



Mutinda v Lavington Security Limited (Employment and Labour Relations Appeal E009 of 2023) [2023] KEELRC 3332 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3332 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E009 OF 2023
ON MAKAU, J
DECEMBER 20, 2023**

BETWEEN

RUTH MUKONYO MUTINDA APPELLANT

AND

LAVINGTON SECURITY LIMITED RESPONDENT

(Being an Appeal against the Judgment of the Principal Magistrate at Karatina, Hon.E.Kanyiri, delivered on 30th May, 2023 in MELRC No.E006 of 2021)

JUDGMENT

1. The appellant was employed by the respondent as a security guard from August, 2012 to 30th June, 2020 when they separated. Thereafter, the appellant filed suit in the lower court alleging that the employment was unfairly terminated by the respondent but the respondent blamed the claimant for the separation through resignation. After considering the evidence tendered, and especially the resignation letter dated 30th June 2020, the trial court dismissed the suit with costs. In the court's view, the claimant was not dismissed by the respondent but she resigned.
2. The claimant was aggrieved and filed the instant appeal citing the following grounds:-
 - a. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim in its entirety thereby occasioning a miscarriage of justice.
 - b. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim under the heads of unpaid leave days, gratuity, rest days, underpayments and housing allowance, thereby occasioning a miscarriage of justice.



- c. That the learned Trial Magistrate erred in law and fact by failing to hold and find that the Appellant's termination was unfair as the Appellant had not voluntarily resigned, thereby occasioning a miscarriage of justice.
- d. That the learned Trial Magistrate failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.
- e. That the learned Trial Magistrate erred in law and fact by failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a miscarriage of justice.

Appellants submission

3. As regards the first ground, it was submitted that court relied on the wrong principles of law in finding that the appellant was not dismissed but she wrote the resignation letter dated 30th June, 2020. It was argued that the trial court failed to closely examine and analyze the said letter. It was submitted that the letter was clear that the appellant requested to be notified of any other assignment and indicated her phone number for communication on any new assignment.
4. It was submitted that although DW1 testified that after the contract between the respondent and AFC lapsed, the employees were notified of the same and thereafter redeployed, no documentary evidence of the redeployment was produced during the trial. It was argued that there is no evidence to prove that the appellant was given any redeployment before the alleged resignation.
5. It was submitted that the appellant never left her employment voluntarily but she was dismissed considering that the alleged redeployment was done before she wrote the letter dated 30th June 2020. It argued that the respondent tricked the appellant into writing a resignation letter and later refused to pay her terminal dues. Accordingly, it was submitted that the trial court failed to analyze the evidence which pointed to unfair termination of the appellant's employment by the respondent since due process was not followed and there was no valid reason.
6. For emphasis, several cases were cited including *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where the courts agreed that termination of employment is unfair unless it is grounded on a valid reason and that fair procedure is followed.
7. The same reasons highlighted above, it was submitted that the court erred in failing to award the appellant the reliefs sought and instead dismissed the entire suit. It was submitted that the appellant is entitled to the reliefs sought under section 49 of the *Employment Act*, section 48 (2) of the *Labour Institutions Act* and Regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1988. Finally, it was submitted that the appellant is entitled to a certificate of service under section 51 of the *Employment Act*.

Respondents submission

8. On the first ground, it was submitted that the resignation letter clearly communicated to the respondent that she was resigning to join Solvit Security Limited. It was further submitted that the appellant admitted during cross examination that she wrote the resignation letter dated 30th June 2020 so as to get paid her terminal dues. Further that she confirmed that she understood the contents and the purport of the letter. Consequently, it was submitted that trial court was right in finding that the claimant was not dismissed but she resigned voluntarily.



9. It was further submitted that the claimant admitted to knowing that the contract between the respondent and AFC ended but refused to be redeployed to another assignment like the other employees. Instead she resigned to take up a new job with Solvit Security Limited that was given tender to replace the respondent.
10. For emphasis, reliance was placed in the case of *Rose Mwikali Nzuki v Food for the Hungry Kenya* (2015) eKLR where the court held that a resignation is voluntarily if the employer does not influence or prompt the employee to resign. In the instant case it was submitted that there is clear evidence that the respondent did not influence or prompt the appellant to resign.
11. In view of the alleged resignation, it was submitted for the respondent that the issue of valid reason for termination and due process did not arise. For the same reason the claim of salary in lieu of notice and compensation for unfair termination did not arise. For emphasis, reliance was placed on the case of *Onialo v Majilis Resort Lamu T/A Majilis Lamu Ltd* (2022) eKLR and *Reuben Lucheleli Shikuri v Eldoret Packers Ltd* (2015) eKLR where the court found that the claimant having resigned voluntarily he was not entitled to salary in lieu of notice.
12. It was further submitted that the appellant enjoyed all his leave and off days before the resignation. Further, that the appellant never adduced any evidence to prove that he had accrued any leave days before the separation. The claim for underpayment was also denied and it was submitted that the appellant's employment history (page 41 of the Record of Appeal) showed that she was paid over the minimum wage prescribed by the law.
13. It was further submitted that the appellant was receiving a consolidated salary which was inclusive of house allowance. It was submitted also that the appellant never adduced any evidence to rebut that fact.
14. As regards the claim for service pay, it was submitted that the appellant was a member of NSSF and therefore under section 35 (6) of the *Employment Act* she is barred from payment of service pay. It was further submitted that the issue of certificate of service was not pleaded in the primary pleadings and therefore it was not an issue in dispute during the trial.
15. Finally, it was submitted that the trial court evaluated the entire evidence as presented and also the submissions and arrived at the correct judgment. Therefore, the court was urged to dismiss the appeal with costs to the respondent.

Analysis and determination

16. The mandate of this court as a first appellate court is to reevaluate the evidence on record and make its own conclusions as it was noted by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd* (1968) EA 1 thus:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”



17. Having carefully considered the record of appeal and the submissions made by both parties, the issues that fall for determination are:-
- a. Whether the appellant resigned voluntarily or she was dismissed by the respondent.
 - b. If she was dismissed, whether the dismissal was grounded on a valid reason, and done in accordance with a fair procedure.
 - c. Whether the appellant is entitled to the reliefs sought in her Memorandum of claim dated 15th June, 2021.

Dismissal or resignation

18. The appellant's case is that she was dismissed by respondent's agents on ground that the contract with AFC had come to an end. The respondent's case on the other hand is that after the contract with AFC lapsed, it called all its officers who were assigned to work there for redeployment. All the employees complied and were redeployed except the appellant. Thereafter the appellant was found working at AFC for Solvit Security Limited and she wrote the resignation letter dated 30th June, 2020.
19. I have carefully considered the letter dated 30th June 2020 which I have copied below:-

“Ruth M.Mutinda

O Box 582

Nyeri.

30/6/2020

Lavington Security Ltd

O Box 76283-00100

Nairobi

Kenya

Ref: Resignation From Lavington Security

I, Ruth M.Mutinda ID 23117953 I resign from Lavington Security to Solvit Security due to the end of contract.

I thank Lavington Security for their good service they offered for many years.

I humbly request the company if they get another assignment well know is me -0724519253 (sic)

Yours faithfully

Ruth Mutinda.”

20. The letter was written on 30th June, 2020 and it bears a receiving stamp of the respondent on 30th June, 2020. The letter was written on the last day of the contract between AFC and the respondent. I say so because there is evidence of handing over of the AFC premises by the respondent to Solvit Security Limited on 1st July, 2020. The letter expressly shows that the appellant was joining Solvit Security Limited after the contract for the respondent at AFC lapsed. The letter requested the respondent to contact her if it secured a new assignment to deploy her. She also gave her phone number.



21. There is no evidence that she was ever contacted for a new assignment by the respondent. The respondent never wrote any response to the resignation letter. Although the appellant alleged that she was prompted by respondent's officer to write the resignation letter in order to get paid her terminal dues, I find that allegation not convincing. There is no evidence that she visited the respondent's officer to claim her dues before writing the letter. The letter was written a day before her new employer took over the AFC premises. I agree with the trial court that the resignation was done voluntarily after the appellant got the chance to continue working at AFC for the new company.
22. She has admitted to authoring the letter. She understood its purport. She was not coerced or misled by the respondent. She wrote the letter before visiting the respondent's office for redeployment or other directions. It follows that the alleged unfair and unlawful dismissal does not arise in circumstances of this case.

Reliefs

23. The appellant faulted the trial court for not analyzing the specific claims pleaded. The claims set out in the memorandum of claim include salary in lieu of notice, damages for unfair termination, service pay, gratuity, rest days and housing allowance. I agree with the appellant that the trial court erred in law by failing to address the specific claims as set out in paragraph 18 (a) of the claim.
24. In the last paragraph of the impugned judgment, the trial court held that:-

“It is agreed by both parties that the claimant was an employee of the respondent. It is also agreed that the claimant did write and sign letter of resignation dated the 30th June, 2020. It is also clear that the claimant was aware that the contract between the respondent and AFC had ended and so opted to leave and it has not be (sic) proven that it was of any coercion but of her free will. The claimant was never terminated.

Orders

Having discussed as above, the claimant's suit is dismissed with costs to the respondent.

Orders accordingly.”

Conclusion

25. I have found that the appellant voluntarily resigned from the respondent's employment, to work for Solvit Security Limited. I have further found that the trial court fell into error when it dismissed the appellants suit entirely without considering the specific reliefs sought. Consequently, I find that the appeal succeeds to that extent and hereby set aside the order dismissing the suit and refer the matter back to the lower court for consideration of the claims sought on merits. This consideration will however not extend to the claims based on unfair termination because the claimant was not dismissed. The appellant will have half the costs of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2023.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.



ONESMUS N MAKAU
JUDGE

