West Kenya Sugar Company Limited v Alenga (Employment and Labour Relations Appeal E014 of 2023) [2024] KEELRC 2153 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2153 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E014 OF 2023

JW KELI, J

JULY 25, 2024

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

CHARLES KAVAYI ALENGA ..... RESPONDENT

(An Appeal from the Judgment and Decree of the Honourable L. Kassan (C.M) delivered on 15/11/2023 in Kakamega MCELRC Cause No. 191 of 2019)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable L. Kassan (CM) delivered on 15/11/2023 in Kakamega MCELRC Cause No 191 of 2019 Between Charles Kavayi Alenga v West Kenya Sugar Company Limited, filed the Memorandum of Appeal dated 15th December 2023; the Record of Appeal dated 8th April 2024 and received in court on 12th April 2024, seeking the following orders: -

    a. This Appeal be allowed.

    b. The judgement by the Honorable L. Kassan (CM) dated and delivered on 15TH November 2023 in Kakamega MCELR Cause No 191 of 2019 - Between Charles Kavayi Alenga v West Kenya Sugar Company Limited and the consequential decree be set aside.

    c. The costs of this Appeal and those of the Trial court be awarded to the Appellant.

    d. Such further or other reliefs as this Honourable Court may deem just and fit to grant in the circumstances of this Appeal.

2. The Appeal was premised on the following grounds: -

i. The Learned Magistrate erred in law and fact in failing to consider, identify, and appreciate the fact that the Respondent had engaged himself with the Appellant as a loader on a piece rate basis on various dates and therefore does not qualify as an employee whose services can be terminated.

ii. The Learned Magistrate erred in law and in fact in failing to appreciate that the Cane Haulage Report showcases separate and distinct records and accordingly erred in assuming that the Respondent was terminated yet he left and absconded work out of his own volition.

iii. The Learned magistrate erred in law in failing to consider and appreciate Section 47(5) of the *Employment Act*, 2007 by failing to appreciate that the burden of proving that an unfair termination of employment or wrongful dismissal shall rest on the Respondent herein, who claimed to the Appellant's employee.

iv. The Learned Magistrate erred in law and fact in finding that the Appellant paying NSSF Statutory deductions qualified the Respondent as an employee of the Appellant.

v. The Learned Magistrate erred in law and in fact in finding that the Appellant terminated the Respondent despite the Respondent not having proved that he was terminated.

vi. The Learned Magistrate erred in law and fact in finding that the Appellant did not follow the due and fair procedure on termination.

vii. The Learned Magistrate erred in law and in fact by finding that the Respondent was entitled to a 28 days' notice or payment-in-lieu of termination notice yet he was a piece-rate worker who is not entitled to such a notice.

viii. The Learned Magistrate erred in law and in fact by awarding six months' compensation and costs of the suit to the Respondent herein.

ix. The Learned Magistrate erred in law and in fact in disregarding the evidence tendered by the Appellant and/or failing to consider the said evidence in its totality.

x. The Learned Magistrate erred in law and in fact in failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case.

xi. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions which were duly filed.

xii. The Learned Magistrate erred in law and in fact in appreciating, and considering the Appellant's witnesses' testimony during the hearing at the trial court only to the prejudice and detriment of the Appellant.

xiii. The Learned Magistrate erred in law and in fact in misapprehending the evidence on record.

xiv. The Learned Magistrate erred in law and fact in arriving at conclusions and inferences which are not supported by evidence, and/or based on any documentation.

xv. Other grounds and reasons to be adduced at the hearing hereof.

(Pages 9-12 of the Record)

3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by O & M Law LLP Advocates were dated 2nd May 2024 and received in court on 3rd May 2024. The

Respondent's written submissions drawn by V.A. Shibanda & Co. Advocates were dated 26th June 2024 and received on an even date.

Background to the appeal

4. The Respondent filed a suit in Kakamega CMELR Cause No 191 of 2019 against the Appellant alleging unfair termination. The Statement of Claim was dated 5th November 2019 supported by the Respondent's verifying affidavit sworn on even date and filed on 26th November 2019(pg. 13-16).

5. The Respondent on 15th January 2020 filed a reply to the Appellant's Memorandum of Defence dated 4th January 2020(pg.35-36 of Record).

6. Through an application dated 18th January 2022 and filed on 15th March 2022(pg. 37-40 of the Record), the Respondent sought leave to file an amended statement of Claim dated 18th January 2022 which was annexed thereto (Pg. 24-28 of the Record)

7. Through the amended statement of claim, the Respondent/Claimant sought the following reliefs: -

    a. One month's salary in lieu of notice- Kshs 11,926/-

    b. Prorate leave for 14 months-Kshs 58,439.36/-

    c. Underpayment of wages-Kshs 50,494.2/-

    d. Public holidays -Kshs 75,431.4/-

    e. Overtime for extra hours worked- Kshs 75,600/-

    f. Rest days- Kshs 133,576.24/-

    g. 12 months compensation salary- Kshs 143,117.4/-

    h. Costs of this suit

    i. Certificate of service.

    j. House Allowance- Kshs 150,272.64/-

    (pages 24- 28 of the record is the Respondent's claim)

8. The Respondent relied on his written statement dated 5th November 2019, the list of documents of even date, and the documents attached to the Statement of Claim dated 5th November 2019(pg. 17-23 of the Record).

9. The Appellant entered appearance on 18th December 2019(Pg.29 of the Record) and on 9th January 2020 filed its Memorandum of Defence dated 16th December 2019 (pg.30-34 of the Record).

10. The Appellant filed a list of witnesses dated 5th September 2022, the list and bundle of documents of an even date, and the undated Witness statement of Duncan Abwawo (Pg.41-50 of the Record).

11. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with him as the only witness on the 9th of August 2023. The Defence case was heard on the same day when Duncan Abwawo testified as Defence Witness of fact and produced Defence exhibits 1 to 2 (pages 93-96 of the record).

12. The parties filed submissions in the lower Court after the closure of the defence case. The Respondent/Claimant filed submissions (pages 51-64 of the Record). The Appellant/Respondent filed written submissions and authorities (pages 65-78 of the Record).

13. The Trial Court (Hon. L. Kassan (CM)) delivered its judgment on the 15th of November 2023 in favour of the Respondent/Claimant and awarded one month's salary in lieu of notice, six months' salary as compensation, and costs of the suit (Pg. 79-86 of the Record).

Determination

Issues for determination.

14. The Appellant submitted the following issues for determination in the appeal: -

    a. Whether the trial court erred in finding that the Respondent was an employee.

        i. What was the nature of the Relationship between the Appellant and the Respondent?

    b. Whether the trial court erred in law by shifting the burden of proof of termination to the Appellant.

    c. Whether the Appellant is entitled to notice pay or any of the reliefs sought.

15. The Respondent submitted globally in his submissions asserting that he was an employee and that he had been unfairly terminated without any notice.

16. The Court sitting on appeal from the Trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1948) EA123.

17. The Court guided by the Selle's decision, that the Court sitting at first appeal has to evaluate the facts and evidence before the Trial Court while making allowance of not having seen the witnesses to reach their own conclusion, finds the issues for determination in the appeal are as follows: -

    a. Whether the Trial Court erred in finding that the Respondent was an employee.

        a. Whether there was proof of unfair termination.

        b. Whether the Appellant is entitled to notice pay or any of the reliefs sought.

Whether the trial court erred in finding that the Respondent was an employee

18. The Appellant submits that the Respondent's evidence before the Trial Court was a certificate of postage, casual workers' time, and pay card. That this was not proof of employment. The Appellant on the other hand produced evidence that the Respondent was engaged as a cane loader by the Appellant dependent on the availability of cane haulage work and when he availed himself. That the Respondent failed to avail himself for work on the 10th November 2016. That the Respondent was a piece-rated worker and not a term contract.

19. On the other hand, the Respondent submits that his testimony before the Trial Court was that he was paid Kshs 360 daily payable every two weeks and relied on his NSSF statement indicating remittances from 2012 to April 2019. The Respondent was not agreeable to having been for tonnage loaded.

20. At the trial the Respondent told the court he used to work daily reporting at 5am and leaving at 9 pm. During cross-examination the Respondent told the court he could not recall the day he went to work but was given a card. That the Appellant gave him the NSSF card though it did not indicate so. That he was a loader for cane tractors. He was paid Kshs 350 daily paid after two weeks vide MPESA. He did not produce the MPESA statement as proof of payment. He relied on the NSSF statement as proof

of work with the Appellant from 1st November 2012 to 31st March 2019. The statement showed the employer was the Appellant. He stated that the gaps in the statement did not mean he was not at work. He used to report to the supervisor daily and there was a book where they used to record on reporting and leaving work and the tonnage of cane. He did not have a witness to prove he worked daily from 5 am to 9 pm. That he was in the welfare group. He was not aware of the agreement signed in 2012 with the welfare to pay statutory dues.

21. The Appellant on the other hand called its witness and produced record to effect that the Respondent started work on the 16th August 2015 and stopped working on the 30th November 2019, that he was a member of the welfare and they deducted his pay. During cross-examination, DW told the Trial Court they had a transport department and a transport manager in charge who knew the loaders who reported to work and the role was delegated to the supervisors. That they keep records of payment and those reporting to work as produced before the Trial Court and that the loaders were trained and given overalls through the welfare. (pages 93 to 96 of the record were the proceedings)

22. In the judgment, the Trial Court held the Respondent was a piece-rated worker. This Court returns that the holding of the Learned Magistrate was consistent with the evidence before the Trial Court hence no basis to disturb the decision. The Court upholds the finding by the Learned Magistrate that the Respondent was a piece-rated worker.

Whether there was proof of unfair termination.

23. The Appellant submits that it is trite he who alleges must prove. The Appellant relied on the decision of this Court in Joshua Asakhulu v West Kenya Sugar Company Limited (2023)e KLR where it was held that in a claim of unfair dismissal, the employee must lay basis for the allegation of unfair termination through evidence of the termination and the unfairness. In that case, the Court held for failure to prove the date of termination it was probable the Appellant stayed away from work as a cane loader for his reasons.

24. The Appellant submits that though the Respondent claimed he was unfairly terminated in April 2019 as per their records on 30th of November 2019, he was at work. The Appellant further relied on the provisions of section 47(5) of the *Employment Act* on the burden of proving unfair termination and as interpreted in Protus Wanjala Mutike V Anglo Properties T/A Jambo Mutara Lodge Laikipia (2021)e KLR where Justice D.K. Marete held there was no case of termination of employment, the employee having not adduced evidence in support of the termination let alone the unlawful termination on a balance of probabilities. The Appellant further relied on the decision of Justice Linnet Ndolo in Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited (2016) e KLR to emphasise the duty of the employee to lay basis of claim of unfair termination where the Judge stated:- '11. This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice." The Appellant submits that the Respondent claimed to have been dismissed in April 2019 but failed to give details regarding how the dismissal occurred and could not even state the name of the person who dismissed him. On their part, they produced a cane haulage report to effect that the Respondent worked up to 30th November 2019(pages 45-49).

25. The Respondent on this issue submits that he produced an NSSF statement of remittance to April 2019 when he claimed to have been dismissed. That having stated he was employed from 2012 to 2019 his employment was protected under section 37 of the *Employment Act* and he was entitled to notice before termination under section 35 of the *Employment Act*. The Appellant had not produced the muster roll for the period 2012-2019 to support the DW evidence that the Respondent did not work every day but when work was available. That the Muster Payrolls under section 10 (6 &7) of the *Employment Act* were under the custody of the Appellant.

26. The Trial Court in its decision observed: -'The respondent pleaded and testified that the claimant and other piece rate workers were paid and cleared from the respondent company after they had completed the piece rate work they had been employed to do. The validity of this position was not disputed by the Claimant. Termination of the claimant's piece rate engagement cannot, therefore, be said to have been on invalid reason.''(page 85)

Decision

27. The Learned Magistrate held the Respondent was not given the 28-day termination notice under section 35(1) of the *Employment Act* or paid in lieu. The Learned Magistrate then held for the lack of notice the process of severing was unfair. The Learned Magistrate then stated that the dismissal was unfair and unjustified. In reading the decision of the Learned Magistrate the Court finds that the Trial Court held the termination unfair for lack of notice while at the same time holding that the engagement coming to an end was not an invalid reason for termination.

28. The Court of Appeal in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR considered the issue of piece rate work dis-engagement and observed:- ''One of the questions that we need to resolve is whether it was proper for the learned Judge to rely on section 37 to convert the terms of employment of the respondents from piece rate work to term contract. Section 37 provides that; "37. (1) Notwithstanding any provisions of this Act, where a casual employee (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or (b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1) (c) shall apply to that contract of service." (Emphasis supplied). This provision, as correctly pointed out by learned counsel for the appellant, and as can be seen from its plain language, applies to casual, as opposed to piece work employees. The Act deals differently with these two types of employments. We have already reproduced section 2 in which "piece work" is defined with emphasis being on the amount of work done and not time taken to do it. On the other hand casual employee is defined to mean "...a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time." The distinction between this form of employment and piece work is therefore not in doubt. 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 piece work employees. It follows that the learned Judge erred in equating the two forms of employment and converting piece work employees to casual employees." This Court finds that the Learned Magistrate correctly applied the law and did not convert the engagement of the Respondent of piece rate to term contract.

29. This Court holds that Learned Magistrate court having held that the engagement just came to an end and that, that was not an invalid reason, the only outstanding issue was the lack of notice.

Consequently, this Court returns that there was no wrongful dismissal but termination of engagement for a valid reason of end of work as correctly held by the Learned Magistrate. For failure of notice pay then the Trial Court was right to find the termination was unfair.

Whether the Appellant is entitled to notice pay or any of the reliefs sought.

30. In the afore-cited decision in *Krystalline Salt Ltd* the Court of Appeal held:- ''On the other hand section 35(1) (c) provides for the manner of termination of various forms of employment in the following terms: "35(1)A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be – ..... (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing." A piece rate worker would, in terms of these provisions be entitled to a notice of 28 days before termination of service." The Court upholds the decision to apply in the determination of the instant appeal.

31. The Learned Magistrate applied the minimum wage of Kshs 11,926.45/- as pleaded as it was not rebutted by the Appellant and awarded the same as notice pay. The Learned Magistrate further awarded the equivalent of 6 months' salary for the lack of notice. The applicable remedies for unfair dismissal are as stated in section 49 of the *Employment Act* (Rev. 2024) which reads in part, ''(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—''(emphasis given). The remedies under subsection 1 apply where the termination was unjustified.

32. The Learned Magistrate found the termination for reasons of work coming to an end was not invalid. The termination was justified hence, in the application of section 49 (1) of the *Employment Act* to award compensation of 6 months' salary, the Learned Magistrate erred in law. Notice pay under section 35 of the *Employment Act* sufficed.

Conclusion and Disposition

33. In the upshot, for the above reasons, the appeal is allowed by setting aside the compensation of six months' salary as the termination was justified. The Judgment and Decree of the Honourable L. Kassan (CM) delivered on 15/11/2023 in Kakamega MCELRC Cause No 191 of 2019 is set aside and in place judgment is entered for the claimant for payment of notice pay in lieu for Kshs 11,926.45/- with interest at the court rate from the date of judgment until payment in full. The claimant is awarded the costs of the suit.

34. On costs of the appeal, while this Court upholds the principle that costs follow the event, the instant appeal was partially successful. I exercise my discretion and order that each party is to bear its own costs in the appeal.

35. It is Ordered.

DATED, SIGNED, AND DELIVERED ON THE 25TH DAY OF JULY 2024 IN OPEN COURT AT KAKAMEGA.

J.W. KELI

JUDGE

In the presence of

C/A – Macheso

For Appellant: Ms. Kahiu

For Respondent: Ms. Shibanda