



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 45 OF 2017

BETWEEN

EMMANUEL MUSEMBI NTHAMBI.....APPELLANT

AND

TARMAL WIRE PRODUCTS LTD.....RESPONDENT

(Being an appeal from decision of the Employment & Labour Relations of the

High Court of Kenya at Mombasa (Makau, J.) dated 28th, April, 2017

in

Employment and Labour Relations Cause No. 583 of 2015)

JUDGMENT OF THE COURT

1. **Emmanuel Musembi Nthambi** (the appellant), was employed by **TARMAL WIRE PRODUCTS LTD** (the respondent) as a cutting machine helper on 2nd January, 2011. He worked in that capacity on casual basis at a daily wage of Kshs. 180.00, which was gradually increased to Kshs. 300.00 per day by 2nd December, 2014 when the employer, decided to enter into a formal contract of employment with its workers, among them the appellant herein, after giving him one month notice on 1st November, 2014.
2. The Appellant signed the said notice and upon expiry of the same, a formal fixed term contract was entered into between the two parties on 1st December, 2014. A copy of the contract which is part of the record of Appeal shows that the appellant was employed as an unskilled helper with effect from 1st December, 2014 to 28th February, 2015. The Basic Salary was indicated as Kshs. 6,783.00 with a house allowance of Kshs. 1,017.00, less statutory deductions. The appellant would be placed on probation for the first 15 days before confirmation to that position
3. The contract provided that either party would terminate the contract by giving the other party 7 days' notice in writing or pay in lieu. Annual leave of 21 days would accrue after 12 consecutive months of continuous service. **Clause 8** thereof provided for summary dismissal on several grounds enumerated thereunder.
4. The appellant signed and thumb printed the agreement after confirming that he had read and understood the contents of the contract and that the same had also been explained to him. From the record, it would appear the contract used to be for a fixed term of 3 months, renewable at the instance of the employer.
5. Upon expiry of the first contract, parties signed another contract for a further 3 months on 2nd March, 2015, which was supposed to lapse on 2nd June 2015. When this latter contract expired, the respondent did not renew it. Aggrieved by that decision, the appellant moved to the Employment and Labour Relations Court and filed his claim on 13th August, 2015, seeking *inter alia* reliefs as outstanding notice pay for one month at Kshs.16,493.10; outstanding underpayment dues at Kshs.316,425.75; payment in lieu of annual leaves (sic) accrued at Kshs.53,602.575 (sic); service pay at 16,444.39; maximum compensation for wrongful dismissal and unfair termination of employment contract as per **section 49** and **50** of the Employment at Kshs. 197,917.20; and punitive damages and certificate of service.

6. The respondent filed a memorandum of response dated 15th December, 2015 in which it denied the appellant's claim and urged the court to dismiss the claim in entirety. It was the respondent's contention that the appellant was employed on fixed term contract as an unskilled helper with effect from 1st December, 2014 till 2nd June, 2015 and the contract had expired and had not been terminated as alleged by the appellant. As the appellant had not worked for 12 consecutive months as per the terms of the contract, no leave days had accrued; that there was no underpayment as his salary was commensurate with the salary scale for general labourers; that since the appellant was a registered contributor to NSSF, then he was not eligible for service pay; and no damages were payable to him for wrongful or unfair termination, as he had not been terminated. The respondent therefore urged the court to dismiss the appellant's claim.

7. The matter proceeded by way of written submissions before Makau J, and no viva voce evidence was adduced. After analyzing the written submissions and witness statements filed, and relevant provisions of the law, the learned Judge found that the appellant had not been terminated from employment, but rather, his contract had expired. The claim predicated on unlawful/unfair dismissal was consequently disallowed. The claim for underpayment was also dismissed for lack of evidence.

8. On the claim based on outstanding leave, the learned Judge appears to have gone outside the employment contract and considered the period before the signing of the contract. He calculated the leave days taken between January 2011 to 2nd December, 2014, deducted them from the appellant's accrued leave days and awarded him Kshs.10,671.15 as unpaid leave. The appellant was also awarded service pay amounting to Kshs.9,000.00. The amount was to attract interest at court rates from 1st December, 2014 until payment in full. The judgment was silent on costs.

9. Being aggrieved, the appellant filed this appeal in which he has proffered 7 grounds of appeal vide his memorandum of appeal dated 4th July, 2017. The seven grounds can well be compacted into three broad grounds. First, that the learned Judge fell into error in finding that there was no termination of employment and that the contract had expired; failing to award notice pay, underpayments and the other damages claimed; failing to consider the appellants submissions and failing to make any order on costs.

10. The firm of **Mbuya and Company Advocates**, filed on behalf of the appellant submissions and bundle of authorities on 15th November, 2017, while **Ms. Opolo**, learned counsel for the respondent filed hers on 27th November, 2017. When the appeal came up for hearing, both learned counsel informed the Court that they would rely on their submissions and would not make any oral highlights.

11. On the issue of wrongful termination, counsel for the appellant submitted that the contracts on record were for a different period other than the one claimed. We have however referred to the two contracts of employment duly signed by the parties herein. The first one dated 1st December, 2014; and the second one dated 2nd March, 2015. The appellant never denied having signed the said contracts or impugned their authenticity. Upon a re- evaluation of the evidence on record, we have no doubt that the two contracts are the valid ones and are the ones that the learned Judge considered in support of the appellants claim.

12. Learned counsel also submitted extensively on the issue of costs, laying emphasis on the fact that the appellant ought to have been awarded costs "as costs follow the event". She also maintained that payment of 1 month salary in lieu of notice should have been paid and that the appellant ought to have been awarded damages of 12 months' salary for wrongful termination.

13. In brief response, counsel for the respondent drew the Court's attention to the fact that the contract documents were not challenged before the trial court, and that challenge cannot therefore be raised for the first time in this appeal. She maintained that the contracts were valid; that there was no underpayment; that the learned Judge had even overpaid on the leave days and service pay which had already been paid. On the issue of costs, she posited that award of costs is discretionary and the learned Judge had properly exercised his discretion in not awarding costs. She urged us to dismiss this appeal. On the validity or otherwise of the contracts, we are in agreement with learned counsel for the respondent that if the validity was in issue, the matter ought to have been raised and canvassed before the trial court to accord the learned Judge an opportunity to pronounce himself on the issue before it can be taken up on appeal. Moreover, we note that validity of the contracts has not been raised as a ground of appeal.

14. We have considered the entire record before us along with the submissions by learned counsel and the authorities cited. We shall now proceed to determine the issues raised based on the said evidence and the law. As pointed out however, there is no cross appeal by the respondent and so we cannot interfere with the award on leave days or service pay even if the same may not have been supported by the evidence placed before the trial court. The gravamen in this appeal is whether the appellant's termination was unlawful or unfair.

15. The learned Judge found that the appellant's employment was based on contract and not otherwise. The contract was for a fixed term and upon expiry, the respondent exercised its discretion not to renew it. We have earlier in this judgment identified the two contracts signed by the appellant. Their validity was not questioned before the trial court. Having re-examined them, we have no doubt they were valid and enforceable. The appellant worked on contract for the time stipulated therein; the contracts lapsed by effluxion of time and the respondent exercised its rights under the contract not to renew and paid the appellant what it thought were his dues.

16. In the circumstances, we agree with the learned Judge that termination of the appellant, unfair or otherwise was not an issue. No award for damages for unlawful termination were awardable. All the grounds of appeal pegged on the alleged unfair termination must therefore fail.

17. On the issue of costs, it is true that the learned Judge said nothing in respect of costs. He failed to indicate whether he intended to award costs to any of the parties or whether he intended that each party bears its own costs. As a general rule, costs are said to follow the event, the event being the success of the claim. However, costs are always at the discretion of the court and a Judge can depart from this general rule for good reason which must be recorded. These reasons will vary depending on the circumstances of the case. For instance, is the suit a family matter where the court finds it important to foster family harmony and costs to one member of the family will pit them against each other? Is it an employer/ employee relationship where the employer has won and the employee can ill afford to pay costs? Is it a suit in public interest? What does the justice of the case demand Examples are legion. All this is in tandem with **section 12(4)** of the employment Act which provides :-

“The Court may, subject to the rules make such orders as to costs as the court considers just”

Although unlike **section 27** of the Civil Procedure Act , the above provision does not specifically require the Judge to give reasons for not awarding costs of the suit to the victor, we think giving reasons is the only way to demonstrate the justice of such decision.

18. This being a first appeal, it is within our remit to make an order on costs as the justice of the case requires. In our view, the appellant’s claim before the trial court succeeded only to a small extent. Although the learned Judge failed to expressly make any order on costs, we are certain that had he intended to award costs, he would not have forgotten to include such an order. We are reluctant to interfere with the Judges’ exercise of discretion in that regard. All we can do therefore is to expressly state that the learned Judge did not award costs to either party. On the whole, for the foregoing reasons we find that other than this small clarification, the appeal is for dismissal. It is hereby dismissed with orders that that each party bears its own costs both in this Court and in the court below. Orders accordingly.

Dated and delivered at Malindi this 28th day of February, 2018

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR