



West Kenya Sugar Company Limited v Chivoli (Employment and Labour Relations Appeal E011 of 2023) [2024] KEELRC 2152 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2152 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E011 OF 2023**

**JW KELI, J
JULY 25, 2024**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPELLANT

AND

AGGREY INENGA CHIVOLI 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. 121 of 2019)

RULING

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable Dolphina Alego (S.P.M) delivered on 23/10/2023 in Kakamega MCELRC Cause No. 17 of 2019 Between Aggrey Inenga Chivoli versus West Kenya Sugar Company Limited, filed the Memorandum of Appeal dated 22nd November 2023; the Record of Appeal dated 8th April 2024 and the Supplementary Record of Appeal dated 18th June 2024 seeking the following orders: -
 - a. The Appeal be allowed.
 - b. The judgment by the Honourable Dolphina Alego (S.P.M) dated and delivered on 23rd October 2023 at the Chief Magistrates Court, Kakamega in Kakamega MCELRC Cause No. 121 of 2019- Aggrey Inenga Chivoli versus 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 driver on a piece rate basis on various dates.
- ii. The Learned Magistrate erred in fact in failing to appreciate that the Driver Cane Haulage and Payment Reports produced by the Appellant during the Trial Court's hearing showcase two separate and distinct records and accordingly erred in not concluding the Respondent was paid three months after which he claims to have been terminated and he absconded duty afterwards and was never terminated by the Appellant.
- 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 be the Appellant's employee.
- iv. The Learned Magistrate erred in law and fact in finding that the Appellant terminated the Respondent despite the Respondent not having proved that he was qualified as an employee whose services can be terminated.
- v. The Learned Magistrate erred in law and fact in finding that the Appellant did not follow the due and fair procedure on termination.
- vi. 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.
- vii. The Learned Magistrate despite entering judgement for the Respondent as prayed for and without having reasoned or making any 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.
- viii. The Learned magistrate erred in law and fact in entering judgement for the respondent as prayed for since prorated 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.
- 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 and only considered one exhibit in her judgement.
- 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 only to prejudice and detriment of the Appellant.
- xii. The Learned Magistrate erred in law and in fact in misapprehending the evidence on record.
- xiii. The Learned Magistrate erred in Law and fact in failing to properly and exhaustively evaluate 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, case law 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 19th June 2024 and received on an even date.

Background To The Appeal

4. The Respondent filed a suit Kakamega CMELR Cause No. 121 of 2019 against the Appellant alleging unfair termination. The Statement of Claim was dated 5th August 2019 supported by a verifying affidavit sworn on even date by the Claimant and filed on 6th September 2019(pg. 13-16).
5. On 24th October 2019, the Respondent filed an Amended Statement of Claim dated on an even date supported by his verifying affidavit of an even date(Pg24-28 of the Record).
6. The Respondent on 26th February 2020 filed a reply to the Respondent's Amended Memorandum of Defence dated 17th February 2020(not in the record of appeal but available in the lower court file).
7. Through an application dated 17th September 2020, the Respondent sought leave to file a further amended statement of Claim dated 13th September 2020 which was annexed thereto (Pg1-10, 21-26 of Supplementary 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. 15,000/-
 - b. Prorate leave for 14 months-Kshs.12,600/-
 - c. Underpayment of wages-Kshs. 86,450/-
 - d. Public holidays -Kshs. 11,000/-
 - e. overtime for extra hours worked- Kshs.11,000/-
 - f. Rest days- Kshs. 28,000/-
 - g. 12 months compensation salary- Kshs. 180,000/-
 - h. Costs of this suit
 - i. Certificate of service.
 - j. House Allowance- Kshs. 31,500/-(pages 1-10, 21-26 of the Supplementary record is the Respondent's claim).
9. The Respondent relied on his written statement dated 5th August 2019, the list of documents of even date, and the documents attached to the Statement of Claim dated 5th September 2019(pg. 16-22 of the Record). The same documents and an additional one were refiled on 16th December 2021 (not in the record but in the lower court file).
10. The Appellant entered appearance on 16th September 2019(Pg.29 of Record) and on 7th October 2019 filed its Memorandum of Defence dated 30th September 2019(pg.30-33 of Record).



11. On 10th February 2020, the applicant filed an Amended Memorandum of defence dated 4th January 2020. (pg. 54-57 of the record).
12. The Appellant on 19th November 2019 filed a list of witnesses dated 14th July 2021, the list of witnesses of an even date, the undated Witness statement of Duncan Abwawo, and the Respondent's documents (Pg.36-53 of Record).
13. The Trial Court proceeded with the hearing of the Claimant's case with him as the only witness on the 29th of November 2021. The Defence case was heard on the same day when Duncan Abwawo testified as defence witness of fact and produced the Appellant's document as Exhibit 1 (pages 133-135 of the record).
14. The parties filed submissions in the lower Court after the closure of the defence case. The Respondent/Claimant filed submissions and authorities (pages 58-69 of the Record). The Appellant/Respondent filed written submissions and authorities (pages 70-124 of the Record). The Respondent/Claimant filed submissions in response to the appellant's submissions (Pg.11-20 of Supplementary Record).
15. The Trial Court (Hon. Dolphina Alego (S.P.M)) delivered its judgment on the 23rd of October 2023 in favour of the Respondent as prayed in the Claim (Pg. 125-130 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 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.
17. The Respondent submitted on one issue in his submissions as follows: -
 - a. Whether the trial court erred in finding that the Appellant was an employee.
18. The Court guided by the settled law in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123, that the court sitting on appeal from the trial court, must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen nor heard the witnesses and should make allowance for that fact, 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 and that he was wrongly dismissed
 - ii. 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 and that he was wrongly dismissed

19. The Trial Court held that it was not in dispute that the complainant was employed by the Respondent (page 128).



20. The Appellant contended that the Learned Magistrate erred in law and fact in failing to consider and appreciate the fact that the Respondent engaged himself with the Appellant as a driver on a piece rate basis on various dates.
21. The Appellant submits that the Employment Act provides for various forms of employment; permanent, casual, and piece rate. To buttress this point the Appellant relied on the decision of the Court of Appeal in *Krystalline Salt Limited v Kwekwe Mwakele & 67 Others* (2017)e KLR wherein the employment on a piece rate basis was expounded. The Appellant submitted that their evidence before the Trial Court was to effect that the Respondent was a piece rate driver whose role was to transport loaded cane to the company and his payment was computed daily and paid out every two weeks depending on the number of trips made and he had the freedom to decide what time and days he worked depended on the cane haulage work. In the trial court, the Appellant produced the cane haulage report and loader payment report to demonstrate the respondent worked intermittently, made varying numbers of trips on each day engaged and his payment varied each month depending on the weighment (pages 41-52 was the cane haulage report and loader payment report).
22. The Respondent submits that he did not admit facts as submitted by the Appellant and referred the court to the proceedings on pages 133 and 134 of the record. He submits that he did not admit that he had the freedom to abscond duty without permission. The claimant stated his pay was Kshs. 500 per day paid every two weeks. That if the employer disputed his position, they could have produced MPESA record to show payment per weightage. He submitted that he did not sign the payment report produced by the Appellant to confirm he received that payment and not Kshs. 500 per day every two weeks. That the claimant at the Trial produced a demand letter, certificate of postage, NHIF card, and NSSF statement and not just the certificate of postage, casual workers pay time, and pay card as submitted by the appellant.
23. The Respondent submitted that the NSSF statement shows remittance by the Appellant from 2012 to 2019, that no muster rolls were produced to show a consistency of working of the claimant, and that he was a piece rate worker. The claimant was a casual worker for 9 years with the respondent and the employment was terminated on the 16th of April 2019. That there was no evidence he worked on the 25th of September 2019 as alleged by the Appellant.

Decision

24. The Court sitting on first appeal had to evaluate the evidence before the trial court to reach its own conclusion. The starting point in the exercise was the evaluation of the pleadings by the parties. The respondent filed a supplementary record of appeal and annexed an application dated 17th September 2020 seeking to amend the statement of claim and annexed a document titled further amended statement of claim. The Court perused the Trial Court proceedings and did not find a ruling on the application. The Court returned that the said application was not heard and no leave was granted to further amend the claim. The Learned Magistrate did not disclose the claim the Trial Court was dealing with in the judgment.
25. In the amended claim filed before the Trial Court on the 25th October 2019, the Respondent stated he was employed sometimes in 2011 as a driver earning Kshs. 500 per day paid every 2 weeks. That he worked for 8 years and was terminated on 16th April 2019 without notice or pay(pages 24-27).
26. In response (amended defence at pages 54-57), the Appellant denied employment of the respondent as driver for Kshs. 500 per day and stated he was a piece rate worker, tractor driver, assigned work depending on the availability of tractor and sugar cane availability. That he was paid per tonnage of sugar cane delivered.



27. In reply to the defence the claimant reiterated his claim (not on record but found in the Trial Court file).
28. At the Trial Court hearing, the Respondent produced as his evidence the demand letter and certificate of postage, NHIF card, and NSSF statement. During cross-examination, he stated that he was sacked on the 16th April 2019 and that they never used to sign anywhere on reporting. After he was sacked he went to look for work elsewhere, and he got hurt on the 16th of April 2019. That he was paid by MPESA. The court proceedings further disclose that the Respondent told the Trial Court, 'We used to work as per the hours you worked for'. The Court did not get what the Trial Court wrote though it appeared that it was payment per hours worked. The Respondent told the Trial Court that one Tom told him his work had come to an end. In re-examination, the Respondent told the Trial Court that they started work at 4 am and did not sign anywhere while reporting.
29. The Appellant on the other hand called DW, its Human Resources Manager who produced the cane haulage report to demonstrate that the Respondent was engaged on the 5th July 2015 to 25th September 2019. That he never complained about his work. They had slips for cane picking and delivery. The payment was every two weeks. The claim was filed on the 5th of August 2019 while the Respondent was still working, payment was per hours worked. During cross-examination, DW told the Trial Court that the drivers were issued with slips to pick cane and that NHIF and NSSF were remitted. All accidents are a record of the company. The documents produced were computer generated and fully automated system. DW told the Trial Court the system could not be manipulated.
(The Trial Court proceedings on pages 133-135 of the record of appeal)

Decision

30. The Respondent laid claim of having been paid a daily rate of Kshs. 500 payable every two weeks. He did not produce evidence on the alleged terms of engagement save for the NSSF statement. The claimant alleged he was terminated on the 16th April 2019. On the same date, he testified he was involved in an accident and the employer paid his bills after he got well. How could he have been terminated on the same date while he stated it was the employer who took him to the hospital and paid his bills after he got better? On other hand, the Appellant produced the cane haulage reports and payment with respect to the claimant's work. The report was not rebutted by the Claimant. The Appellant told the trial court it was a system generated report and could not be manipulated.
31. The cane haulage report produced by the Appellant before the Trial Court indicated that the claimant worked 5 days in June, 2 days in August, and 9 days in September 2019. The payment for the days worked in April 2019 was produced by the Appellant indicating gross earnings of Kshs. 5528 for quantity 172.75.(page 52)
32. The Respondent submits that he did not sign under the alleged payment report of April 2019 as having received the payment. The Court returns that the employer is the custodian of employee records. The employer produced a record of cane haulage and payment of the respondent before the Trial Court. The record was not rebutted. The Court finds on a balance of probabilities that the Appellant's position on the engagement of the Respondent was true having held it was unbelievable he was sacked on 16th April 2019 same date he was injured and taken to the hospital by the Appellant. Further, according to the Respondent, the Appellant paid the bills after his treatment. The Trial Court did not disclose in its decision how it treated the Appellant's evidence.
33. The Court for the foregoing reasons finds that there was evidence that the Respondent was still engaged by the Appellant as at the time it filed the instant claim on the 2nd September 2019. Secondly, the



Trial Court did not address its mind on the payment rate yet the employer produced a record of work payment. The Court returns that the foregoing were pertinent issues to be addressed in the determination and the failure to do so led to an erroneous conclusion of wrongful dismissal and subsequent award of all prayers in the claim without substantiation by the Learned Magistrate.

34. The Appellant’s employee records disclosed the Respondent was a piece rate worker. The Court upholds the decision in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* (2017)e KLR to apply in the instant case where the Court of Appeal held:- ‘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. While we appreciate his concern that the respondents having worked for long as piece rate workers, their terms ought to have reflected this fact, such a course was not foreseen by the makers of that law. If they intended the piece rate workers to benefit from the conversion like casual worker that would not have been such a difficult thing. We think however that the determination should have been made under section

18 (1)

- (b) as read with section

35 (1)

- (c). The former deals with the intervals of payment and provides; “18.

(1) Where a contract of service entered into under which a task or piecework is to be performed by an employee, the employee shall be entitled

- (a).

- (b). in the case of piece work , to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, which date is the earlier.}}”(Emphasis) 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. These are some of the reforms in employment relationship introduced by the Employment Act.”



35. In terms of remedies available to piece rate workers in the event of termination or unfair termination of employment the Court of Appeal in Krystalline Salt Limited decision (supra) stated:- “In terms of sections 35 (1) (c) and 49(1) (a) (c) the respondents were only entitled to be paid their wages for one month in addition to wages equivalent of a number of months not exceeding 12 months based on the gross monthly wage. We also noted earlier that the wages in question must be in tandem with the statutory minimum wage.”
36. The Court in the instant appeal found the Respondent had not proved termination having occurred as pleaded. On the contrary, there was proof that the Respondent worked post the alleged date of termination. The Court finds that it was not in dispute the Respondent had been working on a piece rate basis and it appears his engagement just came to an end on a date in 2019. Considering the period of engagement, I find that the termination deserved notice pay under section 35 of the *Employment Act* as stated in the Krystalline Salt Ltd case. The parties did not submit on the payable minimum wages. The minimum wage (2018 order) for tractor drivers in the municipality in 2018 was Kshs. 16,428.30. Notice Pay of the amount ought to have been awarded and is hereby awarded.

Conclusion And Disposition

37. In the upshot the appeal is allowed and the Judgment and Decree of the Honourable Dolphina Alego (S.P.M) delivered on 23/10/2023 in Kakamega MCELRC Cause No. 121 of 2019 set aside and substituted with a judgment that the claim is allowed for notice pay in lieu for the sum of Kshs. 16,428.30 with interest at court rate from date of judgment. The claimant is awarded costs of the suit.
38. On appeal costs, the Court returns that the appeal was partially successful. Consequently, the Court orders that each party is to bear its own costs in the appeal.
39. 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. Kahiu

For Respondent: Ms. Shibanda

