Kenyatta University v Maina (Civil Appeal 261 of 2020)
[2022] KECA 1201 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KECA 1201 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 261 OF 2020

DK MUSINGA, F SICHALE & HA OMONDI, JJA

NOVEMBER 4, 2022

BETWEEN

KENYATTA UNIVERSITY ..... APPELLANT

AND

ESTHER NJERI MAINA ..... RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J) dated 15th April, 2020 in ELRC Constitutional Petition No. 133 of 2018)

JUDGMENT

1. This is an appeal against the judgment of Wasilwa, J rendered on April 15, 2020. A brief background to the appeal is that Esther Njeri Maina, (the respondent herein and the then petitioner), filed suit against her employer, Kenyatta University (the appellant herein). The gist of her complaint was that the appellant had violated her fundamental rights and freedom as enshrined in the Bill of Rights of the *Constitution* and further that the appellant had failed to recognize her as a permanent employee, having worked for it for a continuous period of 9 years.

2. The dispute between the two was heard and determined by Wasilwa, J who in her judgment found in favour of the respondent as follows:

> "i. A declaration that her right to fair labour practices was infringed upon.
>
> ii. A declaration that the nature of her employment relationship with Respondent is not casual or temporary but permanent and pensionable with effect from the date of this judgment.
>
> iii. The respondent should henceforth issue the Petitioner with a contract detailing the nature of this contract as per the law and in tandem with other

permanent and pensionable employees who are permanent and pensionable on her grade.

iv. The respondent to pay the Petitioner costs of this Petition."

3. The appellant was dissatisfied with the said outcome, thus provoking the instant appeal. In a Memorandum of Appeal dated June 29, 2020, the appellant listed a whopping 25 grounds of appeal which are merely repetitive. Fortunately, in the appellant's written submissions dated April 8, 2022, these were condensed into three 3 main areas namely:

i. Whether the learned judge misapprehended section 37 of the *Employment Act* as set out in grounds 1,2,3,4,7 & 11;

ii. That the learned judge was faulted for ignoring the contract between the appellant and the respondent as set out in grounds 5,6,8,9,10,15 & 22; and finally,

iii. That the learned judge failed to consider the pleadings, the evidence and the relevant authorities relied upon by the applicant.

4. On July 23, 2022, the appeal came up before us for hearing. Learned counsel, Mr Thuo, appeared for the appellant and highlighted the appellant's submissions dated April 8, 2022. He also relied on a case digest filed on the same day. The respondent, who appeared in person, also highlighted her written submissions dated April 23, 2021 and a case digest of the same date.

5. In urging the appeal, Mr Thuo contended that a court cannot convert a fixed term contract to a permanent contract of employment as the respondent was employed in a three (3) months' contract and was not a casual employee employed on a daily basis; that a fixed term contract cannot be equated to casual employment. Reliance was placed on the decisions of *Emily Migwa v Seventh Day Adventist Church Central Kenya Conference (CKC) & another* [2020] eKLR and *Samuel Ochieng' Ogeda v Doshi Enterprises Limited [2017] eKLR* for the proposition that a court has no jurisdiction or power to convert a fixed term contract to permanent employment.

6. Secondly, it was contended that the learned judge ignored a contract which had been duly signed by both the appellant and the respondent. For the proposition that a court cannot rewrite a contract for the parties, reliance was placed on the decision of *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR* .

7. The judge was also faulted in that the appellant maintained that there was no basis for finding that the respondent's right to fair labour practices were violated in the absence of pleadings, evidence and the relevant authorities.

8. Finally, it was submitted that the learned judge failed to consider pleadings, evidence and relevant authorities. It was contended that the court's finding that the appellant had violated the respondent's right to fair labour practices was unsupported by the evidence.

9. In opposing the appeal and whilst relying on her written submissions as aforesaid, the respondent gave a brief highlight. She submitted that section 37(4) of the *Employment Act* permits a court to vary the terms of service of a casual employee; that she was not a casual employee, having worked for the appellant for 11 years, and citing the decision of *Nanyuki Water & Sewerage Company Ltd v Benson Mwiti Ntiritu & 4 others [2018] eKLR* , she submitted that her contract had assumed permanency.

10. She placed further reliance on several decisions including *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited [2013] eKLR* where it was held:

> "The *Employment Act*, 2007 has now created a fundamental shift from the previous *Employment Act*, cap 226 with regard to who a casual employee is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified as casual workers or casual labourers. This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and coverts such casual employment into term contract status."

11. In a brief response, Mr Thuo reiterated that there was a contract and contrary to the respondent's contention, it was not signed under duress.

12. We have considered the record, the oral and written submissions, the authorities cited and the law. This being a first appeal, our mandate is as set out in *Selle & another v Associated Motor Boat Co Ltd of Kenya & others* [1968] EA 123 wherein it was stated:

> "An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts 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. (*Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 EACA 270*."

13. There is no gainsaying that the appellant had a working relationship with the respondent. It is also true to say that the relationship spanned a period of over 10 years. Further, it is also true that the trial in the ELR court took the form of adduction of evidence by way of affidavits. For some time, the appellant expressed a desire to cross-examine the respondent. However, on December 19, 2019, Mr Thuo who appeared for the appellant dispensed with the need for cross- examination. Therefore, the respondent's evidence remained largely unchallenged and uncontroverted.

14. According to the respondent, her employment as a Secretary commenced in August, 2009; that on July 19, 2018, all casual employees were made to sign seasonal contracts; that the signing of the seasonal contracts was made under duress; that whilst in the employment of the appellant, she was not entitled to sick-off nor maternity leave; that on September 26, 2018, she was made to sign another contract effective from October 1, 2018; that on the contract signed on November 9, 2018, she made the following remarks:

> "(a) She did not understand the contract since the meeting to explain the contract had not yet been held and that she signed under duress;
>
> b. That there was misrepresentation of facts with regard to salary;
>
> c. That the issues of maternity leave raised at the graduation square were yet to be looked into as promised."

15. In its response, the appellant contended that the respondent is employed on contractual terms that cannot be re-written by the court; that the respondent's salary is calculated on a daily basis and paid at the end of the month to avoid reconciliation and logistical difficulties; that the appellant operates a semester system and there are instances when the student population is low, thus requiring less members of staff; that although the respondent had worked as a casual employee, in July, 2018, the arrangement was formalized by having all casual employees engaged on contract basis. It denied the respondent's allegation of not being allowed to proceed on maternity leave. It attributed this to the respondent's failure to fill the requisite forms seeking maternity leave.

16. The learned trial judge considered the evidence and came to the conclusion, and rightly so in our view, that the respondent had served the appellant "... since 2009 at times continuously even for a year with a lapse of a month or so, and thereafter continuing to serve again for months on end and even years before 2018 when the Respondent decided to place her on a seasonal contract."

17. Section 37(1) of the *Employment Act*, 2007 provides as follows: "37. Conversion of causal employment to term contract:

    1) Notwithstanding any provisions of this Act, where a casual employee:

        a. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

        b. performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service."

18. Further, section 2 of the *Employment Act* provides that:

> " Casual employee" means 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".

19. The contention that the respondent had signed a fixed term contract of 3 months flies in the face of the situation obtaining between the appellant and the respondent. The signing of contracts of 3 months which were renewed on expiry is a roundabout way of avoiding the provisions of the law on casual employment.

20. In our view, an employer cannot have an employee under the guise of being a casual on the reasoning that it has peak and off-peak sessions. To subject an employee to such a treatment is unfair because being laid off during off peak season does not guarantee the employee permanency and neither can the employee look for employment elsewhere during the off-peak season. We are in agreement with the conclusion of Wasilwa, J when she concluded:

> " This is the position in the instant Petition where there is no contention that the Petitioner served the Respondent continuously for months on end, which cumulatively comes to over many years."

And that:

> " It is my finding that the nature of the employment relationship between the petitioner and respondent is therefore not casual or temporary but permanent and pensionable and which I hereby declare as per section 37(1) of the *Employment Act* 2007."

21. By being retained to what in essence was casual employment, we are further in agreement with the learned judge's summation that the respondent's constitutional rights were infringed. She was treated as a non-permanent employee and this is tantamount to unfair labour practices and thus denying her all the rights of a permanent employee. However, as regards the respondent's contention that her transfer to Kitui violated her rights, we find no such violation. Being an employee of the appellant, the latter is at liberty to transfer its staff depending on exigencies of duty. We also note that the respondent did not file a cross-appeal against the judgment of Wasilwa,J Be that as it may, we find no merit in this appeal. It is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.

D.K. MUSINGA (P)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR