Chilodi v China City Company Limited (Appeal E002 of 2024)
[2024] KEELRC 1485 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1485 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

APPEAL E002 OF 2024

M MBARŨ, J

MAY 16, 2024

BETWEEN

SAHA MGALLA CHILODI ..... APPELLANT

AND

CHINA CITY COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgment cause No. 7 of 2020 of Hon. M. S. Kimani delivered on 10 January 2024 in Mariakani Magistrate's Court)

JUDGMENT

1. The appeal arises from the judgment delivered on 10 January 2024 in Mariakani Magistrate's Court ELRC No.7 of 2020. The appellant is seeking orders that the trial court judgment be reviewed with an order that there was the termination of employment that was unprocedural and substantively unfair and in the alternative, the judgement be set aside and there be payment of terminal dues with costs.

2. The appeal arose from a claim filed by the appellant on the grounds that the appellant was employed by the respondent from 15 January 2018 as a machine operator (mixer). On 13 September 2019, his employment was terminated without due process. At the time he was earning a wage of Ksh.12, 000 per month. He reported to work and was told there was no work. He demanded to be paid his terminal dues but the respondent refused and instead, he was told to write a resignation letter which he did. There was no payment of terminal dues. He claimed that he attended work during public holidays without compensation and claimed Ksh.28, 389 there were underpayments of wages amounting to Ksh.58, 320. He claimed there was involuntary and constructive dismissal and claimed the following dues;

3.

    a. Notice pay Ksh.14,680.90;

b. Service pay for a year of Ksh.7,325.45;

c. Underpayments Ksh.58,320;

d. Leave pay ksh.14,650.45;

e. 12 months compensation Ksh.175,810.80;

f. Public holidays Ksh.28,389;

g. Costs.

4. In response, the respondent admitted that the appellant was employed as a casual labourer in the crusher department and dependent on the availability of work. Work was not continuous and there were long breaks. There was no contract of employment for the appellant to claim any benefits but on 13 September 2019, the appellant tendered his resignation which was accepted. The gross salary was not Ksh.12, 000 as alleged but Ksh.22, 000 per month. It was an agreed term of employment that termination of employment would be upon one month's notice but the appellant tendered his resignation without notice. At the end of employment, all terminal dues were paid in full. There was pay in lieu of notice hence the claim for leave pay is not justified. During all public holidays, the appellant was paid under the Minimum Wage Orders. Upon voluntary resignation, the claims made are not justified.

5. The learned magistrate in the judgment held that the appellant had failed to produce evidence of employment as required under Section 107(1) of the *Evidence Act*, that he failed to prove his case under the provisions of Section 43, 45(2) and 45(5) of the *Employment Act*, 2007 (the Act), the claim was dismissed with costs.

6. Aggrieved, the appellant filed this appeal on grounds that it was an error to dismiss his claim despite the trial court making a finding that his employment had converted from casual to term contract hence regulated under Section 35 of the Act. The contention that he was constrained to resign to receive terminal dues was not supported by evidence and was in error since the appellant resigned due to constructive dismissal.

7. The respondent amended its response but the trial court failed to address his amended claim. Employment termination was unprocedural and substantively unfair but the trial court failed to address such matter and further that a crusher is similar to a machine operator. Had the evidence been considered in its totality, there ought to be a different finding hence the appeal should be allowed.

8. Both parties attended court on 13 March 2024 for hearing directions and agreed to address the appeal by way of written submissions.

9. The appellant submitted that his employment converted from casual to term contract which fact was acknowledged by the trial court that under Section 37 of the *Employment Act*, 2007 (the Act) his employment had become term employment. In this regard, under Section 35(1) of the Act, he was entitled to notice or payment in lieu thereof.

10. The appellant's evidence before the trial court was that on 13 September 2019, he reported to work but was told there was no work and his services were terminated. There was no reason given, hearing or payment of terminal dues.

11. The appellant submitted that he was coerced to resign to be paid his terminal dues. Upon termination of employment, the appellant pleaded for payment of his due wages but these court not be processed until he tendered a resignation. This was not voluntary. In the case of William Njoroge v Kenol Kobil

Limited [2022] eKLR the court held that there was constructive dismissal. The employee had relocated to Rwanda with his whole family to pursue his career and could not have woken up one morning to tender a resignation. This was highly unlikely but forced. In this case, the appellant was not taken through the due process of Section 41 of the Act resulting in unfair termination of his employment and hence entitled to compensation.

12. The appellant submitted that the trial court failed to take into account the amended claim despite the same having been filed. In the case of D. T. Dobbie & Company Case No.370 of 1978, the court held that no suit should be summarily dismissed unless it appears so hopeless and plain discloses no reasonable cause of action and is weak beyond redemption. The appellant testified in support of his case and relied on his pleadings which were not considered in the judgment.

13. The appellant submitted that there was unlawful and unprocedural termination of his employment by the respondent and he is entitled to compensation. The respondent called Mwanaharamu Juma as the witness and upon cross-examination, he confirmed that the appellant in his resignation letter had given reasons for his action which was not disputed. Under Section 43 of the Act, the respondent had the burden to prove reasons for the termination of employment as held in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR. The appeal is with merit and should be allowed with costs.

14. The respondent submitted that there was no conversion of employment from casual to term contract as alleged. This is not supported by any evidence. The appellant tendered his resignation voluntarily and there is no evidence of coercion. In the Further Amended Statement of Claim filed on 18 October 2022, the appellant pleaded that he reported to work but was informed that there was no work available. He demanded to be paid his dues and the respondent asked him to write a resignation. He then claimed there was constructive dismissal. In the case of Kenya Agricultural and Livestock Research Organization v Okoko & another Civil Appeal No.36 A of 2021, the court held that the court should determine the case on the issues that flow from the pleadings. Judgment cannot be pronounced from issues not pleaded as parties are bound by their pleadings.

15. The appellant failed to prove a case for constructive dismissal under the principles outlined in the case of Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR. The employee must demonstrate how the conduct of the employer made his continued employment intolerable leading to tendering a resignation which is lacking in this case. He has not produced any proof of frustration. In the case of Eric Ouma Aringo v Cooperative Bank of Kenya Limited [2019] eKLR the court held that a letter of resignation does not mention any frustration. The conduct of the employee including the timing of action in resignation and filing suit did not demonstrate any frustration to claim constructive dismissal.

16. In this case, the appellant failed to demonstrate any matter of coercion to resign. The burden placed on him under Section 47(5) of the Act was not discharged to allow the respondent to prove the reasons leading to termination of employment under Section 43 of the Act as held in the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR.

17. The appellant was not a machine operator as alleged. He was engaged as a general labourer in the department of a crusher. His duties involved carrying stones and placing them in the machine but a machine operator was controlling the machine. In the Regulation of Wages and Conditions of Employment (General) Orders, a machine attendant sets up and operates automatic or semi-automatic machines used for cutting, punching or moulding materials. A machine operator operates different types of automatic power-driven machines which have been set up for repetitive work. The appellant was not engaged in such duties and in the case of Texas Alarms (K) Limited v Juma Ramadhan Sadiki [2021] eKLR the court held that employment was terminated when the employee tendered his

resignation letter he signed and the respondent accepted the same. Following the voluntary resignation of the appellant, his employment was terminated lawfully.

18. The respondent submitted that the claim for notice pay is not sustained or any compensation arising from a matter of constructive dismissal which has not been proved. The appeal should be dismissed with costs.

Determination

19. This is a first appeal. The court is required to re-evaluate the record, evidence and findings by the trial court and make its conclusion. However, take into account that the trial court had the opportunity to hear the witnesses.

20. In the judgment by the learned magistrate, great reliance was that the appellant had not filed any evidence to support his claims. That under Section 107(1) of the *Evidence Act*, he who asserts must prove.

21. In employment claims, such are regulated under the Act. The employer has to produce work records and not the employee. This is a mandatory requirement under Section 10(7) of the Act. Upon being served with the claim, the duty to file all work records rested with the respondent as the employer.

22. In his evidence-in-chief, the appellant testified that he was employed by the respondent on 15 January 2018 through an oral contract/agreement. He signed the attendance sheets. The respondent filed exhibit (2), the worksheets signed by the appellant and his supervisor.

23. Through a letter dated 13 September 2019, the appellant resigned from his employment. This was accepted by the respondent.

24. On this basis, there was an employment relationship between the parties regulated under the oral terms. This is a valid employment relationship regulated under Sections 7, 8 and 9 of the Act.

25. The duty to issue a written contract of service rests with the employer under Section 10(3) of the Act. Where the respondent found it necessary to retain the services of the appellant for periods of more than 24 hours, he ceased being a casual employee as alleged. His employment was converted under the provisions of Section 37 of the Act. He became a protected employee with rights and benefits under the Act. See Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR that;

> Casual employment entails engagement for a period not longer than 24 hours at a time and payment made at the end of the day. As a matter of fact the appellant had employees in both categories. Parliament indeed intended to draw this distinction and that is why section 37 does not make mention of piecework employees. It follows that the learned Judge erred in equating the two forms of employment and converting piece work employees to casual employees."

26. However, without any written letter of appointment, the appellant's employment fell under the Regulation of Wage Orders giving the minimum terms of service.

27. On the foundation of the employment relationship established by the trial court, there should and ought to have been an assessment of the claims made by the appellant on the merits.

28. The appellant's case is that he was unfairly terminated after he was made to resign from his employment which resulted in constructive dismissal. He tendered his resignation on 13 September 2019.

29. The concept of constructive dismissal is addressed by the Court of Appeal in the case of Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR the court held that where the employee is placed under intolerable working conditions and forced to resign from employment, such is constructive dismissal and the employee is entitled to claim unfair termination of employment. The position of reiterated in the case of Peter Kaburu Karanja v Kirinyaga Construction (K) Limited [2020] eKLR.

30. In constructive dismissal, there must be the aspect of being placed under intolerable working conditions. The initiative must come from the employee who becomes so frustrated by the conduct of the employer that continued employment becomes untenable. The employer forced the employee to tender his resignation.

31. For the appellant, his evidence is that on 13 September 2019, he reported to work and was told there was no work. He demanded to be paid his terminal dues. The respondent offered to tender his resignation. He did as directed.

32. When the appellant was cross-examined on his resignation, he testified that he demanded a wage increase. Instead, he was tricked into writing the resignation letter under the pretext that the respondent would pay him.

33. Upon realization that he was tricked, the appellant did nothing. There is no letter revoking his resignation. He did not act on the alleged deception until he filed his claim on 20 February 2020 where he did not address any matter of constructive dismissal. He waited until his Further Amended Memorandum of Claim filed on 18 October 2022 to raise the matter of constructive dismissal.

34 The appellant cannot justify his assertion that his resignation was forced on him or that he suffered unfair termination of employment after tendering his letter of resignation on 13 September 2019. He cannot benefit from any inaction to address the alleged being tricked into tendering a resignation.

35. The findings by the learned magistrate that there was no unfair termination of employment is correct save for the reasons addressed above. The remedy of compensation and notice pay are not available.

36. The analysis above addressed, the claims made for payment of terminal dues should have all been addressed on the merits.

37. Service pay is due to the employee when the employer fails to pay statutory dues to NSSF and NHIF. The work records filed by the respondent as part of the Record of Appeal outline the various payments to the appellant including NSSF and NHIF. Under the provisions of Section 35(5) and (6) of the Act, service pay is not due.

38. On the claim for leave pay for a year, the employee has the right to take annual leave under the provisions of Section 28 of the Act. Upon taking annual leave or payment in lieu thereof, the employer bears the duty to file such evidence. Without any record of the appellant having taken his annual leave from 15 January 2018 to 13 September 2019, the claim is justified. The appellant has pleaded that he is entitled to ksh.15, 383 for accrued leave. The respondent's assertion that the wage earned per month was Ksh.22, 000 gives the claim for Ksh.15, 383 in lieu of taking annual leave credence. Such a claim is justified.

39. On the claim that there was no payment during public holidays, such days are published by the Minister. To claim under such a vote, one must particularize the dates under reference to assist the court in making a just analysis and award. A general claim cannot suffice.

40. On the claim for underpayment, there finding that there was verbal employment placed the appellant under the minimum wage. He was employed in the Crusher department. He had not produced any evidence that he had a contract as a machine operator. For a general worker placed at Mombasa Kwa Jomvu/Mombasa Mariakani Highway, a wage of Ksh.22, 000 per month well compensated the appellant in his employment.

41. On the claim for a Certificate of Service, this is a legal requirement at the end of employment. Under Section 51 of the Act, the employee should be allowed to clear and be issued with such a certificate.

42. Accordingly, the judgment in Kaloleni MCELRC No.7 of 2020 is hereby reviewed in the following terms;

43.

a. On the claim for costs, the appeal is partially successful with an order that employment terminated upon the resignation of the appellant and his terminal dues should include Ksh.15, 383 in unpaid annual leave.

b. A Certificate of Service to be issued within the provisions of Section 51 of the *Employment Act*, 2007.

c. For the appeal and lower court, each party bears its costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant:

..... and .....