**Njoroge & Musyoka Advocates & 3 others v Wamai (Appeal E171 of 2021) [2022] KEELRC 13029 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13029 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL E171 OF 2021**

**JK GAKERI, J**

**NOVEMBER 1, 2022**

**BETWEEN**

**NJOROGE & MUSYOKA ADVOCATES ..... 1ST APPELLANT**

**MARGARET WANJIRU NJOROGE ..... 2ND APPELLANT**

**JUDY WANJIRU GICHUMBI ..... 3RD APPELLANT**

**DIANA NJOKI GICHUMBI ..... 4TH APPELLANT**

**AND**

**EVELYNE WAMAI ..... RESPONDENT**

## JUDGMENT

1. This is an appeal against the ruling of Hon E Wanjala (M/s) – Principal Magistrate, Milimani Commercial Courts delivered on November 23, 2021 in CMEL No 372 of 2020.

2. The respondent commenced proceedings against the appellants sometime in early 2020 alleging unfair and unprocedural dismissal from employment by the appellants seeking various reliefs including payment in lieu of notice, unpaid salaries for November and December 2019, unpaid leave, house allowance, service pay, compensation and certificate of service.

3. When the matter first came up on November 2, 2020, the respondent was absent and a mention was slated for March 24, 2021 when Kinyua appeared for the respondent/appellants and sought time to comply with order 11. Counsel informed the court that the respondents were out of the country.

4. Counsel for claimant/respondent sought for certification of the suit ready for hearing.

5. The court fixed a mention for April 22, 2021 to confirm compliance by the respondent on which date the respondent had not complied and sought leave to amend the defence and file a further list of

documents. Counsel sought 21 days. Mr Salim for the claimant opposed the application and urged the court to accord the respondent/appellants 7 days.

6. The court acceded to the respondents response and fixed a mention for May 17, 2021 on which date the respondents/applicants application to amend the defence was allowed as unopposed and a further mention was slated for June 7, 2021 to confirm compliance.

7. The suit was confirmed ready for hearing on June 7, 2021 and a hearing date fixed by consent. On the hearing date, October 5, 2021 while the claimant's counsel was ready to proceed, the respondent's counsel could only proceed with the claimant's case as counsel could not procure the attendance of the witness who was out of the country and time zones are different.

8. The claimant testified and was cross-examined and the respondent's case was slated for November 23, 2021.

9. On November 23, 2021 during the call over, counsel holding brief for Kinyua, counsel for the respondent informed the court that he was ready to proceed.

10. Strangely, when hearing was due to start, a Mr Mutiri holding brief for Kinyua told the court that the witness could not be traced, that Kinyua had communicated her predicament to the claimant's counsel and sought his indulgence.

11. The claimant's counsel denied knowledge on receipt of the email and sought the courts directions.

12. The court fixed the hearing for 11.45 am at which time Mr Waweru informed the court that Kinyua was not ready to proceed as none of the respondent's was responsive and the one out of the country was not traceable. Counsel sought the courts indulgence.

13. The claimant's counsel reiterated his earlier submission that the respondent's counsel was not according the process the seriousness it deserved and urged the court to close the respondent's case. Mr Waweru on the other hand sought the courts indulgence.

14. In a short ruling, the learned principal magistrate stated as follows;

> " All considered. Justice is both to the claimant and respondent, as earlier indicated; reasons for adjournment are not merited just stating that a witness cannot be traced is not reason enough to adjourn a matter and if a witness is not traceable, is a clear indication that they have lost interest in the matter. This date was taken way back on October 5, 2021 over a month ago, why the respondents witnesses are not before the court is not explained. Noting that proceedings are virtual in the interest of justice. The respondent's case is marked as closed. Parties to file and exchange submissions, each to have 14 days . . ."

15. This is the impugned ruling. The appellants attached the memorandum of appeal to the notice of motion application dated December 23, 2021 which sought various orders.

16. The ruling is impugned on various grounds that;

    1. The trial court errand in law in closing the respondents/appellants case without the key witness testifying.

    2. The trial court erred in law and fact by failing to consider the fact that the key witness was desirous to defend the claim.

    3. The trial court erred in law and fact in falling to appreciate the fact that on November 23, 2021, counsel had submitted that the key witness was unable to attend court for being out of the

country and there was communication breakdown between them by reason of different time zones and the need for more time.

4. The trial court failed to consider the appellants counsel submission for an adjournment to enable the witness attend hearing.

5. The trial court failed to appreciate the impeccable defence of the appellants.

6. The trial court arrived at an erroneous conclusion of locking out the appellant's key witness.

7. The trial court issued a mention for submission as opposed to a hearing date for the appellant.

8. The trial court failed to consider awarding the claimant costs for the day being the first adjournment.

9. The trial court failed to give the appellants a last adjournment being the first it was coming up for defense hearing.

17. The appellant sought orders that;

a. The appeal be allowed with costs.

b. The ruling delivered on November 23, 2021 together with all other consequential orders set aside.

c. All proceedings in CMEL Case No 372 of 2020 at Milimani Commercial Courts be stayed.

d. The appellant's be allowed to call their witness, to defend the allegations by respondent spelled out in her statement of claim dated April 10, 2020.

e. Costs of this appeal be borne by the respondent.

18. In sum, the appellant's are faulting the exercise of discretion by the learned trial magistrate.

**Appellant's Submission**

19. The pith and substance of the appellant's case is that they were condemned unheard which they characterize as a very punitive decision which courts sparingly use and in extreme circumstances.

20. Reliance is made on the sentiments of Lenaola J (as he then was) in *Mandeep Chauhan v Kenyatta National Hospital & 2 others* (2013) eKLR relying on the sentiments of the Supreme Court of Uganda in the *Management Committee of Makondo Primary School & another v Uganda National Examinations Board* HC Civil Miscellaneous Application No 18 of 2010.

21. It is urged that the court should strike a balance between delaying justice and occasioning of injustice on any of the parties. That the appellants were not given the last chance to adjourn the hearing.

22. It is submitted that the learned magistrate erred in law and fact by failing to consider the fact that the key witness was out of the country and was desirous of defending the claim but was unable to attend court on the material day due to communication breakdown and different time zones and the predicament had been communicated to counsel for the respondent.

23. That an adjournment would not have prejudiced the respondent and would have reinforced the right to fair hearing.

24. Reliance is made on the decision in *Kenya Commercial Bank Ltd v Titus Kilonzo Mutua t/a Mbwala Agencies & 16 others* (2014) eKLR to underscore the proposition that the grant of adjournment is the exercise of judicial discretion based on the reasons given in the particular circumstances.

25. It is submitted that the court should have considered the totality of the circumstances that led to the non-appearance of the witness.

26. The appellants further submitted that their right to fair hearing as guaranteed by article 50 of the *Constitution of Kenya, 2010* was violated by closure of their case before they tendered evidence.

27. The decision in *Judicial Service Commission v Gladys Boss Shollei & another* (2014) eKLR is relied upon to reinforce the submission.

28. Further reliance is made on the decision in *Harit Sheth t/a Harit Sheth Advocate v Shamas Charania* Civil App No 68 of 2008 to underline the essence of proportionally and level playing field for all parties in determination of the suits.

**Determination**

29. This being a first appeal, the court is duly bound to evaluate the evidence a fresh and make a determination.

30. In *Gitobu Imanyara and 2 others v Attorney General* (2016) eKLR, the court stated as follows;

> "An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect."

31. Guided by the foregoing principles, the court proceeds as follows.

32. The only issue for determination is whether the learned trial magistrate exercised discretion judiciously by denying the appellants an adjournment and closing their case before their witness had testified.

33. The law on adjournment of suits is well settled.

34. Order 17 rule 1 if the *Civil Procedure Rules, 2010* provides as follows;

> "1. Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.
>
> 2. When the court grants an adjournment, it shall give a date for further hearing or directions."

35. In *FitzPatrick v Batger & Co Ltd* (1967) 2 All ER 657, Lord Denning MR was emphatic that "public policy demands that the business of the courts should be conducted with expedition".

36. The need for expeditious resolution of disputes is underscored under article 159(2) (b) and (d) of the *Constitution of Kenya, 2010*. Courts are required to ensure that justice is administered without regard to technicalities and is not delayed.

37. Similarly, section 3 (1) of the *Employment and Labour Relations Court Act, 2011* provides that

> " The principal objective of this Act is to enable the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act."

38. The requirement of expeditious resolution of disputes at all levels is now a constitutional imperative and the granting or refusal of adjournment must have regard to this overriding imperative.

39. Courts are enjoined to ensure speed resolution of disputes and administer justice at the same time.

40. In *Savannah Development Co Ltd* CA No 120 of 1992, the Court of Appeal in reliance on the Judicial Committee of the Privy Council in *HK Shan & another v Osman Allu* (1946) 14 EACA 45 stated as follows;

> " The Court of Appeal will be very slow to interfere with the discretion of the trial judge on matters of adjournment of a trial but will not hesitate if the result of the adjournment is to defeat the rights of the parties or injustice to one or other of the parties. In the instant case, the appellant has been denied the right to prosecute its suit and the learned trial acting judge failed to consider the possibility of injustice or miscarriage of justice which might result to the appellant . . ."

41. The reasons being given by the Ag Judge (*supra*) were limited to the conduct of the Advocate (Mr Sheth) and although quite deplorable, he did not consider all the other necessary matters. The principles to be applied for granting or refusal of applications for adjournment were aptly summarised by the Judicial Committee of the Privy Council in *HK Shah and another v Osman Allu* (1946) 14 EACA 45 at 49 as follows;

> " The granting or refusal of an application for adjournment is, of course, a matter of discretion but the discretion must by exercised judicially. The authorities go to show that the elements to be taken into consideration are
>
> 1. the adequacy of reasons given for the application for adjournment;
> 2. how far, if at all, the other party is likely to be prejudiced by an adjournment; and
> 3. how far such other party can be suitably compensated by mulching the applicant in costs."

42. As submitted by the appellants and apparent from the foregoing, the granting or refusal of an adjournment is the exercise of judicial discretion and the discretion is exercised based on the reasons given and circumstances of case. (See *Kenya Commercial Bank Ltd v Titus Kilonzo Mutua t/a Mbwala Agencies and 16 others* (supra)).

43. I will now proceed to apply the foregoing propositions of law to the facts of the instant case.

44. The ruling by the learned magistrate is assailed on the premise the court did not appreciate that the key witness of the appellant was out of the country, with different time zones, loss of communication, and this was the application for adjournment.

45. As a diverted to elsewhere in this judgment, the hearing date on October 5, 2021 was taken by consent on July 7, 2021 and the appellant's witness was not available and the same state of affairs repeated itself of November 23, 2021.

46. But more significantly, the reasons given by the appellants appear to be generalities. The trial court was not told why the witness, the appellants style as 'key' could not be reached. The contention of different time zones is unconvincing in the era of internet and advanced forms of communication. Courts have as a matter of routine been hearing witnesses from different parts of the world as proceedings are virtual.

47. In fact, on November 23, 2021, Mr Waweru, holding brief for Kinyua told the court that it had been difficult to trace the 3rd respondent who was in the United States of America. Counsel merely stated that he would try to trace the respondent for the matter to "proceed next time". Counsel made no effort to explain the efforts expended to trace the witness or other attempts to be made with timelines.

48. The apparent casual treatment the appellants appear to have taken court processes may have informed the courts decision in declining the application for adjournment.

49. The foregoing notwithstanding, the court is alive to the fact that refusal to grant an adjournment by a court of law may as a consequence deny a litigant the right to be heard.

50. Needless to emphasize, the right to be heard is sacrosanct. This has been stated and restated in innumerable decisions.

51. In this case, the exercise of discretion by the court in the manner it did denied the appellants the right to be heard. The cogency of the reasons notwithstanding.

52. The right to be heard is now a constitutional imperative as provided by article 50 of *Constitution* and as emphasized in *Judicial Service Commission v Gladys Boss Shollei & another* (supra).

53. Finally, the court is guided by the sentiments of the Court of Appeal in *Japheth Pasi Kilonga & 8 others v Mombasa Autocare Ltd* (2015) eKLR where it underscored the need to balance efficiency and expediency with the right to be heard as follows;

> " Balance between the need for efficiency and expediency on the one hand and the need to accord all parties before it, a fair hearing, the court erred in failing to balance the scales of justice on the side of the appellants bearing in mind . . ."
>
> We conclude, for all these reasons, that the appellants were denied, without reasonable justification the right to a fair hearing by the learned judge. On that ground alone, this appeal must succeed and . . ."

54. For the foregoing reasons, the appeal is allowed in the following terms:

    a. The ruling delivered on November 23, 2021 with all other consequential orders are set aside.

    b. The appellants be allowed to call their witness in defence of the claim by the respondent.

    c. There shall be no order as to costs.

55. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF NOVEMBER, 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**