Agura v Twiga Chemicals Industries Limited (Appeal E056 of 2024)
[2024] KEELRC 2314 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2314 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E056 OF 2024

M MBARŨ, J

SEPTEMBER 26, 2024

BETWEEN

GEORGE WAUDI AGURA ..... APPELLANT

AND

TWIGA CHEMICALS INDUSTRIES LIMITED ..... RESPONDENT

(Being an appeal from the judgment of L. K Sindani delivered on 21st March 2024 in Mombasa CM ELRC No.E556 of 2022)

JUDGMENT

1. The appeal arises from the judgment delivered on 21st March 2024 in Mombasa CM ELRC No.E556 of 2022. The appellant is seeking that the judgment be set aside and the claim allowed with costs.

3. The appellant had filed his claim before the trial court on the basis that he was employed by the respondent as a loader at a daily wage of Ksh.625. In May 2022 his employment was terminated on the basis that the Mombasa office had been closed and his work no longer required. That this was a redundancy and his terminal dues were not paid. He claimed the following dues;

    a. Notice pay Ksh.17,500;

    b. Unpaid leave days for 11 years Ksh.144,375;

    c. Severance pay for 11 years Ksh.103,125;

    d. 12 months compensation Ksh.210,000;

    e. Compensation for underpayments for 11 years Ksh.103,488.10;

    f. Costs of the suit.

4. In response, the respondent denied the claim and that the appellant should have reported the matter to the labour office for initial investigations before filing suit hence he is in abuse of court process as provided under Section 47 of the *Employment Act*. The respondent admitted that the appellant was employed as a casual labourer whenever there was loading and unloading goods. A casual employee is defined as a worker who is engaged and paid each day and not beyond 24 hours. Work depended on availability and there was no cause of redundancy. The appellant had no genuine claims to justify the outlined claims. There was no underpayment as alleged and reliance on Regulation of Wages (General) Order, 2018 is misleading. The claims made beyond 3 years are time barred per Section 90 of the *Employment Act* and joining NSSF while working as a casual employee does not change the employment status.

5. The trial court in the judgment held that the appellant had failed to prove employment beyond casual employment and the evidence that he had been confirmed into full-time employment had no basis. That reliance on the NSSF statement is not sufficient proof of employment to enjoy the protection of Section 37 of the *Employment Act*. The claim was dismissed.

6. Dissatisfied, the appellant filed this appeal on the grounds that;

    1. The learned magistrate erred in law and fact by dismissing the suit by stating that the appellant was employed on casual terms therefore reaching the wrong conclusion that he was not entitled to any terminal dues;

    2. The learned magistrate erred in law and fact by dismissing the appellant's evidence confirming his employment and further finding that the appellant was barred from relying on Section 37 of the *Employment Act* at the submissions stage to prove conversion of terms of employment by operation of the law.

    3. The learned magistrate erred in law and fact by dismissing the appellant's claim in its entirety including the terminal dues sought.

7. Both parties attended and agreed to address the appeal by way of written submissions.

8. The appellant submitted he was employed by the respondent for 11 years as evidenced by the NSSF statement. In the case of *Makori Orina Jackson v M/S Vee Enterprises Limited* [2020] eKLR the court held that under Sections 10 and 74 of the *Employment Act*, the employer must produce work records. Under Section 10(3) (c) of the *Employment Act*, the duty to issue a contract to the employee is upon the employer. In this case, the assertion by the respondent that he was a casual employee is not supported by the fact that he was an employee in the full-time service.

9. The appellant submitted that he is entitled to the terminal dues claimed upon declaration of redundancy being notice pay, unpaid leave days, severance pay and underpayments. The respondent failed to follow due process before declaration of redundancy and hence resulted in unfair termination of employment and compensation is due as claimed.

10. The respondent submitted that there was causal employment whenever work was available and the submission of the NSSF statement is not proof of employment. The appellant did not work for the respondent monthly but when work was available and would be paid for days worked. Each day is needed upon the daily wage. The appellant cannot rely on the provisions of Section 37 of the *Employment Act* since the parties intended to have him only for causal duties. In the case of *Daniel Otieno Migore v South Nyanza Co. Ltd* [2018] eKLR, the court held that parties are bound by their pleadings and that evidence that is at variance cannot be relied upon. In the case of *IEBC v Stephen*

Mutinda Mule & others [2014] eKLR the court held that in the absence of clear pleading produced in evidence, the court has nothing to consider.

11. The respondent submitted that the trial court assessed the evidence before it and correctly dismissed the claims. This appeal is without merit and should be dismissed with costs.

Determination

11. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its independent judgment on whether or not to allow the appeal. A first appellate court is required to subject the entire record to fresh and exhaustive evaluation and make conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses first-hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*.

12. In the Memorandum of Claim and witness statement dated 29 September 2022 filed before the trial court on 3 October 2022, the appellant only noted the date of alleged termination of employment as May 2022. The details concerning his employment are hazy. Called to testify on 19 October 2023, but he did not clarify the date of employment. Upon cross-examination, he testified that;

> I worked as a casual from 2010 to 2015 when I was confirmed as permanent. The confirmation was to enroll me into the system as their employee. I have a letter to show confirmation. The NSSF documents show that I did not get a confirmation letter. I have never received an appointment letter by the respondent. They were not deducting PAYE. ...

13. Indeed, the motion of Section 47(5) of the *Employment Act* requires that;

> (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.

14. The employee alleging that there was employment must demonstrate and discharge his burden under the law. Proof that there was unfair termination of employment.

15. Even where the statutory burden to produce work records is upon the employer, under Section 10(6) and (7) of the *Employment Act*, the employer must be guided based on the nature of the pleadings presented.

16. In the case of Bamburi Cement Limited v Kilonzi [2016] eKLR the court held that the employee claiming that there is unfair termination of employment must establish a prima facie case first to shift the burden of proof to the employer under section 47(5) of the *Employment Act*.

17. Unless the employee discharged the legal burden and can outline a *prima facie* case as held in the case of *Samsung Electronics East Africa Ltd v K M [2017] e*KLR, the burden is not discharged and the employer has no duty to justify the alleged unfair termination of employment.

18. In this case, the pleadings and record before the trial court were well analyzed and indeed there was no employment beyond casual duties for loading or unloading wherever work was available.

19. An NSSF statement is not a primary record of employment. This is a record to confirm the remittance of statutory dues to the body and under the National Social Security Act, a remittance by a given entity does not conform to any employment relationship.

20. To claim redundancy dues in the given circumstances is not justified.

21. On costs, the appeal analyzed and found without merit, the appellant to meet the respondent's costs.

22. The appeal is without merit and is hereby dismissed. Judgement in Mombasa CM ELRC No.E556 of 2022 is hereby confirmed. The appellant is to meet the respondent's costs for the appeal. Costs for the lower court proceedings as directed.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....