



REPUBLIC OF KENYA



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**Mistry V Naran Mulji & Co. v Gonzi (Appeal E030 of 2024)
[2024] KEELRC 2313 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2313 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E030 OF 2024
M MBARÚ, J
SEPTEMBER 26, 2024**

BETWEEN

MISTRY V NARAN MULJI & CO. APPELLANT

AND

GONZI CHULA GONZI RESPONDENT

*(Being appeal from the judgement of Hon. G Sogomo delivered
on 23 February 2024 in Mombasa CMELRC No.230 of 2020)*

JUDGMENT

1. The appeal arises from the judgment delivered on 23 February 2024 in Mombasa CMELRC No.230 of 2020. The appellant is seeking that the judgment be set aside and an order be issued dismissing the same.
2. The background to this appeal is a claim filed by the respondent on the basis that he was employed by the appellant on 1st March 2009 as a general labourer until 1st March 2019 when he was forced to resign from his employment for lack of payment of his salary from September 2018 until his resignation. The respondent claimed there was constructive dismissal and the following dues;
 - a. Notice pay Ksh.19,500;
 - b. Wage arrears from 1st September 2018 to 1st March 2019 Ksh.101,400;
 - c. Underpayments Ksh.397,396.20;
 - d. Leave pay for 10 years Ksh.136,500;
 - e. Service pay for 10 years ksh.97,500;
 - f. Refund of unremitted NSSF deductions ksh.21,200;



- g. Refund of unremitted NHIF Ksh.60,000;
 - h. Costs of the suit.
3. In response, the appellant admitted that the respondent was employed on a casual basis as a general worker and not on 1st March 2009 as alleged. There was no work for 6 days as alleged or forced to resign to claim constructive dismissal. The claim that on 5 January 2019, the respondent issued the appellant through Mr Keittany a two-month resignation notice is without proof. The appellant did not direct any of its employees including the respondent to resign from employment to be paid terminal dues as alleged.
 4. The appellant's case was that in February 2017 it employed the respondent as a casual and employment remained casual without any written contract. He did not work for one month continuously and was only employed when the need arose. As a casual employee, employment was daily until February 2019 when the respondent last showed up at work. There was no case of constructive dismissal and the claims made are without merit.
 5. The learned magistrate heard the parties and in the judgment delivered on 9 February 2024 held that there was an unfair termination of employment following the declaration of redundancy and the respondent was hence entitled to notice pay, salary arrears, underpayments, unpaid leave and costs.
 6. Aggrieved, the appellant filed this appeal on the grounds;
 1. The learned magistrate erred in law and fact in finding that the respondent was an employee of the appellant monthly yet the respondent testified that he was being paid daily wages.
 2. The learned magistrate erred in law and fact in finding that the respondent was unfairly terminated yet he resigned on his own.
 3. The learned magistrate erred in law and fact in awarding the respondent Ksh.19, 500 as payment in lieu of notice yet there was no evidence to prove that he was unfairly terminated.
 4. The learned magistrate erred in law and fact in awarding the respondent Ksh.101, 400 in salary arrears despite him not providing evidence.
 5. The learned magistrate erred in law and fact in awarding the respondent Ksh.397, 396.20 being underpayment despite the evidence provided by the appellant. Further, the underpayment is time-barred as provided under Section 90 of the *Employment Act*.
 6. The learned magistrate erred in law and fact in awarding the respondent ksh.136, 500 being unpaid leave despite the evidence provided by the appellant.
 7. The learned magistrate erred in law and fact in awarding the respondent terminal dues that are only awarded to term contract employees and not casual employees.
 8. The learned magistrate erred in law and fact in awarding the respondent maximum compensation yet he was never unfairly terminated.
 9. The learned magistrate erred in law and fact by disregarding the evidence and written submissions.
 7. Both parties attended and agreed to address the appeal by way of written submissions.
 8. The appellant submitted that the respondent was not an employee and remained casual on a daily wage. He admitted in evidence that there was a daily wage paid and no contract of employment was issued.



- The appellant called a witness who testified that NSSF dues were paid even though employment was on casual terms. Section 37 of the *Employment Act* only converts casual employment where there is continuous work for over a month. The respondent was only employed when work was available and not continuous.
9. The appellant submitted that the findings by the trial court that there was unfair termination of employment were in error since there was no employment relationship established. The respondent resigned on his own accord as admitted in his pleadings.
 10. The award of notice pay is not justified since work was for 26 days each month and upon his resignation, no notice pay was due. The respondent lied about wage arrears and there was no proof of work done and not paid for. The alleged underpayments are not correct since the respondent admitted that he was paid for work done. There was no leave due since a casual employee is paid once there is work attendance. The maximum compensation awarded is in error.
 11. The respondent submitted that he was employed on casual terms but he continued to work for the appellant until his resignation due to non-payment of his wages. The appellant would pay his NSSF dues as an employee upon registration on 24 July 2013. Under Section 10 of the *Employment Act*, the appellant as the employer had a duty to issue a contract of employment which was not done. Under Section 37 of the *Employment Act*, casual employment is converted by operation of the law as held in *Jackson Muiruri Wathigo t/a Murton Supermarket v Lilian Mutune* [2021] eKLR.
 12. The respondent submitted that he was forced to resign after the appellant failed to pay his wages leading to constructive dismissal and the award of compensation and notice pay are justified.
 13. Under the Wage Orders, the daily wage paid was an underpayment and the difference is due as held in *Adil Fiyaz Ahmed t/a My Discovery Restaurant v Matsololo Nyawa Nyale alias Bakari Nyawa ELRCA E015 of 2023 (Mombasa)*. There is no proof that the respondent took annual leave and the same should be awarded and the appeal dismissed with costs.

Determination

14. The appellant has challenged the claims made relating to underpayments claimed from May 2010 to December 2015 on the basis that these claims are time-barred by operation of Section 90 of the *Employment Act*. There are no written submissions to address these grounds of appeal.
15. The respondent did not respond to this issue.
16. The application of Section 90 of the *Employment Act* is an issue of law that can arise at any stage in the proceedings. However, such an issue should be addressed at the earliest possible time to allow the court to deal with it instantly.
17. Section 90 of the *Employment Act* is in two parts. On the one part, a claim that has accrued should be addressed within 3 years from the date the cause of action arose. The other part is that of a continuing injury which should be addressed within 12 months and while employment subsists. In the case of *The German School Society & another v Helga Ohany & another* [2023] KECA 894 (KLR) the Court of Appeal in addressing what constitutes continuing injury held that;
18. The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. “A continuing wrong” refers to a single wrongful act which causes a continuing injury. “Recurring/successive wrongs” are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. The Supreme Court of India in *Balakrishna S.P. Waghmare v*



Shree Dhyaneswar Maharaj Sansthan AIR 1959 SC 798 explained the concept of continuing wrong (in the context of the Indian Limitation Act) as follows:

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”

in *Siddiq v Suresh Das* [2020] 1 SCC 1, the Court held that;

. . . A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise . . . What makes a wrong a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist the breach of such a duty creates a continuing wrong and hence a defense to a plea of limitation.

19. On this definition, it would then arise that a claim of underpayment would entail a continuing injury that occurs monthly upon payment of a wage that is below the minimum. Upon such occurrence, where employment subsists, the employee should lodge a claim of such underpayment within 12 months from the date the wrong and or injury occurred. However, upon cessation of employment, the provisions of Section 90 of the *Employment Act* apply to allow a claimant 3 years to lodge a claim for such wrong. These provisions do not deny the employee the benefit of claiming unpaid wages which are legally due as held in *Musee v International School Of Kenya Ltd (Cause 60 of 2020)* [2023] KEELRC 2102 (KLR).
20. On the issue of whether there was employment or not, the appellant’s case is that the respondent was a casual employee from February 2017 until he resigned with effect from 1st March 2019. Section 2 of the *Employment Act* defines a casual employee as one who is engaged daily and paid at the end of each day. However, where the employee continues to offer his labour continuously or for work not likely to end each day, such an employee becomes protected under Section 37 of the *Employment Act*.
21. In the case of *Krystalline Salt Ltd v Kwekwe Mwakele & 67 others* [2017] eKLR, the court held that, under Section 37 of the *Employment Act*, a casual employee who remains in the service of an employer beyond 24 hours is protected with rights and benefits under the Act. This position is reiterated in the case of *National Bank of Kenya Ltd V Hamida Bana & 103 others* [2017] eKLR.
22. The acknowledgement that the respondent was a casual employee from February 2017 to 1st March 2019 is sufficient proof of continued availability on the shop floor.
23. The duty to file work records is upon the employer in terms of Section 10(7) of the *Employment Act*. Furthermore, the duty to issue a written contract of employment is upon the employer. Where the respondent was a casual employee on a daily wage, these work records are not filed.
24. The respondent was protected under the provisions of Section 37 of the *Employment Act*.



25. Within his employment, the respondent claimed that he tendered his resignation to the director, Mr Keittany in January 2019 with effect 1st March 2019. The appellant's case is that this resignation was voluntary. The respondent's case is that he had not been paid his wages hence the reason leading to termination of employment. His evidence was that;

From March 2009 until 1st March 2019 when I was forced to resign, I was employed as a general labourer. ... I was paid a daily wage of Ksh.170/= from when I was employed until December 2013. My salary was increased to ksh.200/= per day from January 2014 to December 2014 then from January 2015 to December 2015 it was increased to Ksh.300/= and from January 2016 until the time of my constructive dismissal I was earning Ksh.650/= per day. I was paid weekly and in cash and I was required to sign a voucher for that. ...

26. From February 2017, a general labourer had a basic wage of Ksh.527.10. In this period, the respondent was paid Ksh.650 per day. He was paid within the Wage Orders.
27. From 1st May 2017, the minimum wage increased to Ksh.622 per day. The respondent was paid ksh.650 per day above the minimum.
28. Can this be a justification for resignation? Can the respondent claim constructive dismissal?
29. At the time the respondent resigned in January 2019, he was under a minimum wage without any underpayment. His reasons for the resignation were that at the time of his forced resignation/ constructive dismissal was earning Ksh.650.00 per day and over the years he was being paid a daily wage an amount which was below the minimum amount prescribed by the law.
30. There was no underpayment of wages at this point in January 2019 to warrant a resignation to claim under constructive dismissal.
31. Going back to the year 2013 to claim underpayment, the respondent was protected under Section 90 of the *Employment Act* to claim under continuing injury, if any, which he failed to address. Sitting back for over 12 months to claim under constructive dismissal is not justified.
32. Without a proper case of underpayments at the point of resignation or any claim for the same over the years, the respondent cannot justify a case of constructive dismissal. He opted to voluntarily terminate his employment.
33. Notice pay and compensation are remedies removed from the respondent.
34. Going back to May 2013, the minimum wage was KS. 470.60 Whereas the respondent was paid Ksh.170 per day an underpayment of Ksh.300 for this period up to December 2013 there is an underpayment of Ksh.63, 126.
35. From December 2013 the wage increased to Ksh.200 and until December 2014, the claim for underpayment at Ksh.84, 427.20 is justified.
36. The wage increased in January 2015 to Ksh.300 until December 2015 with a total due of Ksh.65, 092.
37. The total underpayment is Ksh.212, 645.
38. On the award of underpayments over the years, the wage paid at the end of employment being a minimum wage, the claim for wage arrears at Ksh.101, 400 is not justified.
39. On the claim for unpaid leave, indeed, where leave is allocated, the employer should keep the work records. In this case, the appellant failed to allocate any annual leave under the mistaken belief that the



respondent was a general/casual employee. Upon the protections of Section 37 of the Employment Act, such annual leave or payment in lieu should have been allocated. However, the respondent did not apply to take his annual leave and where such annual leave was not allocated, he failed to apply the provisions of Section 90 for a claim under a continuing injury. Therefore, under the provisions of Section 28(4) of the Employment Act, he can only claim accrued leave days for up to 18 months being 33 leave days. These are encashed based on the basic wage of Ksh.650 total due is Ksh.21, 450 in accrued leave.

40. Accordingly, the judgment in Mombasa CMELRC No.230 of 2020 is hereby reviewed in the following terms;
- a. Employment terminated voluntarily through the resignation of the respondent;
 - b. The respondent is entitled to the following terminal dues;
 - i. Accrued leave Ksh.21,450;
 - ii. Underpayments Ksh.212,645;
 - c. For the appeal, each party to bear its costs;
 - d. For the lower court proceedings, costs as awarded.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

