



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. E062 OF 2021

(Being an appeal from the Judgment of the Hon. M. Nabibya, Principal Magistrate,

delivered on 12.08.2021 in CM, ELRC No. 927 of 2019 at Mombasa)

K.B. SANGHANI & SONS.....APPELLANT

- VERSUS -

PETER IDEWA PAPA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th November, 2021)

JUDGMENT

The appellant filed the memorandum of appeal on 23.08.2021 through Chamwada & Company Advocates. The appellant appeals against the trial Court's judgment delivered on 12.08.2021 (by Hon. M. Nabibya, learned Principal Magistrate) and upon the grounds that she erred in law and fact by:

1. Making a presumptive conclusion that the respondent could have been terminated verbally yet the respondent had failed to plead and adduce evidence of who exactly terminated him, what exactly was said, the time when and place where he was verbally terminated.
2. Concluding that the respondent did not call any independent eye witness to corroborate his assertion of verbal termination.
3. Shifting the burden of proof of the claim of termination on the appellant and finding that the claim had been proved by default of the appellant not proving a letter written to the respondent to explain his whereabouts or a letter notifying labour offices of the respondent's disappearance.
4. Dismissing the appellant's defence of desertion in its entirety without taking into consideration the factors that the respondent deserted duty without any explanation; the appellant had made attempts to reach out to the respondent to no avail; after desertion the respondent never returned at work; and, as a result of desertion the appellant's contract with Bamburi Cement – Vpingo quarry was subsequently terminated.
5. Finding that the respondent was employed as a medium sized driver working in Mombasa yet the evidence on record was that the respondent was a saloon car driver working in Vipingo – Kilifi County.
6. Finding that the respondent was underpaid based on an erroneous Regulation of Wages (General) (Amendment) Order 2018 that was inapplicable in the circumstances.
7. Overlooking the principle that parties are bound by own pleadings and awarding Kshs. 15, 000.00 for notice pay instead of the pleaded Kshs. 7, 300.00; adopting a minimum wage of Kshs.23, 039 which was unjust and way beyond what the respondent had pleaded being Kshs.n18, 319.00 and which was still above the minimum wage for Vipingo; and calculating and awarding various claims of underpayment for each year worked yet the respondent had pleaded a general claim of underpayment.
8. Finding that the respondent had proved his claim of leave pay by default of the appellant failing to provide employment records.
9. Considering extraneous factors that were unsupported by evidence thereby by arriving at an unjust decision.

The appellant prayed for Orders:

- a. The Honourable Court be pleased to allow the appeal with costs to the appellant.
- b. The Honourable Court to set aside the Judgment dated 12.08.2021 and dismiss the claimant's suit with costs.

The appellant filed the submissions on the appeal. Mukongolo & Company Advocates were served for the respondent and they failed to file submissions as directed. The Court has considered all the material on record and makes findings as follow.

First, as submitted for the appellant this is a first appeal and the guiding principles on the Court's role in the appeal is as was held in **Selle – Versus – Associated Motor Boat Co. of Kenya & Others (1968) EA 123** that an appeal from a trial court is by way of a re-trial and the principles upon which the Court acts (as of first appeal) are that the 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 witnesses and should make due allowance in that respect. Further, the Court is not bound 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 or probabilities materially to estimate the evidence or the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally per **Abdul Hameed Saif –Versus – Ali Mohamed Sholan (1955)22 EACA 270**. The Court finds accordingly.

Second, the appellant has reduced the grounds of appeal into three main issues:

1. Whether the respondent proved verbal termination.
2. Whether the respondent absconded from duty,
3. Whether the respondent is entitled to remedies sought (awarded).

Third, for the **1st issue and 2nd issue** the respondent pleaded at paragraph 5 of the memorandum of claim thus, **“5. The claimant was verbally terminated without justifiable reason or notice as per Section 41(1) of the Employment Act, an employee is to be given a fair hearing as well as access of charges levelled against him before termination and where this apply a notice must be issued under the terms and conditions of Employment.”** The respondent does not plead the date of termination and the particulars of the alleged verbal termination. No evidence of the date of verbal termination and the evidence of the persons involved and the venue or other circumstances were stated in the respondent's witness statement filed on 29.10.2019. The demand letter by the respondent's counsel Mukongolo & Company Advocates dated 21.08.2019 allege that the respondent worked for the respondent from January 2015 to May 2019 when his services were verbally terminated. The appellant in the memorandum of response dated 04.12.2019 at paragraph 3 stated that the appellant employed the respondent as a saloon car driver in January 2015 to May 2019 at Kshs. 15, 000.00 per month. At paragraph 4 the appellant stated that the respondent absconded duty without valid reason and notice effective towards the end of May 2019. The appellant denied that the claimant had been terminated and the claims of breach of the Act and Kshs. 667, 636.00 was misplaced. The appellant's witness was Boaz Tsuma Randu and in his witness statement filed on 04.12.2019 and dated 03.12.2019 stated he was the respondent's supervisor and the respondent had absconded duty towards the end of May 2019 without any valid reason. In testimony before the Court the respondent testified that May 2019 was his last day at work; his documents did not show the date of termination; June, July, August 2019 he was not on duty; and he had not stated the person who told him to leave the employment or given evidence. The appellant's witness testified that in June, July and August the respondent was never on duty; he was paid last up to 31.05.2019; the respondent had left employment by himself, the witness had called him on phone but the respondent had failed to respond; and he left employment without notice and he never came back at all or for terminal dues. The trial Court found in the judgment as follows, **“However, the defendant failed to adduce evidence that after claimant left, any letter was written to him and the labour offices informed. There was no chance given for him to explain his whereabouts through his last known address. I therefore concluded that he could have been terminated verbally as he said and no notice pay paid.”** The Court finds that as submitted for the appellant, that finding was presumptive and speculative as it was inconsistent with the respondent's pleading that the termination was verbal and the respondent's evidence that he did not provide evidence of the person who terminated him verbally. That the respondent testified that he did not provide evidence of the person who terminated him verbally is found to be inconsistent with the pleading of verbal termination. The Court upholds the appellant's submission that the trial Court erred in that regard. The Court also upholds the appellant's submission that the respondent's pleading and evidence was credible and coherent that the claimant had by himself absconded duty without reason and notice – essentially constructively resigned from employment. The Court finds that there was no verbal termination as had been alleged and claimed for the respondent.

Fourth, on the issue of remedies, the Court finds as follows:

- a. The Court finds that as per the appellant's case, the exhibited respondent's payslip for May 2019 showed that his consolidated monthly pay was Kshs. 13, 000.00 and the trial Court while finding as such, erred when it proceeded to state, **“With the above, I will adopt Kshs. 15, 000/= as his monthly earnings and I proceed to award the figure in lieu of notice.”**
- b. As there was no termination but the respondent walked away from employment, the award of notice-pay and compensation for unfair termination were made in error and are liable to being set aside. The Court also finds that the trial Court erred in terms of ground 7 of appeal by disregarding the figures pleaded for the respondent.
- c. The appellant's submission that underpayment awarded for 30 months Kshs.330, 585.00 be set aside is upheld. As submitted the respondent was paid a gross monthly salary of Kshs.13, 000.00 which was above the Kshs. 12, 182.25 for Kilifi County (Vipingo) and as per the Regulation of Wages (General) (Amendment) Order, 2013, 2015 and 2017. Further as submitted the trial Court erred in adopting minimum wage for a driver of medium size vehicle in Mombasa whereas the respondent worked at Vipingo quarry in Kilifi County and further, the trial Court erred in calculating underpayment for the entire of 2019 whereas the respondent had served only up to May 2019.

d. On pay in lieu of annual leave, it is submitted that the award ignored appellant's evidence that the respondent had taken annual leave and the last payslip showed no pending leave days. The Court has perused the pay slip and it states leave payment as a deduction 0 – and it is not clear the effect was that the respondent had nil leave days or that he had no negative leave days to justify a deduction. The claimant in his witness statement and the testimony in Court did not offer evidence on the claim for leave. The appellant's witness testified that the respondent used to take leave. In absence of the claimant's evidence on leave, the Court finds that on a balance of probability, the claimant took leave and the trial Court erred in awarding leave pay and upon an erroneous base of monthly pay of Kshs. 15,000.00.

In conclusion the appeal is hereby determined in favour of the appellant and against the respondent with orders:

1. The appeal is allowed with costs to the appellant.

2. The Judgment dated 12.08.2021, the decree therefrom and all processes flowing thereof are set aside and the claimant's suit is hereby dismissed with costs in favour of the appellant.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 26TH NOVEMBER, 2021

BYRAM ONGAYA

JUDGE