REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. E14 OF 2020

(Being an appeal from against the judgment by Hon. E.K. Makori, Chief Magistrate,

delivered on 09.12.2020 at Mombasa in CMELR Case No. 209 of 2019,

Victor Chonga Kamala –Versus- mepro Trade Limited and three others)

VICTOR CHONGA KALAMA.....CLAIMANT

- VERSUS -

MEPRO TRADE LIMITED.....1ST RESPONDENT

MOHAMED ADAN HASSAN.....2ND RESPONDENT

BARE FARAR.....3RD RESPONDENT

IBRAHIM MOHAMED.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd July, 2021)

JUDGMENT

The appellant filed the memorandum of appeal on 29.12.2020 throughMunee Katu & Associates Company and served it upon the respondents' advocates, Mogaka Omwenga & Mabeya Advocates. The appellant was dissatisfied with the whole judgment delivered by Hon. E.K. Makori, Chief Magistrate, delivered on 09.12.2020 upon the following grounds of appeal:

1) The learned trial Magistrate erred in law and fact by ignoring the appellant's Port Movement Pass issued by the respondents, the appellant's NSSF statement and Safaricom m-pesa statements and concluding that "**it will be difficult to deduce employer-employee relationship**".

2) The learned trial Magistrate erred in law and fact by ignoring the fact that it was the obligation of the respondents to cause a written contract between themselves and the appellant and which contract was to include all terms and conditions of employment.

3) The learned trial Magistrate erred in law and fact by upholding hear-say that there was a change of directorship of the 1st respondent without any production of the then CR-12 extracts from the registrar of companies and which changes if any as per the alleged minutes and share transfers then were to be filed at the Registrar of Companies, cause changes and new CR-12 extracts issued.

4) The learned trial Magistrate erred in law and fact by finding that the 1st respondent wound-up operations in the year 2017 without any production of the gazette notice from the Registrar of Companies.

5) The learned trial Magistrate erred in law and fact by finding that the 2nd, 3rd and 4th respondents who used to be the General Manager, Operations Manager and Marketing Manager respectively and paid the appellant's wages, not liable to pay the claimant's final dues.

6) The learned trial Magistrate erred in law and fact by finding that the 1st respondent wound-up operations in the years 2017 then raised up again and appointed the firm of Mogaka Omwenga & Mabeya Advocates to act on their behalf in the matter on 11.04.2019.

7) The learned trial Magistrate erred in law and fact by finding for the respondent against the weight of evidence and submissions.

8) The learned trial Magistrate erred in law by dismissing the appellant's prayers being:

a) A declaration that the appellant's termination by the respondent was procedurally unfair.

b) Notice.

c) Accrued pending leave.

d) Severance.

e) Maximum compensation for unfair termination.

f) Certificate of service.

g) Costs and interest from the date of filing the suit.

9) The appellant prays for orders:

a) The appeal be allowed and the judgment of the trial Court delivered on 09.12.2020 be set aside or over-turned.

b) The costs of the appeal be awarded to the appellant.

The parties filed their respective submissions. The parties fully relied on the submissions as filed. The Court has considered the material on record and makes findings as follows:

The **1st issue** is whether the trial Court erred or contradicted itself in finding thus, "**12. It will be difficult to deduce employer-employee relationship in this matter and how it calculated out, in terms of the terms and conditions of service. The claimant therefore has failed to prove his claim against 1st Respondent and 2nd – 4th Respondent as stated above his suit will be dismissed with costs to the Respondent in any event.**" This being a first appeal the Court has revisited the pleadings and the evidence. At paragraph 5 of the memorandum of claim the appellant stated that he was engaged by the respondent verbally on 02.09.2011 and in the position of Import and Export declaration officer. At paragraph 1 of the witness statement the appellant stated that he was engaged by the 1st respondent verbally on 02.09.2011 as Import and Export declaration officer at Kshs. 56, 000.00. His demand letter dated 05.03.2019 is addressed to the 1st respondent's directors. For the respondents, they denied the allegations of employment per paragraphs 2 and 3 of the response to the claim and at paragraph 4 stated that if employment existed, the termination was not unfair and he was fully paid. In cross-examination the claimant testified that he was employed by the 1st respondent who gave him the port gate pass as exhibited. The respondents' witness (RW) stated in his witness statement at paragraph 9 that the claimant (appellant) was employed by the 1st respondent from 2011 to 2016. RW also testified in court that the claimant was employed from 2011 to 2016. In view of that pleading and evidence, the Court finds that the 1st respondent employed the appellant from 02.09. 2011 and the contract of service ended on 30.03.2016 as per the claimant's case and as confirmed by RW's evidence. The port gate pass was issued to the claimant by the 1st respondent. The NSSF statement also showed the employer was the 1st respondent. The evidence was that nevertheless, the 1st respondent failed to issue a written contract of service per section 9 of the Employment Act, 2007. In view of sections 10 (7) and 74 of the Act, the respondent has not disproved the claimant's case that the monthly pay was Kshs. 56, 000.00 and the Court finds as much. To that extent the Court finds that grounds 1 and 2 of the memorandum of appeal will succeed.

Further, the Court finds that ground 3 will succeed because no evidence of registered change of directors of 1st respondent was exhibited before the trial Court. Similarly, at paragraph 11 of the judgment, the trial court found that the case was complicated by the fact that it was stated for the 1st respondent company was wound up. RW testified in-chief that the company changed business and then in re-exam stated the company wound-up. The fact of 1st respondent winding up was not pleaded and no evidence of the winding up was before Court (other than RW's empty assertion in that regard). As submitted for the respondents, it was true that the appellant testified that he did not know if the respondent existed or not (as at the time of hearing the suit) and RW testified that the 1st respondent had wound-up. The Court finds that as lamented for the appellant, there was no evidence as envisaged under the Companies Act about the winding up and further, the issue had not been pleaded – the only pleading being generally that the suit offended the provisions of the Companies Act and a preliminary objection would be raised and further, the evidence being that shareholding in the company changed. The Court returns grounds 4 and 6 of appeal will succeed – that the trial court erred in considering that the 1st respondent had wound up. Further, the appellant is successful in urging that the 1st respondent could not have wound-up and been in no existence in circumstances whereby it had appointed advocates to act in the suit.

To answer the **2nd issue**, the evidence was that the employer was the 1st respondent. The trial Court would only be faulted for finding no liability against the 1st respondent but was at no error in finding that the 2nd to 4th respondents had no employment relationship with the claimant. To that extent, the Court finds that as submitted for the respondents, ground five of appeal will collapse. Nevertheless, the appellant testified that 1st and 2nd respondents were in charge of the company. At paragraph 2 of the witness statement he stated that the 2nd, 3rd, and

4th respondents were the 1st respondent's managers who also acted as the directors. In oral testimony the appellant testified thus, "**2nd and 3rd Defendants are the ones who stopped me from further work**." In view of that evidence which was not rebutted by the 2nd to 4th respondents or by the1st respondent, the Court finds that the 2nd to 4th respondents were necessary parties to the suit for the just, expeditious, efficient, proportionate and complete determination of the suit and taking into account section 3 of the Employment and Labour Relations Court Act, 2011.

The **3rd issue** is whether the appeal should be allowed. The circumstances of termination as pleaded by the claimant are that on 30.03.2016 he was terminated un-procedurally and unfairly. In his evidence he stated that on 30.03.2016 he arrived at work and was told that there was no work. Further he testified that he was not given a report on what had happened and the 2nd to 3rd defendants are the ones who stopped him from further work. RW testified that the claimant stopped going to work and he was never stopped from working. RW further stated that the claimant left work on his own. RW in the witness statement stated that the appellant deserted duty. The respondents in the joint response to the memorandum of claim denied the fact of employment relationship and stated that if there was employment, he was terminated lawfully for gross misconduct, he was given a hearing, termination was fair and procedural, he was given reasons for termination, and his dues were paid. The Court finds that the evidence for the respondents that the claimant deserted duty was at variance with the defence that he was terminated on account of gross misconduct. The Court finds that the respondents' account cannot be trusted and on a balance of probability upholds the appellant's case and evidence that he was terminated by the 1st respondent orally on 30.03.2016 on account that there was no work. In the Court's findings the termination amounted to redundancy in terms of the Employment Act, 2007 and the provisions of section 40 applied but were breached by the respondent. The termination was unfair for want of due procedure as envisaged in section 40 of the Act and if there had been gross misconduct (as pleaded for the respondents) then the claimant was entitled to a notice and a hearing per section 41 of the Act but which was not done.

On the reliefs prayed for per memorandum of claim in the lower Court, the Court finds as follows:

a) The appellant is entitled to a declaration that he was un-procedurally and unfairly terminated from employment by the 1st respondent.

b) The 1st respondent to deliver a certificate of service per section 51 of the Employment Act.

c) The appellant is entitled to severance pay per section 40 (1) (g) of the Act thus **Kshs. 140, 000.00** as was claimed and prayed for.

d) Per section 28 (1) (b) of the Employment Act, the claimant established on a balance of probability that he was not accorded due leave and he is awarded Kshs. 205, 800.00 as claimed and prayed for. However, the same was a continuing injury ceasing on 30.03.2016 and the claimant filed suit long after lapsing of 12 months of limitation as prescribed in section 90 of the Act. The claim will fail as time barred.

e) One month pay in lieu of notice is awarded at **Kshs. 56, 000.00** as claimed and prayed for in view of provisions of sections 35 and 40 of the Act.

f) The Court has considered the factors in section 49 of the Employment Act. The 1st respondent terminated the contract of service abruptly with no notice and without preparing the claimant at all. The termination was in total disregard of safeguards in section 40 on redundancy and section 41 on due procedure in event of misconduct. The Court has considered that the claimant had served for only 5 years. To balance justice for parties, the claimant is warded 6 months for compensation for the unfair termination thus **Kshs.336, 000.00**.

In conclusion, the appeal is hereby determined and judgment entered for the appellant with orders:

1) The trial Court's judgment delivered on 09.12.2020 is set aside.

2) The declaration that the 1st respondent's termination of the appellant's employment on 30.03.2016 was procedurally unfair.

3) The 1st respondent to pay the appellant the sum of **Kshs. 532, 000.00** (less PAYE) by 01.09.2021 failing interest to be payable at court rates from the date of this judgment till full payment.

4) The 1st respondent to deliver the appellant's certificate of service in 30 days from the date of this judgment.

5) The 1st respondent to pay the appellant's costs of the appeal and the suit in the lower court and the respondents to bear own costs of the appeal and the proceedings in the lower court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 23RD JULY, 2021.

BYRAM ONGAYA

JUDGE