



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CIVIL APPEAL NO. E076 OF 2020**

**MOSES NJUKI NGETHE.....APPELLANT**

**VERSUS**

**MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL**

**GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The appeal is made against the judgment of Hon. D.M. Kivuti, Senior Resident Magistrate delivered on 9/10/2020. The grounds of Appeal are as follows:-

1. **THAT** the learned Magistrate misdirected himself in law in failing to consider the evidence in Chief of both the Appellant and Respondents' witness in his judgment.
2. **THAT** the learned magistrate erred in law and fact in failure to capture crucial evidence of the parties in his judgment and thus denies the appellant an opportunity to challenge the evidence tendered by Respondents' witness and raise plausible grounds of Appeal before this Honourable Court.
3. **THAT** the learned Magistrate erred in law and fact in failure to protect the rights of the appellant herein provided under Article 50 of the Constitution of Kenya, 2010 by making a finding that the appellant underwent disciplinary hearing.
4. **THAT** the learned Magistrate erred in law and fact in failure to reproduce the evidence of the parties taken before the trial Magistrate Hon. I. Orange, Senior Resident Magistrate and thus denies the appellant an opportunity to challenge the evidence tendered by Respondent's witness and to appreciate the basis of dismissal of his claim.
5. **THAT** the learned Magistrate misdirected himself in failing to find that the appellant was wrongly dismissed as he was incapacitated to attend work place due to mental illness which issue was supported by medical documents submitted to the Court by the appellant.
6. **THAT** the learned Magistrate erred in law and fact in failing to consider appellant's pleadings and plausible evidence tendered by the appellant before the trial Magistrate and as such occasioned miscarriage of justice to the appellant.

2. The parties filed written submissions. This being a first appeal, this Court is guided by the decision in **Selle –vs- Associated Motor Boat Company Limited [1968] E.A 123** where **Sir Clement De Lestang** stated:-

**“This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.**

**However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances on probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally,"**

3. At the hearing according to the submissions by both parties, the suit proceeded by way of oral evidence where the claimant testified in person and relied on his witness statement dated 15<sup>th</sup> March, 2019 and filed on 21<sup>st</sup> March, 2019. The respondent on the other hand called one witness Mr. Harold Avisia from the Public Service Commission who testified on his statement dated 4<sup>th</sup> July, 2019 and filed on 18<sup>th</sup> July, 2019.

4. The learned trial magistrate Hon. D.M. Kivuti in his judgment dated 9/10/2020 did not set out in any detail or summary the testimony by the claimant and that by Mr. Herold Avisia. Indeed, the trial magistrate does not allude to any oral testimony by the parties at all.

5. The judgment by the Court lacks any and or any credible consideration of the evidence by the parties and the decision arrived at by the learned magistrate lacks any logical support from factual analysis of facts before him.

6. Accordingly, this Court finds that the proceedings in the lower Court amounted to a mistrial and the Court hereby declare so and remit the suit for re-hearing *denovo* before another magistrate other than Hon. D.M. Kivuti and Hon. Orengo.

7. Costs in the cause.

8. It is so ordered.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Moses Njuki – appellant in person

Ekale – Court clerk