Wairagu v Green Hills Hotel Nyeri (Appeal E001 of 2021)
[2022] KEELRC 13181 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13181 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

APPEAL E001 OF 2021

DKN MARETE, J

OCTOBER 31, 2022

BETWEEN

PETER MWANGI WAIRAGU ..... APPELLANT

AND

GREEN HILLS HOTEL NYERI ..... RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Appeal dated February 1, 2021. It comes out as follows;

    1. The learned trial Magistrate erred in law and fact when she dismissed the Appellant's claim and disregarding the evidence on record which did not support such a finding.

    2. The learned trial Magistrate erred in law and fact by finding that the Appellant had absconded duty while there was no evidence on record to support such a finding.

    3. The learned trial Magistrate erred in law and fact when she found that the Appellant was in compliance with the law summarily terminated by the Respondent for absconding duty yet there is no evidence on record to support such a finding.

    4. That the learned trial Magistrate failed to appreciate the submissions of the learned counsel for the Appellant.

2. It seeks the following orders of court;

    a) The appeal be allowed.

    b) The Judgment and consequent Decree delivered by the Honourable Hon.w.Kagendo on 6th day of January in CM ELRC Cause No.36 of 2018 be set aside in its entirety and the claim allowed.

c) The Appellant be awarded the costs of this Appeal and in the trial court.

3. The Appellant in his written submissions dated March 15, 2022 supports a case by submitting that in the analysis of issues Nos. (i) and (ii) the trial court correctly interpreted the provision of sections 2 and 37 of the *Employment Act, 2007* to find a case of permanent employment of the Appellant on the basis of time. However, when it came to issues No.(iii) and (iv), the learned magistrate erred in failing to appreciate that once the terms of service were fully converted the Appellant was entitled to the basic and minimum rights attendant to a normal employee under the *Employment Act*.

4. The Appellant cites the following as a radiation of the judgment of court at page 347;

> "It is the court's observation that whenever employee fails to show up at work, he or she ought to inform the employer. While the above position is not a prerequisite provided by law, it is considered to be the best practice. In our case, it is evident that there was a good relationship between the employer and the employee. At no point did the employee complain of mistreatment by the employer nor did the employee undertake any disciplinary measures against the employee at any point his employment, in view of the above discussed relationship it was the onus of the claimant to prove on a balance of probability that the Respondent unfairly terminated him from employment."

5. With this kind of record, the appellants submits that in a case of absconding duty as alleged by the Respondent, due disciplinary process should have been undertaken with a show cause letter to the appellants as to why disciplinary action should not be taken against him.

6. It is his further submission that no notice was issued as per section 35 (1) of the *Employment Act, 2007* as he was not afforded a hearing in terms of section 41 (2) of the said Act.

7. The Respondent in her written submissions dated 30th November, 2021 oppose the appeal. It is her case that judgment was issued in her favour because the Appellants failed to proof his case of unlawful termination of employment against the Respondent's case of absconding duty and therefore lawful termination of employment.

8. Her further case is that the learned magistrate appreciated the case of terms of employment as converting from casual to permanent by virtue of section 2 and 37 of the *Employment Act, 2007* but nevertheless dismissed the claim for reasons that a claimant had absconded duty never to return.

9. The story and evidence of green pastures by the Respondent's witness bears credence on this. Absconding duty and not returning to work whatsoever on the part of the Appellant must have disabled the Respondent's attempt at conducting any disciplinary proceedings against the appellant. If this evidence is to be believed, which it is, a case of frustration of either a conciliation process or disciplinary action inter partes ensued in the circumstances.

10. It is also notable that the Appellant did not bring any witnesses at the trial court. This would have been required to controvert a case of desertion as adduced by the Respondent. I therefore find no fault or failure by the learned magistrate in finding a case in favour of the Respondent. The claimant had failed to proof a case of unlawful termination of employment per section 47 (5) of the *Employment Act, 2007* which comes out thus;

> "For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the

employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

11. I am therefore inclined to dismiss the appeal with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Wa Gathoni instructed by Muchiri Wa Gathoni & Company Advocates for the Appellant.

2. Miss Mwikali instructed by Gathara Mahinda & Company Advocates for the Respondent.