Wanjala Mulunda v Robinson Security Group (Appeal 2 of 2019)
[2022] KEELRC 12687 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12687 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

APPEAL 2 OF 2019

JW KELI, J

SEPTEMBER 28, 2022

BETWEEN

JARED WANJALA MULUNDA ..... APPELLANT

AND

ROBINSON SECURITY GROUP ..... RESPONDENT

(Appeal from Judgment of Honorable C.A.S. Mutai SPM delivered on the 6th December, 2019 Bungoma Chief Magistrate's Court ELRC Cause No. 4 of 2019)

JUDGMENT

Introduction

1. On the February 28, 2019, the Respondent (Claimant in the trial court) filed a Statement of Claim dated February 26, 2019 seeking the following orders:-

    (a) A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the Claimant is entitled to compensation of her terminal dues as outlined in the claim;

    (b) The sum of Kshs 238,905.69/- in terminal benefits as set in the Claim;

    (c) Exemplary damages;

    (d) Certificate of service and

    (e) Cost of this suit and interest at court rates from time of filing this suit until payment in full.

2. The Respondent did not file defence to the Claim and the Appellant (Claimant) filed request for interlocutory judgment on the June 21, 2019.

3. On the July 10, 2019 the trial court fixed the matter for formal proof.

4. On the September 5, 2019 the matter proceeded on formal proof exparte. The Appellant gave sworn evidence.

5. The Appellant filed written submissions on the September 19, 2019.

6. The Hon CAS Mutai SPM delivered judgment in the claim delivered on December 6, 2019 dismissing the claim.

The Appeal

7. In his Memorandum of Appeal dated December 13, 2019 , received in court on the December 13, 2019, the Appellant raises the following grounds of appeal:-

    a The learned trial Magistrate erred in law and fact in disregarding the fact and onus is on the employer to justify termination of employment matters.

    b The learned trial Magistrate erred in law and fact while arriving at the wrong decision by misinterpreting the provisions of the *Employment Act*, *2007*.

    c The learned trial Magistrate erred in law and fact in failing to contextualize the provisions of Section 10,41,45 and 51 of the *Employment Act* , 2008 and therefore arrived at unlawful decision .

    d The learned trial Magistrate erred in law and fact by applying wrong principles in dismissing the suit.

    e The learned trial Magistrate erred in law and fact in failing to appreciate the evidence by the appellant thereby leading to a miscarriage of justice.

    f. The learned trial Magistrate erred in law and fact in dismissing the appellant's case without any factual or legal basis even after tendering overwhelming and undisputed evidence against the Respondent.

    g. he learned trial Magistrate erred in law and in fact disregarding the evidence of the Appellant on record hence resulting to wrong decision.

    h. The learned trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied on in support thereof.

    i. That the judgment of the learned Magistrate in the circumstances was unfair and unjust.

    j. That the Learned trial Magistrate's decision was plainly wrong.

8. The Appeal was canvassed by way of written submissions. The Appellant's submissions drawn by Limo RK & Company Advocates dated May 12, 2022 were received in court on the May 13, 2022.

9. The Respondent's submissions drawn by PD Onyango & Company Advocates and dated June 14, 2022 were received in court on the June 17, 2022.

Determination

10. The Appellant submits that this being a first appeal the court ought to consider the case entirely on matters of both fact and the law and be guided by the principles set in the case of S*elle & Another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court held that:

> " The court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it neither has seen or heard the witness and should make due allowance in that respect. The court upholds this decision".

11. This being a first appeal, the Court has latitudes within the province of a retrial. Within these parameters, I am required to reconsider and re-evaluate the evidence on record and arrive at my own conclusions. In this respect, I take guidance from the decision in *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR where the Court of Appeal stated the following:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

12. The trial court's decision leading to this appeal reads:-

'In this matter the Respondent did not testify nor file any reply to the claim of the Claimant herein. The Claimant's claim was not contested. The Claimant however did not produce any other evidence nor did he call any other witness to confirm that he was under the employment of the respondent. Where there is no evidence, this court is not in a position to make an award. Reasons afore stated I shall decline to make any award."

13. The Appellant and the Respondent are agreeable on the issues for determination in the appeal as stated in their respective written submissions as follows:-

    a. Whether the Appellant established an employment relationship between himself and the Respondent.

    b. Whether the Appellant discharged its burden of proof of establishing that unfair termination of employment had occurred.

    c. Whether the Respondent discharged the burden of justifying the grounds of termination of the employment as fair.

    d. Whether the appeal herein is merited for grant of the orders sought

14. The court adopts the above issues by the parties for determination in the appeal.

Whether the appellant established an employment relationship between himself and the respondent

15. The Appellant submits that during his testimony in court he stated he was employed by the Respondent which is demonstrated by his NSSF statement dated May 17, 2018 at page 18 of the Record of appeal indicating the Respondent as the employer, a warning letter dated April 20, 2018 by the Respondent addressed to the Appellant at page 17 of the record of appeal. That this is clear demonstration that the Appellant was employed by the Respondent and it was not challenged by the Respondent.

16. The Respondent submits that at page 41 of the record of appeal that the Appellant stated that he had been employed by the Respondent as Security guard. He did not produce any evidence to back up his claim. He did not tell the court when he was employed and where he was stationed. The Respondent submits that the burden of proof is on the person who asserts and wants the court to make a decision in its favour and relies on the provisions of Section 107 of the *Evidence Act* which reads:- 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

17. The Respondent submits the proceedings at page 41 of the record of appeal indicate that the Appellant only told the court that he had been employed by the Respondent as security guard and was being paid Kshs 7,600/- per month and did not produce evidence.

18. The Respondent submits that the NSSF statement at page 18 of the record of appeal and the warning letter at page 17 of the record of appeal were never produced in the trial court during the hearing hence the court could not have considered them as evidence.

19. The Respondent submits that until when documents that are listed and produced as per the evidence rules do they form part of the court record and can be considered as evidence until then they remain documents in the file. To buttress this submission the Respondent relies on the decision in *Jackson Ndwiga v Elizabeth Thara Ngahu* [2021] eKLR where the Judge in paragraph 22 relied on the decision of the court of Appeal in *Kenneth Nyaga Mwige v Austen Kiguta and 2 others [*2015] eKLR and held that there mere marking of the document for identification does not dispense with the formal proof thereof. The court then explained how a document became part of evidence in case as follows:- "22. Any document filed and or marked for identification by either party passes through three stages before it is held proved or disproved. First when the documents are filed, the documents though on the court file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to proof , admission of a document in evidence should not be confused with proof of the document . Third, the document becomes proved , not proved or disproved when the court applied its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. The court will not look at the document alone but would take into consideration all facts and evidence on record".

> " 23. The Court of Appeal further stated: once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation of its authenticity and relevance to those facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as exhibit and be part of the court record. If the document is not marked as exhibit, it is not part of the record. If it is admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and unauthenticated account."

20. The Court of Appeal decision *Kenneth Nyaga Mwige v Austen Kiguta and 2 others* [2015] eKLR (supra) is binding on this court. The court upholds the Respondent's submission that the NSSF Statement and the warning letter at pages 18 and 17 respectively of the record of appeal were never produced and therefore the court cannot rely on their content.

21. The Respondent further submits that the fact that there was no defence filed did not relieve the Appellant from proving employment relationship with the Respondent and relies on the decision

of the court in *Zarika Adoyo Obondo v Tai Shunhun & Another* [2020]eKLR,Nairobi ELRC where Justice Maureen Onyango stated at page 3 of the judgment:-

> "it has been stated time and again by this court that where the Respondent does not participate in the hearing and has not admitted the employment relationship, the Claimant must prove the same as a preliminary point as without proof the entire claim is anchored on quicksand."

22. The court Zarika Adoyo Obondo case relied on the decision of the court in *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* where the court found the Appellant had not produced any document to prove employment relationship between the grievant and the respondent and not even the alleged letter of resignation the grievant is alleged to have written to the employer. The court in that case held that the court must be satisfied that the employment relationship exists and a claimant claiming Employment Rights must therefore prove the existence of the employment relationship.

23. The court in Zarika Adoyo Obondo case further cited the decision in Mary Mmbone Mbayi v Chandubhai Patel & Another(industrial cause no 761 of 2011) where the court stated:- 'even in cases where there may be no documentary proof of an employment relationship or termination thereof , the claimant retains the burden of proving their case through *viva voce* evidence".

24. The court upholds the decision and finds that the Appellant despite the lack of defence had to still discharge his burden of proving employer employee relation. In this case he failed to produce his evidence at the hearing though he had filed the list of documents and the bundle of the said documents.

25. The proceedings of the trial court at page 41 of the record of indicate that the appellant told the court he knew the Respondent where he had been employed as a security guard and used to be paid salary of Kshs 7,600/- per month and that his services were terminated on the April 20, 2018 and for reason that he gave out confidential information but was not given opportunity to be heard before the termination of employment.

26. At page 18 and 17 of the record of appeal are NSSF statement indicating the respondent as employer and warning letter by respondent respectively. The said documents were in the list of documents filed in court together with claim. There is no evidence in the proceedings at the hearing of the said documents being produced as exhibits. The court upholds the binding decision Court of Appeal *Kenneth Nyaga Mwige v Austen Kiguta and 2 others* [2015] eKLR where the court held that when documents are filed in court, though on the court file they do not automatically become part of the judicial record, that they have to be produced as exhibits at the hearing. The court finds that the said documents at pages 17 and 18 of the record of appeal though in the filed list of documents, having not been produced as exhibits during the formal proof hearing they did not constitute evidence to be relied on by the trial court.

27. The court finds that the lack of defence did not discharge the Appellant from producing evidence to prove the employment relationship with the Respondent. The documents at pages 18 and 17 of the record of appeal while they could have been evidence, were not produced at the hearing as required in the court of Appeal decision in Kenneth Nyaga Mwige(supra).

28. The court finds that this case was handled in a very casual manner perhaps because it was undefended and perhaps this should serve as a warning to future litigants. The court finds that the standard of proof in civil cases of balance of probabilities was not met by the Appellant in the claim.

29. The court agrees with the Respondent that submissions are not evidence as stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another*[2014]eKLR, where the

court stated:- 'submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in the submissions cannot come to his aid. ... indeed there are many cases decided without hearing submissions but based only on evidence presented." The Court of Appeal in that case considered submissions to be marketing language of the parties.

30. The court applying the foregoing Court of Appeal decisions then finds that the ground of appeal that the Learned Magistrate did not consider the submissions and authorities of the appellant to be of no help to the Claimant's cause for having not produced his evidence at the formal proof hearing.

31. The court upholds the finding of the trial court that there was no prove of employer employee relationship hence no basis for making any award.

Whether the appellant discharged its burden of proof of establishing that unfair termination of employment had occurred

32. The Appellant submits that it is the burden of proof of the employer to prove reason for termination under Section 43 and Section 47(5) of the *Employment Act*. The Appellant submits that he annexed evidence to the statement of claim at pages 17,18,19,20,21. These were the documents under the filed list of documents. The court already determined there is no evidence of employer employee relations and found the Appellant did not produce evidence at the hearing.

33. The Appellant relies on the decisions of the High Court in Karuru *Munyororo v Joseph Ndumia Murage & Another* Nyeri HCC NO 95 of 1988 to support his submissions that the evidence of the Claimant having not been challenged by cross-examination remained uncontroverted hence credible. The Appellant also relies on the decision in Interchemie EA limited v Nakuru Veterinary Center limited Nairobi (Milimani) HCC No 165B of 2002 where the court found that without witnesses of defence the evidence tendered on behalf of the plaintiff stood uncontroverted.

34. The court finds that the High Court in the above case referred to evidence tendered. In the instant appeal no evidence was tendered before the trial court. The documents under the filed list of documents were never produced as exhibits. The decision of the court of Appeal in Kenneth Nyaga Mwige(supra) which is binding on this court held that unproduced documents though filed were not evidence.

35. The Respondent submits no evidence was produced at the hearing and further submits that written submissions are not pleadings and hence the court should discard the submissions by the Appellant relying on filed documents. The court agrees with the Respondent that submissions are not evidence as stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another*[2014]eKLR(supra)

36. The court having upheld the judgment of the trial court that there was no proof of employer employee relationship between the Appellant and the Respondent then the court has no basis to make award under this this issue.

37. The existence of employer employee relationship between the parties is the foundation of the jurisdiction of the court under Section 12 of the Employment and Labour Relation Court Act in a claim by employee for compensation following termination of employment.

Whether the respondent discharged the burden of justifying the grounds of termination of the employment as fair.

38. The court having upheld the judgment of the trial court that there was no prove of employer employee relationship then the court has no basis to make award under this issue.

Whether the appeal herein is merited for grant of the orders sought

39. The court having upheld the judgment and findings of the trial court that there was no evidence before the court that the Appellant was under the employment of the Respondent then the court determines the instant appeal lacks merit.

Conclusion and disposition

40. The appeal dated February 26, 2019 received in court on 2August 7, 2021 is dismissed for lack of merit. The Judgment of Honourable CAS Mutai SPM in Bungoma CMC ELRC Cause No 4 of 2019 is upheld.

41. No order as to costs.

42. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2022 IN OPEN COURT AT BUNGOMA.

J.W. KELI,

JUDGE.

In the presence of:-

Court Assistant: Brenda Wesonga

For Appellant:- Kibet holding brief for Kibii Waganda.

For Respondent:- P.D Onyango Advocate.