Kangethe t/a Nakubreeze Travellers Inn v David (Civil Appeal 332 of 2019) [2024] KECA 932 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 932 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 332 OF 2019

MA WARSAME, PO KIAGE & FA OCHIENG, JJA

JULY 26, 2024

BETWEEN

JOSEPH NGIGE KANGETHE T/A NAKUBREEZE TRAVELLERS INN ..... APPELLANT

AND

DORCAS NDANU DAVID ..... RESPONDENT

(Being an appeal against the judgment and decree of the Employment and Labour Relations Court at Nakuru (Hon. Lady Justice Monica Mbaru) delivered on 17th October 2019 in ELRC Cause No.237 of 2016)

JUDGMENT

1. The appeal emanates from a verbal employment contract between the appellant and the respondent. The respondent was employed by the appellant as a waitress in May 2014 and promoted to a cashier in February 2016, a position she held until 4th February 2016 when she was orally terminated.

2. The respondent approached the Employment and Labour Relations Court and claimed that she was underpaid under the Regulation of Wages, for working overtime and during public holidays, that she did not proceed for leave for one year 10 months and that her NSSF contributions were not made by the employer. She also sought gratuity and compensation for unfair termination.

3. The appellant refuted the claim, maintaining that they had CCTV footage of the respondent receiving money without receipting it, resulting in her arrest by the police following the filing of a report after which she absconded duty. The appellant also insisted that the respondent was given a chance to explain herself but failed to do so.

4. After hearing the claim, the Employment and Labour Relations Court (ELRC) did not find any good cause to sustain the claim for unfair termination and compensation, having been satisfied that the respondent did not return to work after her arrest and release by police. The ELRC nevertheless held

that the respondent was entitled to underpayment of Shs.219,000.00; overtime of Shs.150,752.60; leave payoff Shs.36,443.80 and pay for January 2016 of Shs.23,262 and 4 days in February 2016 for Shs,3,101.60 This was based on the remuneration set out in the Regulation of Wages Regulations, the court having found that they were applicable to the circumstances of the claim.

5. In his appeal before this Court, the appellant faults the trial court for finding that the respondent was being underpaid, award of overtime, finding the respondent was entitled to annual leave and for finding that the respondent was entitled to pay for January 2016 and 4 days in February 2016. The appellant articulates its position through submissions dated 10th March 2023.

6. On her part, the respondent filed submissions dated 15th March 2023. The respondent agrees with the judgment made by the ELRC and submits that the same was properly informed, right and sound both in fact and law. The respondent frames five issues for determination. Mainly, the respondent's issues are; whether the appeal should be dismissed for want of prosecution; whether the learned Judge erred in her finding on the respondent's underpayment; whether the award of overtime, annual leave and payment in January was justified without evidence; and whether the trial Judge properly evaluated the evidence placed before court.

7. Without the need to rehash the submissions and taking into account the positions adopted by the parties respectively, the following issues suffice for the apt determination of the appeal:

   a. Whether the appeal should be dismissed for want of prosecution.

   b. Whether the respondent is entitled to the awards of underpayment, overtime, annual leave, payment for the month January 2016 and for 4 days in the month of February 2016

   c. The appropriate reliefs to be granted.

8. As first appellate court, the mandate of the Court is to re-evaluate the evidence and make our own findings on those made by the trial court. This is the import of Rule 31 of the Court of Appeal Rules 2022. The Court's appellate jurisdiction is delineated under Article 164(3) of *the Constitution* and section 3(1) of the Appellate Jurisdiction. However, we remain cautious not to interfere with the trial Judge's findings unless we are satisfied the same was either unsupported by evidence or was outrightly erroneous.

a Whether the appeal should be dismissed for want of prosecution.

9. The respondent hinges her argument in this regard to the provisions of Order 42 Rules 11 and 13 of the Civil Procedure Rules requiring an appellant to within thirty days of filing the appeal cause the same to be listed for directions before the Judge under section 79B of the *Civil Procedure Act*. She submits that the appellants have failed to invoke these provisions and the appeal should be dismissed under the scenarios set out in Order 42 Rule 35 of the Civil Procedure Rules.

10. In Rafiki Enterprises Limited vs. Kingsway Tyres & Automart Limited [1996] eKLR, the Court was emphatic that the provisions of the *Civil Procedure Act* do not apply to proceedings before it. The Court stated:

> "The provisions of the *Civil Procedure Act* do not apply to the Court of Appeal and the reason(s) for that is not difficult to understand. The Court of Appeal has its own rules of procedure and those rules cater for virtually all situations which may arise during the hearing of an appeal. It is accordingly not necessary for the Court of Appeal to have recourse to the provisions of the *Civil Procedure Act* and the rules made thereunder..."

11. With respect, this position as articulated by the respondent is unsustainable for various reasons. First, the applicable rules for this Court are the Court of Appeal Rules made under the *Appellate Jurisdiction Act* and not the Civil Procedure Rules made under the *Civil Procedure Act*. Secondly, unlike what is alluded to by the respondent, it is the Court that sets down the appeal for disposal, first through the Deputy Registrar for case management and then to the Court for disposal as the Court is in charge of its own diary. Third, the Court's rules contemplate dismissal for grounds other than those raised by the respondent. For instance, a dismissal is warranted on account of non- attendance or non-appearance at the hearing under Rule 58 of the Court of Appeal Rules, 2022.

12. Where an essential step in the proceedings is not taken, an application has to be specifically made for the striking out of the appeal. This by no means is expected to be raised by way of submissions as the respondent seeks to do. Finally, it is also trite that applications for striking out the appeal are not handled by a single judge. The prayer to dismiss the appeal for want of prosecution therefore inevitably fails on the basis of the foregoing. At any rate, at no time did the issues raised in this regard by the respondent arise during case management before the Hon. Deputy Registrar of the Court.

b) Whether the respondent is entitled to the awards of underpayment, overtime, annual leave, payment for the month January 2016 and for 4 days in the month of February 2016.

13. The main consideration under this ground is the evidence adduced before court. At the onset it is not lost to us that on a balance of probabilities, the ELRC did not find merit in the claim for unfair termination of employment and compensation. This finding was not appealed against by the respondent.

14. It is also clear to us that the employment contract was verbal in nature. The *Employment Act* in section 8 recognizes this type of contract without imposing onerous terms to the employer. Thus, making an adverse inference as against the appellant cannot merely be on account of the verbal nature of the contract.

15. On underpayment, credence has to be given to the contract whose terms were unequivocal. The Regulation of Wages provisions continue to be in place and the respondent has not demonstrated why she never invoked the provisions while in the course of employment. While her claim could be founded, for her to wait until she is out of employment and then put a spirited effort on the basis of underpayment is not only mischievous but also an afterthought.

16. In the same breadth, while it is the employer who is bestowed to have a record under section 74 of the *Employment Act*, it is a cardinal principle of litigation, as cemented in legal parlance and legislatively engraved, that the burden of proof rests on the person that makes an allegation. No evidence was led to demonstrate that the respondent made attempts to go on annual leave and the same was declined.

17. On overtime, at the hearing, counsel for the respondent conceded that indeed the respondent worked between 8am to 6pm. The record also indicates that the respondent took her one-hour break over lunch time. We take it that by making such a concession, the claim on overtime fails and the ELRC findings in this regard are for setting aside.

18. The ELRC having found that the termination of employment was unfair, it is apparent that the respondent abandoned the employment. Section 35 of the *Employment Act* is instructive on termination notice. In the absence of a written contract, where the wages or salary is paid periodically at intervals of or exceeding one month, a contract is terminable by either party at the end of twenty-eight days next following the giving of notice in writing. The respondent not having issued any such notice, it is reasonable to infer that she should have forfeited an equivalent of one month's salary in lieu

of notice. This is more so on the basis that the termination of employment was at the instance of the respondent. This leaves the claim for payment of one month's salary superfluous. The orders made by the ELRC on this issue are for setting aside.

19. In our view, the findings by the trial court were somewhat contradictory. The court having made a finding that the termination was fair, it nevertheless granted the respondent reliefs against the appellant. The court largely made extrapolations by adopting the respondent's claim without regard to the contract, which the respondent, conceded was already in place albeit orally. It was not for the court to infer an overpayment and then proceed on the basis of the revised remuneration to tabulate the award made. In doing so and bearing in mind the fact that the respondent was not the only employee in that section, the revised remuneration would create a situation of discriminatory practice. A better approach would have been to, say, refer the issue of remuneration of employees by the appellant to the labour office for rationalization, if at all necessary. That was not done by the trial court.

20. It is clear beyond doubt that the respondent's hand was found in the till, captured by the CCTV footage, a report made to the police leading to her arrest. Thereafter, she absconded from duty and failed to submit to the disciplinary process of the appellant. As a result of her conduct, the trial court did not find merit in her claim for unfair termination but proceeded to award all heads in her claim. Such conduct must mean something, that a person who allegedly committed a criminal offence of theft, upon absconding from duty, makes a claim for underpayment, overtime, leave off and pay for January, 2016 and four days in February, 2016. We think such a person is undeserving of any claim against the appellant. As we have said earlier, the whole claim is speculative and an afterthought. The trial court should have seen that claim was unjustified and unproven. We have subjected the evidence by the parties through our judicial lenses and arrive at the conclusion that the appeal is for allowing. Had the trial court used her judicial lenses properly, she would have arrived at a similar decision as ours.

21. It is important to appreciate that the respondent testified during the hearing but did not produce any evidence to substantiate her claim under any of the heads. From the evidence of the appellant, the respondent worked at the Hotel within the stipulated time as per her employment contract. Nowhere did the respondent show that she was subjected to unfair labour practice. It is not the law that every allegation put forward by a party be accepted as the gospel truth. It is incumbent upon the party alleging to demonstrate that his grievance/cause of action is genuine and prove the same on a balance of probabilities. Without any evidence to support the various leading on her cause of action, the respondent cannot expect the court to arbitrarily accede to her claim.

22. Here is a case where the trial court without an iota of evidence was quick to grant the prayers sought by the respondent. As is often said, the court is an arbiter between parties. It is therefore required to weigh and balance the evidence tendered by the parties and give justice to the deserving party. That is not what happened. Having addressed our mind to all the material, evidence and the law, we think the trial court made a grave error in awarding the respondent reliefs, which were not proved to the required standard. More so when it is the respondent who is the author of her own misplaced grievances. In short, the claim against the appellant was unjustified and the trial court's judgment cannot be supported.

23. Having come to the above conclusions, we are persuaded that the appeal should be allowed. Appreciating that this was an employment matter, we find it unnecessary to burden either side with costs and make no order as to costs before the Employment and Labour Relations Court or before this Court.

24. Consequently, we make the following orders:

    a. The appeal is allowed.

b. The judgment entered in Nakuru ELRC Cause No.237 of 2016 on 17th October 2019 be and is hereby set aside.

c. No order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

P. O. KIAGE

..... JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR