Lintons Place Limited v Kamau & 2 others (Appeal E064 of 2022)
[2023] KEELRC 2901 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2901 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E064 OF 2022

NZIOKI WA MAKAU, J

NOVEMBER 6, 2023

BETWEEN

LINTONS PLACE LIMITED ..... APPELLANT

AND

STANLEY KARANU KAMAU & 2 OTHERS ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. Principal Magistrate Mr. A. S. Lesootia delivered on 9th May 2022 in the Milimani Commercial Law Courts CMEL No. 908 of 2019)

JUDGMENT

1. Being dissatisfied with the Judgment of Principal Magistrate Hon. A.S. Lesootia at Milimani Chief Magistrates Court Nairobi delivered on 9th May 2022 in CMEL No. 908 of 2019, the Appellant filed an Appeal against the whole Judgment on the following grounds:

    a. The learned Magistrate erred in law by conducting the hearing of 8th March 2022 ex-parte without satisfying himself that there was proper service of a hearing notice to the Appellant;

    b. The learned Magistrate erred in law under the legal doctrine of in pari delicto porior est conditio possidentis by conducting the hearing of 8th March 2022 ex-parte without regard to the similar absence of the Respondents in the prior hearing date of 28th September 2022;

    c. The learned Magistrate erred in law by conducting the hearing of 8th March 2022 ex-parte without satisfying himself whether the Respondent had an excusable cause for failing to attend the hearing;

d. The learned Magistrate erred in law and breached the Appellant's right to fair trial by proceeding ex-parte with the hearing on the 8th March 2022 by denying the Appellant's right to adduce witnesses in their own defence;

e. The learned Magistrate erred in law and breached the Appellant's right to fair trial by proceeding ex-parte with the hearing on the 8th March 2022 by denying the Appellant's right to confront his accusers through cross examination.

f. The learned Magistrate erred in law by allowing the 1st Respondent herein to give evidence on behalf of the others in a suit that was not a class action or a representative suit;

g. The learned Magistrate erred in law and denied the Appellant a right to be heard via submissions by failing to direct the Respondents to serve the Appellant with a mention date for filing submissions after the ex-parte hearing on 8th March 2022 was over;

h. The learned Magistrate erred in law by failing to direct the Respondents to serve the Appellant with a judgment notice for delivery of judgment on the 28th March 2022;

i. The learned Magistrate erred in law by failing to direct the Respondents to serve the Appellant with a judgment notice for delivery of judgment on the 9th May 2022;

j. The learned Magistrate failure to direct the Respondents to serve the Appellant with a judgment notice for delivery of judgment on 9th May 2022 took away the Appellant's right to apply for stay of execution at the point of delivery of judgment as allowed under Order 42 rule 6(5) contrary to the Appellant's right to equal protection and equal benefit of the law;

k. The learned Magistrate failure to direct the Respondents to serve the Appellant with a judgment notice for delivery of judgment on 9th May 2022 infringed on the Appellant's right of appeal since the 30 days room to appeal began to run without the Appellant's knowledge;

l. The learned Magistrate altogether erred in law by conducting ex-parte proceedings after 8th March 2022 thereby creating the appearance of bias in the proceedings;

m. The learned Magistrate made an error of law in his judgment by failing to dismiss the case of the other two Claimants that were absent on the hearing date of 8th March 2022 and thereby creating the appearance of bias against the Appellant whose non-attendance on 8th march 2022 was sanctioned by the same magistrate.

n. The learned Magistrate made an error of law in his judgment by completely ignoring the many triable issues of law and facts raised in the Appellant's defence by terming the defence as a general denial at paragraph 3 of the judgment:

o. The learned Magistrate made an error of law in his judgment by failing to appreciate the separate burdens of proof of the employer and the employee under sections 47(5) of the *Employment Act* 2007 and inquire as to their satisfaction even where the Appellant did not testify at the hearing;

p. The learned Magistrate made an error of law in his judgment by considering the hearsay evidence of the 1st Claimant/1st Respondent herein as good evidence on behalf of the other two Claimants/Respondents that were absent on 8th March 2022;

q. The learned Magistrate made an error of law as from paragraph 7 of his judgment onwards by failing to consider each of the three distinct employees claims separately (as pleaded) but rather chose to consider them generally;

r. The learned Magistrate made an error of law in paragraph 7 of his judgment by assuming that outsourcing services to be a form of redundancy without offering authority or reasoning for that conclusion;

s. The learned Magistrate made an error of law in paragraph 7 of his judgment by identifying as a triable issue the question whether the employer had lawful grounds (substantive justice) to declare redundancy but then went ahead without considering if outsourcing is a fair ground of either termination or redundancy vis-a-vis section 45(2)(b)(ii) of the *Employment Act* 2007 as pleaded by the Appellant in their Defence;

t. The learned Magistrate made an error of law in paragraph 9 of his judgment by considering procedural steps that the Claimants/Respondents herein did not specifically plead in their Statements of claim;

u. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of leave pay by holding that the claim was not contested yet it clearly was contested in the Defence;

v. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of leave pay by failing to give the Appellant a chance to substantiate its allegation of having paid leave pay by calling witnesses and adducing supporting evidence;

w. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of House Allowance by holding without giving authority that the housing allowances of the Claimants were not consolidated in light of minimum wage laws;

x. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of Severance pay by granting severance payments to Members of NSSF contrary to section 35(6)(d) of the *Employment Act*;

y. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of general damages for unfair termination without considering if outsourcing was a fair ground of either termination or redundancy;

z. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of general damages for unfair termination by taking into account

steps of procedure relating to redundancy that were not pleaded by the Claimants;

aa. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of general damages by considering the length of service of the Claimants as a group instead of considering individual lengths of service;

ab. The learned Magistrate made an error of law in paragraph 12 of his judgment on the topic of general damages by alluding generally to all the thirteen (13) factors under section 49(4) of the *Employment Act* without identifying the specific factors that influenced his decision to grant 4 months' pay as damages;

ac. The learned Magistrate made an error of law in paragraph 13 of his judgment by ordering the Appellant to issue a certificate of service without giving it a chance to adduce evidence of having issued the certificate as claimed in its Defence;

ad. The learned Magistrate made an error of law in paragraph 15 of his judgment by condemning the Appellant to pay costs and interests of suit that was generally conducted in a manner highly unfair to the Appellant.

2. The Appellant prayed that the Appeal be allowed and the Judgment and subsequent decree of the lower Court be set aside. Further, that the parties be granted a new trial before a different Magistrate or the Respondents' claim in the lower Court be altogether dismissed; and that costs of this Appeal and the lower Court be in the cause of the new trial or costs or be met by the Respondents. It also prayed that the Court be pleased to grant such other orders as it may deem just and expedient.

3. The matter was disposed by way of written submissions.

4. **Appellant's Submissions**

The Appellant submitted that far from being granted a fair trial, it was not given a trial at all in the lower Court, let alone a fair one and that it was condemned unheard without service of a hearing notice upon its advocates. It argued that a new trial is worthy under Article 25 of *the Constitution* of Kenya and grouped the 30 grounds of appeal into three categories as follows:

a. Lack of a fair trial through denial of a hearing to the Appellant;

b. Procedural unfairness in the aftermath of the ex-parte proceedings of 8th March 2022; and

c. Errors of law in the body of the judgment.

5. Under the first category, the Appellant submitted that Grounds 1 to 8 of the Appeal touch on the unfairness of the ex-parte proceedings conducted on 8th March 2022, for which it was never served a hearing notice and cannot be called upon to prove a negative. That a perusal of the lower Court file would show that no affidavit of service was filed by the Respondents with an attached hearing notice (bearing the stamp of the Appellant's advocates) in respect of the said hearing date. That the typed proceedings themselves do not show that the learned Magistrate directed his mind to the issue of service before proceeding with the hearing as would usually be the practice. That in any case, the Respondents still had a duty to serve hearing notices even without such a positive direction from the Court but the matter proceeded ex-parte without the Respondents caring to involve the Appellant from 7th June 2021 onwards.

6. It was the Appellant's submission that the condemnation without affording it a hearing is reason enough to set aside the Judgment because an unconstitutional trial is a nullity ab initio. Moreover, the ex-parte trial was conducted as though it was a trial for a representative suit yet it was not and that only one out of the three Respondents testified on behalf of the others, which was a misdirection. That three separate suits had joined into one by the mere convenience of counsel for all Respondents being the same law firm and that that did not turn it into a representative suit as each Respondent had a different set of documents to adduce and a different case to put forth with peculiar facts of its own known.

7. In relation to Grounds to 13 of the Appeal under the second category, the Appellant submitted that even if there was proof of service of the hearing notice of the 8th March 2022, there was further procedural unfairness in the aftermath of the ex-parte hearing held on the said date to impugn the Appellant's right to a fair trial. It argued that at the end of the impugned ex-parte hearing, the Court should have directed that the Appellant be served with a mention notice to confirm filling of submissions even if they did not testify in the main trial. That whereas the Respondents were granted up to 30th March 2022 to file their submissions, its right to file submissions, which is subsumed under the right to be heard, was therefore denied. That notably, the Respondents were absent when the matter was called out on the said 30th March 2022 but showed up at 10am and a judgment date firstly fixed for 28th April 2022. The Appellant further noted that neither did the Court yet again direct that a judgment notice issue to the absent Appellant nor was one issued by the Respondent as a matter of fairness or professional courtesy. In addition, the judgment was actually delivered on 9th May 2022, which new date should have been communicated to the Appellant but was not. Finally, it did not have the benefit of the full 30 days within which to appeal, to consider taking steps towards lodging an appeal including filling for stay pending appeal at the Appeal Court since it was not informed of the first or second judgment dates.

8. It was the Appellant's submission that once this Court holds that the ex-parte court proceedings of 8th March 2022 were in breach of the Appellant's right to a fair trial, it would be moot to consider the merits of the Judgment that arose thereafter. That this position was affirmed in JMK v MWM & another [2015] eKLR in which the Court of Appeal in allowing the appeal, held that courts have been consistent on the importance of observing the rules of natural justice and in particular, hearing a person that is likely to be adversely affected by a decision before the decision is made. The Appellant's stance was that if this Court however disagrees with the arguments on the breach of the Appellant's right to a fair trial, it should consider the following submissions.

9. The Appellant submitted that for Grounds 14 to 30 under its third and final category, once the lower Court held that the Defence contained "general denials", it completely overlooked the issues of law raised therein to the prejudice of the Appellant. It cited the case of Blue Sky Epz limited v Natalia Polyakova & another [2007] eKLR where the Court found that for a defence, a mere denial or a general traverse does not amount to a defence (which must raise triable issues), in which case the court will exercise the power to strike out such a defence. The Appellant further submitted that the Statement of Defence raised very cogent triable issues that were completely overlooked by the learned Magistrate, including the separate burdens of proof of the employer and employee, whether leave pay entitlement was admitted in the Defence and whether or not the Respondents were entitled to housing allowance and to severance pay. It therefore invited this Court to cipher through the said document (at page 46 - 50) and make its own independent conclusions as to whether the defence contained "general denials" or triable issues. That as a first appellate court, this Court has a duty to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own conclusions. It citied the case of Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) [2021] KECA 95)(22 October 2021 (Judgment).

10. Further, that at paragraph 12 of the judgment, the lower Court took into account the aggregate length of service of the three Defendants in awarding general damages, instead of looking at the length of service for each individual. That the lower Court also failed to specifically identify which other factors under section 49(4) of the *Employment Act* influenced its decision in the award of damages for each of the Respondent. That although the Magistrate was within his discretion, the law imposes an obligation to give a reasoned judgment for the court's conclusions on damages. It relied on the case of Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR)(24 January 2022)(Judgment) in which the Court held that the giving of reasons for a particular decision is a normal incident of the judicial process that stems from the common law and which duty also has a constitutional dimension being the need for accountability. It was the Appellant's submission that from the foregoing submissions, the lower Court judgment ought to be set aside in the interests of justice and the matter fixed for a fresh hearing before another magistrate.

11. The Appellant further submitted on the issue of costs. It argued that there was blatant abuse of process in the Appellate Court as was with the abuse in the lower Court where the Respondents' counsel deliberately failed to serve notices upon it. That at the hearing of the Notice of Motion dated 20th June 2023, this Court directed that the costs of the application shall be considered when delivering the judgment on the main appeal. That this Court should thus not only award the costs of that Application but also the costs of this Appeal into the bargain. That it may be more just to condemn the Respondents' Counsel themselves to personally pay the costs since, by and large, their clients were innocent in the repeat acts of abuse of process. It was the Appellant's submission that as these are matters in the discretion of this Court, it would let this Court direct on the issue of costs.

12. **Respondents' Submissions**

The Respondents submitted that from the 30 grounds of Appeal, they consolidated the same into the following issues for determination by this Honourable Court:

a. Whether the Respondents with the same cause of action can authorize one of them to plead and act on their behalf in an employment dispute/claim.

b. Whether the rules allow a suit to proceed in the face of non-attendance by a party and whether the trial court erred in doing so.

c. Whether the trial court erred by finding the Respondents were terminated unlawfully on the account of redundancy.

d. Whether the trial court erred in awarding the Respondents the reliefs sought.

13. It was the Respondents' submission that as the first appellate court, the duty of this Court was asserted in the case of Abok James Odera t/a Al Qdera & Associates v John Patrick Machira t/a Machira [2013] eKLR where the Court of Appeal held that the primary role of a first appellate court is namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. They further submitted that when it comes to issues germane to employment or labour disputes at the lower court, the Rules of this Court (Employment and Labour Relations Court (Procedure) Rules, 2016 (hereinafter "ELRC Procedure Rules, 2016") apply pursuant to Gazette Notice No. 6024 of 2018 and sections 29(3) and (4) (b) of the *Employment and Labour Relations Court Act*, 2011. Regarding the first issue for determination, the Respondents submitted that persons with a similar cause of action

can have a suit instituted on their behalf provided they sign a letter of authority. That Rule 9 of the ELRC Procedure Rules, 2016 provides as follows:

> 9 (1) A suit may be instituted by one party on behalf of other parties with a similar cause of action.
>
> (2) Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:
>
> Provided that in appropriate circumstances, the Court may dispense with this requirement.

14. They argued that it was on the above basis that the 2nd and 3rd Respondents authorized the 1st Respondent to act on their behalf and that a letter of authority dated 8th May 2019 signed by the 2nd and 3rd Respondent had been annexed to the Statement of Claim (page 12 of the Record of Appeal). That any ground of appeal challenging this position and plain reading of the law is therefore not sustainable and must fail.

15. On the second issue, the Respondents submitted that Rule 22(1) of the ELRC Procedure Rules provides for proceedings in the absence of either party, stating that where a hearing notice was served on the parties and an affidavit of service has been filed, the Court may proceed with the case before it in the absence of any party thereto if –

    a. the party has indicated that it does not wish to attend the hearing;

    b. the party fails to appear for the hearing without providing any reasons; or

    c. the Court is not satisfied with reasons forwarded to it by that party for non-attendance.

16. It submitted that Rule 22(1)(b) is applicable in these circumstances as the Claimant was served on the same date with a hearing notice dated 17th January 2022 indicating that the hearing at the trial court would be conducted on 8th March 2022 and a return of service dated 7th March 2022 was filed to that effect. That after service, the Appellant did not receive the said notice under protest to indicate whether the said date was inconvenient or not and that it also did not attend on the hearing day to have the matter adjourned or provide reasons as to why that matter could not proceed. That in short, the Appellant's assertions that there was no proof of service is a lie as the return of service is also shown in the Court tracking system (CTS) of the lower Court file CMEL 908/2019 as having been filed on 7th March 2022. They invited the Court to establish this fact and find that the Respondents met the requirement under Rule 22(1) that a hearing notice be served and an affidavit of service be filed, which was why the lower Court proceeded to hear the matter.

17. It was the Respondents' submission that the learned Magistrate did not thus err in proceeding to hear the matter and that the Appellant had not shown that the trial Court re-invented the will and acted beyond what is provided by the law. That this position was asserted in the case of Jennifer Kaindi Kithure v Magondu M'igweta & 2 others [2021] eKLR in which the Environment and Land Court sitting on appeal further stated that Courts should not be held to ransom by litigants who do not show up in court when matters are listed for hearing. The Respondents submitted that having proved to the Court that the Appellant was served, it was yet to give a cogent reason why it did not attend the hearing at the trial court. That the Appellant could not seek further audience at the trial court because it was aware the Court acted within the law to proceed in their absence and it was why they were seeking for this Honourable Court to order a new trial. They further submitted that all grounds of appeal in relation to the ex-parte proceedings at the lower Court must therefore fail.

18. With regards to the third issue, the Respondents submitted that the trial court did not err in finding that the Respondents were unlawfully terminated on the account of redundancy. They argued that firstly, Courts have indicated and settled the consequences of a defendant not calling any witnesses or producing any documents. That in the instant case, the Appellant had no list of documents and consequently, the Respondents' case at the lower court remained uncontroverted. They relied on the decisions of the court in Billiah Matiangi v Kisii Bottlers Limited & another [2021] eKLR and Maurice Wandera Egesa v Inter-Security Service Limited [2016] eKLR. Secondly, that the Respondents' termination letters read to effect that the Appellant had abolished in-house security services thereby declaring the Respondents redundant. That the said letters did not make any reference to the procedure laid for redundancy under section 40 of the *Employment Act* and no evidence was furnished to prove that the process under section 40 had taken place. That the trial Court demonstrated this position at paragraphs 8-11 of the impugned Judgment.

19. On the fourth and final issue on the reliefs awarded, the Respondents submitted that once the trial Court made the adverse finding that they were unlawfully terminated, it then had to award the Respondents compensation pursuant to section 49(1)(c) of the *Employment Act*, and in its discretion, awarded the maximum 12 months' pay as compensation. That the trial Court also indicated what it considered when exercising its discretion to award maximum compensation. They submitted that the Appellant had not demonstrated in any way why this Honourable Court should disturb the award/ discretion of the lower Court and that the ground of appeal must thus fail. The Respondents further submitted that for notice pay, the notices required under section 40(1) of the *Employment Act* were not issued by the Appellant and that the relief was correctly awarded. They denied that they were awarded service pay, submitting that they were correctly awarded severance pay since it was a relief guaranteed by law once one is declared redundant under section 40(1) of the Act. As regards house allowance, the Respondents submitted that payment of the same is a statutory requirement and one that is couched in mandatory terms. That employers are bound by section 31(1) of the *Employment Act* to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. That since the Appellant made no effort to prove to the lower Court that the Claimants' salary were consolidated, the trial Court did not err in enforcing their legal entitlement to house allowance as under section 31 of the Act. Further, the Respondents submitted that the courts' jurisprudence on leave is solid. That in the case of Trebar Marambe v For You Chinese Restaurant [2021] eKLR, the Court stated that:

> " It is not only good practice but a legal requirement that an employer keeps records relating to persons in their service and l have no doubt in my mind that these records includes leave roaster or forms filled by employees when requesting to go on leave and the days for which they have asked to take. For the Respondent not to have produced evidence relating to the Claimant's leave goes to confirm to this court that the Claimant worked for 5 years without taking leave. Moreover, no evidence was rendered to show that the Claimant was paid in lieu of the accrued leave days.
>
> The Court thus finds and holds that the Claimant is entitled to payment of accrued leave that he did not take and was not otherwise compensated and is hereby awarded payment for 21 days for the five years he was in the service..."

20. That in this case, the Appellant did not have a list of documents despite being an employer required to keep employee records under section 74 of the *Employment Act*. On who should be condemned to pay costs of the Appellant's Notice of Motion application dated 20th June 2023, the Respondents submitted that the application sought to have the appeal, which had been dismissed, reinstated and

execution stayed. That the Respondents instructed their advocates not to oppose the said Application and the same be allowed as the focus was to have the appeal heard on merit. According to them, they did not thus file a response to the said Application and that each party should bear their costs.

21. The Appellant is correct in their surmise that an appellate court such as this one, has a duty to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own conclusions. The Court called for and was able to peruse the original record being CMEL No. 908 of 2019 'Fast Track'. The Appellant was served with a pre-trial notice on 15th August 2019. The Respondents did serve the Appellant's representative on 11th November 2019 to fix a date of hearing of the case. On 30th March 2021 the Appellant was invited to attend fixing of a date. Thereafter the matter proceeded in the absence of the Appellant who was never called to fix a hearing date as the minutes of 3rd December 2021 indicate. An ex parte date was taken for hearing on 8th March 2022. No notice of hearing was filed, no affidavit of service is on the record to show the notification of the date of 8th March 2022 was made to the Appellant as required. On 8th March 2022, the Hon. Lesootia Saitabau proceeded with the hearing in the absence of the Appellant. The Respondents did not demonstrate service had been effected on the Appellant and the proceedings culminated in a mention on 30th March 2022. The Hon. Learned Magistrate directed the parties to take a date at the Registry but later at around 10.00am the advocate for the Respondents made it to court and a Judgment date was set for 28th April 2022. The Respondents did not serve the date upon the Appellant as far as the record shows.

22. Since there was no service upon the Appellant, its right to a fair hearing under the law was impacted. As such, the judgment entered herein was compromised by the failure to issue a notice. Had the Respondents served and the Appellant failed to appear, their judgment would perhaps have been upheld bar any inconsistencies with the evidence and the law. In this case, the Appellant was not served and therefore was denied the opportunity to challenge the evidence adduced at the hearing. The Respondents proceeded as if the claim was undefended. In the final analysis, having considered the matter, the grounds of appeal which were unnecessarily many, collapsible into a mere 3 grounds, the finding of the Court is that the Appeal is merited and is allowed in the following terms:-

    i. The Judgment of the Learned Magistrate issued on 9th May 2022 and the Decree dated 24th May 2022 in MCELRC No. 908 of 2019 – Stanley Karanu Kamau & 2 Others v Lintons Place Limited be and is hereby set aside ex debito justitiae.

    ii. An immediate and unconditional release of the goods of the Appellant attached in execution of the decree of the Trial Court as the Judgment and decree of the Learned Magistrate is hereby set aside in its entirety.

    iii. The file being MCELRC No. 908 of 2019 – Stanley Karanu Kamau & 2 Others v Lintons Place Limited be heard afresh before any other Learned Magistrate at Milimani Commercial Law Courts who is authorised to hear employment matters.

    iv. A mention of MCELRC No. 908 of 2019 – Stanley Karanu Kamau & 2 Others v Lintons Place Limited be made before Chief Magistrate on 14th November 2023 for allocation to the Learned Magistrate who will hear the case.

    v. Each side to bear their own costs of the appeal.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE