

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. E098 OF 2023

(Before D. K. N. Marete)

KEVIN OUMA OWITI..... APPELLANT

VERSUS

ENDEAVOURS CONSTRUCTION COMPANY LTD..... RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 16th June, 2023. It comes out as follows;

- (i) That the trial court erred in law and in fact in dismissing the claimant's claim without any basis in law and fact.
- (ii) That the trial court erred in law and in fact in finding that the claimant was a casual employee without any basis in law or facts.
- (iii) That the trial court erred in law and in fact in finding that the termination was not unfair and wrongful.
- (iv) That the trial court erred in disregarding that the claimant was paid twice a month and therefore is not a casual employee, in the light of the evidence before the court.
- (v) That the trial court grossly misdirected itself in ignoring the principles set out in Section 43 and 45 of the Employment Act in dismissing the claim.
- (vi) That the trial court erred in law and in fact in failing to consider the Appellant's submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned determination.

(vii) That the trial court's decision is against the weights of evidence.

Reasons therefore, the Appellant prays;-

- a) The appeal be allowed.
- b) That the judgment of the trial court be set aside or varied.
- c) That the Appellant be awarded the prayers relating to claim for damages, terminal benefits and damages for unprocedural unfair and unlawful termination of employment.
- d) The costs in the subordinate court and this appeal be awarded to the Appellant.

The Appellant instituted the primary suit vide a Memorandum of Claim dated 29th October, 2019. This was due to a termination of his employment on 4th October, 2018. Judgment was delivered on 19th May, 2023 where the trial court dismissed the claim with costs to the Respondent.

At trial, the Appellant adopted its Witness Statement dated 28th October, 2019 - at page 9 of the Record of Appeal. His case is that he was employed by the Respondent on 1st February, 2017 but was not issued with a letter of appointment. Instead his name was recorded in a book and his national identification card was taken by the Respondent.

The Appellant's further case is that he was engaged as a carpenter in the Respondent's company and issued with a job card which he would submit every morning on reporting to work and pick it up every evening upon exit. He posits that he worked every day of the week from 730 to 1700 hours. Initially he was paid on a cash basis but later this was made through Mpesa. It was Ksh. 700.00 per day and the total pay per month would be Ksh. 21,000.00.

There was a register for payments on pay day and on tabulation of the days worked in a month, the pay master would request for our national identity card and verify the same before paying the monies through Mpesa.

The Appellant's other case is that on 4th October, 2018, he reported to work as usual but the supervisor, one, Victor informed him that his services were not longer required. He was not given any reason for the termination of his employment. This employment is not disputed by the Respondent.

The Respondent's case is that the services of the claimant/Appellant were not terminated but instead he was transferred to another site after completion of works at the existing site. It is upon such action that the claimant voluntarily dismissed himself from work.

The matter at the trial court was not defended, or at all. This is despite the Appellants response to Memorandum of Claim dated 21st January, 2020 which comprised largely of denials to the allegations in the claim.

The Appellant submits that at page 65 of the Record of Appeal, the trial court observed that from the evidence and Mpesa statement that was adduced in evidence, there was no single time on the three (3) occasions that the Respondent paid the claimant a sum of more than Ksh. 10,000.00. This evidence therefore proves that he was a casual employee. At page 66, the trial court observes as follows:

“Casual employment is lawful and legitimate and so is term contract, piece rate and seasonal contract. Section 2 of the Act defines casual employee, as casual employee means a person

the terms whose engagement provides 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”.

“With the claimant having proved to have been a casual employee of the Respondent I find that he has failed to prove that the alleged termination was unfair or that they were wrongfully dismissed hence has failed to prove his case on a balance of probability as against the Respondent”

The Appellant therefore projects a case where the trial court did not take into account the evidence and submissions of the Appellant in that whereas the Respondent admitted that the Appellant was its employee the trial court nevertheless concluded that the Appellant was a casual employee. The court also failed to appreciate that the Appellant was paid every two weeks and did nine (9) months of continuous service and therefore cannot have been a casual employee in terms of Section 2 of the Employment Act, 2007. This is because he was not paid after each day and his employment was longer than twenty-four (24) hours at a time.

The trial court again failed to take into account that the Appellant was not given any reasons for termination of his employment. Besides the trial court also failed to appreciate that the honors of proving or disapproving any allegation made by an employee is placed on the employer on the basis that it is the custodian of employment records and documents.

Inasmuch as the Respondent/employer did not participate in the proceedings to prove a case against termination of employment, the Appellant also fell short of establishing a case of termination of employment. Section 47(5) of the Employment Act, 2007 is succinct on the requirements of proof in a case of unlawful termination of employment. The employee must

at the onset set out and establish a *prima facie* case of unlawful termination of employment upon which the employer is called upon to justify such termination of employment.

In the instant case the Appellant claims that he was employed at a pay of Ksh. 700.00 per day all totaling to Ksh. 21,000.00 per month. This remains an allegation that was not supported by any further evidence in documents or otherwise. The trial court observed that in all the three occasions demonstrated by the Appellant Mpesa statement, he received less than Ksh. 10,000.00 as pay. This does not demonstrate permanence in employment and therefore the finding by the trial court that indeed, he was a casual employee.

Cases are not won on the basis that Respondent's have neglected and or refused to appear in court and defend their cases. Court would look at the tangibility of the evidence adduced by the claimant in support of such claims. It is upon establishing the veracity of the claim that a court would find in favour of the claimant party. This is not the case in the circumstances of this appeal. The claim failed for want of proof.

I am therefore inclined to dismiss the appeal with orders that parties their costs of the same.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Miss Karanja instructed by Karanja & Partners Advocate for the Appellant.
2. No appearance for the Respondent