West Kenya Sugar Company Limited v Ndombi (Employment and Labour Relations Appeal E004 of 2024) [2024] KEELRC 1967 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1967 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E004 OF 2024

JW KELI, J

JULY 25, 2024

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

PETER ANDATI NDOMBI ..... RESPONDENT

(An Appeal from the Judgment and Decree of the Honourable Angeline Odawo (P.M) delivered on 07/02/2024 in Kakamega MCELRC Cause No. E009 of 2020)

JUDGMENT

Representation:

For Appellant- O & M Law LLP Advocates

For Respondent- V.A. Shibanda & Co. Advocates

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable Angeline Odawo (P.M) delivered on 07/02/2024 in Kakamega MCELRC Cause No. E009 of 2020 Between Peter Andati Ndombi versus West Kenya Sugar Company Limited, filed the Memorandum of Appeal dated 4th March 2024; the Record of Appeal dated 7th June 2024 and received in court on 14th June 2024, seeking the following orders: -

    a. This Appeal be allowed.

    b. The judgement by the Honourable Angeline Odawo (P.M) dated and delivered on 7th February 2024 in Kakamega ELR Cause No. E009 of 2020 - Between Peter Andati Ndombi 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 cane loader on a piece rate basis and not as a casual employee 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 Loader Cane Haulage and Payment Reports produced by the Appellant during the Trial Court's hearing, showcasing separate and distinct records and accordingly erred in not concluding that the Respondent was hired subject to the availability of cane for haulage and effectively rendering him a piece rate worker.

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 directly and substantially 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 fact in concluding that the Respondent was a casual worker and that per Section 37 of the *Employment Act*, the contract of service was therefore one where wages were paid monthly, thus granting the Respondent the status of an employee, whose termination would require notice, failure of which payment in lieu should be made.

v. The Learned Magistrate erred in fact and in law by finding that the Respondent be granted pro-rate leave for the years worked between 2015 -2018, without the Respondent tendering evidence of a sufficient nature to prove the same.

vi. The Learned magistrate erred in law and in fact in finding that the Respondent was entitled to one month's salary in lieu of notice, despite the Respondent not having discharged his burden of proof which required him to prove sufficiently that he was unfairly terminated from his employment.

vii. The learned magistrate erred in law and in fact in finding that the Respondent did not prove unfair termination and dismissal of the employment but rather that the same came to its natural conclusion and proceeded to award the Respondent one month's salary in lieu of Notice.

viii. 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.

ix. The Learned Magistrate erred in law and in fact in failing to take into consideration the Appellant's submissions filed in support of its case.

x. The Learned magistrate erred in law and fact in entering judgement for the Respondent as prayed for since payment of one month's salary in lieu of notice and prorate leave 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 misapprehending and disregarding the evidence on record and tendered by the appellant and/or failing to consider the said evidence in totality.

xii. 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.

xiii. Other grounds and reasons to be adduced at the hearing hereof. (Pages 1-4 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 7th June 2024 and received in court on 18th June 2024. The Respondent's written submissions drawn by V.A. Shibanda & Co. Advocates were dated 15th July 2024 and received in court on an even date.

Background to the appeal

4. The Respondent filed a suit in the Magistrates courts Kakamega CMELR Cause No. E009 of 2020 against the Appellant alleging unfair termination. The Statement of Claim was dated 22nd September 2020 supported by a verifying affidavit sworn by the Claimant on 21st July 2020 and filed on 16th November 2020 seeking the following reliefs: -

a. December Salary- Kshs. 12,522.70.

b. One month's salary in lieu of notice - Kshs. 12,522.70/-

c. Prorate leave -Kshs. 96,424.79/-

d. Underpayment of wages-Kshs. Kshs. 821,396.4/-

e. Public holidays -Kshs. 145,200/-

f. Overtime for extra hours worked- Kshs. 118,800/-

g. Rest days- Kshs. 220,399.52/-

h. 12 months compensation salary- Kshs. 150,272.4/-

i. Costs of this suit

j. Certificate of service.

k. House Allowance- Kshs. 247,946.46/-

(pages 5- 9 of the record is the Respondent's claim).

5. The claim was supported by Claimant's written statement dated 12th July 2020, the list of documents dated 21st July 2020, and the documents attached to the Statement of Claim (pg. 10-17 of the Record).

6. The Appellant entered appearance on 5th March 2021(Pg.18 of Record) and on 12th September 2023 filed its Response to the Claim dated 11th September 2023 (pg.19-23 of Record). Accompanying the response was a list of witnesses dated 11th September 2023, the Witness statement of Duncan Abwawo of an even date, and the list and bundle of documents of an even date (Pg.24-38 of Record).

7. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with him as the only witness on the 13th of September 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 113-116 of the record).

8. The parties filed submissions in the lower Court after the closure of the defence case. The Respondent/ Claimant filed submissions (pages 39-52 of the Record). The Appellant/Respondent filed written submissions and authorities (pages 53-100 of the Record).

9. The Trial Court (Hon. Angeline Odawo, P.M) delivered its judgment on the 7th of February 2024 partially in favour of the Respondent/Claimant and awarded one month's salary in lieu of notice and prorate leave, totalling Kshs. 108,947.49/-; costs and interest of the suit (Pg. 101-107 of the Record).

Determination

Issues for determination.

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

    a. Grounds 1 to 4- whether the Trial Court erred in finding that the Respondent had been converted to contractual employment as per the principles set out in Section 37 of the *Employment Act*

    b. Grounds 8,9,11 and 12 -whether the trial Court erred in law by shifting the burden of proof of termination to the Appellant.

    c. Grounds 5,6,7 and 10- whether the Respondent herein is entitled to the reliefs granted by the Trial Court.

11. The Respondent in its submissions submitted the following issues for determination in the appeal: -

    a. Whether the Trial Court erred in finding that the respondent's employment had been converted to contractual employment as per the principles set out in Section 37 of the *Employment Act*.

    b. Whether the Trial Court erred in law in shifting the burden of proof of termination to the appellant.

12. 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.

13. The court guided by 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. Grounds 1 to 4- whether the Trial Court erred in finding that the Respondent had been converted to contractual employment as per the principles set out in Section 37 of the *Employment Act*

    b. Grounds 8,9,11 and 12 -whether the Trial Court erred in law by shifting the burden of proof of termination to the Appellant.

    c. Grounds 5,6,7 and 10- whether the Respondent herein is entitled to the reliefs granted by the Trial Court.

Grounds 1 to 4- whether the Trial Court erred in finding that the Respondent had been converted to contractual employment as per the principles set out in Section 37 of the *Employment Act*

14. The Learned Trial Magistrate at paragraph 10 to 12 of her Judgment found that it was not in dispute the Respondent was an employee of the Appellant save that the Appellant contended he was a piece rate worker. The Trial Court then held that the Respondent having been engaged on diverse dates from 2015 to 2018 the employment was deemed to no longer be piece rate but converted to contractual employment under section 37 of the *Employment Act* to wit:- '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.''

15. The Appellant submits that neither party before the Trial Court alluded to casual engagement for the Learned Magistrate to have addressed conversion of casual employment under section 37 of the *Employment Act* and relied on the decision of the Court of Appeal on piece rate work in Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] e KLR

16. The Respondent on the other hand submits that his testimony was that he was a casual worker given work every day from 5 am to 6 pm. That the Court ought to uphold findings by the Trial Court that he was indeed a casual worker.

17. The evidence placed before the Trial Court by the Claimant was his NSSF statement. The Appellant on the other hand produced a loader cane haulage report payment indicating the number of trips the Respondent had done and weight of the cane and the amount paid.

18. The Trial Court in paragraph *12* found the piece rate work had converted to term contract due to the long engagement period of time. It was the finding of this Court that the Learned Magistrate concluded the Respondent was a piece rate worker and there was no cross-appeal on that finding.

19. The issue on appeal was whether the Learned Magistrate erred in applying the conversion under section 37 of the *Employment Act* (supra). Both parties relied on the decision of the Court of Appeal in Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] e KLR. In that decision the Trial Court had converted piece rate work to term contract. In return the Court of Appeal 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." Applying the foregoing decision of the Court of Appeal, the Court returns that, the Learned Trial Magistrate having held the Respondent was a piece rate worker, erred in equating the two forms of employment (piece rate and casual) and converting the employment of the Respondent as a piece worker to term contract.

Grounds 8,9,11 and 12 -whether the Trial Court erred in law by shifting the burden of proof of termination to the Appellant.

20. The Learned Magistrate held at paragraph 15 of the judgment: - 'In my view, the claimant did not prove unfair termination and dismissal by the respondent. I would state that his engagement of services was merely ended. ''

21. This Court did not understand why both parties raised the issue taking into account the foregoing observation of the Trial Court. The Respondent did not cross-appeal on the decision. I find it is a waste of precious judicial time to re-evaluate the evidence on the issue. I uphold the holding of the Trial Court on the issue to the effect that there was no proof of unfair dismissal and the engagement of the Respondent just came to an end.

Grounds 5,6,7 and 10- whether the Respondent herein is entitled to the reliefs granted by the Trial Court.

22. The Trial Court for the reason of conversion of the piece rate work to term contract awarded the Respondent one month's salary in lieu of notice being minimum wage of a general labourer for Kshs. 12,522 and prorate leave for the period of work 2015 to 2018 for Ksh. 96,424.79. There was no cross-appeal. The amount of minimum wage of Kshs. 12,522 was not challenged.

23. The Appellant submits that the employment relationship having been held to be of piece rate, applying the decision in Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] e KLR the awards were not merited. In the said decision the Court of Appeal observed, - ''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 the reliefs sought extended beyond those of price rate work. In the decision the Court of Appeal held that 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*. Where an employee alleges that the termination was unfair the evidential burden of proof shifts to the employer to demonstrate the existence of any of the

circumstances enumerated under section 45." The Court in the appeal proceeded to set aside other awards outside notice pay and compensation for unfair termination.

24. In the instant appeal, the Trial Court held there was no unfair termination. Consequently, the award for notice pay stands as the Trial Court held that the engagement came to an end and there was a demonstration of a long period of service. The award of prorate leave pay was not available to a piece-rate worker. The notice pay amount of Kshs. 12,522 was not challenged in the appeal and thus is upheld.

Conclusion And Disposition.

25. For the reasons above, the appeal is allowed by setting aside the Judgment and Decree of the Honourable Angeline Odawo (P.M) delivered on 07/02/2024 in Kakamega MCELRC Cause No. E009 of 2020 and substituting the same with an Order allowing the claim for notice pay of Kshs. 12,522 to the Claimant with interest at court rate from the date of judgment until payment in full. Costs to the Claimant.

26. On appeal costs, the Appellant was only partially successful. The Court orders each party to bear its own costs in the appeal.

27. 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 Waweru

For Respondent: Ms. Shibanda