



**Chariman/Board of Management Nyeri-German Child Support (CBO) v Gitau  
(Appeal 2 of 2019) [2019] KEELRC 2618 (KLR) (17 December 2019) (Judgment)**

Neutral citation: [2019] KEELRC 2618 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
APPEAL 2 OF 2019  
NZIOKI WA MAKAU, J  
DECEMBER 17, 2019**

**BETWEEN**

**CHARIMAN/BOARD OF MANAGEMENT NYERI-GERMAN CHILD  
SUPPORT (CBO) ..... APPELLANT**

**AND**

**RACHAEL WANJIRU GITAU ..... RESPONDENT**

**JUDGMENT**

1. The Appeal before me is against the decision of the Learned Trial Magistrate Hon. Ruth Kefa, Resident Magistrate Nyeri delivered on 24<sup>th</sup> June 2019. In the appeal, the Appellant raises 5 grounds of appeal to wit:-
  - i. That the trial Magistrate erred in fact and in law by taking into account irrelevant considerations to impute the existence of an employment relationship between the parties herein.
  - ii. That the trial Magistrate erred in fact and in law and completely misapprehended the principles of evidence by making a finding that the Respondent was entitled to rest days worked and leave days not utilized amounting to Kshs. 288,500/- without any shred, iota or grain of evidence to prove the assertion.
  - iii. That the trial Magistrate erred in law and in fact by awarding the Respondent one month's salary in lieu of notice and unpaid salary for August 2018 wherein the Respondent left employment on her own volition, the Appellant not having issued any termination notice and in any event the Respondent not having pleaded constructive dismissal.
  - iv. That the trial Magistrate erred in fact and in law and completely misapprehended the principles governing an award of general damages for unfair termination.



- v. That the trial Magistrate erred in law and in fact by failing to take into account the Appellant's submissions and the binding authorities cited by the Appellant.

The Appellant thus sought in the Appeal to have the decision of the Learned Trial Magistrate be set aside in its entirety and the judgment and decree be varied and/or set aside. The Appellant sought to be awarded the costs of the appeal.

2. The Respondent did not file any documents showing her opposition to the Appeal however both the Appellant and the Respondent filed submissions for and against the Appeal. In the submissions filed, the Appellant submitted that in its defence to the suit it averred that there was no employee-employer relationship. It was submitted that in the trial before the lower court the Respondent (Claimant before the Learned Magistrate) was shown the contract she had signed which did not have the Respondent's signature. The Appellant submitted that its witness Silas Njeru testified that the customs and usage of the Appellant was that the employer must countersign the contract. The Appellant submitted that the Respondent was not an employee and that she had been listed as a director and that did not make her an employee. The Appellant submitted that the evidence before the lower court was that the Respondent was a daughter of the then chairman of the Respondent and was at times seen driving the Appellant's vehicle. The Appellant submitted that it was at a meeting where the Respondent's assault of a minor was to be discussed that she dropped the demand letter while in the company of her lawyer. The Appellant submitted that an analysis of the law and evidence was that the Respondent was not an employee as there existed no valid contract creating the employee-employer relationship. The Appellant relied on the cases of *Ol Pajeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR and submitted that the trial Magistrate did not attempt to justify why she awarded the maximum compensation for 12 months. The Appellant submitted that should the court impute existence of an employment relationship there is evidence the Appellant at least attempted to accord the Respondent a hearing as it convened a board meeting on 10<sup>th</sup> August 2018 and one of the agendas was to discuss the Respondent's conduct. The Appellant submitted that having left of her own accord there was no termination and the Respondent was not entitled to any damages under this head. The Appellant urged the appeal be allowed as prayed.
3. The court as the first court on appeal, is bound to consider the evidence and pleadings of parties while warning myself that I never saw nor heard the witnesses and evaluate the evidence accordingly and if in agreement with the finding of the Learned trial Magistrate uphold the decision and where there is basis for departure even set aside the decision. In the matter before me, there was a denial of an employee-employer relationship yet the evidence adduced contradicts the Appellant on this. Its own pleadings in the lower Court it avails minutes of a board meeting where the Claimant was listed as a member and the agenda was to discuss child abuse allegations against her inter alia. It is unfathomable how a Board would discuss the child abuse allegations against a person who was not a member of staff as the Board should have taken the matter to the Police if the abuser was not its employee. It beats logic to conduct a disciplinary hearing for a stranger. In addition, the Claimant had a contract from the Respondent that she signed as well as proof of NSSF and NHIF deductions which are standard for employees. This settles the issue of employment. As the Learned Trial Magistrate did not consider anything outside of the evidence adduced and the pleadings as well as the law the decision of the lower Court is upheld. As to quantum, the Appellant sought a variation and/or setting aside. As the Respondent was not accorded a hearing by her employer before termination and having worked for the Appellant for over 3 years the award of the maximum 12 months compensation was not excessive or unreasonable. I also uphold the quantum of damages granted by the Trial Court. In sum the appeal fails and is dismissed albeit with no order as to costs since the Respondent did not participate.

It is so ordered.



**DATED AND DELIVERED AT NYERI THIS 17<sup>TH</sup> DAY OF DECEMBER 2019.**

**Nzioki wa Makau**

**JUDGE**

