The appeal is premised on the grounds that:
 - i. The Learned Trial Magistrate erred by failing to consider relevant facts from which an employment relationship between the parties could be construed.
 - ii. The Learned Trial Magistrate erred by failing to appraise evidence comprised in documents which the Appellant produced.
 - iii. The Learned Trial Magistrate erred by failing to consider that the Appellant had on the evidence adduced before the court established his claim on a balance of probabilities.
 - iv. Having found as a fact that the parties had a relationship, the Learned Trial Magistrate erred by failing to find and to hold that the Respondent had an obligation in law under Section



- 10(6) and (7) of the *Employment Act* to maintain employment records, and that default by the Appellant to produce an employment contract was not fatal to his claim.
- v. The Learned Trial Magistrate failed to hold and to find that the Respondent's allegation that the Appellant was an intern was unsupported by any credible evidence.
 - vi. The Learned Trial Magistrate failed to consider and to hold that the Respondent's allegation that he was a director of an unnamed company which used to operate Kisii Shell Station, contradicted facts contained in his witness statement and should have warned itself on the dangers of relying on the Respondent's evidence.
 - vii. The judgment of the Learned Trial Magistrate was against the weight of evidence placed before the court.
 - viii. The Learned Trial Magistrate failed to consider submissions and case law presented to him by the Appellant.
 - ix. The Learned Trial Magistrate's judgment is a miscarriage of justice.
4. The Appellant's prayer is that the judgment and decree of the Trial Court delivered on 15/06/2021 be vacated in its entirety, and Judgment entered in his favour as prayed in the Memorandum of Claim. He further prays that costs of Kisii CMCELRC No. 1 of 2020 and of this appeal be borne by the Respondent.
5. Parties canvassed the appeal by way of written submissions.

The Appellant's Submissions

6. It is the Appellant's submission that by reason that the Respondent paid him through his bank account corroborates his assertion that he was an employee of the Respondent.
7. The Appellant submits that the Respondent admitted in his statement being the Director of the Shell Kisii, which was the company that employed him and cannot now be heard to say that he was a manager of the business, and hence had the ability to employ the Appellant. It is the Appellant's further submission that the Respondent admitted diligently paying him Kshs. 15,000/-, and which is the amount that the Appellant challenges for amounting to an underpayment.
8. The Appellant submits that the Respondent disowned his own witness statement in the hope of avoiding consequences of unfairly terminating him.
9. It is the Appellant's submission that the Respondent did not adduce any evidence to rebut the particulars of employment brought out by the Appellant. The Appellant sought to rely in the case of *Florence Arinji Khalakai v Eastern Produce Kenya Limited* (2016) eKLR to support this position.
10. The Appellant submits that the Trial Court shifted the burden of producing and keeping employment records to the Appellant against the provisions of Section 73, 74 and 10 (7) of the *Employment Act*.
11. The Appellant submits that he discharged his burden under Section 47(5) by proving that he was orally terminated. He submits that no termination letter was issued to him and neither were fair procedures followed during his termination. He placed reliance in the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* (2021) eKLR to buttress this position.
12. The Appellant submits that sufficient material was placed before the Trial Court to justify a judgment in his favour.
13. The Appellant prays that his appeal is allowed.



The Respondent's Submissions

14. The Respondent submits that the Appellant was not an employee but a student on industrial attachment/internship. He sought to rely on the case of *Omusamia v Upperhill Springs Restaurant* (Cause 852 of 2017) [2021] KEELRC 3 (KLR) (5 October 2021)
15. The Respondent further submits that the Appellant did not produce any contract of employment as proof of existence of an employer-employee relationship between himself and the Respondent.
16. It is the Respondent's submission that the Appellant failed to exhibit any academic papers showing his qualification as that of an Accountant and when he applied for the job with the Respondent.
17. The Respondent submits that payment of a monthly allowance or stipend through a bank account did not in any way amount to an employment relationship between the parties. The Respondent had reliance in the case of *William Wachira Waruinge v Kago Mukunya & Associates* (2020) eKLR to support this position.
18. It is the Respondent's submission that Kisii Shell Filling Station has a policy on employment and employment contract which is issued to employees employed by it.
19. The Respondent submits that the Appellant has not discharged the burden of proof and hence his appeal lacks merit and ought to be dismissed with costs.

Analysis and Determination

20. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The nine grounds of appeal are condensed into two, which are:
 - i. Whether the Appellant proved that he was an employee of the Respondent, and if so, whether he was unfairly terminated; and
 - ii. Whether the Appellant is entitled to the reliefs sought.

Whether the Appellant proved that he was an employee of the Respondent, and if so, whether he was unfairly terminated

21. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, Madan J.A had this to say on appeals:

“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.”

22. I will therefore proceed to re-evaluate, re-assess and re-analyze the extracts on the record and determine whether the conclusions reached by the learned Trial Magistrate are to stand or not.
23. Section 2 of the *Employment Act*, 2007, defines an employee as one employed for wages or salary and includes an apprentice or indentured learner.



24. The Appellant asserts that he was an employee of the Respondent. The Respondent on his part, stated that the Appellant was an intern who was paid a monthly stipend of Kshs. 15,000, but which he denied was a salary.
25. Section 2 of the *Employment Act*, recognizes internship as a proper employment as an intern can properly be defined as an apprentice or indentured learner. It therefore follows that an employer has an obligation to draw a contract for an intern as much as any other employee, and more so, where an intern earns a salary or wages.
26. In the case of *James Onduko v Computer for School Kenya* [2014] eKLR, the Court ruled that an intern is an employee after interpreting the definition of an employee as framed in the *Employment Act*, 2007. The Court further stated that an intern is considered an employee, and which raises an employment relationship.
27. Further, in the case of *Mary Wanjiru Ndwiga & 913 Others v Principal Secretary, Ministry of Health & Another* [2015] eKLR, it was held that those who drafted the *Employment Act* 2007 intended to include indentured learners in the scope of an employee whether they received remuneration or not.
28. In practice, an employee is subject to the employer's right of control, supervision, and command. The greater degree of supervision and control is indicative of an employment relationship. In *Stanley Mungai Muchai v National Oil Corporation* [2012] eKLR. the Court, held that the element of control exists where an employee is subject to the command of the employer as far as his or her performance is concerned.
29. The bank statement produced in evidence by the Appellant, shows that the Appellant earned wages ranging between Kshs. 11,000 to Kshs. 15,000/-.
30. The Respondent was by law under obligation to reduce his agreement with the Appellant into writing, whether he was an intern or a regular employee. In the premise, the Respondent having admitted that the Appellant was his intern and being paid wages, confirms existence of an employer-employee relationship.
31. On whether the Appellant was unfairly terminated, once an employer-employee relationship is established, the employee becomes entitled to the rights accorded under the law, both while in employment and during separation.
32. The Appellant in my view was thus at the very least entitled to notice indicating the end of the internship period or the rights under Sections 41, 43, 45 and 47 if the termination was as a result of misconduct.
33. Additionally, the Appellant was also entitled to payment of any withheld or accrued benefits in the course of the internship.
34. The Respondent was the employer and had the burden to reduce the terms of the internship into writing which he did not.
35. Having construed the relationship between the parties herein as an employer-employee relationship on account of the internship, and in the absence of a written contract on the terms of the employment/ internship, I hold that the Appellant was unfairly terminated.

Whether the Appellant is entitled to the reliefs sought.

36. On the claim for underpayment of wages, there is no prove that the Appellant was entitled to more than the Kshs. 15,000 paid monthly by the Respondent.



37. The Appellant's position is that he was briefly paid by vouchers the amount agreed upon of Kshs. 32,000, but which vouchers, the Respondent retained. If indeed the Appellant served/interned in the position of Accountant, it would mean that he prepared the payment vouchers. This in itself leaves doubts in the mind of the Court as to how the Appellant could not produce a single voucher as prove that he was at one time paid more than the Kshs. 15,000 intern's stipend which the Respondent admitted paying.
38. The claim fails and is dismissed.
39. On the Appellant's claim for unpaid salaries for the month of February, 2017, the Bank statement produced in evidence shows that the Appellant was last paid on 9th February, 2017, which evidently is salary for the month of January, 2017. This thus confirms that the Appellant was not paid salary/wages for February, 2017 and which is hereby awarded.
40. On the claim for one-month salary in lieu of notice, the Respondent did not show that he issued notice either of the end of the internship or termination to the Appellant, and the claim succeeds on this account.
41. Finally, having held the Appellant's termination unfair, the finding entitles him to an award of damages in accordance with Sections 49 and 50 of the *Employment Act*.
42. The Appellant's employment was on internship whose period is unknown both to the Court and the Appellant. It is therefore right to say, that it was one that was bound to end at the employer's appointed time. For this reason, I deem a two months' salary sufficient compensation for the unfair termination, and which is hereby awarded.
43. In the upshot, the Appellant's appeal succeeds, and orders issued as follows: -
- i. That the Trial Court's finding that the Appellant did not prove his case is set aside and substituted with a declaration that the Appellant was an employee of the Respondent.
 - ii. A declaration that the Appellant was unfairly terminated.
 - iii. That the Respondent pays the Appellant wages for the month of February, 2017 at Kshs. 15,000/-
 - iv. Salary in lieu of notice at Kshs. 15,000/-
 - v. Two months' salary for the unfair termination at Kshs. 30,000/-
 - vi. The Respondent shall bear the costs of the appeal
44. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF NOVEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Kebungo present for the Appellant

Mr. Arati present for the Respondent

Mr. Erwin - Court Assistant.

