



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC APPEAL NO.EOO2 OF 2021

(Before D.K.N.Marete)

JULIUS MWANTI MUTAHL.....APPELLANT

VERSUS

BATIAN SECURITY COMPANY LIMITED.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 24th February, 2021. It comes out thus;

1. THAT the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim thereby occasioning a miscarriage of justice.
2. THAT the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim under the head of underpayment, service pay and housing allowance, thereby occasioning a miscarriage of justice.
3. THAT the learned Trial Magistrate erred in law and fact by applying the wrong principles of law by making a finding that the Appellant was asking the court to rewrite the employment contract for the parties, thereby occasioning a miscarriage of justice.
4. THAT the learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgment, thereby occasioning a miscarriage of justice.
5. THAT the learned Trial Magistrate failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.
6. THAT the learned Trial Magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a miscarriage of justice.

He prays as follows;

1. THAT the Appeal be allowed in its entirety.
2. THAT the Judgment of Honourable W.Kagendo, Chief Magistrate, delivered on 25th January, 2021, in Nyeri CMELRC No.43 of 2019, be set aside and/or varied.
3. THAT the Honourable Court grants any other/further reliefs as it may deem necessary.
4. THAT costs of this Appeal be provided for.

The Respondent opposes the appeal and prays that the same be dismissed with costs.

The matter came to court variously on the 10th March, 2021 when the parties decided on a disposal and determination by way of written submissions.

The issues for determination therefore are;

1. Whether the Appellant is entitled to the relief sought?
2. Who bears the costs of the Appeal?

The 1st issue for determination is whether the Appellant is entitled to the relief sought. The parties hold diametrically oppose positions on this.

The Appellant in his written submissions dated 17th May, 2021 reiterates his appeal. It is his case that the claim was dismissed for failure to prove the same on a balance of probability. This, he denies.

The Appellant further case is that this court is duty bound to re-analyse and re-evaluate the evidence adduced at the trial court with a view to reaching its findings and conclusions. However, the court should arrive to the fact that should only interfere with the finding of the trial court when the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching its findings.

It is the Appellant's further case that he had established a sound case of unlawful termination of employment where the Respondents had failed to comply with the mandatory provisions of the Constitution, the Employment Act, 2007 and the principles of natural justice in that;

- a. No notice to show cause was served upon the claimant to answer to any charges, if any.
- b. No hearing ever took place before the alleged decision to summarily dismiss the claimant was reached.
- c. Due process was thrown out of the window in the haste to summarily dismiss the claimant.

In further buttressing of his case, the Appellant seeks to rely on the authority of **Msagha vs Chief Justice & 7 others Nairobi HCMCA No.1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) (2006) 2 KLR 553** the court observed thus;

“...The court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...it is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material...”

The Appellant submits an abrogation and affront to section 48 of the Labour Institutions Act, 2007 as follows;

1. Notwithstanding anything contained in this Act or any other written law-
 - a. The minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;
 - b. If the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.
2. An employer who fails to-
 - a. Pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
 - b. Provide an employee with the conditions of employment prescribed in the order, commits an offence.

The Respondent's in her written submissions dated 20th May, 2021 submits that at page 76 of the Record of Appeal evidences a situation where the trial court analysed the evidence given by the claimant's on the circumstances of his alleged termination. The court noted that the claimant alleged to have been terminated from employment by, one, Mirriam, who was not an employee of the Respondent. She was instead a person who worked at the place where the claimant had been sent to guard. The court observed that the claimant did not follow up with the Respondent who was his employer to find out the actual position but instead left employment.

The court further agreed with the Respondent's evidence that indeed, the Appellant failed to report to work without any notice and never returned. The claimant also had earlier warnings on absenteeism. The trial court is therefore not at default. The defaulter is the appellant who was instrumental in terminating his employment and later turns out to claim compensation.

The Respondent further seeks to rely on the authority of **Pius Machafu Isindu v Lavington Security Guards Limited, Court of Appeal at Nairobi, Civil Appeal No.301 of 2015** where it was held that it was the burden of the appellant to prove that not only were his services terminated but also that this termination was unfair and lawful.

The Respondent further submits as follows;

We submit yet again as we submitted before the trial court that there was no way of the respondent hearing the appellant or even according him due process as it were, seeing that he had absconded duty. Procedural fairness can only be accorded a person who is available. The appellant was not available having absconded and we urge the court to uphold the finding that the appellant terminated his employment and unlawfully so, and disallow this ground of appeal.

The Respondent's case overwhelms that of the Appellant. The appeal must fail. This is because the Appellant has not in any way demonstrated a case of failure of observance of principle on the part of the trial court.

The Respondent has ably demonstrated a case where the trial court went out of its way in analysing and evaluating the case and evidence of the appellant in coming to its conclusion. The Appellant is therefore only in denial. The appeal is not sustainable.

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

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2021

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mrs.Magua instructed by Magua & Mbatha advocates for the Appellant.
2. Mr. Kimunya instructed by Robert Muturi Kimunya Advocates for the Respondent.