Superforam Limited v Olwanda & 7 others (Appeal E007 of 2022)
[2022] KEELRC 4028 (KLR) (12 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 4028 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E007 OF 2022

M MBARŨ, J

MAY 12, 2022

BETWEEN

SUPERFORAM LIMITED ..... APPELLANT

AND

GEORGE OLWANDA ..... 1ST RESPONDENT

VINCENT NYAKUNDI ..... 2ND RESPONDENT

JAMES LODI ..... 3RD RESPONDENT

BERNARD OGWARO ..... 4TH RESPONDENT

DIONYIUS MOENGA ..... 5TH RESPONDENT

PATRICK MOMANYI ..... 6TH RESPONDENT

ROBAI KHAVEREE ..... 7TH RESPONDENT

DANREE MULTIHANDLING SERVICES LIMITED ..... 8TH RESPONDENT

(being appeal from the judgement of Senior Principal magistrate C.A. Otieno Omondi delivered on 20th December, 2021 in Ruiru MCELRC No.24 of 2020)

JUDGMENT

1. The appellant filed the appeal herein following judgement in Ruiru MCELRC No.24 of 2020 delivered on 20th December, 2021 and aggrieved filed The appeal herein is on 7 grounds summarised as being that the learned trial magistrate erred in fact in law by failing to give concise statements of points of determination and reasons for the judgement; finding that the appellant was the employer of the respondent's, the compensation awarded was excessive and unreasonable at 6 months gross wage, there was disregard to the evidence of the appellant and ignored the judgement entered in default against the 8th respondent and proceeded to apportion liability between the appellant and the 8th respondent. that

for these reasons the judgement of the trial court should be set aside and reviewed and appeal allowed with costs.

Both parties attended and agreed to file written submissions.

3. The appellant submitted that the 1st to the 7th respondents filed claim against the appellant and 8th respondent claiming compensation for unfair termination of employment following an illegal strike which led the 8th respondent to terminate the employment through summary dismissal. The trial court heard the parties and in judgement held that the appellant and the 8th respondent unfairly terminated employment and awarded the 1st to 6th respondents compensation at 6 months wage and 12 months to the 7th respondent and the claim against the 8th respondent was dismissed.

4. The trial court had entered default judgement against the 8th respondent but later determined that the 8th respondent was not culpable and dismissed the claim against the 8th respondent. no reasons were going for going against the default judgement. In so doing, the court failed to appreciate and make a determination as to whether there was outsourcing agreement between the appellant and the 8th respondent which would have aided in a determination as to who between the appellant and the 8th respondent was the employer.

5. The appellant produced salary and wage outline and work schedules supplied by the 8th respondent from September, 2017, the summary of labour supplied to the appellant and invoices for supply of labour issued by the 8th respondent but the trial court ignored the same and hence arrived at a wrong decision in judgement. The appellant was not the employer and cannot be held liable to compensate the 1st to 7th respondents.

6. The fact that there was no written contract between the appellant and the 8th respondent for outsourcing labour does not infer the appellant was the employer. On the records filed, the 8th respondent invoiced the appellant for labour supply and was paid accordingly.

7. The 1st to 7th respondent filed suit against the appellant and the 8th respondent seeking reliefs for alleged unfair termination of employment following notices of summary dismissal dated 25th September, 2017 issued by the 8th respondent following an illegal strike. the statements of final payments of terminal dues and Deed of Discharge are issued by the 8th respondent and not the appellant.

8. The appellant submitted that the trial court relied on the fact of the absence of an agreement for outsourcing between the appellant and the 8th respondent whereas the witness called addressed eh issue comprehensively. The appellant would make payments to the 8th respondent who was responsible for hiring and payment of salaries and statutory due for its workers and remitted PAYE, NSSF and NHIF. The concept of outsourcing is now acceptable practices as held in *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* [2016] eKLR and in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR. the appellant in a bid to focus on its core business entered into an agreement with the 8th respondent for the provision of labour in 2009 which resulted into the 1st to 7th respondents being seconded to the appellant by the 8th respondent for work. They were never the employees of the appellant as held in *Henry Simiyu Wanyonyi v Unga Holdings Limited & another* [2021] eKLR.

9. The appellant also submitted that the compensation awarded by the trial court was excessive and should be reviewed based on the evidence given in response. The trial court did not address the number of years served by each employee in the assessment of compensation awarded as held in *Elizabeth Washeke & 62 others v Airtel Networks (K) Limited & another* [2013] eKLR.

10. the trial court failed to take into account judgement entered in default against the 8th respondent as the employer and proceeded to find the appellant as liable which was an error of fact and law and for these reasons, the judgement of the trial court should be set aside and or reviewed and the appeal allowed with costs.

11. In response, the 1st to 7th respondents that they were employees of the appellant and were dismissed over alleged go slow at the appellant's premises on 12th September, 2017. During the hearing before the trial court the respondents denied participating in any industrial action against the appellant, the 2nd respondent was on a work trip to Moyale at the time and the 1st respondent was on night shift on 11th September, 2017. On 12th September, 2017 the respondents were summoned for a hearing by the appellant and there was no representation of the 8th respondent

12. The appellant denied being the employer but a common agreement of 15th September, 2017 show that it contracted Danree and commenced operations including payroll and processing dues to the respondent who were coerced to sign for such dues on 22nd September, 2017.

13. On the grounds of appeal, the trial court heard the parties and made a determination on the merits and gave reasons. The agreement of 15th September 2017 between the appellant and Danree has nothing to imply the retrospective application of the same with regard to employment of the respondents as held in *Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd* [2017] eKLR. the alleged agreement to outsource labour to the 8th respondent in the year 2009 was never produced while the respondents remained in the service of the appellant.

14. The non-attendance of the 8tth respondent before the trial court and in this appeal is because the contract of employment was with the appellant and the contract of 15th September, 2017 with Danree only arose after employment had terminated and does not bind the respondents who were compelled under duress to sign the terminal des by Danree on 23rd September, 2017 and the cited cases in support of the appeal do not apply in this case. The trial court considered the totality of the evidence before it and arrived at a proper judgement and should be upheld and the appeal dismissed with costs.

Determination

15. As this is a first appeal, the court is allowed to re-evaluate the evidence and arrive at a finding.

16. Before the trial court, the 1st to 7th respondents filed claim against the appellant and the 8th respondents on the grounds that they were employees of the appellant but on 14th September, 2017 the 2nd respondent served them with letters and notices to show cause allegedly that they had incited other workers to go on strike. the 1st, 3rd and 7th respondents were elected workers representatives and who had addressed work conditions but during a meeting with the directors the management wanted to compromise them which they refused. On 11th September, 2017 there was no strike but a go slow demanding for various demands be implemented and the appellant decided to victimise them and on 12th September, 2017 they were dismissed from employment and then final due paid through the 8th respondent.

17. In response, the 1st respondent filed a reply and denied being the employer of the 1st to 7th respondents and that they were direct employees of the 2nd respondent who reported to the appellant that certain of their employees were n a go slow. The 2nd respondent as a separate entity from the appellant took action against its employees and dismissed them which nothing to do with the appellant and the claims made should be dismissed.

18. Before the trial court the appellant produced various work records including an agreement with the 8th respondent to offer labour services, salary schedules, summary of labour supplied, invoices for labour supply, letters of summary dismissal and payments thereof and discharge vouchers for the 1st to 7th respondents.

19. In judgement, the Honourable magistrate analysed the evidence and made a finding that the appellant was the employer of the respondents and the agreement allegedly made between the appellant and the 8th respondent for supply of labour going back to the year 2009 was not produced only the one commencing on 15th September, 2017 was produced. The agreement to outsource labour commenced on 15th September, 2017 and not earlier. The appellant had failed to demonstrate that it was not the employer as alleged and was therefore liable to pay compensation for unfair termination of employment. the appellant being the employer had the authority to dismiss the respondents and not the 8th respondent.

20. With regard to the reason leading to termination of employment, the honourable magistrate made a finding that there was summary dismissal on the grounds that the respondents had incited fellow employees to go on strike and as the representatives they got victimised. The 1st respondent was not at work on the night of 11th September, 2017 and the 2nd respondent was away in Moyale on duty and could not have participated in any strike. there was no proof that a strike had taken place.

21. The trial court also held that there was no due process followed in the summary dismissal of the respondents which was effected by the 8th respondent who was not the employer and hence held that there was unfair termination of employment and the respondents entitled to notice pay, compensation, leave pay and costs and interests.

22. On the record, the appellant claim that there was no employment relationship between the 1st to 7th respondents is on the grounds that since the year 2009 they had outsourced labour to the 8th respondents who was dealing with all employee issues including discipline, salary payments and remittance of statutory dues and insurance policies. That there was no agreement before the one dated 15th September, 2017 save there was an implied agreement for the services to be rendered.

23. The appellant has produced various documents to support the assertions that the employer was the 8th respondent being;

    Agreement dated 15th September, 2017;

    Schedule of salaries for September, 2017;

    End pay for September, 2017;

    Summary of labour supplied end of September, 2017;

    Final dues paid to drivers dated 26th September, 2017;

    Invoice for service dated 27th September, 2017;

    Letters of summary dismissal dated 22nd September, 2017;

    Final payments dated 27th September, 2017; and

    Cheques dated 28th September, 2017.

24. Whereas the appellant has asserted that there was no employment relationship with the respondents, the contract outsourcing labour is done on a date after end of employment on 12th September, 2017. The records for payment of salaries/wages said to have commenced in the year 2009 have not been

produced. They all relate to a date after end of employment on 12th September, 2017 when the respondents are said to have engaged in unlawful strike.

On the records, the appellant was the employer.

25. Whereas outsourcing labour is now an accepted labour concept, such should not be applied to allow for unfair labour practices. Where indeed the 8th respondent had an agreement to provide labour to the appellant and was paying wages, remitting statuary dues and insurance for its employees seconded to the appellant, there was nothing easier than to provide the payment statements issued to the employees pursuant to Section 17 and 19 of the *Employment Act*, 2007 to prove such facts. As the entity engaging to the with 8th respondent for provision of labour, the appellant had a duty to ensure the employees placed at their disposal to offer their labours were sourced within the confines of the law and issued with payment statements commensurate to the provisions of Section 20 of the *Employment Act*, 2007.

26. Adherence to section 20 of the *Employment Act*, 2007 would have been the deal breaker here.

27. The respondents were offering their labours to the appellant, without evidence to the contrary that these were the employees of the 8th respondent before the agreement dated 15th September, 2017; the appellant cannot extricate itself from the role of the employer.

28. Even in a case where the appellant entered into an agreement with the 8th respondent on 15th September, 2017 the duty was to end employment relationship with the respondents first before outsourcing labour to a third party. That is the gist of the judgement in *Elizabeth Washeke & 62 others v Airtel Networks (K) LTD & another* [2013] eKLR that;

> ... what an outsourcing or transfer of business entails, this must be clearly spelt out in the contract of employment between the concerned employee and the new employer failure to which the former employer must complete their end of the bargain as between themselves and their employee before conferring a responsibility unsecured with a third party.

29. The employer must lawfully and procedurally end the employment relationship and issue Certificate of Service before a new employer such as the 8th respondent can take over the subject employees. to enter into an agreement to outsource labour without notice to the affected employees is defined as an unfair labour practice which goes contrary to sections 35, 41 and 45 of the *Employment Act*, 2007. The subject employee affected by such an agreement must be issued with notice, given a hearing and the same addressed procedurally.

30. Employees are not chattels to be moved from one entity to the next. Due regard to the law is an imperative.

31. The appellant as the employer ought to have addressed any matter arising out of the employment relationship with the respondents and not the 8th respondent. the findings of the Honourable Magistrate cannot be faulted in this regard.

32. With regard to the reasons leading to termination of employment, the 1st to 7th respondents admit they were the workers representatives and held a meeting with management to address the problems the workers were facing. They attended as representatives but the appellant tried to compromise them without addressing the problems. The workers went on a go slow.

33. As workers representatives, the respondents cannot take a position that the other employees opted to go on a go slow and they remained innocent. That indeed a go slow ensued on 12th September, 2017 but this was not a strike and therefore nothing much.

34. Any form of industrial action at the shop floor and which relates to non-performance of work as required whether through a strike, demonstration, picketing or go-slow which is not protected is prohibited pursuant to Part X (10) of the *Labour Relations Act*, 2007. An employee who engages in unprotected industrial action commits a gross misconduct and invites summary dismissal upon him/herself.

35. The rationale is that a workers representative, just like the shop steward is bestowed with the greatest responsibility at the shop floor to ensure industrial peace. See *Mathias Nyoka Ngala & 3 others v Kenya National Private Security Workers' Union & another* [2015] eKLR.

36. In the case of *Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers v Pwani University* [2015] eKLR the court held that;

> The law recognizes that Shop Stewards have special rights. Their role is to assist Employees at the shop floor level in grievance and disciplinary hearings. Section 41 of the *Employment Act* 2007, requires for instance, that an Employee is accompanied by a shop floor Trade Union Representative to a disciplinary hearing. Shop Stewards as seen above are the eyes, ears and mouths of the Trade Union. They monitor and report any of the Employer's contraventions of the law to the appropriate authorities. They are allowed to have time off with full pay during working hours, in discharging their role as Workers' Representatives.

37. Whether the 1st and 2nd respondents were physically present at the shop floor during the go-slow on 11th/12th September, 2017 as the workers representatives, their word was sufficient. The knowledge of the industrial action was sufficient.

38. Save for the letter of summary dismissal being issued by a third party the 8th respondent, on the admissions by the 1st to 7th respondents that as the workers representatives there was a go slow at the shop floor, such negates the employment relationship and frustration of own employment.

39. The appellant must regularise termination of employment and issue notice or payment in lieu thereof together with Certificate of Service. taking into account the notice by the 8th respondent dated 22nd September, 2017 has since taken effect, payment in lieu of a notice by the appellant shall suffice. Pursuant to Section 35 of the *Employment Act*, 2007 each respondent shall be paid for one month in lieu of notice.

40. The respondents have since been paid for days worked and annual leave days not taken.

41. With regard to judgement entered in default against the 8th respondent, the employment relationship between the parties was between the 1st to 7th respondents and the appellant. The appellant cannot be found to hide behind the shield of the agreement dated 15th September, 2017 to avoid liability whether the respondents enforce the default judgement or not. To enjoin the 8th respondent in the proceedings before the trial court was of no legal consequence. The claim as framed and the remedies sought directly related to the appellant save the entity of the 8th respondent in issuing notices after employment had terminated to mar and muddle up the issues. The Honourable magistrate, though for different reasons cannot be faulted in this regard.

42. On the award of compensation, the admission by the respondents noted above, having frustrated own employment and as workers representatives, there was great responsibility in engaging in an industrial action that was not protected in any form. The award to compensation in this regard was not justified and the appeal to this extent is with merit.

43. Accordingly, judgement of the trial court in Ruiru CMELRC No.24 of 2020 is hereby set aside and the following orders issued;

a. The appellant is hereby found to be the employer;

b. The appellant shall pay the 1st to 7th respondent one months' notice pay based on the last wage earned within 30 days after which date the same shall accrue interests at court rates until paid in full;

c. The appellant shall issue the respondents with a Certificate of Service; and

d. Each party shall bear own costs of the appeal and the lower court.

DELIVERED IN COURT AT NAIROBI THIS 12TH DAY OF MAY, 2022.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and .....