Abdala & 9 others v Zhongmei & another (Civil Appeal 296 of 2019) [2025] KECA 26 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 26 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 296 OF 2019

J MOHAMMED, AO MUCHELULE & LK KIMARU, JJA

JANUARY 17, 2025

BETWEEN

BONAYA KAMBICHA ABDALA & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9 OTHERS ..... APPELLANT

AND

D JIANGXI ZHONGMEI ..... 1ST RESPONDENT

ENGINEERING CONSTRUCTION COMPANY LIMITED ... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Employment & Labour Relations Court at Nyeri (Nzioki Wa Makau, J.) dated 4th July 2019 in ELRC Cause No. 489 of 2017 consolidated with Cause Nos. 490 through to 499 of 2017)

JUDGMENT

Background

1. Bonaya Kambicha Abdala & 9 others (the appellants) commenced separate claims before the Employment and Labour Relations Court (ELRC) by filing individual Statements of Claim. The trial court proceedings indicate that directions were given on 6th February, 2017 that the separate causes be consolidated and Cause No. 489 of 2017 was made to be the test suit.

2. The facts giving rise to the dispute before the ELRC as it can be inferred in the Statement of Claim dated 14th December, 2017 are that on or about 1st May, 2011 all the appellants were employed in various capacities to perform diverse duties by Jianxi Zhongmei Engineering Construction Company Limited (the respondent) during the construction of the Marsabit – Turbi-road. The appellants contended that they served the respondent diligently, with full dedication and commitment until 24th November, 2015 when they were allegedly wrongfully, unprocedurally, unfairly, unjustifiable and/or

unlawfully terminated. It was their contention that the respondent refused to pay them their terminal benefits.

3. The appellants further particularised the alleged unlawful violation by the respondent of Sections 41 (1), 44 (4), 45 (2) (a), 45 (4), 35 (1) (b) & (c), 36 28 (1), 27 (1), 15 (c), 31 and 51 of the *Employment Act* Cap 226, underpaying the appellants contrary to the *Labour Institutions Act*, Cap 234 *Legal Notice No. 197 of 2013* and failing to give the appellants house allowance contrary to Rule 3 (1) of the Labour Institutions (Building and Construction Industry) (Wages) Order, 2012. The appellants further pleaded that the respondent breached a Collective Bargaining Agreement (CBA) entered between their Union and the respondent's management.

4. The appellants further particularised the breach of agreement on the respondent's part, as failure to issue them with an appointment letter, failure to issue them a payslip, failure to pay them on public holidays as required by law, failure to pay them overtime, failure to provide them with personal protective equipment, failure to adjust wages agreed in the agreement and failure to submit NSSF and NHIF as required and agreed. The appellants further tabulated the alleged dues which the respondents owed them being two month's pay in lieu of notice, gratuity/service benefits, compensation for unfair termination, underpayment, annual leave dues, unpaid house allowances and Sunday's underpayments.

5. Against the above factual background, the appellants prayed for judgment against the respondent for a declaration that the termination/dismissal process was not done in accordance with the law, payment of the sums claimed at paragraph 8 of the statement of claim, costs and interest and any other relief the trial court deemed fit to grant.

6. Opposing the statements of claim, the respondent filed a replying memorandum dated 12th February, 2018. The respondent conceded that it entered into a fixed term contract with the appellants on diverse dates between the years 2012 and 2015 for the purposes of upgrading Phase II Marsabit - Turbi (A2) Road. However, the respondent denied the allegations that it unfairly, wrongfully and unlawfully terminated the appellants' employment.

7. The respondent averred that by an agreement dated 11th October, 2010, it was contracted by The Kenya National Highways Authority (KENHA) for the purposes of upgrading to bitumen the Kenya/ Ethiopia Corridor Development Project Phase II Marsabit - Turbi (A2) Road for a period of 3 years commencing 5th April, 2011 to 5th April, 2014. The respondent admitted that it employed the appellants to offer services in various capacities within the contractual period. It was contended that as of April 2014, a substantial part of the work had been completed. It was further contended that between April and September 2014 the respondent relieved most of the appellants from employment depending on the month which the appellants finalised their specific assignments. The respondent stated that as of April 2014, it had not been granted extension of contract by KENHA for the remainder of the works.

8. The respondent averred that in August 2014, its contract was extended for a further period of 1-year until 20th April, 2015. The respondent stated that it retained some of the appellants whose portions of the works were yet to be completed until April 2015 when they were released upon completion of the projection. It was further stated that the respondent continued maintaining the road with minimal staff between April 2015 and April 2017 which was the defects liability period before the project was handed over.

9. The respondent contended that none of the appellants had a legitimate expectation that they would continue working for it as their contracts automatically lapsed with the completion of the project. According to the respondent, its separation with each of the appellants was discussed and it issued each

of the appellants with recommendation letters and paid them their accrued terminal dues including payment in lieu of leave days not taken. The respondent denied that it is liable to pay all the other dues as pleaded by the appellants and urged that their claims be dismissed with costs.

10. After considering the pleadings, the facts in dispute, the viva voce evidence and written arguments by all the parties, the ELRC (Nzioki wa Makau, J.) was of the view that three issues were for determination. On whether the termination was wrongful, unprocedural, unjustifiable and/or unlawful, the ELRC referred to Section 43 of the *Employment Act* and found that the respondent ought to have informed the appellants the reasons for their termination of employment in compliance with Section 41 of the *Employment Act*. The ELRC faulted the respondent for failing to pass the fairness test of both substantive justification and procedural fairness. The ELRC found that the appellants having been dismissed in the manner in which they were, were entitled to remedies as their evidence remained uncontroverted.

11. On the remedies sought, the trial court referred to the appellants' claim that they were being underpaid. It was held that under the *Labour Institutions Act* and *Legal Notice No. 197 of 2013*, the appellants fell into the category of 'general workers'. Under the said category, the appellants were to be paid a basic minimum wage, which is Kshs.5,218/=. However, the appellants were being paid Kshs.10,608/= a month. The ELRC observed that this amount was higher than what is provided for in law. The appellants were therefore estopped from pleading that they were underpaid. The ELRC held that all other alleged underpayments being the Sunday underpayments, house allowances were all catered for in the basic minimum salary.

12. From the foregoing, the ELRC held that the appellants were entitled to one month's salary as notice, two months salary as compensation and Kshs.20,000/= as costs.

13. Aggrieved by the said decision, the appellants are now before us seeking to set aside the judgment of the ELRC and have it substituted with a judgment of this Court. The appellants also pray that the costs of this appeal and those of the ELRC be awarded to them based on the Advocates (Remuneration) Order 2014. The appellants raise five grounds of appeal in their Memorandum of Appeal dated 5th November, 2019. We hereby reproduce verbatim as follows: -

    1. The trial court erred in law and in fact in using Legal Notice Number 197 of 2013 which deals with casual workers instead of *Legal Notice No. 20 of 2013* which specifically deals with workers in the Building and Construction Industry in determining the issues of salary underpayment, housing allowance, Sunday's underpayment and overtime;

    2. The trial court erred both in law and in fact in awarding two months' salary as compensation for unlawful termination which was grossly low as to be reasonable considering the 12 months' salary envisaged under the *Employment Act*;

    3. The trial court erred in both law and fact in treating all the appellants as general workers supposed to earn a salary of Kshs. 5, 218/= under the Regulations of Wages (General) Amendment Order 2013 whereas the appellants were engaged in various assignments in construction of the subject road;

    4. The trial court erred in both law and fact in not making a computation of the appellants' award in his judgement;

    5. The trial court erred in law and in fact in arbitrarily awarding costs of Kshs, 20,000/= to each of the appellants contrary to the minimum amounts set by the Advocates (Remuneration) (Amendment) Order 2014.

Submissions by Counsel

14. We heard the parties virtually on 8th March, 2024. Learned counsel Mr. Orayo appeared for the appellant while learned counsel, Mr. Karuti appeared for the respondent. Both counsel relied on their written submissions.

15. In support of their appeal, the appellants filed written submissions dated 12th August, 2023. It was submitted that all the appellants were employed in his/her own assignment and it was erroneous for the ELRC to have treated all of them as general workers as he did. Counsel for the appellants urged us find that the applicable law in respect to the appellants' claim is the *Legal Notice No. 20 of 2013* Labour Institutions (Building and Construction Industry) (Wages) Order as opposed to *Legal Notice No. 197 of 2013* (Regulations of Wages (General/Amendment) Order 2013. The appellants asked us to consider that the capacity in which each of the appellants was employed, the wage/salary, date of employment and date of termination were all different.

16. The appellants submitted that the ELRC further erred by finding that the appellants did not prove underpayments and house allowances as they did not produce payslips or bank statements. It was submitted that contrary to the Collective Bargaining Agreement (CBA) dated 27th July, 2012, the respondent failed to issue the appellants with a payslip and therefore they could not have produced it. The appellants were being paid using payment vouchers which were being kept by the respondent hence they had no records in their possession that they could produce in court.

17. The appellants contended that they proved their claims under the heads of payment in lieu of notice, gratuity/service pay, compensation for unfair termination, underpayment of wages, annual leave dues, unpaid house allowance and Sunday payments. The ELRC was therefore duty bound to award them the amounts each of the appellants computed. The appellants stated that the two months compensation was on the lower side. The appellants urged us to award 12 months pay as stipulated under Section 49 (1)(c) of the *Employment Act*. The appellants further urged us to allow the appeal with costs in the ELRC and in this appeal to scale.

18. In rebuttal, counsel for the respondent through written submissions submitted that the contention that the ELRC misdirected itself in relying on *Legal Notice 197 of 2013* instead of *Legal Notice No. 20 of 2013* is misleading since the court relied on *Legal Notice No. 197 of 2013* which was pleaded by the appellants themselves. It was submitted that this Court cannot rely on a notice which was being introduced for the first time given that this was not an issue which was raised in the ELRC. To support this, the appellant relied on the decision of Pop - In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (1990) eKLR where this Court held that a party cannot be allowed to bring forward another case only because they have omitted part of their case.

19. On the award of two months' salary compensation as too low, it was submitted that the ELRC made the correct finding based on the evidence tendered before it. It was submitted that the appellants have not demonstrated that the ELRC acted on wrong principles upon arriving at its decision. The respondent urged that unless this Court finds or establishes that ELRC acted erroneously, the award should be upheld as it was found in the decision of this Court in Kenya Broadcasting Corporation vs Geoffrey Wakio [2019] eKLR. The respondent further urged that before determining quantum of damages in claims of unlawful termination, the factors outlined in Section 49(4) of the *Employment Act* should be considered. It was submitted that considering that the appellants were employed as casual labourers for the construction of the Marsabit – Turbi Road, which was for a certain duration of time, the two months' salary compensation was fair and just.

20. The respondent submitted that the assertion that the appellants were not being given payslips, was raised in this appeal for the first time and it was not an issue before the ELRC. We were urged to refer to the decision of this Court Pop In (Kenya) Limited & 3 Others (supra) where this Court eschewed raising new issues on appeal which were not the subject of determination at trial. It was further submitted that the issues have been raised at the submissions stage, of which, they are no pleadings.

21. According to the respondent, the award of 12 months' salary would be unjustified and excessive in the circumstances since the respondent's conduct in the circumstances was not callous or capricious.

22. On the categorization of all the appellants as general employees, it was submitted that having failed to prove the allegations of underpayment by attaching payslips or bank statements, there was no reason for the court to analyse the specific circumstances of the appellants' claim. It was submitted that the burden of proof lay with the appellant and they did not discharge the same. The respondent relied on this Court's decision Manyinsa vs Lavington Security Limited (Civil Appeal No. 55 of 2019) KECA 1376 (KLR) (24 November 2023) to support the submission that the appellants did not place evidence to support the alleged loss and damage.

23. On whether the trial court erred in not making a computation of the appellants awards in his judgment, the respondents submitted that the trial court in its findings awarded two month's salary as compensation and costs of Kshs.20,000/= each on the 10 files. On the arbitrary award of Kshs.20,000/ = to each appellant on costs, it was submitted that award of costs is discretionary and no basis had been laid out to warrant this Court's interference with the ELRC's award of costs.

Determination

24. This being a first appeal, our duty as the first appellate court is to re - evaluate and reconsider the evidence adduced before the ELRC so as to draw our own independent conclusions as it was held in the case of Selle vs Associated Motor Boat Company [1968] E.A. We must also examine and satisfy ourselves on whether the conclusions reached by the Learned Judge were based on no evidence, or a misapprehension of the evidence or on application of the wrong principles as was held in the case of Sanitam Service (EA) Ltd vs Rentokil [2006] eKLR.

25. We have carefully considered the record of appeal, the written submissions by both counsel, the cited authorities and the law. We are of the view that the following three issues fall for determination: -

    i. Whether the appellants' termination was unfair and unlawful;

    ii. Whether the appellants are entitled to the reliefs sought;

    iii. Whether the assessment of costs by the trial court was unreasonable.

26. The uncontroverted evidence is that there was an employer - employee relationship between the appellants and the respondent. It is also common ground that the basis of the employment relationship was premised on a contract for the then upgrading to bitumen standards of the Kenya/Ethiopia Corridor Development Project Phase 11 Marsabit - Turbi (A2) Road for a period of 3 years commencing 5th April, 2011 to 5th April, 2014. It is also factual that the construction period was further extended by one year to April 2015 and a further extension of two years till 19th April, 2017 to cover the defects liability period.

27. At paragraph 11 of the response to the claim, counsel for the respondent demonstrated the role each of the appellants played and the period of service. According to the table, the appellants were employed and terminated on diverse periods between the years 2011 - 2016. The appellants served

in different capacities ranging from general workers, tipper drivers, security guard, surveyor, radio operator, secretary, foreman and so forth. Hence, we are constrained to observe and it is factual to conclude that each of the appellants had a specific role that they played during the construction period.

28. Counsel for the appellants contended that the appellants' termination was not lawful as the respondent did not follow the laid-out procedure under the *Employment Act*. The ELRC held that the respondent ought to have informed the appellants the reasons for the termination and accord to them a fair hearing to comply with the provisions of Section 41 of the *Employment Act*.

29. Section 2 of the *Employment Act*, defines a contract of service to mean an agreement whether oral, written, express, implied, to employ or to serve an employee for a period of time. The law recognises that there are certain contracts which are time bound. In this instance, the terms of appellants' employment were clear that it was to last as long as the construction of the road was ongoing. The period having lapsed by virtue of completion of the works, the respondent had no other choice but to relieve some of the appellants whose services were no longer needed.

30. Furthermore, the appellants cannot be heard to allege that they were terminated unlawfully when they had not demonstrated that their skills were necessary for the extended period of the contract or in the alternative, the respondent terminated their contracts but proceeded to employ other persons to work in the same capacity that they did. Hence, it cannot be concluded that the appellants' termination was unlawful and unfair within the meaning of Section 45 of the *Employment Act*.

31. Much as Section 41 of the *Employment Act* requires that a party is to be informed on the reasons for termination, the facts herein present unique circumstance as the terms of engagement between the parties was for a specific period. We do not think that the argument that the appellants wish us to adopt that they ought to have been informed on the reasons prior to termination, come to their aid in this instance.

32. The contract period having lapsed by effluxion of time, there was no obligation on the part of the respondent to give notice of the expiry for a contract which it would not have otherwise renewed. This Court in Registered Trustees of the Presbyterian Church of East Africa & Presbyterian Foundation vs Ruth Gathoni Ngotho- Kariuki [2017] KECA 194 (KLR) held that: -

> "The general position on the consequences of expiry of a fixed term contract, as can be gleaned from various decisions of this Court and that of the Employment and Labour Relations Court, is that once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period."

33. It is our finding that the appellants' terms of service with the respondent lapsed upon completion of the road construction. There was no legitimate expectation either impliedly or explicitly by the appellants that they would have been retained by the respondent upon completion of the construction project and neither was the respondent under any legal obligation to inform the appellants on the reasons for termination of their employment.

34. Having found that the termination of the appellants' employment was in accordance with the law and proper, the second and third issues for determination fall by the wayside.

35. In the penultimate, we find and hold that this appeal is devoid of merit.

It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR