Mungai v Kabuito Contractors Limited (Civil Appeal 53 of 2018)
[2023] KECA 120 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 120 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 53 OF 2018

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

FEBRUARY 3, 2023

BETWEEN

DANIEL MUNGAI ..... APPELLANT

AND

KABUITO CONTRACTORS LIMITED ..... RESPONDENT

(Being an appeal from part of the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (M. N. Nduma, J.) delivered on 1st April, 2017 In E.L.R.C Cause No. 1990 of 2011)

JUDGMENT

1. The appellant, Daniel Mungai, was engaged by the respondent, Kabuito Contractors, as a Roller operator with effect from May 5, 2006 at a daily rate of KShs. 600.

2. Following his engagement, the appellant worked intermittently until May 28, 2011 when his engagement was terminated. His claim was that he was wrongfully and unfairly dismissed.

3. By a Statement of Claim dated November 23, 2011 filed in the Industrial Court of Kenya at Nairobi Cause No. 1990 of 2011, the appellant claimed: KShs. 339,800 on account of terminal dues; compensation for wrongful dismissal amounting to 12 months' wages in the sum of KShs. 216,000; costs of the suit; interest on the two sums aforesaid; and any other relief that the court may deem just.

4. In its Reply to the appellant's Memorandum of Claim datedJanuary 5, 2012, the respondent stated that the appellant was engaged intermittently on diverse dates on casual basis between 2006 and 2009; that his daily rates in 2006 was KShs. 200, KShs. 250 in 2007, KShs. 300 in 2008, and KShs.325 in 2009; that the appellant was called to duty and engaged from time to time when the respondent had a contract in progress; that the last of their contracts expired in December 2009, but was later re-engaged 7 months later in August 2010; and that the appellant was laid off in June 2011when their road construction project came to an end.

5. The appellant reported the matter to the Thika District Labour Offices, whereupon the labour officer called for the appellant employment records on the basis of which he computed the appellant's terminal dues in the sum of KShs. 17,791 pursuant to the provisions of the *Regulation of Wages (General Amendment) Order*, 2011 and the *Employment Act*, 2007. The respondent remitted the sum of KShs. 17,791 to the labour office for onward transmission to the appellant. The respondent obtained a receipt dated September 14, 2011 from the labour office indicating that the amount paid was "on account of final dues".

6. Dissatisfied by the settlement sum, the appellant filed the claim in the Employment and Labour Relations Court and obtained an award of KShs. 30,900 made up of: KShs. 18,000 being one month's salary in lieu of notice; KShs. 8,100 in lieu of leave; and KShs. 4,800 on account of 4 public holidays worked. In his judgment, the learned Judge directed that, in the event that the appellant had collected the sum of KShs. 17,791 from the labour office, then the respondent was only bound to pay the difference together with interest at court rates from the date of filing suit until payment in full. In addition, the learned Judge ordered the respondent to furnish the appellant with a certificate of service, and also bear the costs of the suit.

7. Aggrieved by the decision of the Employment and Labour Relations Court (M. N. Nduma, J.), the appellant moved to this court on appeal from part of the judgment claiming: compensation for wrongful and unfair dismissal equivalent to 12 months' wages in the sum of KShs. 216,000; the prayers as sought in the Memorandum of Claim; and costs of the appeal. The appellant's appeal is anchored on 7 grounds, namely that the learned Judge erred in law and in fact: in finding that there was insufficient evidence to prove that the appellant was a permanent employee; in failing to apply the provision of section 37 of the *Employment Act*, 2007; in finding that the appellant was aware that he would be laid off when a specific contract came to an end, and subsequently re-engaged as and when a new opportunity arose; in failing to consider that a redundancy situation was present in the termination of the appellant; in failing to consider the provisions of section 40 of the Act on unfair termination; in failing to find that sections 41, 43 and 45 of the Act were applicable in the appellant's case; and in failing to determine the appellant's prayer No. II in view of the unlawful and unfair dismissal.

8. We need to point out at the onset that, this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co* [1968] EA p123.

9. In *Selle's case* (ibid), the court held:

> " An appeal to thiscourt from a trial by the High Court is by way of retrial, and the principles upon which this courtacts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

10. Having examined the record of appeal and the grounds on which it is founded, the written submissions of learned counsel for the appellant and learned counsel for the respondent, we are of the considered

view that the appeal turns upon our finding on four main issues, namely: whether the appellant was in the respondent's employment on permanent terms; whether termination of his employment was wrongful or unfair; whether the appellant is entitled to the relief sought; and what orders ought we to make in determination of this appeal, including orders as to costs.

11. On the first issue, it is not in dispute that the appellant's wages were computed at daily rates. However, we find nothing on the record to suggest that he was a casual employee within the meaning of section 2 of the Act as contended by the respondent. section 2 of the Act defines a "casual employee" as "a person the terms of whose engagement provide 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." Neither does the evidence adduced at the trial establish that the appellant was a permanent employee. What then were the terms of his employment?

12. The respondent was a road contractor. It engaged the appellant as a Roller operator as and when it had a road construction contract in progress. According to the respondent, the appellant was engaged intermittently and conditional on the respondent securing a contract. In our considered view, the appellant was employed from time to time on contract terms, and for the duration of any particular road construction contract secured by the respondent. That explains why his wages were computed at daily rates. Simply put, the appellant was not employed on permanent terms, but on short-term contracts renewable from time to time. In the circumstances, his contractual engagement was terminable at the end of a particular contract unless and until he was subsequently re-engaged under a new contract.

13. In view of the foregoing, we are of the considered view that termination of the appellant's contractual engagement on May 28, 2011 was in accordance with section 45(2) (b) (ii) of the Act, which contemplates termination of employment "... based on the operational requirements of the employer". Such termination was neither wrongful nor unfair within the meaning of section 45 of the Act as alleged by the appellant.

14. It is also noteworthy that the appellant's last engagement on contract was for a term of 10 months – August 2010 to June 2011. Section 45(3) of the Act bars any claim for wrongful or unfair dismissal of any employee who has been continuously employed by the employer for a period of 13 months or less. Accordingly, his claims for compensation for wrongful and unfair dismissal and terminal dues on account of house allowance, overtime allowance and amounts not remitted to the NSSF, fail.

15. In view of the fact that the learned Judge awarded the appellant KShs. 18,000 in lieu of notice, KShs. 8,100 leave allowance, and KShs. 4,800 for 4 public holidays worked, we find nothing to fault the trial court's decision. Accordingly, the appellant's appeal fails and is hereby dismissed with no orders as to costs. In effect, we uphold the judgment of the Employment and Labour Relations Court (M. N. Nduma, J.) dated April 1, 2016. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR