IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 13 OF 2018

BETWEEN

IDD SALIM MWADELE

MWANAMKUU MWATENDE

SAUMU SHEE ABDALLA

JACOB KAMBU MTSONGA

HASSAN KITAURO SHEE

MUHAMED HASSAN MWARINDANO

ALIMA ABDALLA DARUSI

KASSIM JUMA ABDALLA

CAROLINE ATIENO OSINYA

UMAZI CHIKOPHE MWERO

MWANAULU DARUSI JEKE

MWANGOMBE BAKARI HASSAN

JABIRI BAKARI MWANZIWI

MUHAMED MASUDI RASHID

MWANAISHA MKULU KASSIM

MKULU SULEIMANI MKULU

MWANAISHA ALI MWASARIA

ALI HASSAN JUMA

YABI DARUSI MOHAMED

HASSAN KASSIM RASHID.....APPELLANTS

AND

KWALE INTERNATIONAL

SUGAR COMPANY LIMITED.....RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations

Court at Mombasa (Makau, J.) dated 17th November, 2017

in

***Cause No. 731 of 2016.*)**

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JUDGMENT OF THE COURT

1. It is not in dispute that the relationship between the respondent and the appellants was at one point that of employer/employees. However, the point of contention between them is the terms of the appellants' employment. The dispute became apparent when the appellants' services were terminated on diverse dates provoking them to file several suits at the Employment and Labour Relations Court (ELRC) which were subsequently consolidated. They sought payment of their terminal dues.

2. The appellants' case was predicated on the grounds that they were paid on a weekly basis. At some point the respondent began delaying and ultimately stopped paying their weekly wages. Upon raising their concern on that state of affairs the respondent used policemen to chase them away from the premises and thereafter, terminated their services. As far as the appellants were concerned, their termination was not only unlawful but unfair; they were neither informed of the reason(s) of termination nor given an opportunity to be heard prior to the termination. It is on this basis that each of them tabulated the terminal dues they believed they were entitled to.

3. Conversely, the respondent averred that the appellants were casual employees who were engaged on a need basis, that is, on availability of work. As such, they were precluded from alleging that their services were unfairly terminated and seeking terminial dues. They had been paid all their dues.

4. During the hearing the parties called one witness each in support of their respective cases. Upon weighing the evidence on record the learned Judge in a judgment dated 17th November, 2017 held:

> ***"Under Section 45(2) of the Employment Act, termination of*** *(sic)* ***employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. However, the foregoing protection against unfair termination is a right that is only available to employees who are employed under a regular term contract of service.***
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> ***In this case however the claimants were casual employees whose contract of service never converted to regular term contract of service as held herein above. Consequently, I find and hold that they were not capable of being unfairly terminated and they were not so terminated. I also dismiss as without merits, their narrative about the reason and the manner of termination for being unsupported by the pleading. I say so because, although they all allege that they were dismissed and chased away by police for claiming their delayed pay, the claimants have not prayed for the delayed wages in their respective suits.***
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> ***In view of the foregoing finding that the claimants were casual employee and that they were not unfairly terminated I decline to grant all the reliefs sought because they are not availed to casual employees by the law."***

5. It is this decision that has provoked the instant appeal wherein the appellants complain that the learned Judge erred by totally disregarding ***Sections 10, 35, 37, 43, 45(1), 47(5), 51, 74*** and ***59*** of the ***Employment Act***; the evidence tendered by the appellants; and failing to assess damages payable to the appellants.

6. At the hearing of this appeal Mr. Ratemo appeared for the appellants while Mr. Njuru appeared for the respondent. The appeal was disposed of by written submissions and oral highlights by the parties' respective counsel.

7. Mr. Ratemo began by submitting that it was common ground that the parties' relationship was that of employer/employee. As a result, the provisions of ***Section 47(5)*** of the ***Employment Act*** came into play; in that, the appellants had the burden of proving that their termination was unfair and unlawful while the respondent had the burden of justifying the grounds for termination. In his view, the learned Judge had failed to appreciate the foregoing.

8. He went on to argue that the appellants had discharged their burden hence the burden shifted to the respondent to demonstrate that the reason(s) for termination was reasonable. In that regard, this Court's decision in ***Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR*** was cited.

9. Mr. Ratemo contended that the appellants' terms translated into a regular term contract of service due to the continuous period of service. In the absence of the respondent producing employment records to demonstrate that the appellants' engagement was on a casual basis then the trial court ought to have believed the appellants' case. In support of that line of argument reference was made to following sentiments of the ELRC in ***Pramillah Asena Ayuma vs. Quest Laboratories Limited [2015] eKLR***:

> ***"Where employment is alleged, the duty is upon the employer under section 74 of the Employment Act to produce work records, statements or any material relevant so as to prove the nature of relationship that existed between them and a person alleging to be an employee. In this case, the claimant has asserted her rights in the capacity of an employee whereas the respondent has disputed this and admitted the claimant was their employee as a Commission Agent. Such evidence has however not been produced to see what terms and conditions of such engagement were agreed upon. The duty is vested upon employer at all material times to ensure that all work records, contracts of employment, piece work contract or any work records are kept by them. The employee as the recipient of such records is not the one talked to produce the contract in a claim such as this one. Whether the employer is a claimant or respondent, the law is emphatic; work records are kept by the employer and should be produced in court where a claim is filed. I find no such material. The evidence of the claimant must therefore be taken as such – she was an employee of the respondent."***

10. Moreover, the learned Judge ignored the provisions of ***Section 37(1)(b)*** of the ***Employment Act*** which entitled the appellants' terms to be converted into a regular contract of service.

11. In opposing the appeal, Mr. Njuru urged that the trial court's decision was well reasoned and sound. Elaborating further, he submitted that the appellants failed to demonstrate that their casual engagement had been converted into a regular term contract. To that extent we were referred to the ELRC's decision in ***Persteeno Omondi vs. Steel Makers Ltd [2017] eKLR*** wherein the Court held:

> ***"Under Section 37 of the Act, casual employee's contract of service converts to regular term contract after serving continuously in the aggregate of …….. the burden of pleading and proving continuous service rests with the casual employee. In this case however, the claimant has failed to discharge the said burden of proof on a balance of probability. In view of the foregoing, I hold that the claimant was a casual employee as at the date of his termination."***

12. He added that failure to pay wages at the end of each day and instead payment that was being made on a weekly basis, like in this case, did not by itself change the appellants' engagement as casual employees. To bolster this proposition reliance was placed in this Court's decision in ***Rashid Odhiambo Allogoh & 245 others vs. Haco Industries Limited [2015] eKLR***.

13. Besides, the appellants' own witness, Idd Salim Mwadele admitted that they were engaged on a casual basis. In point of fact the credibility of this witness was brought into question at the trial. The said witness testified that he had executed a contract of service which was retained by the respondent which was contrary to his own pleadings that there was no contract of service between him and the respondent.

14. Before any burden could shift to the respondent to justify the termination, the appellants were required to prove first, the conversion of their casual employment which they did not and then secondly, that their termination was unfair. All in all, the appellants had not made out their case to the required standard.

15. We have considered the record, submissions made on behalf of the parties and the law. As the first appellate court we are cognizant of our role to reappraise the evidence on record and draw our own conclusion(s) whilst taking into account that we did not have the privilege of seeing the witnesses' demeanour as they testified like the trial court. See this Court's decision in ***J. S. M. vs. E. N. B. [2015] eKLR***.

16. The appeal herein turns on the terms of the appellants' engagement. Having perused the record we cannot help but note that from their pleadings the appellants averred that they had not executed any contract with the appellants. Idd Salim Mwadele, one of the appellants, testified that they had been engaged to do casual labour earning Kshs.350 per day. It was also his evidence that the respondent used to engage about 500 casuals per day and that they would be paid at the end of the week, that is, on Saturdays. This piece of evidence corroborated the respondent's evidence that the appellants were casual employees.

17. We also find that the appellants failed to demonstrate that they were entitled by dint of ***Section 37(1)*** of the ***Employment Act*** to the conversion of their engagement from casual to regular term contracts of service. ***Section 37(1)*** stipulates:

> ***"(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. In cross examination, Idd Salim Mwadele was clear that the appellants did not work continuously on the respondent's plantation as delineated under the above mentioned provision. Consequently, we agree with the trial Judge that the appellants could not invoke the provisions of ***Section 45*** of the ***Employment Act*** as a basis of claiming that their services were unfairly terminated. ***Section 45 (3)*** is quite clear in that respect:

> ***"An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated."*** *[Emphasis added]*

Furthermore, the appellants being casual employees were not entitled to notice prior to their termination by virtue of ***Section 35(1)(a)*** of the ***Employment Act***.

19. In the end, we are satisfied that the appellants failed to establish their case and therefore, the evidential burden under ***Section 47(5)*** of the ***Employment Act*** did not shift to the respondent. Accordingly, the appeal herein lacks merit and is hereby dismissed with costs.

Dated and delivered at Malindi this 27th day of September, 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