



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

ELRC CAUSE NO.18 OF 2021

(Formerly Meru High Court Civil Appeal Case No.106 of 2017)

(Before D.K.N.Marete)

ASSOCIATED MOTORS LIMITED.....APPELLANT

VERSUS

SILAS NYAMU IKIUGURESPONDENT

J U D G M E N T

This matter was originated by way of a Memorandum of Appeal dated 7th December, 2017 and comes out as follows;

1. *THAT the learned Trial Magistrate erred in law and fact in failing to appreciate that the Respondent had not proved his case on a balance of probabilities.*
2. *THAT the learned Trial Magistrate erred in law and fact in failing to appreciate and consider the Defendants evidence on record.*
3. *THAT the learned Trial Magistrate erred in law and fact by awarding the respondent sum of Kshs.2,239,175/= which sum is inordinately high, excessive and exaggerated as to be wholly erroneous in law and was not supported by any evidence.*
4. *THAT the learned Magistrate erred in law and fact in finding that paragraph 4 of the Defendant's defence was an admission to the plaintiff.*
5. *THAT the learned Trial Magistrate erred in law and fact by proceeding with the matter for hearing exparte despite the Defendants Counsel who was holding brief for counsel on record explaining in depth the unavailability of counsel on record and who is/was in conduct of this matter.*
6. *THAT there was outright basis by the trial Magistrate in favour of the plaintiff.*
7. *The learned Trial Magistrate erred in law and fact in failing to appreciate that the matter touched on labour and employment and that the court therefore lacked jurisdiction to proceed with the matter.*
8. *The judgment is against the weight of evidence.*

She prays as follows;

- a) *THAT this appeal be allowed and judgment by the trial court delivered on 14th November, 2017 be set aside.*
- b) *This Honourable court do order a refund before a different trial Magistrate.*
- c) *This Honourable court do re-evaluate the evidence and re-access the award of Kshs.2,239,175/- awarded to the Respondent.*
- d) *This Honourable court do re-evaluate the evidence on record.*

e) *That costs of this appeal be paid by the Respondent to the appellant.*

The issues for determination therefore are;

1. Whether the appeal is feasible and sustainable in the circumstances?
2. Who bears the costs of the appeal?

The 1st issue for determination is whether the appeal is feasible and sustainable in the circumstances. The parties hold diametrically opposed positions on this.

The Appellant in his written submission dated 22nd April, 2021 brings out a case for the appeal. It is his submission that the ex-parte proceedings of 13th November, 2017 and judgment on the following day together with all consequent orders should be set aside and the matter re-tried on merit.

The Appellant further goes out to raise a very elaborate submissions on this appeal and in the penultimate prays that this court allows the appeal and set aside the judgment of 14th November, 2017 and all consequent orders and decrees. She also prays that this matter be placed before the Chief Magistrate for re-trial and hearing on merit.

The Respondent in the written submissions dated 11th March, 2021 also bring out an equally elaborate submission on the demerits of the appeal.

It is her case that the trial court heard the matter on merit and found that the plaintiff had proved his case on a balance of probabilities and therefore found in his favour. He brings out an analysis of the grounds of appeal and dismisses them for lack of veracity and substance. In all, he prays that the appeal be dismissed with costs.

I have had occasion to evaluate the evidence before the trial court and also scrutinise the decision of court. The trial court has come out with a very elaborate and sequenced analysis of the issues that were due for its determination. It has also ably come out with a very sound determination of the same.

No amount of argument would beat sense, or even reality. The Respondent in the trial court presented a well evidenced catalogue of the data and sequence of the events in his employment and termination of employment. He presented documentary evidence of his employment contract and the provision for commission payments on sales made. He further demonstrated the Appellant's default on payments of such due commissions.

The Respondent has also submitted on the Appellant's reluctance to participate or even have the matter heard at the trial court. This is a demonstration of the Appellant's reluctance to have a final resolution of the issues in dispute at the lower court.

This appeal is, to me, frivolous and vexatious. It is an abuse of the process of court. Why? Any reasonable person, looking at the ingredients and facts of the appeal would drop it at the first instance. This, for lack of sensibility and merit.

I am therefore inclined to dismiss the appeal with costs to the Respondent.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022.

D.K.NJAGI MARETE

JUDGE

APPEARANCES

1. MRS.KIMANI INSTRUCTED BY O&M LAW LLP ADVOCATES FOR THE APPELLANT.

2. MR.WAMBUA INSTRUCTED BY MAITAI RIMITA & COMPANY ADVOCATE FOR THE RESPONDENT.