



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. E037 OF 2021

(Being an appeal from the judgment of Honourable A.S Lesootia delivered on 26.05.2021 in CMELR

**Cause No. 164 of 2020 consolidated with Causes 143, 144, 145, 146, 147, 148, 149, 150, 151,
152, 153, 154, 155, 156, 158, 159, 160, 161, 162, and 163 all of 2020 at Mombasa)**

AISHA YAKUB ADMANI T/A FORT JESUS ACADEMY.....APPELLANT

- VERSUS -

BENARD ODHIAMBO OKECH.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th March, 2022)

JUDGMENT

The appellant filed the memorandum of appeal on 25.06.2021 through Daly & Inamdar Advocates and Mr. Abdulhafeez Noorani Advocate appeared in that regard. The parties made written and oral submissions and C. Masinde & Advocate acted for the respondent.

The appellant appealed against the whole of the lower Court's Judgment in the suits as consolidated upon the grounds that the learned trial Magistrate erred in law and fact as follows:

- 1) In finding that there was an employer employee relationship between the appellant and the respondent.
- 2) In failing to fully consider the appellant's submissions.
- 3) Having found that the appellant was not trading as Fort Jesus Academy and was not a registered proprietor of Fort Jesus Academy, erred in law and fact by holding that the appellant was the employer of the respondent.
- 4) In determining an issue that did not arise from the pleadings and was left to the court for determination from the course of trial.
- 5) In holding that the appellant had unfairly terminated the respondents' employment.
- 6) In finding that it was the appellant that terminated the respondents' employment.
- 7) In finding that the appellant was bound to comply with sections 40, 41, and 43 of the Employment Act when she was not the employer of the respondents.
- 8) In finding that the respondent was entitled to the reliefs sought from the appellant when she was at no point an employer of the respondents.

The appellant prayed for orders:

- 1) The appeal be allowed with costs.
- 2) The judgment of the learned Magistrate delivered on 26.05.2021 be set aside.

3) The claim be dismissed with costs to the appellant.

4) Costs of the appeal.

The main issue in dispute in the appeal is whether the appellant and the respondents were in a contract of employment.

Counsel for the appellant summed up the appellant's case upon three points of submissions. First, the appellant was sued as an employer on the basis that she was trading as Fort Jesus Academy and which fact was not pleaded at all. Further, the clear and uncontroverted evidence before the trial Court was that the appellant was not registered proprietor of that name or business and the trial Court found as much. There was no denial that the respondent and other employees in the consolidated suits were employees of Fort Jesus Academy and the appellant was not, in law, Fort Jesus Academy. Second, Counsel for the appellant submitted that the trial Court relied upon the control test to arrive at the finding that the appellant as administrator of Fort Jesus Academy controlled work of the employees and thereby established employer-employee relationship – yet, the respondents had not pleaded the control test and further, the control test as developed and applied by courts was invoked in cases of presupposed relationship of independent contractor or contract for service and seeking to establish if a contract of service existed. Further, in the instant case no such presupposed contractual relationship existed between the appellant and the respondents so that the learned Magistrate erroneously invoked the control test. Thirdly, Counsel for the appellant submitted that the respondents say that the appellant should have issued third party notice to bring in the suit the true owners of the Fort Jesus Academy. It was submitted that even if that was the respondents' strategy, the respondents could not have had any direct claims against the purported 3rd parties. Further, the memorandum of response in the lower Court disclosing the true owners of Fort Jesus Academy had been filed and served but the respondents failed to apply to amend to substitute the proper respondents or to add the true owners as respondents, accordingly.

For the respondents it was submitted that there was employer-employee relationship between the appellant and the respondents because the contracts were issued by the appellant to the respondents. Further, 3rd parties alleged to be the true owners of Fort Jesus Academy were never known to the respondents for the periods of employment by the appellant. Further, the appellant had failed to take out 3rd party proceedings without any cause and the appellant had no document to show that she was not the owner of Fort Jesus Academy. Further the appellant solely paid the monthly salaries and she was fully in charge of the school's operations.

This is a first appeal and the Court's role is to re-evaluate the evidence before the trial Court and arrive at its own conclusions one way or the other. While proceeding to do so, the Court remains alert that it did not by itself take the evidence as was done by the trial Court.

Sections 2 of both the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 define “**employee**” and “**employer**”. Employee means a person employed for wages or salary and includes an apprentice and indentured learner. Employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The Court considers that the definitions should be mapped against the appellants' claims and the parties' evidence.

The respondents pleaded to the following effect per their respective memorandum of claims. The appellant was a female adult operating a learning institution duly registered as such. The appellant employed each of the respondents (on diverse dates) who at all material time were in continuous employment until the appellant verbally terminated the employment on 24.10.2019. Further, the termination was abrupt, wrongful, unlawful because it was in contravention of section 40 of the Employment Act, 2007 and the respondent had refused to pay the final dues; there was no just reason for dismissal; the respondents had not been accorded due process or heard at all; and despite reconciliation efforts by the respondents, the appellant had refused to pay the legitimate terminal dues. Each claimant made claims and prayers upon the headings of a declaration that the termination was unfair and unlawful; 12 months' compensation; pay in lieu of termination notice; salary arrears for November 2019; severance pay at half monthly pay for each completed year of service; certificate of service; costs and interest at court rates; and any other relief the court deemed fit to grant.

For the appellant it was pleaded in the memorandum of reply as follows. The appellant denied that she is or has ever been trading as Fort Jesus Academy, denied being a proprietor of or partner in or otherwise owning or operating a learning institution as alleged or otherwise and put the respondents to strict proof thereof. The appellant further pleaded Fort Jesus Academy is a registered business name in the names of one Mohamed Jaffer Mawji and one Zalaika Mohamed Savigear as joint proprietors and “**...the respondent shall at the appropriate time apply to join the said Mohamed Jaffer Mawji and one Zalaika Mohamed Savigear as Third Parties to the suit.**” The appellant then denied all claims and prayers made for the respondents; and the appellant prayed the respondents' respective suits be dismissed with costs.

The Court has considered the evidence. The appellant stated that she had never traded as Fort Jesus Academy and had never employed the claimants. She further disclosed that Fort Jesus Academy was a registered business in the names of Mohamed Jaffer Mawji and one Zalaika Mohamed Savigear as proprietors per the exhibited certificate of registration services showing the registration was on 05.08.1988 to carry out business of school education. The appellant also exhibited the certificate of registration of schools showing that Fort Jesus Academy was registered on 19.12.2000 as a private school and the registered manager was Mrs. Zalaika Mohamed Mawji Savigear. The appellant also exhibited the letter dated 18.07.2000 showing that she was employed at Fort Jesus Academy in January 1989 as a teacher in the primary section and promoted to Academy's headmistress for the primary section; and that she was a duly trained P.I Teacher. She further exhibited the letter dated 01.12.2019 addressed to one Zalaika Mohamed Mawji Savigear explaining that she had come from leave and found that Fort Jesus Academy had ceased to exist because the landlord had repossessed the premises occupied by the school and let them out to a new tenant, Fort Highlights Academy Limited which had taken up furniture, equipment and other movables belonging to Fort Jesus Academy which had been in the premises. She further wrote, “**As I understand it, the new tenant has recruited all the staff of Fort Jesus Academy and is looking to enroll all the students as well.**” She observed that the decision had been taken by the proprietors of Fort Jesus Academy and she had no option but to tender her resignation from position of Administrator of Fort Jesus Academy. She further exhibited the letter dated 03.12.2019 by Zalaika Mohamed Mawji accepting the resignation effective 01.12.2019. The appellant testified that Zalaika Mohamed Mawji had since left Kenya. Further, she was the Administrator and Headmistress of the Fort Jesus Academy whose ownership was never passed to her and that she had signed the respondents' letters of employment in her capacity as employed by the owners of the school. For the respondents it was testified that they never knew the said owners of the school and it was the appellant they had dealt with all along.

The learned trial Magistrate evaluated the evidence and found that the appellant was the respondents' employer and upon the following reasons. First there was no doubt that the school had been registered in 1988 with proprietors as mentioned in the certificate exhibited by the appellant. Second the appellant confirmed that she had issued the letters of appointment in favor of the respondents and the respondents worked upon the appellant's instructions and terms of service – as the control test applied to establish the employment relationship. Third, the registered owners of the school were not known to the respondents and the appellant had testified that Zalaika Mohamed Mawji had since left Kenya and there was no evidence that the other registered proprietor Mohamed Jaffer Mawji ever participated in the running of the school.

The Court has considered the parties' respective cases. The evidence is that the appellant employed the respondents for a monthly salary. The further evidence is that the appellant was the Administrator and Headmistress of the School and she acted as an agent or manager of the school on behalf of the proprietors. The Court finds that the trial Court did not err in finding that the appellant and the respondents were in a contract of service and were respectively employer and employees within the statutory definitions referred to earlier in this judgment. The Court finds that the facts and evidence disclosed the employment relationship and, contrary to the submission made for the appellant, the Court returns that the trial Court did not go beyond the pleadings and the evidence in applying the control test. As submitted for the appellant, the control test may usually be invoked in establishing a contract of service where the defence of existence of a contract for service is invoked but which was not the case in the instant dispute. However, the Court considers that while an allegation of a contract for service had not been pleaded, as submitted for the appellant, the control test was a tool available for the trial Court to invoke towards establishing whether a contract of service existed looking at the pleadings and the evidence. Undisputedly, control test was a tool for establishing existence of a contract of service and the Court considers that there is no established principle that the pleading of a contract for service is a precondition to applying the control test towards establishing a contract of service. Thus it was not necessary for an allegation of a contractor relationship or contract for service to have been made as a precondition for the trial Court to invoke the control test. The Court finds that the learned trial Magistrate did not err in that regard.

While making that finding, it is curious to note that the appellant by purporting to resign, she did not on her part claim any terminal benefits. It would therefore appear that she had a special relationship with the school's registered proprietors and manager, one going beyond mere employee-employer relationship – so that it appears she had a special undisclosed equity in the enterprise. Thus, she was truly an employer of the respondents within the statutory definition, more so than, the respondents' co-employee. Without doubt, she was the manager and the respondents were the employees working under her.

Turning to the issue of third party proceedings, the appellant properly pleaded that at the earliest opportunity it would apply to enjoin third parties, presumably the registered owners and manager of the Fort Jesus Academy. However, despite being bound by that pleading and the same being the legitimate step to take in civil proceedings whereby the appellant as the defendant had claimed contribution or indemnity against the registered owners or manager of the school not already parties to the suit, the appellant failed to issue the necessary third party notice or to apply and obtain leave of court to enjoin her principals. The Court finds that it was misconceived when it was submitted for the appellant that it was for the respondents to accordingly seek to amend their respective statements of claim to add the registered proprietors and manager as defendants or third parties or to substitute the appellant as the defendant. It is the Court's finding that the respondents were coherent and consistent (in pleadings and evidence) that the appellant employed them, set the terms of service and effected the payment of salaries and that, the respondents did not know about the registered proprietors or the manager throughout the period of their respective services under the appellant. While the Court is mindful that the appellant was not a registered proprietor or manager, she was indeed the school's manager as Headmistress and Administrator so that while the appellant testified that the registered school manager visited the school, there was no evidence that the registered manager performed any human resource functions but, the appellant solely instructed and paid the respondents.

The Court has considered the submission that it was not factual that the appellant traded as Fort Jesus Academy. While that is true, the Court considers that the appellant admitted being an adult of sound mind and made testimony about her relationship with the respondents so that the trial court was entitled to determine the dispute between the persons actually before it in terms of the guiding principles in Article 159 of the Constitution of Kenya, 2010.

The appellant challenged the trial Court's finding on unfair and unlawful termination on account that there was no employer-employee relationship. That issue having been resolved, the Court returns that the appeal will collapse. The appellant will pay respondents' costs of the appeal.

In conclusion, the appeal is hereby dismissed with orders:

- 1) The final orders in the trial Court's judgment and the decree flowing therefrom are hereby upheld.
- 2) The appellant to pay the respondents' costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 11TH MARCH, 2022.

BYRAM ONGAYA

JUDGE