IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, SICHALE & J. MOHAMMED, JJA]

CIVIL APPEAL NO. 425 OF 2017

BETWEEN

THE GOVERNMENT PRINTER..... 1ST APPELLANT

THE PERMANENT SECRETARY, MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL , GOVERNMENT.....2ND APPELLANT

THE HON. ATTORNEY GENERAL.....3RD APPELLANT

AND

JAMES JANGOLO APUT .....1ST RESPONDENT

MARTIN NZIOKA MWANIA .....2ND RESPONDENT

(Being an appeal against the judgment of the Employment and Labour relations Court at Nairobi (Nduma Nderi, J) dated 14th November, 2016 **in Nairobi ELRC Petition No. 76 Of 2017)**

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JUDGMENT OF THE COURT

This is an appeal against the judgment of **Nduma Nderi, J** delivered on **14th November, 2016.**

A brief background to this appeal is that **James Jangolo Aput** and **Martin Nzioka Mwania**, the respondents herein and the then petitioners filed a petition naming the **Government Printer**, the **Permanent Secretary, Ministry of Interior & Coordination of National Government** and the **Hon. Attorney General** as the 1st, 2nd and 3rd respondents respectively. The respondents alleged that they were

employees of the appellant from **16th December, 2005** upto **25th February, 2016** at a monthly salary of **Kshs 7,200/=.**

A brief background will give this appeal context. On **1st September, 2015**, **James Jangolo Aput (James)** received a telephone call from the 1st appellant's administrator, one **Benedict Munywoki,** informing him that his services had been terminated due to lack of funds to pay his wages. On **16th September, 2016, James,** through his lawyer **Mr. Mukele Ngacho & Company Advocates** wrote to the 1st appellant requiring them to reinstate his services within seven (7) days. In **February, 2016**, the 1st appellant reinstated **James** to his work but unilaterally decreed him to work for only two weeks in a month. On **25th February, 2016, James'** lawyer wrote to the 1st appellant requiring them to rescind their position as **James** was a permanent and pensionable employee. According to **James,** the 1st appellant thereafter terminated his services without any explanation, notice, disciplinary hearing or dismissal letter. **James** contended further that he worked for the 1st appellant for over ten (10) years, being paid a monthly salary, hence deeming himself as a permanent employee.

As regards **Martin Nzioka Mwani (Martin)**, the 2nd respondent herein, his contention was that he was employed by the 1st appellant from **16th December, 2005** to **1st September, 2015** at a monthly salary of Kshs 7,200/=. He contended that on **1st September, 2015**, he received a

phone call from the 1st respondent's administrator, one **Benedict Munywoki**, informing him that his services had been terminated due to lack of funds to pay his wages. He instructed the firm of **Mukele Ngacho & Co. Advocates** who on **16th September, 2016** wrote to the 1st appellant requiring them to reinstate him within seven (7) days. He stated that in February**, 2016,** the 1st appellant reinstated his services but altered his terms of employment by unilaterally decreeing him to work for only two weeks in a month. On **25th February, 2016**, **Martin's** lawyer wrote to the 1st appellant requiring them to rescind their decision that **Martin** works for only two weeks in a month as **Martin** considered himself a permanent and pensionable employee of the 1st appellant. **Martin** further contended that shortly after **25th February, 2016,** the 1st appellant terminated his services, once again without any explanation, notice, disciplinary hearing or any dismissal letter. According to **Martin**, having worked for the 1st appellant for over ten (10) years while earning a monthly salary, he was a permanent employee of the 1st appellant.

In a replying affidavit sworn by **Eng. Karanja Kibicho,** the Principal Secretary in the Ministry of Interior and Coordination of National Government dated **24th May, 2016,** in which he deponed that the 1st appellant has no mandate to employ staff; that the petitioners were engaged at the Government Press Welfare Canteen to assist in serving food to the staff members; that the Government Press Welfare

Society is an autonomous body registered under the Societies Act, Cap 108 of the Laws of Kenya.

In his judgment, **Nduma Nderi, J,** made a finding that the respondents were employees of the 1st appellant and that the termination of the respondents" employment was unlawful and unfair. The Judge proceeded to make the following orders:

> **"i. A declaration that the termination of the employment of the petitioners was in violation of Section 35, 37, 40, 41 and 45 of the employment Act, 2007.**
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> **ii. A declaration that, keeping the petitioners in employment for a period of ten (10) years without converting their employment to permanent and pensionable terms and or giving them substantive contracts of employment with terms on their terminal benefits and pensionable status was unfair labour practice and in violation of Article 41 (1) of the Kenya Constitution (sic), 2010.**
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> **iii. That the petitioners having been declared redundant are entitled to:**
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> > **a. One month salary in lieu of notice in the sum of Kshs 7,800/= each.**
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> > **b. Fifteen (15) days severance pay for every completed year of service for ten (10) years in the sum of Kshs 36,000/=.**
> >
> > **c. And in lieu of prayer for reinstatement, a declaration that the petitioners are entitled to the applicable service gratuity for Government Officers not on permanent and pensionable terms at the rate of 31% of the basic salary for the completed years of service in the sum of Kshs 7,200 x 12 x 31% = 267,840 each.**
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> > **Total award to each of the petitioners is Kshs 311,040/=**
> >
> > **d. The award is payable with interest at court rates from the date of termination of employment, 1st September, 2015 till payment in full.**
> >
> > **e. Respondent to pay costs of the petition".**

The 1st appellant was dissatisfied with the said outcome and in a Memorandum of Appeal dated **20th December, 2017** listed eight (8) grounds of appeal which can be summarized as follows; that the learned Judge erred in:

> i. failing to find that there was no employer-employee relationship between the 1st appellant and the respondents;
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> ii. finding that the respondents were protected by Section 35 and 37 of the Employment Act without any documentary evidence being adduced in support thereof;
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> iii. holding that the respondents were wrongly terminated without proper procedure as stipulated under Section 43 and 45 of the Employment Act without appreciating that they were not employees and they had no legal relationship with the 1st appellant;
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> iv. failing to appreciate that the 1st appellant had offered a substantive defence and finally,
>
> v. holding that Human Resource Office of the Government Printers participated in the recruitment of the respondents.

On **18th June, 2019**, the appeal came before us for hearing. **Ms Chibole**, learned counsel for the appellants reiterated that the respondents were not the employees of the 1st appellant but that they were casuals of a Welfare Society. In her written submissions filed on **22nd November, 2018**, she stated that there was no employer-employee relationship between the 1st appellant and the respondents; that the Government Printer has no mandate to employ staff; that the respondents were engaged at the Government Press Welfare Canteen to assist in serving food to staff members as casual workers; that the Government Press Welfare Society is an autonomous body within the meaning of the Societies Act Cap 108 Laws of Kenya that can sue and be sued under its own name; that the respondents were never engaged for more

than the legal duration for casuals and, that given the casual nature of the engagement, they would earn different amounts of wages each month.

In opposing the appeal, **Mr. Ngome**, learned counsel for the respondents relied on their written submissions dated **8th November, 2018** and list of authorities of the same date. Counsel maintained that the respondents were the employees of the 1st appellant and had worked for the appellants continuously for a period of ten (10) years and were paid at the end of every month. He cited the High Court decision of **Peter Wambugu Kariuki & 16 others vrs. Kenya Agricultural Research Institute [2013] eKLR** wherein it was held:

> **" ……. A considerable attention need to be paid to provisions of Section 37 of the Employment Act, 2007 which provides for Conversion of casual service to permanent employment. In particular, subsection 37(5) provides that anemployee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee. Further subsection 37**
>
> **4. empowers the court to vary terms and conditions of service of such employee by applying terms and conditions consistent with the provisions of the Act. It is the finding of the court that these provisions of the Act fully apply to the petitioners' circumstances".**

The respondents also relied on Section 37 of the Employment Act which provides as follows:

> **"Sec. 37. Notwithstanding any provisions of this Act, where a casual employee –**
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> **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(I)**
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> **c. shall apply to that contract of service.**
>
> **2. In calculating wages and the continuous working days under *subsection (I), a casual employee shall be deemed to be entitled* to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.**
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> **3. An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.**
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> **4. Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this act.**
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> **5. A casual employee who is aggrieved by the treatment of employer under the terms and conditions of his employment file a complaint with the Labour Officer and Section 87 of Act shall apply"**

Further, that apart from the photographs taken by the respondents at the 1st appellant's place of work, they also adduced evidence that they were in the st appellant's employment. The respondents urged us to dismiss the appeal.

This being a first appeal, our mandate is as set out in ***Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:

> **" an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.**
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> **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.**
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> **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 orprobabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955)22 EACA 270".**

On our part, we have considered the record, the appellants' submissions dated **20th December, 2017,** its digest and list of authorities filed on **12th March, 2019**, the respondent's submissions and list of authorities dated **8th November, 2018**, the rival oral submissions made before us, and the law.

Central to this appeal is whether there existed a relationship of an employer/employee between the 1st appellant and the respondents. It was the 1st appellant's position that it had never engaged the respondents as its employees and that the respondents were engaged by the 1st appellant's Welfare Society, albeit on a casual basis. The learned trial Judge in paragraph 19 of his judgment appreciated that the Government Press Welfare Society is registered under the Societies Act. He stated:

> **"Clearly, the society was not part of Government and its liabilities, if any cannot be met by any of the respondents.**
>
> **The minutes of the new office bearers of the Government Printers Welfare Society with the Government Printer held at the Government printers Office on 30*th* January, 2009, made several resolutions including that "casuals must renew their contracts and the review of the same will be done in liaison with the Human Resource Office and in consultation with the G. P.". G.P. stands for Government Printers.**
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> **From these minutes, it would appear that the Human Resource Office of the Government Printers and therefore the Government Printers participated in the recruitment of the petitioners".**

In our view, having come to the conclusion that the Government Press Welfare Society was an entity on its own, the learned Judge ought to have dismissed the respondents' claim as against the 1st appellant.

The trial court also observed in paragraph 16 of its judgment as follows:

> **"The petitioners have no written contract of employment but attached copies of photographs showing them at the work place. The two did not produce any pay slip or evidence of payment. They however testified that they served food to the casual workers employed by the 1*st respondent*".**

It is not disputed that the respondents did not have letters of contract with the 1st appellant and /or with the welfare society. They had no pay slips to demonstrate that they were on a payroll. We take judicial notice that the 1st appellant is a Government entity. There is evidence that it does not hire but even if it had the mandate, the staff complement would have to be approved by the Government. Salary would then be paid by the Government after effecting statutory deductions. It cannot be that the respondents were employees on the basis that they produced photographs taken at the premises of the 1st appellant. It cannot also be construed that there was an employer-employee relationship on the basis that issues relating to the respondents appeared in minutes of a meeting of the 1st appellant.

Having come to the above conclusion, the issues of whether the employees were casuals or not and their entitlements thereof do not arise as we have found that they were not employees of the 1st appellant.

The upshot of the above is that we allow the appeal and set aside the judgment of **Nduma Nderi, J** of **14th November, 2016.** We direct that each party shall bear its/their own costs.

Dated and Delivered at Nairobi this 8*th* *Day of* November, 2019.

W. KARANJA

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JUDGE OF APEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR