Chic Fashions Limited v Maundu (Employment and Labour Relations Appeal E136 of 2022) [2024] KEELRC 2704 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2704 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E136 OF 2022

MN NDUMA, J

OCTOBER 31, 2024

BETWEEN

CHIC FASHIONS LIMITED ..... APPELLANT

AND

DANCUN KALUMU MAUNDU ..... RESPONDENT

RULING

1. The applicant in a notice of motion application dated 14/5/2024 seeks review of the judgment of Honourable court delivered on 25/4/2024. The application is premised on grounds 1 to 7 set out on the face of the application and embellished in the supporting affidavit of Pradeep Shah which grounds may be summarized that there is an apparent error on the face of the judgment at page 8 paragraph 5 to page 9 paragraph 1 where the court notes that the appellant never produced a certificate of electronic evidence in compliance with section 106A of the *Evidence Act* Cap 80 Laws of Kenya before the trial court, yet this was done with both parties to this appeal submitting on the same in their submissions before the trial court.

2. That failure by this court to consider the evidence led the court

> "rendering a decision devoid of congruent evidence that would have at the very least provided mitigating circumstances against the respondent's claim."

3. That the court would have arrived at a different opinion in the matter had it considered the electronic evidence.

4. That the applicant has not appealed the decision set to be reviewed. That the court do reconsider the judgment and allow the application.

5. The application is opposed vide a replying affidavit of the respondent in which he states that he is advised by his advocate that there is no apparent error on the face of the record which is self-evident and obvious which could reasonable not elicit two different opinions.

6. That the applicant is aggrieved with the finding and conclusions made by the court on the merits of the appeal which could be addressed by way of an appeal as the applicant is allowed to do in law.

7. That the judgment of the court is holistic and well-reasoned in finding that the appellant regarded the recipient as a daily paid temporary worker and so simply told the respondent to go away on 3/7/2020 and did not recall him again.

8. That the respondent's employment had converted to a monthly paid employee in terms of section 37(3) of the *Employment Act*, 2007 and thus was entitled to at least 28 days' notice and his employment could only be terminated for a valid reason following a fair procedure.

9. That the trial court evaluated the credibility of the respondent and believed that he was asked by RW1 to go home and would be recalled but did not happen and that when he visited the appellant to find out when he would resume work, he was told there was no more work for him.

10. That the issue of absconding work did not arise since the magistrate correctly found that the appellant had terminated the employment of the respondent on 3/7/2020 because the appellant wrongly regarded the respondent as a temporary employee not protected under sections 36, 41, 43 and 45 of the *Employment Act*, 2007.

11. That the appellant purported to file supplementary record of appeal countering the certificate of electronic evidence on 24th January 2024 without leave of court contrary to Order 42 Rule (4) of Civil Procedure Rule, 2010 read together with Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 since direction on hearing of the appeal were issued on 19th December 2022.

12. In the submissions the appellant states that the court erroneously assumed that the certificate of electronic evidence was being filed at the appellate stage through the supplementary record of appeal when the same had been filed before the trial court. That there is no denial by the respondent that the electronic evidence and certificate were not before the trial court.

13. The court has carefully considered the supplementary record of appeal dated 24/1/2024 filed by the appellant and is satisfied that the same was properly filed but the court had erroneously assumed that it was being filed for the first time before this court when indeed the same had been filed before the trial court as annexure '9' and '10'. The said evidence contained copies of phone records of one Francis Njau Mwaura who alleged that he had at the material time corresponded with the respondent telephonically and vide sms regarding his whereabouts.

14. The court has carefully considered the memorandum of appeal as filed by the appellant and is satisfied that grounds 1 to 5 thereof did not specifically address failure by the trial magistrate to consider electronic evidence adduced by the appellant. Instead, the appellant, only in general terms stated:

> That the learned magistrate erred in fact and in law by failing to sufficiently consider thereby disregarding the evidence as filed and adduced by the appellant in the matter or at all"

15. It is the appellant's contention that the telephone logs produced but ignored by the trial court and not considered by this court tend to show that the appellant was in constant communication with the respondent to inform him when he would be willing to avail himself to resume work and or undertake other tasks at the appellant's premises.

16. That the trial magistrate in arriving at his decision did not consider that DW1 had adduced evidence that the respondent had texted DW1 on 23/7/2020 requesting for a sum of Kshs. 500/= as fare to avail himself for any contract. That if the court had considered its electronic evidence it would have reached at the conclusion that the appellant did not terminate the employment of the respondent but instead the respondent had made up his mind to pursue alternative engagements and not return to work for the appellant after the COVID break.

17. The court notes that the trial magistrate indeed considered the electronic evidence comprising call logs and sms transactions from Safaricom and Airtel provided by the appellant at paragraph 15 of the judgment, which factor this court admits it erroneously did not note in its judgment.

18. The court however notes that the decision of the trial magistrate and that of this court did not turn on the alleged electronic evidence at all but on the fact that the appellant had at all material times regarded the respondent as a casual worker, erroneously and therefore did not provide the claimant with notice of termination; did not grant the respondent any annual leave and did not pay him in lieu of notice. That the respondent had worked for the appellant for a period of 8 years still being considered as a casual.

19. Despite the electronic evidence adduced before the trial court, the court concluded that the appellant had on 3/7/2020 informed the respondent through one Mr. Njau, Human Resource Manager not to report to work the following day and to await to be called.

20. The trial court concluded upon review of all the evidence before it including the call logs and sms that the appellant never recalled the respondent back to work and was never issued with termination letter primarily because the appellant had considered the respondent a casual worker for a period of 8 years.

21. This court having acknowledged the erroneous assumption that electronic evidence was firstly introduced before this court has now reviewed that position but is still of the finding that the apparent error does not change its position in affirming the decision of the trial magistrate in its judgment dated 29/7/2022.

22. Accordingly, this application is allowed only to the extent of correcting that limited error in the judgment which does not affect the final decision of this court in its judgment dated 25/5/2024.

    No orders as to costs.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2024

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Kadere for Appellant/Applicant

Mr. Njuru for respondent

Mr. Kemboi – Court Assistant