



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**APPEAL NO. 11 OF 2020**

**(Being an appeal from the entire Judgment and Decree of Hon. C.N Ndegwa, Senior Principal Magistrate, delivered on 30.04.2020 at Mombasa in Employment and Labour Relations Cause No. 200 of 2018 in the Chief Magistrates' Court at Mombasa, Samson Mwakenda Mangale and Another–Versus- Magot Freight Services Limited)**

**SAMSON MWAKENDA MANGALE.....1<sup>ST</sup> APPELLANT**

**BARRACK OPONDO ODHIAMBO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MAGOT FREIGHT SERVICES LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> April, 2021)

**JUDGMENT**

The appellant filed the memorandum of appeal on 14.05.2020 through C. Masinde & Company Advocates. The appeal is against the entire judgment delivered by Hon. C. N Ndegwa, Senior Principle Magistrate, on 30.04.2020. The grounds of appeal are as follows:

- 1) Whether the learned Magistrate erred in finding that there existed no employer-employee relationship between the claimants and the respondent.
- 2) The learned Magistrate wrongfully found that the claimants were not entitled to any award including salary arrears, leave arrears, and underpayment arrears.
- 3) The learned Magistrate erred in fact and in law by totally disregarding the appellants' evidence and submissions.
- 4) The learned Magistrate erred in fact and in law by considering factors which he ought not to have considered and disregarding factors which he ought to have considered.

The appellants filed the memorandum of claim on 31.08.2018. The 1<sup>st</sup> appellant alleged that he was employed by the respondent as a turn boy and the 2<sup>nd</sup> appellant alleged that he was employed as a driver. They alleged that their services were unlawfully terminated on 05.05.2018. Further, it was unfair because they were not given reasons for termination; they were not accorded a hearing; and the termination was contrary to section 40 of the Employment Act. They claimed against the respondent upon the headings of underpayment of salary; 12 months' compensation for unfair termination, notice pay; salary arrears; leave pay; and a certificate of service. They (as claimants) prayed for judgment against the respondent for:

- 1) A declaration that termination of the claimants' employment was unfair and unlawful.
- 2) The respondent to pay the claimants a sum of Kshs. 547, 221.00.
- 3) Costs of the claim plus interest thereon at court rates.
- 4) Certificate of service to be issued to the claimants.
- 5) Any other relief court deems fit to grant.

The respondent filed the response to the appellant's memorandum of claim dated 12.10.2018 and appointed Wachira King'angai & Company

Advocates to act in the suit. The respondent stated that it had never employed the appellants and therefore it could not have terminated their alleged contracts of employment. The respondent stated that it had employed drivers whose names appeared in its witness statement and further it had never employed turn boys to avoid the temptation of drivers allowing turn boys to attempt driving the respondent's trucks. Further, the respondent pleaded that it remitted statutory dues for its drivers and the 2<sup>nd</sup> appellant's name never featured in the lists of its drivers.

The trial Court found that the appellants had failed to show that the respondent had employed them. The trial Court stated thus, "**The central issue that the court has to determine is whether there was an employer-employee relationship between the Claimants and the Respondent. The Claimants have admitted that they were never paid by the Respondent and that they were paid by a person called Maureen Okatch. No evidence has been placed before court to prove that Claimants were employees of the Respondent. I also note that although the Claimants contend in the Memorandum of Claim that their services were terminated on 05.05.2018, their respective statements and evidence indicate that their services were terminated on 9<sup>th</sup> May, 2018. Their case is therefore at variance with their pleadings.**" The trial Court therefore found that the appellants had failed to prove their case and it was dismissed with costs.

This is a first appeal and the Court's duty is to re-evaluate the evidence before the trial Court and arrive at its own conclusion one way or the other.

Sections 2 of both the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 define "**employee**" and "**employer**". Employee means a person employed for wages or salary and includes an apprentice and indentured learner. Employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The Court considers that the definitions should be mapped against the appellants' claims and the parties' evidence.

It is submitted for the appellants as follows:

- a) The 1<sup>st</sup> appellant testified that he was employed by one Omondi who is the Director of the respondent company.
- b) The 2<sup>nd</sup> appellant testified that he was paid by Maurine Okatch who the respondent's witness Michael Okatch testified was his daughter.
- c) The respondent's witness testified that the lists of NSSF and NHIF remittance relied on could not be verifiable as they were not the evidence of NSSF and NHIF remittance.
- d) The respondent's witness failed to avail a witness involved in recruitment of staff while the witness confirmed he was not involved in recruitment.
- e) While testifying that his daughter Maurine Okatch had her own separate business, the respondent's witness failed to provide evidence to show that she had her own trucks and employees.
- f) While confirming that the respondent had muster roll records, the respondent's witness failed to exhibit the same.
- g) Under section 10 (6) and (7) of the Employment Act, 2007 the employer is obligated to keep written particulars about the contract of service for 5 years after the termination of employment and to bear the burden of proving or disproving an alleged term of employment.

From the submissions, it is concluded for the appellants that the appellants were in a contract of employment with the respondent.

For the respondent it is submitted as follows:

- a) Section 107, 108 and 109 of the Evidence Act Cap 80 places on the claimants the burden of proof of asserted facts upon the party asserting and therefore, the appellants bear the burden of proof of their assertion that they were employed by the respondent. It was their burden to exhibit such documents such as documents showing remission of statutory deductions such as PAYE, NHIF and NSSF but failed to do so. They also failed to exhibit or otherwise show evidence of payment of salary or wage.
- b) The respondent had discharged its burden in section 10 of the Employment Act by exhibiting the records on NHIF and NSSF for persons in its employment.
- c) In absence of a contract of service, the trial Court rightly found that the appellants were not entitled to remedies as prayed in the memorandum of claim.
- d) The trial Court gave sound reasons for the findings in the judgment and the appellants' evidence and submissions had been properly taken into account.
- e) The appeal should therefore be dismissed as no factors to be considered were disregarded and no irrelevant matters were considered by the trial court.

The Court has considered the parties' respective submissions and positions. The Court makes findings as follows:

1) As submitted for the respondent, it was an evidential burden upon the claimants to establish the fact of employment. In the Court's opinion, the relevant matters to establish the existence of the contract of service, in view of the statutory definition of employee and employer, would include evidence that the respondent paid the appellants' salary or wage; and that the appellants were recruited by the respondent or respondent's agent. The Court has reconsidered the memorandum of claim and it is clear that the appellants did not plead the precise dates of the alleged contracts of employment and did not plead the particulars of the recruitment process or circumstances. Their respective witness statements and oral evidence equally failed to provide details on the date of employment, the circumstances of recruitment, and details of how they used to get paid. After the respondent filed a memorandum of response denying the fact of employment, the appellants never filed a reply to the response to plead the particulars on formation of the alleged contract of service. As submitted for the respondent, the burden for the employer under section 10(7) of the Employment Act, 2007 to prove the terms and conditions of service in a contract of employment will accrue only where the fact of the contract of employment has been established or is not in dispute and the burden does not spread to burden to prove the formation or existence of the contract of service.

2) The Court has examined the appellants' evidence at the hearing before the trial Court. The 1<sup>st</sup> appellant testified that he was employed in 2016 by one Omondi. He does not state the relationship between Omondi and the respondent. He stated that he was employed in 2016 and he was a turn boy for the 2<sup>nd</sup> appellant who was the driver. The 2<sup>nd</sup> appellant testified that he was employed in March 2018. He testified he was interviewed by one Juma but he does not state the relationship between Juma and the respondent. The appellants failed to provide evidence on the registration number of the truck they may have been assigned and failed to show that any such truck belonged to the respondent. The 2<sup>nd</sup> appellant denied that he was employed by one Maurine Okatch. The Court has evaluated the evidence and finds that the 1<sup>st</sup> appellant failed to account for whoever was the driver he was assigned as a turn boy prior to the later employment of the 2<sup>nd</sup> appellant. The Court finds that the appellants have failed to give evidence to show that they were employed by the respondent or respondent's agent. They have also failed to show that they were assigned a motor vehicle belonging to the respondent – so that they have not shown that they worked for the respondent. The Court further finds that there is no evidence by the appellants to show that they were paid a salary or wage by the respondent or respondent's agent. The Court considers that even if the appellants needed certain documents from the respondent to prove their case, no such documents were identified and no notice to produce was served in that regard.

3) In view of the foregoing findings, the Court returns that the trial Court made a sound finding that no evidence had been placed before the trial Court to prove that the appellants were employees of the respondent. The Court upholds the trial Court's dismissal of the suit with costs to the respondent.

In conclusion, judgment is hereby entered for the respondent against the appellants for dismissal of the appeal with costs.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 23<sup>rd</sup> April, 2021.**

**BYRAM ONGAYA**

**JUDGE**