IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO 43 OF 2017

BETWEEN

RASHID MAZURI RAMADHANI ..... 1ST APPELLANT

ANTHONY DZUYA MAZERA ..... 2ND APPELLANT

MOHAMED PETER TSUMA ..... 3RD APPELLANT

RASHID ALI ..... 4TH APPELLANT

ANTHONY ONYANGO WAGA ..... 5TH APPELLANT

SILVANUS ADRIANO ATUGI ..... 6TH APPELLANT

JAMES MWANG'OMBE KALAMA ..... 7TH APPELLANT

HAMISI ATHUMAN MTOA ..... 8TH APPELLANT

SAID BAKARI BUKI ..... 9TH APPELLANT

BRIAN MULI KITUMA ..... 10TH APPELLANT

TUMAINI CHANGAWA MWAGANDI ..... 11TH APPELLANT

AND

DOSHI & COMPANY (HARDWARE) LIMITED ..... 1ST RESPONDENT

DOSHI ENTERPRISES LIMITED ..... 2ND RESPONDENT

seventeen years. The appellants were terminated on diverse dates between 2013 and 2015. They had filed different suits against the respondents which suits were consolidated, heard and determined together. These were Mombasa ELRC Nos 98, 99, 100, 101, 102, 105, 109, 110, 111, 114 of 2016 with the holding file being Mombasa ELRC No 96 of 2016 Rashid Mazrui Ramadhani Vs Doshi & Co. (Hardware) LTD &Another. Rashid Mazrui Ramadhani gave evidence as (CW1) as the only witness for all the claimants.

[2] The appellants alleged in their respective statements of claim that they worked continuously without interruption for several years but their services were wrongfully and unfairly terminated by the respondent without justifiable cause. The appellants also stated that due to their continuous service, their employment had converted from casual to regular terms contract and therefore was protected by law against wrongful or unfair termination. They therefore sought to recover salary in lieu of notice, accrued leave, service pay, compensation for wrongful dismissal and unfair termination of their employment plus a certificate of service.

[3] On the part of the respondents, they admitted that they had employed all the eleven appellants as casual employees but denied that they worked continuously and without interruption. It was the respondents' case that the appellants were only hired intermittently as and when casual labour was required. The respondents went on to state that none of the appellants ever worked continuously for one complete month. They therefore strenuously denied that the appellants' casual status was converted to regular term contract.

[4] At the hearing, directions were agreed upon that one appellant Rashid Mazrui Ramadhan (CW1) was the one to give evidence on behalf of all claimants and the witness statements by the other appellants be considered as part of the evidence. CW1 adopted his statement in which he stated that he was continuously and uninterruptedly employed by the respondents from early November, 2011 to 2nd August, 2015 as a Machine Attendant at a salary of Ksh.547 per day as at the time of termination. He claimed his employment was pursuant to a verbal contract, no formal contract was executed between him and the respondents despite demanding for the same. He alleged that in early August, 2015 he was approached by a supervisor by the name David, who informed him that his employment was terminated due to lack of raw materials. He was not given notice or sufficient reasons or any at all for termination. This witness also confirmed that he knew the other appellants whose suits were consolidated.

[5] On the part of the respondents, George Ongany, (DW1) the human resource officer gave evidence, he adopted the statements he had filed in response of all the claims by the appellants. It was the respondents' case that the appellants were casual employees who were employed intermittently whenever there was work. They were paid daily wages and their employment depended on job availability, however the appellants deserted work after they were paid their daily wages on diverse dates. DW1 took it upon himself to contact each of the appellants as the 1st respondent was prepared to offer each of the casual employees a contract of employment but they all turned it down claiming that they had obtained work elsewhere.

[6] After hearing the evidence, and subjecting it to his analysis the learned Judge, found the appellants were employed as casual workers and were paid a daily wage. They never worked continuously but intermittedly; CW1 admitted that they used to work on rotation for two days in a week to give a chance to other casuals depending on the availability of materials of work. Thus, the appellants' casual employment never converted to regular term contract of service within the meaning of Section 37 of the employment Act. The Judge also posited that on a balance of probability the appellants deserted work protesting the conversion of their casual employment status to short term contracts.

[7] Accordingly, since the appellants' casual employment could not be converted, therefore their claim for unfair or wrongful termination was unfounded; under **Section 35 (1) (a)** of the Act are terminable without notice which provides that

"Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice"

Similarly, the claims for service pay was dismissed as the Judge found they had not served for one complete year; so was the claim for annual leave as the appellants never worked for a continuous period of even one month and so was the claim for a certificate of service. In other words the appellants' suit was dismissed with no orders as to costs.

[8] Those are the orders that provoked the instant appeal that is predicated on some 8 grounds of appeal which we will summarize as the learned Judge erred on law and fact by; finding the appellants deserted employment deliberately whereas they were terminated; failing to find that the respondents admitted both in their evidence and pleadings they had employed the appellants whose days of work surpassed the statutory threshold of days required to convert casual employment to term contract; that the Judge misdirected himself while interpreting the provisions of **Section 37** of the Act, also on the issues of notice pay, annual leave and issuance of certificate of service and finally for failing to consider the evidence and submissions by counsel for the appellant and for arriving at a wrong conclusion not supported by law or facts.

[9] During the plenary hearing, **Mr. Opolo** learned counsel holding brief for **Mbuya** for the appellants relied on his written submissions and made some oral highlights. He narrowed the above grounds of appeal further to three that is whether the appellants' employment was converted to regular term contract by dint of the provisions of Section 37 of the Act; whether the appellants deserted duty and if they were entitled to the reliefs sought. According to counsel for the appellants their employment was converted to term contract because they were able to demonstrate from the evidence that they worked for an aggregate of 3 months. This in his view was corroborated by the evidence given by the respondents' human resource manager as well in the pleadings where each of the appellant indicated the aggregate number of days they had worked which was not denied in the response and even by the respondents' witness statements.

[10] As regards the defence postulated by the respondents that the appellants deserted work and declined to have their status converted from casual workers to term contracts, counsel urged us to ignore this as a complete afterthought contrived by the respondents to defeat the appellants' claim. Counsel wondered why the respondents admitted in their statement of defence that the appellants were engaged on casual basis by way of a verbal contract. As at the time the respondents were terminating the appellant's contracts, the provisions of **Section 35(1)** had kicked in as they did not offer an explanation as to why the company was doing away with non-contract workers. In this regard counsel urged that the respondent did not discharge the burden of proving the reasons for termination of employment as provided for under **Section 43** of the Act which rested with the respondent. Since there were no letters to show cause why disciplinary action should not have been taken for deserting duty or any conduct of disciplinary hearings, counsel for the appellant urged us to allow the appeal. He relied on the cases of **Rashid Othiambo Allagoh & Others vs Haco Industries Ltd** [2015] eKLR and **Krystalline Salt Ltd v Kwekwe Mwakele & 7 Others**

[2017] eKLR. We shall advert to them later in this judgement.

[11] This appeal was opposed; **Ms Maita** learned counsel for the respondent urged us to distinguish the above decisions as the casual employees were engaged for 20 years; whereas in the instant case the employees used to work for 2 days in a week. Counsel relied on the written submissions that pointed out the discrepancies in the evidence of the appellants which was not helped by the evidence of CW 1 who went on to confirm that the appellants were indeed working for 2 days a week whenever there was availability of work. This was also supported by the petty cash analysis register that was produced in evidence to show the appellants were being paid per day and only 2 days a week. On the contention that the appellants' contract was converted into term contract by dint of the provisions of **Section 35(1)** of the Act, counsel submitted that a casual is defined as a person whose engagement provide for payment at the end of each day and who is not engaged for a longer period than 24 hours at a time.

[12] On the two competing issues whether the appellants' were terminated because there were no raw materials or as claimed by the respondents the appellants deserted duty; counsel drew our attention to letters written to the county labour office that is why the Judge arrived at the conclusion that on a balance of probabilities, the appellants had deserted work; also **Section 35(1) (a)** provides that where a contract is to pay wages daily it would be terminable by either party at the close of any day without notice. Thus, according to counsel, a case for wrongful termination did not arise in the circumstances of this matter nor did a case of conversion of contract to a term one and therefore the appellants could not be paid notice, service pay or any compensation. Counsel urged us to dismiss the appeal with costs.

[13] We have considered the record, submissions by counsel and the law. The issues for determination are two fold, whether the appellants' casual employment was unlawfully terminated and whether by dint of the provisions of **Section 37** of the Act it was converted into a term contract. **Section 37** is the one which empowers the Employment and Labour Relations Court (ELRC) to convert a 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 and thereby entitling him/her to monthly wages and other benefits such as leave and certificate of service.

1. The provision in question stipulates that:-

"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…"

[14] This is a first appeal, that being so, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See **Mary Njoki v John Kinyanjui Mutheru [1985] eKLR**:-

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484."

Also the case of;- **S. M. v E. N. B.** [2015] eKLR:-

"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

[15] On the first issue whether the appellants' casual contract was wrongfully terminated; we shall go by the evidence that was before the trial Judge. The appellants' case was that they were employed by the respondents continuously and uninterrupted for a diverse number of years ranging from 1998 to 2015; that their employment was terminated due to non-availability of raw materials without notice thus the termination was unlawful. The respondents admitted the appellants were casual employees employed on job availability and they were paid a

daily wage as per the petty cash analysis that was produced in evidence. The respondents categorically denied the appellants continuously worked as casuals, and claimed that they deserted duty when they were offered a term contract and the county labour officer was duly notified.

[16] Upon evaluating the aforesaid evidence, the learned Judge made the following key findings;

> ***"After careful consideration of the evidence and the submissions filed, it is clear that the claimants herein were employed on similar (sic) as casual employees and they were paid a daily wage. They never worked continuously but intermittedly. As admitted by CW1, they used to work in rotation for two days in a week to give a chance to other casual employees depending on the availability of materials of work. They were different from the permanent staff of the respondents who worked continuously.***
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> ***In view of the contention by RW1 and the admission by CW1 that the claimants were casual employees who never worked continuously but only hired as and when the need arose, I find and hold that the claimants' casual employment never converted to regular term contract of service within the meaning of Section 37 of the Employment Act"***

Our reading of **Section 37** of the **Employment Act** reveals that 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.**

[17] The question we have to ask ourselves is whether the appellants were able to prove on a balance of probability that they were engaged by the employer for a period aggregating to more than one month so as to convert their casual daily contract to a term contract. This therefore takes us to the evidence adduced by one Rashid Mazrui Ramadhan (CW1) whose evidence in cross-examination is particularly telling. This is what the witness representing all the appellants stated in his own words;-

> ***"We were working depending on the availability of materials. We used to work like 2 days per week and then I be asked to give chance to another employee. We were casuals. I never worked continuously for whole month or more depending on availability of materials. I was terminated on 2.8.2015. I never worked wages for 2.8.2015. I never worked that day. I was told that only permanent staff were continuing with work. I was never given any contract to sign and refused. We used to work between Mondays to Friday whenever there was material.***
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> ***Every employee including the claimants named above working under similar terms as me. We were terminated in the same way after being told that there was no material. I was never called by phone to sign contract and refused. I do not know about the other claimants. We used to clock in and clock out every day we worked"***

[18] Looking at the above evidence we are unable to disagree with the findings of the learned Judge and indeed there is no justification for doing so as the evidence shows the appellants were casual employees who used to work for 2 days in a week depending on the availability of materials. They used to clock their time on the said days when they reported at work. The evidence by the respondents that they used to pay daily wages as per the petty cash analysis sheets that were produced in evidence for each of the appellant was also not challenged so was the evidence that on 2nd August, 2015 some of the appellants deserted work after they were given a term contract to convert their casual status to a term contract. This fact was communicated to the labour office. From the aforesaid facts it is obvious to us the appellants must have found it more advantageous to turn down a term contract and pursue a wrongful termination claim where they thought they could be awarded damages. Alas, justice is like a double edged sword that cuts both sides of the case with equal force. In this case the appellants failed to prove on a balance of probabilities that they were entitled to a term contract without signing for it. It therefore follows that their daily contract could not be converted into a term contract and they were not entitled to notice, leave or certificate of employment as posited by the Judge.

[19] For the aforesaid reasons, we see no reason to interfere with the order made by the Judge dismissing the claim with no order as to costs. Similarly this appeal lacks merit and we order it dismissed. This being an employment dispute, we are reluctant to make an order for costs, we direct each party to bear their own costs.

Dated and delivered at Mombasa this 27th day of June, 2018

ALNASHIR VISRAM

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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