West Kenya Sugar Company Limited v Chilande (Employment and Labour Relations Appeal E009 of 2023) [2024] KEELRC 2119 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2119 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E009 OF 2023

JW KELI, J

JULY 25, 2024

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

DAVID MBOYA CHILANDE ..... RESPONDENT

(An Appeal from the Judgment and Decree of the Honourable Dolphina Alego (S.P.M) delivered on 23/10/2023 in Kakamega MCELRC Cause No. 102 of 2019)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable Dolphina Alego (SPM) delivered on 23/10/2023 in Kakamega MCELRC Cause No 102 of 2019 Between David Mboya Chilande v West Kenya Sugar Company Limited, filed the Memorandum of Appeal dated 21st November 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 judgment by the Honourable Dolphina Alego (SPM) dated and delivered on 23rd October 2023 in Kakamega MCELR Cause No 102 of 2019 David Mboya Chilande 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 cane loader on a piece rate basis and not as a cleaner on various dates and the same was never converted into a formal employment agreement between the Respondent and the Appellant.

ii. The Learned Magistrate erred in law and in fact in failing to consider and appreciate the Load Cane Haulage and Payment Reports produced by the Appellant during the Trial Court's hearing showcase separate and distinct records and accordingly erred in not concluding that the Respondent was paid what was duly owed to him.

iii. The learned Magistrate erred in law and in fact in failing to consider that the nature of the Respondent's engagement with the Appellant was gravely dependent on whether cane haulage work was available and even then, it was further dependent on the Respondent's availability.

iv. 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 be the Appellant's employee.

v. The Learned Magistrate erred in law and fact in finding that the Appellant terminated the Respondent despite the Respondent not having proved sufficiently that he was qualified as an employee whose services can be terminated.

vi. 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.

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

viii. The Learned Magistrate despite entering judgement for the Respondent as prayed for, erred in law and in fact by only making a determination on whether the Respondent was terminated and due process followed, without reasoning or making any determination on any of the other claims or prayers by the Respondent in his Amended Statement of Claim.

ix. The Learned Magistrate despite entering judgement for the Respondent as prayed for and without having reasoned or making a determination on any of the other claims or prayers by the Respondent in his Amended Statement of Claim, failed to make clear the amounts owed to the Respondent.

x. The Learned magistrate erred in law and fact in entering judgement for the Respondent as prayed for since prorate leave, overtime for extra hours worked, rest days and house allowance and other terminal dues are remedies not available to the Respondent due to the nature of his piece rate employment with the Appellant.

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

xii. The Learned Magistrate erred in law and in fact in appreciating and considering the Respondent's submissions only to the prejudice and detriment of the Appellant.

xiii. The Learned Magistrate erred in law and in fact in misapprehending and disregarding the evidence on record and tendered by the Appellant and/or failing to consider the said evidence in totality.

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

xv. The Learned Magistrate erred in law and in fact in failing to properly and exhaustively evaluate the evidence on record.

xvi. 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.

xvii. Other grounds and reasons to be adduced at the hearing hereof. (Pages 7-10 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 10th June 2024 and received on 9th July 2024.

Background to the appeal

4. The Respondent filed a suit in Kakamega CMELR Cause No 102 of 2019 against the Appellant alleging unfair termination. The Statement of Claim was dated 9th July 2019 supported by a verifying affidavit sworn on even date and filed on 1st August 2019(pg. 13-16).

5. On 11th November 2019, the Respondent filed an Amended Statement of Claim dated 23rd October 2019 supported by a verifying affidavit of an even date(Pg. 22-26 of the Record).

6. The Respondent on 26th February 2020 filed a reply to the Appellant's/Respondent's Amended Memorandum of Defence dated 17th February 2020(not found in the record of appeal but available in the lower court file).

7. Through an application dated 17th September 2020 and filed on 7th June 2021, the Respondent sought leave to file a further amended statement of Claim dated 15th September 2020 which was annexed to it (Pg. 27-35 of Record).

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

a. One month's salary in lieu of notice- Kshs 6,870/-

b. Prorate leave for 14 months-Kshs 3,206/-

c. Underpayment of ages-Kshs 610,416/-

d. Public holidays -Kshs 45,342/-

e. overtime for extra hours worked- Kshs 510,300/-

f. Rest days- Kshs 98,928/-

g. 12 months compensation salary- Kshs 82,440/-

h. Costs of this suit

i. Certificate of service.

j. House Allowance- Kshs 111,294/-

(pages 27- 31 of the record is the Respondent's claim).

9. The Respondent relied on his written statement dated 9th July 2019, the list of documents of even date, and the documents attached to the Statement of Claim dated 9th July 2019(pg. 15-21 of the Record).

10. The Appellant entered appearance on 10th September 2019(Pg.36 of Record) and on 1st October 2019 filed its Memorandum of Defence dated 15th September 2019(pg.37-40 of Record).

11. On 10th February 2020, the Appellant filed an Amended Memorandum of Defence dated 4th January 2020. (pg. 45- 48 of the record).

12. The Appellant filed a list of witnesses dated 21st October 2020 and the Witness statement of Duncan Abwawo dated 21st October 2020(Pg.43-44 of Record).

13. The Trial Court proceeded with the hearing of the Claimant's case with him as the only witness on the 14th of March 2022. The Defence case was heard on 3rd April 2023 when Duncan Abwawo testified as Defence Witness of fact (pages 105-108 of the record).

14. The parties filed submissions in the lower Court after the closure of the defence case. The Claimant filed submissions (pages 49-61 of the Record). The Appellant filed written submissions and authorities (pages 62-96 of the Record).

15. The trial Court (Hon. Dolphina Alego (SPM)) delivered its judgment on the 23rd of October 2023 in favour of the Respondent/Claimant as prayed in the Claim (Pg. 97-101 of the Record).

Determination

Issues for determination.

16. The Appellant in its submissions submitted the following issues for determination in the appeal: -

    a. Whether the trial court erred in finding that the Respondentwas 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.

17. The Respondent submitted globally in his submissions asserting that he was employed by the Appellant and was unfairly dismissed without any notice.

18. The Court sitting on appeal from 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.

19. The Court guided by the decision in Selle's case, 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 its own conclusion, finds the issues for determination in the appeal are as follows: -

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

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

    iii. 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.

20. The Appellant alleged that it had produced a cane haulage report and loader payment report as evidence to support its case that the Respondent was a piece-rated worker. The Court perused the record of appeal as well as the original trial court file. The Court finds that the Appellant never produced any document before the Trial Court. The witness statement of DW indicated there was no record of employment of the Respondent and denied the existence of an employee-employer relationship (page 44).

21. The Respondent on the other hand produced his Pay Card as evidence of employment as per the proceedings though not placed in the record but the court found the document in the trial court file. The Appellant stated the Pay Card was not primafacie evidence of employment. The Appellant relying on the testimony of DW at trial submitted the Respondent was a piece-rated worker in cane loading.

22. The Respondent submits that the claimant was a casual worker and he was paid Kshs 229 /- per day as indicated in the casual workers' time and pay card. In its decision, the Trial Magistrate Court stated: ' the defendant avers that he was a loader and not a cleaner and this court takes judicial notice that his employment is thus not disputed."(page 100)

Decision

23. The Court finds that the only evidence placed before the Trial Magistrate Court on the employment of the Respondent was the document titled, 'WEKSOL CASUAL WORKERS TIME AND PAY CARD" filed with the original claim on the 1st of August 2019.

24. The document had the name and ID number of the Respondent. The Court notes the document had only three payments for dates 18/5, 15/5 and 16/5. The year was not indicated and no evidence was led on the same. The dates indicate payment of Kshs 229 per the shift. The days worked being Monday, Friday and Saturday.

25. During the examination in chief the Respondent relied on the said Pay Card and told the Trial Court that he was paid Kshs 229 daily. During the re-exam, he stated he was paid Kshs 229 /- daily in a month 6870/-.

26. The Court having evaluated the evidence before the Trial Court returns that Respondent was an employee engaged as a casual worker for random days by the Appellant.

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

27. The Appellant submits that he who alleges must prove. That the Respondent ought to have proved he was employed, the terms of employment, his salary or remuneration, period of employment, and that he was unfairly terminated from employment. To buttress this the Appellant relied on my decision in *Joshua Asakhulu v West Kenya Sugar Company Limited* (2023) eKLR holding that an employee in a claim of unfair dismissal should lay the basis of the termination and this includes the actual date of termination, evidence of the termination and demonstrate the unfairness. The Appellant further stated that the burden of proof as stated in section 47 (5) of the *Employment Act* ought to be met. The Appellant further relied on the decision of Justice D.K Marete in *Protus Wanjala v Anglo African Properties t/a Jambo Mutara Lodge Laikipia*(2021) eKLR to emphasize the burden of proof under section 47(5) of the *Employment Act*.

28. The Respondent submits that he produced as evidence of his employment and which was terminated unfairly being the casual workers time pay card as his evidence. That the Appellant 's witness stated

he was a piece-rate driver and left employment on his own volition but did not produce the record of employment as per section 10 (6&7) of the *Employment Act*.

29. The Respondent submits that he was a casual worker and worked for the Appellant continuously for 8 years. That he worked every day of the week without notice and without terminal dues to which he was entitled. That the Appellant did not rebut his evidence that he worked throughout without leave or rest days. That he did not leave on his own volition but his supervisor terminated his employment. That he was entitled to termination notice under section 35 of the *Employment Act*.

30. In his witness statement dated 9th July 2019, the claimant before the Trial Court stated he was paid Kshs 6870/- per day(paragraph *4*). He stated that he was deducted NHIF and NSSF which were not remitted, he was not given leave /off days and worked during the weekends. He stated he was dismissed without proper notice or even pay. (page 15-16)

31. In support of the claim he relied on the demand notice and the document 'Weksol Casual Workers Time And Pay Card" filed with the original claim on the 1st August 2019.

32. During cross-examination, the Claimant stated that he was never issued with any letter upon his dismissal. He had nothing to show he was working on the weekend, nothing to show the NSSF deductions.(page 106)

33. During re-examination, the Respondent told the Trial Court his Pay Card was signed by his supervisor. That on 16/5 he worked on the weekend. That it was his supervisor who told him that his job was no more. That he was paid Kshs 299/- daily and in a monthly 6870. (page 106)

34. The defence witness Duncan Abwawo in his statement stated they had no record of the respondent's employment (page 44) the court noted in the Statement of defence the Appellant stated the Respondent was a piece rate worker.

35. In the judgment the trial court relied on section 41 of the *Employment Act* on procedural fairness and held that the claimant was not informed why he was dismissed and that the court took judicial notice the employment was not disputed and entered judgment as prayed.

Decision

36. The Court already held the claimant was a casual worker as per evidence produced 'Weksol Casual Workers Time And Pay Card". It was the burden of the Respondent employee to prove his employment which he did by producing the Casual workers time Pay Card. On the termination, the Respondent stated the Pay Card was signed by his supervisor and it was the said supervisor who terminated his employment. The Respondent did not disclose the name of the said supervisor. He submitted he was entitled to termination notice and procedural fairness which was not afforded to him.

37. On perusal of the Trial Court judgment, the court finds that the Learned Magistrate did not address her mind on the casual engagement, the termination, and whether the claimant was entitled to procedural fairness. The evidence before the trial court was the casual workers' time Pay Card. The document had the name and ID number of the Respondent. The Court observes the document had only three payments for dates 18/5, 15/5 and 16/5. The year was not indicated and no evidence was led on the same. The Card indicates payment of Kshs 229 per shift. The days worked were Monday, Friday and Saturday.

38. The Appellant's witness during the hearing told the Trial Court that the Respondent was not a cleaner but a driver. That he was paid on the tonnage delivered and left on his own volition in October 2019

and was paid Kshs 10000 per month. The Court finds that the only evidence before the Trial Court was a constant pay of Kshs 229/- for 3 days in one week(Monday, Friday and Saturday).

39. Section 47(5) provides for the burden of proof in claims for unfair dismissal as follows:- ''(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.'' The employee has to discharge his burden of proving that an unfair termination of employment or wrongful dismissal has occurred after which the burden shifts to the employer to justify the grounds for the termination of employment or wrongful dismissal.

40. Did the claimant discharge his burden of proof before the Trial Court? To address this question the issue of the employee-employer relationship again comes into play. There was no doubt vide the evidence of the claimant before the Trial Court that he was a casual employee in the month of May, unknown year, which the document evidenced he worked for three days being 18/5, 15/5 and 16/5 being Monday, Friday and Saturday respectively.

41. The casual engagement of employees is recognized as a valid type of employment distinct from contractual employment under the *Employment Act*, with a casual employee being defined as:- 'casual employee" means 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;''

42. The Respondent submits that having been engaged continuously for 8 years his employment then was converted to term contract and he was thus entitled to notice, leave and other benefits of contractual employment. The relevant law is section 37 of the *Employment Act* which reads:- ''37. Conversion of casual employment to term contract (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.''

43. The evidence of the Respondent was only the Casual Workers' time Pay Card which demonstrated that he worked on a Monday, Friday, and Saturday and the wage of Kshs 229 was indicated per shift. This was undisputed evidence in support that he was a casual employee paid daily. The document proved he did not work for a period or a number of continuous working days which amounted in the aggregate to the equivalent of not less than one month under section 37 of the *Employment Act*. The Pay Card disclosed he worked randomly for 3 days in the week. The evidence of his engagement did not qualify for conversion to term contract which would enable the Claimant be entitled to benefits under term contract.

44. The Court holds that the Respondent having relied on the said Pay Card to prove unfair dismissal he failed to discharge his burden of proof of allegation of continuous employment. On the alleged termination the Respondent stated that the Pay Card was signed by his supervisor and he was the one who terminated his services. The Respondent relied on section 10 (6)(7) of the *Employment Act* to state once he alleged unfair termination it was the employer to produce records of his employment to wit:- ''(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment. (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars, prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.''

45. The Appellant to counter the foregoing relied on the decision Justice Ndolo in Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited (2016) eKLR where the Court 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.''

46. Before the Trial Court was the undisputed evidence of the Respondent having worked and been paid per day Kshs 229 on Monday, Friday, and Saturday. How then did the Trial Court find that termination was unfair based on the said document?

47. The Court returns that this was a case of casual engagement where the Respondent worked and was paid Kshs 229 per day shift and was paid for three days in the month of May unknown year. While the court is aware of the burden of the employer to produce records, the employer vide witness statement having stated it had no record of employment, the Respondent ought to have corroborated his claim through fellow employee witness or vide production notice to the employer or proof of payment of salary. The Court holds that the engagement of the Respondent was a classic engagement on a casual basis for 3 days Monday, Friday, and Saturday which evidence was too remote to prove the claim for conversion to term contract on a balance of probabilities.

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

48. The Court having re-evaluated the evidence before the Trial Court returned that the evidence before the trial court was of casual engagement of the Respondent by the Appellant for three days only; Monday, Friday, and Saturday sometime in May of unknown year.

49. The Court holds that the fact of working on a Saturday is not proof of lack of rest day. Section 27 of the *Employment Act* prescribes the statutory Hours of work to wit:- '' (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law. (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.''(emphasis given). Thus an employee is only entitled to at least one rest day in every period of seven days of the week. Out of abundance, some employers will grant their employee an entire weekend as rest days but that is a matter of choice as the employee is only guaranteed one rest day under Section 27 of the *Employment Act*.

50. The Court having held the evidence before the Trial Court was of the Respondent having worked as casual for three days Monday, Friday and Saturday of a week in month of May of unknown year, then the prayers in the claim were unfounded and mistaken. The burden of proof is always at first instance on the one who alleges to prove the existence of the fact. Section 108 *Evidence Act* states- ''Incidence of burden. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'' Section 108 *Evidence Act* is consistent with section 47(5) of the *Employment Act* which provides for the burden of proof of the unfair dismissal to be on the employee and it is only after prove of the existence facts of unfair dismissal the burden shifts to the employer to justify the dismissal to wit:- ''(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.'

51. In this case, the Court returns the burden of proof of termination of the engagement as casual employee , leave alone unfairness, was not discharged by the Respondent hence the burden never shifted to the Appellant to justify the termination. Evidence of work on random days in a week cannot be said to amount to anything else beyond casual engagement.

52. For the forgoing analysis and reasons the Court holds that the Hon. Learned Magistrate erred in facts and law in holding there was unfair dismissal and making the generalized award in the claim as prayed contrary to the evidence before the Trial Court (demand letter, Pay Card and oral testimony of the claimant). The judgment of the Trial Court cannot stand. The Court holds that the Claim was not proved on a balance of probabilities.

Conclusion And Disposition

53. In the upshot, the appeal is allowed and the decision of Judgment and Decree of the Honourable Dolphina Alego (SPM) delivered on 23/10/2023 in Kakamega MCELRC Cause No 102 of 2019 Between David Mboya Chilande v West Kenya Sugar Company Limited is set aside and in place, Judgment entered that the claim dated 9th July 2019 is dismissed. On costs, the Court considered the conduct of the employer at trial with its witness not producing evidence to back its allegations on the employment and found it did not deserve an award of costs.

54. To temper justice with mercy taking into consideration the foregoing I make no order as to costs in the appeal.

55. It is so 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. Kahui

For Respondent: - Ms. Shibanda