



**Mastermind Tobacco (K) Limited v Romano (Civil Appeal  
19 of 2018) [2023] KECA 635 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 635 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 19 OF 2018  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
MARCH 31, 2023**

**BETWEEN**

**MASTERMIND TOBACCO (K) LIMITED ..... APPELLANT**

**AND**

**NICOLA ROMANO ..... RESPONDENT**

*(An appeal from the judgment and decree of the Employment and  
Labour Court of Kenya at Nyeri (B. Ongaya, J.) dated 19th October  
2017 in Embu Employment and Labour Relations Cause No. 61 of 2017)*

**JUDGMENT**

1. The respondent, Nicola Romano, worked for the appellant Mastermind Tobacco (K) Limited between November 2011 and March 2014 as a specialized agronomist in the position of technical support manager. At the commencement of the contract the appellant secured a work-permit from the Immigration Department. It was issued on November 6, 2011. Prior to the expiry of the work-permit on December 28, 2013, the appellant applied for its renewal. It was issued with an acknowledgment slip dated November 28, 2013 from the Immigration Department, and paid a renewal fee of Kshs 10,000/-.
2. On December 28, 2013 the respondent's work-permit expired. The appellant's Human Resources Department assured the respondent that the renewal process was on course. He continued to work.
3. Quite unfortunately, on January 28, 2014 the respondent injured his right knee. He was treated at Nanyuki Cottage Hospital. He was referred to an orthopedic surgeon who recommended 8 weeks of bed rest, and be seen on February 7, 2014 and March 5, 2014 for consultation. He duly informed the appellant's Human Resources Manager of his injury. Later, he received an email dated March 10, 2014 in which the manager sought a meeting with him. He attended the meeting with the Deputy Human Resources Manager. He was informed that the Managing Director intended to relieve him of his duties. He requested to be given two (2) months unpaid leave to be able to recuperate. His position in the



company entailed a lot of field work, and that was why he sought for time to recover. What followed was a letter dated March 13, 2014 from the appellant relieving him of his duties with immediate effect. This letter stated as follows:-

'Further to our discussion this morning, we wish to inform you that your work-permit R-No xxxx expired on the December 28, 2013. Please note that the management has no intention of renewing your work-permit.

Please note that your last day of employment shall be Thursday March 13, 2014. By a copy of this letter, the Director of Immigration Services is advised to close your file and release Mastermind Tobacco (K) from any obligation.'

4. It was this set of events that made the respondent to sue the appellant in the Employment and Labour Relations Court at Embu vide a memorandum of claim dated March 7, 2017 in which he sought the following prayers, among others: -

- a) A declaration that the respondent's dismissal of the claimant from his employment was unlawful, unfair and hence null and void.
- b) A declaration that the claimant's termination was in violation of his constitutional right not to be discriminated against as set out in Article 27 (5) of the *Constitution* of Kenya and the right to fair labour practices as set out in Article 41 of the *Constitution* of Kenya.'

He sought that the appellant be ordered to pay him Kshs 330,000/- in lieu of termination notice; Kshs 165,000/- unpaid salary for March 2014; Kshs 960,000/- being 12 months salaries compensation for unfair termination; the total being Kshs 4,455,000/-. Lastly, he sought an award of general damages for the violations indicated above.

5. The appellant's defence to the claim was that there was nothing unlawful or unfair about the termination of employment, nor were any constitutional rights of the respondent violated. This was because his employment depended on the work-permit. Since the work-permit was not renewed, any further employment became untenable and illegal under section 53(1)(m) of the *Kenya Citizenship and Immigration Act*, 2011.
6. The learned Judge (B Ongaya, J) received evidence from the parties, and in a judgment delivered on October 19, 2017 found for the respondent. He declared that the respondent's dismissal from his employment was unlawful and unfair, and that his constitutional right to fair labour practices as set out in Article 41 of the *Constitution* had been violated. In particular, the court found that the reason for terminating the respondent's employment was unfair for want of a valid reason as envisaged in section 43 of the *Employment Act*, 2007. The court found that the respondent's ill health was what had led the appellant not to conclude the renewal of his permit and to eventually terminate his employment. It was noted that the appellant had, in seeking to continue engaging the respondent in employment, applied for the renewal of the work-permit, but things had changed when the respondent got injured and applied for two (2) months unpaid leave. The request for leave was never considered. The court considered that the need for a work-permit was a statutory provision whose satisfaction was necessary towards the legitimate implementation of the contract of service, but that in the absence of express contractual provision making lack of the permit as frustrating the contract, the absence of the permit by itself did not bar the parties from pursuing their respective rights and obligations under the contract of employment, one way or the other.



7. The learned Judge ordered the appellant to deliver to the respondent a certificate of service by December 1, 2017, and to pay him Kshs 1,815,000/- by December 31, 2017 failing which interest at court rates would be payable until payment in full; and then pay his costs of the cause.
8. The appellant was aggrieved by the decision and orders and preferred the present appeal, whose grounds were as follows:-
  - (1) The learned Judge gravely erred in law in finding that a valid enforceable employment contract existed between the appellant and the respondent after the respondent's work-permit expired on December 28, 2013;
  - (2) The learned Judge gravely erred in law and fact in finding that the appellant ended ex-gratia employment relationship with the respondent on account of the respondent's knee injury, a reason that was extraneous given the employment records availed to the learned Judge;
  - (3) The learned Judge gravely breached the doctrine of judicial precedence in failing to show deference to the decisions of the Court of Appeal of Kenya which settled the law on illegality of employment contracts with foreign nationals entered into without a valid work-permit;
  - (4) The learned Judge gravely misdirected himself in law in failing to consider and analyse the appellant's closing written submissions;
  - (5) The learned Judge gravely erred in law in implying and enforcing an illegal employment contract between the appellant and the respondent;
  - (6) The learned Judge gravely misdirected himself in law in awarding the respondent reliefs in the absence of a valid employment contract between the parties.
9. The appellant prayed that the appeal be allowed, and the judgment and the decree issued on October 19, 2017 be set aside.
10. The respondent filed a notice of grounds affirming the decision of the Employment and Labour Relations Court. The grounds were as follows:-
  - (1) There was a valid and enforceable employment contract between the appellant and the respondent at the time of termination of the respondent's employment contract. Before the expiry of the respondent's work-permit, the appellant had started the process of renewing the respondent's work-permit in November 2013. The appellant did pay application fees for the renewal of the said permit;
  - (2) The appellant never produced any evidence that the Department of Immigration rejected the respondent's application for the renewal of the work-permit;
  - (3) The appellant produced contradictory evidence on the reason for the respondent's termination from his employment; and
  - (4) The termination of the respondent from his employment was in violation of his constitutional rights not to be discriminated against as set out in Article 27(5) and the right to fair labour practices as set out in Article 41 of the *Constitution* of Kenya. He was terminated solely because of his knee injury and his inability to work as at the material time.
11. The appeal was canvassed by way of written submissions which were highlighted during oral hearing.



12. This is a first appeal. This Court has the responsibility to –

' 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.'

(*Selle & Another v Associated Motor Boat Co Ltd & Others* [1968]EA 123).

13. Having considered the evidence as contained in the record of appeal, the grounds of appeal and the respective submissions by counsel for the appellant and the respondent, we formed the view that the issues for determination are:-

- a) Whether there was a valid contract of employment between the appellant and the respondent;
- b) If there was, whether the respondent's dismissal from the employment was unlawful, unfair and hence null and void for want of valid reason as envisaged in section 43 of the [Employment Act, 2007](#); and
- c) Whether the respondent was rightfully compensated by the learned Judge.

14. It was not disputed that the respondent was a foreign national. Section 45(1) and (2) of the [Kenya Citizenship and Immigration Act, 2011](#) provides as follows:-

' (1) No person shall employ-

- a) A foreign national who entered Kenya illegally;
- b) A foreign national whose status does not authorize him or her to engage in employment;
- c) A foreign national on terms, conditions or in a capacity different from those authorized in such foreign national's status.

(2) It shall be the duty of every employer to apply for and obtain a work-permit or a pass conferring upon a foreign national the right to engage in employment before granting him employment and it shall be presumed that the employer knew at the time of the employment that such person was among those referred to in subsection (1).'

15. Further, section 53(1) of the Act stipulates that a person who:-

- (m) Not being a citizen of Kenya, engages in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by a work- permit, or exempted from this provision by regulations made under this Act;
- (n) Employs any person, whether or not for reward, whom he knew or has reasonable cause to believe is committing an offence under paragraph (m) by engaging in that employment commits an offence.'



16. No copy of the contract of employment was produced before the learned Judge, but it was common ground that the appellant employed the respondent sometimes in November 2011 having obtained a two-year work- permit in his favour on December 6, 2011. It was to expire on December 28, 2013. On November 28, 2013, a month before the expiry of the work-permit, the appellant applied to the Immigration Department to have the work-permit extended for a further two years. The appellant paid Kshs 10,000/- for the renewal. By December 28, 2013 the work-permit had not been issued. The appellant retained the respondent in employment until the letter of termination on March 14, 2014. The salary continued to be Kshs 330,000/- per month.
17. It was common ground that, while the parties were waiting for the work- permit and while the respondent was continuing to work for the appellant, he injured his right knee on January 28, 2014. He began treatment. He was on bed rest. His work entailed going to the field and therefore he could not work. He requested from the Human Resources Manager to be allowed two  
(2) months unpaid leave to allow him to recuperate.
18. On March 10, 2014 the Deputy Human Resources Manager sent him an email dated March 10, 2014 requesting for a meeting. It had been indicated that the appellant wanted to terminate his employment, and that was why he had asked for unpaid leave. On March 13, 2014 the respondent's employment was terminated with immediate effect. The letter terminating his employment indicated that his work-permit had expired on December 28, 2013 and that the management had no intention of continuing to employ him. By copy of the letter, the Director of Immigration Services was advised to close the respondent's file.
19. According to the appellant, upon the lapse of the work-permit on December 28, 2013 there was no valid employment relationship between the parties; that such employment was by law dependent on extension of the work-permit; and the salaries paid to the respondent in January and February 2014 were purely on ex-gratia basis in the hope that the work-permit would be forthcoming. When the work-permit was not issued, the appellant contended, the contract of service was not tenable. Reference was made to section 53(1) of the [Kenya Citizenship and Immigration Act](#). Reliance was further placed on the decisions of *Eclairs Group Limited v JKX Oil & Gas plc [1015]UKSC 71*, *Kenya Airways Limited v Satwant Singh Flora, [2013] eKLR* and *Five Forty Aviation Limited v Captain Richard Oloka [2015] eKLR* for the submission that, knee injury or no knee injury, without the work-permit the respondent's employment contract could not be sustained; that the respondent was a foreigner who could only continue to work if there was a work-permit. An employment contract could not be implied or enforced outside the provisions of the Act, it was submitted.
20. The respondent's contention was two pronged. First that, the real reason why he was terminated was the knee injury and not the reason indicated in the letter of termination. If that was the case, then the termination was unlawful and against his right to fair labour practices as the request for a 2 months' unpaid leave was not even considered. Secondly, that the failure to secure a renewed work-permit did not illegalize the contract but merely frustrated it, and that the appellant ought to have fallen back to the procedure provided for under sections 41, 43, and 45 of the [Employment Act](#) which state as follows:-

#### **41. Notification and hearing before termination on grounds of misconduct**

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which



the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

#### **43. Proof of reason for termination**

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

#### **45. Unfair termination**

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
  - (a) That the reason for the termination is valid;
  - (b) That the reason for the termination is a fair reason—
    - (i) Related to the employee's conduct, capacity or compatibility; or
    - (ii) Based on the operational requirements of the employer; and(c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where—



- (a) The termination is for one of the reasons specified in section 46; or
  - (b) It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
- (a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
  - (b) The conduct and capability of the employee up to the date of termination;
  - (c) The extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
  - (d) The previous practice of the employer in dealing with the type of circumstances which led to the termination; and
  - (e) The existence of any previous warning letters issued to the employee.'

21. Counsel for the respondent relied on *Five Forty Aviation Limited v Captain Richard Oloka* [2015]eKLR and *Justin Beswick v Local Ocean Conservation (LOC) Kenya Ltd* [2022] eKLR.
22. The appellant's response on the issue of the reasons for termination was that courts have always been exhorted to be guided by the reasons stated in the termination letter before them (*Kenya Petroleum Oil Workers Union -v- Kenya Petroleum Refineries Limited* [2013]eKLR); that once the reason for termination of the contract of service is established, the duty of the employer is to justify the established reason for the termination.
23. The learned Judge considered the rival evidence and submissions and returned the verdict that the appellant's reason for terminating the respondent's employment was not genuine or valid as envisaged under section 43 of the *Employment Act* 2007. The reason as contained in the letter dated March 13, 2014 was that the work-permit having expired on December 28, 2013, the appellant had no intention of renewing the same. In reaching the decision that the reason was neither genuine nor valid, the court considered that, even after December 28, 2013, the appellant had continued to employ the respondent on the same terms. In the meantime, the appellant had applied for the extension of the respondent's work-permit and paid the Immigration Department for the same. Things changed when the respondent injured his right knee and went for treatment and to recuperate. That was when the



- appellant began to change his mind. When the letter of termination of employment was written, the respondent had three days earlier sought two months' unpaid leave to be able to recuperate. Before the request was considered, the termination letter was done. The Immigration Department had not responded to the request for extension of the work-permit. It had not declined. Why had the appellant changed his mind about continuing to engage the respondent?
24. The court considered the fact the appellant was saying that the work-permit was not renewed and yet the renewal process was ongoing. The appellant was saying that the contract lapsed by effluxion of time, and yet the contract had no clear fixed term tenure; that the appellant did not desire to renew the work-permit yet an application in that regard had been made.
25. The court concluded as follows:-
- ' While making that finding, the court has considered that the need for a work permit was a statutory provision whose satisfaction as necessary towards legitimate implementation of the contract of service but in absence of express contractual provision making lack of the permit as frustrating the contract, the absence of the permit by itself, did not bar the parties from pursuing their respective rights and obligations under the contract of employment, one way or the other.'
26. We have anxiously considered the reasoning by the learned Judge and his conclusions in the matter. We are unable to disagree. We have considered that section 53(1)(m) of the *Kenya Citizenship and Immigration Act*, 2011 requires a valid work-permit before engaging in employment, and it is clear to us that we are enjoined not to enforce an employment contract that is contrary to the provisions of the law.
27. By the conduct and actions of the appellant, it is clear that it intended to continue having the respondent as its employee, hence the application to the Immigration Department for extension of the work-permit. The appellant continued to retain the respondent and remunerated him in January and February 2014 on the same terms. After December 28, 2013 the continued employment of the respondent by the appellant without a work-permit did not render the contract of employment illegal, but gave rise to intervening circumstances which rendered the continued sustenance of the contract between the parties impossible, and at the point the appellant ought to have invoked the provisions of sections 41, 43 and 45 of the *Employment Act*, 2007 to terminate the contract as it had been frustrated. The learned Judge found that the procedures under the provisions had not been followed. We agree with the findings.
28. The reasoning by the learned Judge in the instant case found favour with the Court of Appeal in *Five Forty Aviation Limited v Edward Lanoe* [2019]eKLR when it observed as follows:-
- ' The above finding now leads us to the determination of what in our view should have been the correct mode of terminating the said contract following our finding that the same had been frustrated by the appellant's default to comply with the section 45(2) of the new Act procedures. In the case of *Nicola Romano versus Mastermind Tobacco (K) Limited* (supra), the ELRC expressed the view that, parties to a frustrated contract have recourse to the contract itself. In the instant appeal, the contract itself made provision for Clause 9 of the contract whereby either party could terminate the contract by giving the other one month's notice or one month's salary in lieu thereof. The appellant therefore had an opportunity to have recourse to the said clause to terminate the frustrated contract. Alternatively, since the contract was executed in compliance with the provisions of the *Employment Act*, 2007, the



appellant as the employer, also had an opportunity to invoke sections 41, 43 and 45 of the Employment Act, 2007 procedures to terminate the said frustrated contract.'

29. In Kenya Airways Limited v Satwant Singh Flora (Supra) the employment contract between the parties expressly provided that the employment of the respondent was subject to the renewal of his work-permit. When the work-permit expired the appellant terminated the respondent's contract on grounds that it had been unable to renew the work-permit. Thus, he was given three (3) months' notice. The court found that the respondent was engaged in employment without a valid work-permit after his work permit expired on January 14, 1997. He, therefore, committed an offence under the then Immigration Act. The employment contracts that were entered into between him and the appellant were, therefore, tainted with illegality and could not stand. The court stated as follows:-

' In our view, from the circumstances of the instant case, there existed no enforceable contract between the parties by reason of illegality.

It was an express term of the contract of employment between the appellant and the respondent that the contract would be terminated if the respondent failed to obtain a work-permit from the Immigration Department. Once the respondent's permit expired, any further work he carried out was illegal. In our view, failure to obtain a work-permit was an intervening event which vitiated the contract between the parties.'

30. In the instant case, the appellant and the respondent had no clear fixed term tenure. There was no express term of contract of employment signed between them to say that the respondent's employment would be terminated if the work-permit was not extended by the Immigration Department. The need for a work-permit was a statutory provision whose satisfaction was necessary for the legitimate implementation of the contract. Now that there was no express contractual provision making lack of work-permit as frustrating the contract, the parties were entitled to pursue their respective rights and obligations under sections 41, 43 and 45 of the Employment Act, 2007.

31. In conclusion, we find that there was a valid contract of employment between the appellant and the respondent. We find that the respondent's dismissal from the employment was not validly done as required under section 43 of the Employment Act, 2007. Lastly, we find that the learned Judge was entitled to grant the reliefs in the judgment.

32. On the whole, therefore, we find no merit in the appeal. We dismiss it with costs.

**DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MARCH, 2023.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*



*Signed*

**DEPUTY REGISTRAR**

