



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MALINDI

CIVIL APPEAL NO E10 OF 2021

JOHN KARIMA NYINGE..... APPELLANT

VERSUS

VIPINGO RIDGE LIMITED..... RESPONDENT

(Being an appeal from the judgment of Honourable Mr. JM Kituku, Senior Principal Magistrate at Kilifi made on the 07th of December 2021 in KILIFI SPMCC ELRC Cause No. 21 of 2020)

BETWEEN

JOHN KARIMA NYINGE..... CLAIMANT

VERSUS

VIPINGO RIDGE LIMITED..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the trial court delivered on 7th December 2021 dismissing the Appellant's claim for wrongful termination against the Respondent. Being dissatisfied with the decision, the Appellant has preferred this appeal against it. The appeal raises seven (7) grounds as appear in the Memorandum of Appeal appearing at pages 1 to 2 of the Record of Appeal.
2. On 1st February 2022, the parties appeared before the court for directions on the mode of disposal of the appeal. With their concurrence, it was directed that the appeal be canvassed through written submissions.
3. This being a first appeal, the court reminds itself of its duty to re-evaluate the evidence on record in order to arrive at its own conclusion on the dispute. However, in undertaking this task, the court is mindful of the cardinal principle that unlike the trial court, it did not have the advantage of seeing the parties testify. Consequently, it should only depart from the trial court's findings of fact on solid grounds such as if the trial court reached a decision that is inconsistent with the evidence on record or took into account irrelevant facts in rendering the impugned decision (see *John Kiroria Uvoro & another v Rosemary Mucogo Mbui [2019] eKLR*).
4. The brief facts of the case are that the Appellant was an employee of the Respondent. He was engaged as a watchman earning basic salary of Ksh. 11,926/= or thereabouts.
5. The Appellant asserted that on 27th December 2018 he received a letter from the Respondent terminating his contract of employment. That the termination was irregular as it was without notice and valid reason contrary to the dictates of the law. He therefore filed suit against the Respondent to recover damages for unlawful termination. He also sought to be issued with a Certificate of Service and as well costs of the case.
6. In response, the Respondent denied that it had unlawfully terminated the Appellant. According to the Respondent, the Appellant's contract of service with the Respondent came to a close after the Appellant tendered his resignation letter dated 21st December 2018. That the resignation was without notice contrary to the law.
7. That the letter dated 27th December 2018 purporting to be the Respondent's letter sacking the Appellant was a forgery and an untrue representation of the manner in which the contract of employment between the parties came to an end.
8. The Respondent filed a counterclaim. In it, the Respondent sought to recover damages from the Appellant for resigning from employment without the requisite notice.

9. The parties led their respective evidence before the trial court. Whilst the Appellant called no other witnesses apart from himself, the Respondent had three witnesses testifying in support of its case.

10. At the close of the case, the learned trial magistrate rendered his decision dismissing the Appellant's claim. It was the trial court's view that the Appellant did not deny writing the letter dated 21st December 2018 vide which he resigned from employment. While declining to find that the letter of 27th December 2018 purporting to terminate the Appellant was a forgery as asserted by the Respondent, the trial court nevertheless held that nothing turned on the said letter as it was authored after the Appellant had already resigned from employment on 21st December 2018. Therefore, whether the letter of 27th December 2018 was genuine or forged was immaterial in determining whether the Appellant had been sacked or resigned.

11. It is this decision that has triggered this appeal. The Appellant attacks the trial court's judgment on the following broad grounds as can be discerned from the seven (7) grounds of appeal: -

a) That the trial court failed to appreciate the evidence on record and submissions by the Appellant thereby rendering the wrong decision.

b) The learned trial court did not pronounce itself on the date the resignation letter of 21st December 2018 was received by the Respondent thus reaching a wrong decision in the matter.

c) The trial court erred in failing to declare the termination of the contract of service between the parties (supposedly by the Respondent) as unlawful.

d) That the trial court erred in allowing the Respondent's counterclaim.

12. I have considered these grounds of appeal. Did the trial court misapprehend the evidence of the Appellant or fail to consider the Appellant's submissions in its decision? From the record, the Appellant led very brief testimony. He adopted his written statement as his evidence in chief. The statement merely reiterated the contents of the Appellant's Statement of Claim.

13. In effect, the Appellant stated that he was employed by the Respondent on 17th May 2014. That he was engaged as a security guard. That he was unlawfully terminated on 28th December 2018 when the Respondent issued him with a termination letter. That the termination was without notice. He was told that his termination had been prompted by his alleged chronic absenteeism.

14. It was his further evidence that he was not afforded a hearing before he was terminated. The Appellant stated that prior to the impugned termination he had served the Respondent diligently and without blemish. That he had not been involved in any disciplinary issue and neither had he ever been issued with any warnings for any misconduct at work.

15. In his view, the termination was therefore ill intentioned and illegal. He prayed for compensation for unfair termination as set out in the Statement of Claim and his witness statement.

16. In cross examination, the Appellant seemed to concede that contrary to the position he had taken in his pleadings and Statement of Claim, he in fact had discipline issues at work and had been heard over these issues twice. That he had been pardoned twice.

17. He also conceded that he indeed wrote the resignation letter. He stated that he resigned because of what he called "domestic issues at home."

18. In his analysis of the evidence by the Appellant, the trial magistrate expressed the view that the Appellant never challenged the authenticity of the resignation letter. That all that the Appellant seemed to indicate is that he wrote his resignation after he was handed the letter of termination dated 27th December 2018.

19. The court indicated that it did not believe the Appellant's evidence that he wrote the resignation after he was issued with the letter of termination. The court found it curious that in ordinary circumstances a person who has been terminated would later on and without reason write a letter of resignation and backdate it so as to appear to fall before the termination letter was issued. In effect, the court indicated that the Appellant did not lead evidence to explain this curious development.

20. On this basis, the court held that having admitted that he voluntarily authored the letter of resignation dated 21st December 2018, the Appellant is deemed to have resigned from duty on 21st December 2018. He could not therefore argue that he resigned after receiving the letter of termination dated 27th December 2018. He was estopped from doing this.

21. Further the trial magistrate held that since the Appellant had resigned by the close of 21st December 2018, the purported termination letter of 27th December 2018 was really not material in resolving the dispute between the parties coming long after the employer-employee relation between them had terminated through resignation. Therefore, whether the letter of 27th December 2018 had been lawfully made or forged would have no bearing on the employment status between the parties.

22. From the foregoing, it is clear to me that the court carefully analyzed the evidence as presented by the Appellant before arriving at its decision that the Appellant was not unfairly terminated but rather he resigned. The Appellant has argued in his submissions that he was served with the termination letter dated 27th December 2018 before he wrote his letter of resignation dated 21st December 2018. This is an issue the trial court declined to accept.

23. I agree with the trial magistrate's position in this respect. In the ordinary course of events in life, it is expected that documents bearing an earlier date were prepared before those bearing a later date. If one wants the reverse to be accepted, he/she must lay a basis for this and provide a justification for the departure from the ordinary course of events in life. The Appellant did not do this. There is no evidence provided to support the Appellant's attempt at asserting that he may have been induced to write and backdate the resignation so as to be paid his terminal benefits.

24. In his submissions, the Appellant appears to take the view that since the Respondent did not write back to formally accept his resignation, the resignation did not take effect. On this I can do no better than quote Rika J in **Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR** where he observed thus: -

“ In a recent decision of this Court, Edwin Beiti Kipchumba v. National Bank of Kenya Limited [2018] e-KLR, it was held that resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The Employment Act does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.”

25. I have looked at the resignation letter of 21st December 2018. It is not expressed in futuristic terms. The resignation was not expressed to take effect at some future date. It therefore took effect on 21st December 2018 irrespective of the Respondent's views on it.

26. I therefore find no merit in the grounds of appeal in respect of the foregoing. I dismiss them.

27. On whether the trial court pronounced itself on the date of resignation and whether failure to do so would be fatal to the decision now challenged, it may be true that the court did not make an overt finding on the date of receipt of the resignation. However, the court addresses this question when it states as follows at page 152 of the Record of Appeal (page 7 of the judgment): -

“ having admitted he wrote the resignation letter dated 21/12/2018, he is then estopped from stating he resigned after receiving the letter dated 27/12/2018.”

28. By this, the court made a finding of fact that the resignation came and was received before the letter of 27th December 2018. In other words, by the time the letter of 27th December 2018 was authored, there was no longer an employer-employee relation between the Appellant and the Respondent. And hence the court's position that nothing really turned on the letter of 27th December 2018.

29. But away from this, I confirm from the record that Respondent's case was that the Appellant's resignation letter was received on 24th December 2018 when according to DW1 the Appellant dropped a scanned copy of it at the gate (see the written statement which was adopted as evidence in chief). In cross examination DW1 denied that the Claimant was forced to do the resignation after he had been terminated in order to be paid his benefits. I have nothing to make me disbelieve this evidence.

30. Accordingly, I return a finding that the trial court made a finding of fact that the resignation letter by the Appellant was received by the Respondent before the letter dated 27th December 2018 purporting to terminate the Appellant was authored. Importantly and in line with my mandate as the 1st appellate court, I have after carefully evaluating the record come to the conclusion that the letter of resignation was received by the Respondent on 24th December 2018. I therefore find no merit in the ground of appeal on this issue. I dismiss this ground.

31. On whether the trial court erred in law and fact in failing to declare the Appellant's termination as unlawful, I think that the trial court was right in holding that the Appellant having voluntarily resigned could not be considered as having been unlawfully terminated. Basing on the analysis of the record I see no reason why I should depart from this finding.

32. On the Counterclaim, the court found that the Appellant resigned on 21st December 2018. As indicated above, this is a finding I agree with as the letter of resignation dated 21st December 2018 was not expressed to take effect at some future date. Even though it may have been received by the Respondent on 24th December 2018, it took effect on 21st December 2018, the date it was written. This is indeed as is confirmed by the Appellant and Respondent in their submissions and as is more particularly elucidated in the case of **Kenya Hotels and Allied Workers Union v Mara Siria t/a Safari Camps (K) Ltd [2016] eKLR**.

33. From the record, the Appellant was an employee earning his wage periodically at monthly interval. In terms of section 35 of the Employment Act, he was required to give the Respondent at least twenty eight (28) days notice to resign.

34. The Appellant provided no evidence that this was done. Therefore, the Respondent was entitled to resort to the provisions of section 36 of the Employment Act to seek damages equivalent to the Appellant's twenty eight days' (28) salary in lieu of notice. This works out to roughly what the court awarded the Respondent.

35. Therefore, I find that the appeal is without merit. Accordingly, I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF FEBRUARY, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Mwangunya for the Appellant

Ng'athu for the Respondent

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this Judgment 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

JUDGE