



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 19 OF 2017

BETWEEN

RAPID KATE SERVICES LIMITED.....APPELLANT

AND

JOHN MUTISYA1ST RESPONDENT

SAID MOHAMED GOWE2ND RESPONDENT

BUDZO NASORO MBWAGIZO3RD RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 9th December, 2016

in

Cause No. 305 of 2015

JUDGMENT OF THE COURT

1. The appeal revolves around the application of **Section 37** of the **Employment Act** which empowers the Employment and Labour Relations Court (ELRC) to convert the contract of service of an employee engaged on a casual basis, to one where such an employee is deemed to have been engaged under a contract of service which entitles him/her to monthly wages.

2. The provision in question stipulates that:-

“37 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.

(1) ...

(2) 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.

(3) 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...”

According to the appellant, the learned Judge (Rika, J.) misapplied the above provision by converting the respondents' terms of engagement.

3. The salient facts relating to the dispute were that the 1st, 2nd and 3rd respondents claimed that they had been engaged by the appellant on a casual basis as loaders from the years 1996, 2002 and 2000 respectively. They were each paid a daily wage of Kshs.800. On 22nd March, 2014 without notice the appellant's director, one Mr. Kamlesh terminated their services allegedly on the ground of theft. Aggrieved with the termination, the respondents filed suit in the ELRC seeking firstly, conversion of their contracts of service in line with **Section 37**; secondly, a declaration that their termination was unfair; and thirdly, compensation for unfair termination as well as payment of terminal dues they were entitled to under the converted contract of service.

4. In response, the appellant denied employing the respondents in any capacity. The gist of its defence was that it had engaged Mzee Kassim Mwayyema on a short term contract as a 'gang leader'; he was required at his own expense, to provide manpower for purposes of loading and offloading goods at the appellant's warehouse. If the respondents were engaged as loaders, they were engaged by Mzee Kassim and not the appellant. It denied that the respondents were entitled to the reliefs they sought.

5. After considering the evidence before him, the learned Judge by a judgment dated 9th December, 2016 found in favour of the respondents in the following terms:

a) It is decreed the claimants (the respondents herein) were regular employees of the respondent (the appellant herein).

b) The respondent shall within 30 days of delivery of this judgment pay-

1st Claimant

i. Equivalent of 8 months' gross salary in compensation at Kshs. 166,400.

ii. 1 month salary in lieu of notice at Kshs. 20,800.

iii. Annual leave pay at 21 days annually for 14 years at Kshs. 235,200.

iv. Service pay at 15 days' salary for every completed year of service at Kshs. 168,000.

Total Kshs.590,400

2nd Claimant

i. Equivalent of 8 months' gross salary in compensation at Kshs. 166,400.

ii. 1 month salary in lieu of notice at Kshs. 20,800.

iii. Annual leave pay at 21 days annually for 19 years at Kshs. 319,200.

iv. Service pay at 15 days' salary for every completed year of service at Kshs. 228,000.

Total Kshs.734,400

3rd Claimant

i. Equivalent of 8 months' gross salary in compensation at Kshs. 166,400.

ii. 1 month salary in lieu of notice at Kshs. 20,800.

iii. Annual leave pay at 21 days annually for 15 years at Kshs. 252,000.

iv. Service pay at 15 days' salary for every completed year of service at Kshs. 180,000.

Total Kshs.619,200

In total the respondent shall pay to the Claimants the sum of Kshs. 1,944,000.

c) Certificate of service to issue.

d) No order as to costs.

e) Interest granted at 14% per annum from the date of judgement, payable in the event the whole amount is not payable within

the given 30 days.

6. It is that decision that has upset the appellant who believes the learned Judge had no basis of issuing the orders he did. Following consent by the parties counsel, Mr. Tindi for the appellant and Mr. Osore for the respondents, the appeal was disposed by the written submissions on record.

7. It was the appellant's argument that the respondents had not produced any contract of employment or letter of dismissal to substantiate their claim that they had been employed by the appellant. That by itself was sufficient for the learned Judge to hold that the respondents had not proved their case. Moreover, the learned Judge ignored the evidence that the respondents had been engaged by an independent contractor. As far as the appellant was concerned, the respondents having failed to prove that they had been engaged by the appellant, the provisions of **Section 37** could not apply, at least as against the appellant. Equally, there was no basis for the damages issued in their favour.

8. On their part, the respondents submitted that the appeal lacked merit and should be dismissed. In as much as there were no written contracts on the terms of their engagement, the evidence on record established that they were under the direct control of the appellant. As such, the respondents had discharged the burden of proving the terms of their engagement. As to letters of termination, they contended that they were never issued with the same; that was one of the grounds in support of their contention that they were unfairly terminated. More importantly, the appellant had failed to prove the ground(s) of their termination. All in all, the learned Judge's decision was not capable of being faulted on any ground.

9. We have considered the record, submissions on record and the law. Our reading of **Section 37** of the **Employment Act** reveals that the before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in ***Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR.***

10. Unlike the learned Judge, we find that the respondents had not established that they had been employed by the appellant. Apart from stating that they had been engaged by the appellant, no evidence was led to support their claim. Even if their engagement was through an oral contract, the respondents needed to put forth evidence to establish such contract. We note that they did not shed light on how they were engaged, how work was allocated to them and who paid their wages.

11. Besides, Mzee Kassim in his witness statement corroborated the appellant's position. It was his evidence that he had been employed as a gang leader and tasked to engage at his own expense casual labourers to carry the appellant's goods. The appellant would allocate him work and then he would hire the required manpower. It was on that basis that he had engaged the respondents on multiple occasions; he was the one who paid the respondents wages and not the appellant. His contract of service with the appellant also confirmed as much. In particular clause 2 stipulated:

"2. Terms of reference for the contracted Gang Leader

The company engages the Contracted gang leader to provide at his own expense and through his own contracted manpower resources provide:

a) Loading and offloading fertilizer bags or any other goods into and out of trucks at the company premises or such other areas as the company may from time to time at its own discretion direct..."

12. It is clear to us that the respondents were under the control of Mzee Kassim and not the appellant. As such, the respondents' claim that they had been employed by the appellant must fail. Similarly, it follows that their claim for conversion of the terms of service under **Section 37** suffers the same fate.

13. The upshot of the foregoing is that we find that the appeal has merit and is hereby allowed. We set aside the judgment dated 9th December, 2016 in its entirety and substitute the same with an order dismissing the respondents'.

The appellant shall have costs of both the appeal and the suit in the ELRC.

Dated and delivered at Mombasa this 19th day of April, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR