Malivi v Mini Bakers Limited (Appeal E183 of 2022)
[2025] KEELRC 526 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 526 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E183 OF 2022

NJ ABUODHA, J

FEBRUARY 24, 2025

BETWEEN

MUTUNGA MALIVI ..... APPELLANT

AND

MINI BAKERS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of the Honourable S.A Opande (Mr.)(P.M) delivered on 29th September 2022 in Nairobi Chief Magistrate's Court CMEL NO. 1393 of 2019)

JUDGMENT

1. Through the Memorandum of Appeal dated 25th October, 2022, the Appellant appeals against the whole of the Judgment of Honourable S. A. Opande delivered on 29th September,2022 in Milimani Chief Magistrates' Court CMEL No. 1393 of 2019.

2. The Appeal was based on the grounds that:

    i. The Learned Honourable Magistrate erred in law and in fact in holding that the Appellant's employment with the Respondent was casual against the weight of both oral and documentary evidence.

    ii. The Learned Honourable Magistrate erred both in law and fact by holding that due process was followed in terminating the Appellant's employment.

    iii. The Learned Honourable Magistrate erred both in law and fact by holding that the Appellant was not entitled to Notice pay.

    iv. The Learned Honourable Magistrate erred in both fact and law by holding that the muster roll showed the Appellant remained on casual terms of employment against the weight of evidence.

v. The Learned Honourable Magistrate erred in both fact and law by holding that the Appellant was not entitled to annual leave against the weight of evidence.

vi. The Learned Honourable Magistrate erred both in law and in fact by holding that the Appellant was not entitled to damages for unfair termination yet the evidence placed before the court clearly indicated that the Appellant was unfairly terminated.

vii. The Learned Honourable Magistrate erred in both law and fact by failing to analyse the evidence before him and making a judgment that avoided a determination of all issues placed before the court for determination.

viii. The Learned Honourable Magistrate erred in law and fact in ignoring the pleadings, evidence and submissions by both parties and thereby making a lopsided and unjust determination.

3. The Appellant prayed that the appeal be allowed; Judgment of Honourable Magistrate finding that the Appellant was a casual employee as set out under section 37 of the *Employment Act* be set aside, the court makes a declaration that the termination of the Appellant employment was unfair and unlawful and the court do make an award on compensatory damages, salary in lieu of notice and compensation in lieu of untaken leave with costs.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant through his Advocates Mwaura Kamau & Co. Advocates filed written submissions dated 24th October, 2024. On the issue of whether the Appellant had worked for a period or a number of continuous working days which amounted in aggregate to the equivalent of not less than one month counsel, submitted that the provisions of section 37 of the *Employment Act* which the trial court relied on in dismissing the Appellant's suit were clear. The Appellant stated that he worked for the Respondent from 1997 to the year 2017 working from Mondays to Fridays continuously.

6. Counsel submitted that the Respondent denied that the Appellant was working for the five days a week stating that he never worked for more than 3,4 or 5 days a week. That the Respondent was open for Five days in a week from Monday to Friday. The Respondent produced muster roll and payment vouchers in support of its case but the muster roll produced was only for the period January,2016 to December,2016 same as 2017 with 2017 being unnecessary since the Appellant was terminated early January 2017. That the master roll showed he worked continuously but there were inconsistencies when it came to the payment and attendant payment vouchers.

7. The inconsistencies in the muster roll and the payment vouchers produced by the Respondent showed that the same could not be relied on to determine the number of days the Appellant was at work. That the serial numbers of the vouchers were inconsistent with no chronological order. The vouchers showed that the Appellant was paid on some days like 2nd October,2016 and 28th October,2016 and signed for the same in the Respondent's premises. The master roll showed that those dates the Appellant was absent and there was no way he would sign for the vouchers while absent.

8. Counsel further submitted that the Appellant stated he was working at Dandora 11, yet the muster roll indicated he worked at Dandora 5. The witness was therefore working at a different location and his evidence on attendance of the Appellant was fabrication. That the trial court relied heavily on the muster roll produced by the Respondent neglecting the Appellant's evidence which would have enabled the court reach a different decision.

9. Counsel submitted that the Appellant had started working as a casual employee paid on daily basis but his employment had to be converted into one that section 35 of the *Employment Act* was applicable as read together with section 37 of the *Employment Act*. That the trial court decision finding otherwise should be set aside.

10. On termination of the Appellant, Counsel submitted that on 4th January,2017 he was summoned by the Respondent's operational manager and informed that his services had been terminated after he requested for his terminal dues before his employment was converted to one of contract. The Respondent on the other hand stated that the Appellant deserted employment and was not terminated.

11. On the issue of desertion counsel submitted that the Respondent claimed the defense of desertion despite the Appellant working for 20 years which defense was available to it due to a number of case laws which provided that for an employer to enjoy the defence he/she must show by way of evidence that effort was made to try and get the employee back to work and further it must be clear from the conduct of the employee that he is not interested in his employment any longer. Counsel relied on among others cases the case of Nairobi ELRC No. 1324 of 2014 and Mombasa ELRC cause No 743 of 2017 Javan Kisoi vs S.A.A Inter Estate Traders(K) Ltd.

12. Counsel submitted that no evidence was led by the Respondent to show that the Appellant had no intention of going back to work. That the Respondent never proved that the Appellant absconded duty hence he was unfairly terminated. That the Appellant was not given any notice or payment of salary in lieu of notice. That the Appellant had not committed any breach or offence to warrant any dismissal nor issued with warning either verbal or written, notice to show cause or subjected to a disciplinary process.

13. Counsel submitted that sections 41-45 of the *Employment Act* was not followed where the Appellant ought to have been heard before termination. He was orally terminated on 4th January,2017 without giving the Appellant chance to explain himself or defend himself. This went against section 41 of the Act and relied on the case of Walter Anuro vs Teachers Service Commission (2013) eKLR on requirement for both substantive and procedural fairness. That the termination was unfair as per section 45 of the act for failure to prove reasons for termination under section 43 of the Act.

14. Counsel further relied on the case of Rebecca Ann Maina & 2 others vs Jomo Kenyatta University (2014) eKLR on the need for employee to be given sufficient time to respond to allegations against him and prepare his defence. The Appellant was unfairly terminated hence entitled to damages for unfair termination having worked for 20 years and being terminated inhumanly when he needed the money most.

15. Counsel submitted that the Appellant was entitled to unpaid leave having worked for 20 years without leave. That the Respondent as the custodian of employment records as per section 74 of the Act and did not provide particulars of the Appellant going on leave. Leave was the Appellant's entitlement under section 28 of the Act. That the burden was on the Respondent to prove that the Appellant went on leave or not despite the Appellant making a claim for the same.

Respondent's Submissions

16. The Respondent's Advocates P.N Khisa Advocates filed the Respondent's submissions dated 30th November,2024 and submitted on the role of the first appellate court which was to re-evaluate and re-appraise the evidence in order to arrive at its own conclusion while relying on the case of Bernard Muia Kilovoo v Kenya Fresh Produce Exporters(2020) eKLR.

17. On the first two grounds of Appeal counsel submitted that a party to a suit is bound by his pleadings and cannot assert a fresh claim at appeal level. That the claim at trial court was on unfair dismissal and not on the Respondent's failure to convert the Appellant from casual to permanent employment. That the Appellant in his claim he did not seek a declaration that his employment be declared permanent under section 37 of the *Employment Act*. Counsel relied on the case of *Madara & 2 Others v Chite & Another (Civil Appeal 111 of 2022*) (2023) KEHC 24270(KLR) (24 October, 2023) (Judgment) on this assertion.

18. Counsel submitted that the trial court rightly found that the Appellant was not entitled to rights under contract of service. That while the Appellant alleged that he worked for the Respondent from Mondays to Fridays from 1997 to 4th January 2017 he failed to adduce evidence before the court or prove his claim to the required standard. That the Appellant admitted that he signed a book for payment and admitted he received wages for the work done.

19. Counsel further submitted that the Appellant admitted not having proof of employment in 1997 and he did not complain to anyone in the Respondent's management during his employment for 20 years as a casual worker on his status of employment as a casual worker. That it was true that the Respondent worked from Monday to Fridays as there were payment vouchers for Saturdays and it was not factual that the Appellant worked for the whole month of February 2016 and April 2016 as he worked for around 20 days and he was off duty for around 10 days generally.

20. Counsel submitted that the Appellant did not work for 30 days continuously in any given month nor did he work for three months consecutively hence he remained a casual worker. That the cleaners worked in shifts and not continuous. That the payment voucher serial numbers were never inconsistent as alleged as they ascend with later dates or as the days were entered in the system. That the Respondent had different branches, vouchers prepared by different departments and the booklet could be left in any branch hence anomaly with serial numbers. That the Appellant never produced a witness at trial court to prove interference with serial number and was introducing this at appeal stage.

21. Counsel further submitted that the Muster roll provided credible evidence on the Appellant's working days. That the Appellant had to sign payment vouchers before receiving any payment. That Dandora 11 branch was later renamed Dandora 5 after restructuring in 2015 hence no contradiction and he was supervised by DW1.

22. On ground 2 & 6 counsel submitted that the Appellant was not terminated but he absconded duties after he was advised to avail himself to sign an employment contract in order to be absorbed as a Respondent's permanent employee. That the Appellant was unable to substantiate his claims of dismissal from employment. That the Appellant admitted that he was not terminated but he refused to be absorbed into permanent employment terms. That the Appellant claimed he was terminated on 4th Janaury,2017 yet the Respondent evidence showed that he worked for 7 days last day being 21st January 2017 hence his evidence was not credible.

23. Counsel submitted that the Appellant did not discharge his burden of proof that he was terminated unfairly as per section 47(5) of the *Employment Act*. Counsel also relied on among others the case of Josephine M. Ndungu & Others v Plan International Inc (2019) eKLR urging this court to dismiss the Appellant's claims.

24. On grounds 3 & 5 counsel submitted that the trial court correctly held that the Appellant had failed to demonstrate that he was entitled to rights under a contract of service as he remained on casual terms of employment at the time he absconded duties. That trial court correctly held that the Appellant was engaged as and when work was available. That whenever work was not available the Appellant

would be off. That he never worked consistently. That in October 2015 he worked for three days and in November for four days.

25. Counsel submitted that the Appellant did not prove unlawful dismissal hence not entitled to claims of annual leave, notice pay and service pay. Counsel relied on the case of Tabitha Mumbua Kimongo v Shrink Pack Limited (2017) where court declined to award compensatory damages on absconding employee.

26. On ground 7& 8 counsel submitted that the trial court correctly evaluated evidence adduced and correctly dismissed the claim. That the trial court relied on evidence of both parties and found that actions of unlawfully absconding work amounted to gross misconduct. That the Respondent was willing to absorb the Appellant into permanent contract but he could not be found even when efforts were made to trace him.

Determination

27. This court has considered the record of Appeal and submissions filed by the parties herein and observes that the principles which guide the court in an appeal from a trial court are now well settled. In Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same was stated with regard to the duty of the first appellate court;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

28. In this case, the Judgment of the trial court was a dismissal of the Claimant's claim as he never proved that he was entitled to rights under contract of service as a casual employee.

    a. The court finds that the issues placed by the parties for determination in the appeal are with regard to the trial court finding the that the Appellant was a casual employee hence not entitled to rights under a contract of service; if he was unfairly terminated and if he was entitled to the reliefs sought.

Whether the trial Magistrate erred in finding that the Appellant was a casual employee not entitled to rights under contract of service.

29. The Appellant alleged that he worked for the Respondent from 1997 until 4th January, 2017 as a cleaner when he was terminated for requesting to be paid his terminal dues for the period he had worked of 20 years before he could start working on a contract. The Respondent on the other hand alleged that the Appellant refused to cooperate to be absorbed as a term contract and absconded duties. The Respondent maintained that the Appellant was a casual employee and the trial court decided that the Appellant was a casual employee hence not entitled to rights under a contract of service.

30. The Court in the case of Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others [2017] eKLR defined the different engagements as follows:-

> "The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment...The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the

dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer."

31. The Respondent alleged that the Appellant was a casual employee who never worked for three consecutive months to be converted to a permanent employee as per section 37 of the *Employment Act*. Section 37(1) of the *Employment Act* provides as follows:-

> (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.

32. The Respondent has maintained that the Appellant never worked for a full month as he was paid on daily basis as and when there was work for him and when there was no work he would be off duty. The trial court wondered if this arrangement was a mechanism for the Respondent to avoid the legal requirement of converting the Appellant to a term employee.

33. The Court appreciates that the Act envisages a casual employee to be converted to term contract after working for and employer for an aggregate period of one month or if the work to be performed by its very nature cannot be completed for an aggregate period of three months or more. The court has amplified this position in the case of Silas Mutwiri vs Haggai Multi-Cargo Handling Services Limited [2013] eKLR that:

> "The *Employment Act*, 2007 has now created a fundamental shift from the previous *Employment Act*, Cap 226 with regard to who a casual employee is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified as casual workers or casual labourers. This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and coverts such casual employment into term contract status."

34. In this case therefore, was the Appellant a casual employee forever or he ever converted to a term employee? The Black's law Dictionary 9th Edition defines a casual employment as 'work that is occasional, irregular and for a short period.' In addition, section 2 of the *Employment Act* defines a casual employee as 'a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time'

35. The court notes that the Appellant was engaged as a cleaner and he was paid on daily basis. The evidence before the trial court showed that there was a muster roll and payment vouchers for payment of work done. The NSSF statement shows the Respondent remitted the Appellant's dues to NSSF every month from May, 2015 to January, 2017. The Job Card shows that the Appellant was engaged as a cleaner as a casual staff. The muster roll alternated between present and off duty.

36. The court further notes that the master roll produced was for 2016 and 2017 yet the Appellant claimed to have been terminated in January, 2017. The court reads some mischief on the production of this muster roll and is of the honest opinion that it was calculated by the Respondent to ensure that the

Appellant did not claim term contract status by ensuring that he never worked continuously for a month or for a period of three months. There was no way the appellant could work for 20 years as a casual staff.

37. The *Employment Act* came in place to protect such employees who were at the mercy of the employer to remain as casual employees with loss of their terminal benefits. It is also curious why the Respondent was deducting the NSSF dues from May, 2015 to January 2017 if the appellant was a casual employee paid when work arises.

38. To this extent, this Court finds and holds that the trial Magistrate erred in finding that the Appellant was a casual employee not entitled to rights under contract of service as provided under section 37 of the Act.

Whether the trial learned Magistrate erred in finding that the Respondent was fairly terminated.

39. Having found that the Appellant was converted to a term employee by operation of law, he was therefore entitled to protection as a term employee under section 35 of the Act. The Respondent raised the defence of absconding duties by the Appellant. In this regard, the courts have always held that whenever a defence of absconding or desertion is raised, the burden shifts to the employer to prove it. The Appellant claimed he was terminated by the Operations manager because he requested to be paid his terminal dues for the years worked before conversion to a term contract while the Respondent claimed he absconded duties.

13. The trial court did not address this defence after finding that the Appellant was a casual employee. From the record of Appeal, no evidence was presented by the Respondent on the efforts it made to reach the Appellant like the call logs or letters to that effect. It is common practice that whenever an employee is away from duty without any authorization or lawful cause, the employer must make an effort to find out their whereabouts before coming to the conclusion that such employees has absconded duty and inform the employee that they were contemplating disciplinary action.

14. Under Section 44(4) (a) of the *Employment Act* 2007, absconding duty by an employee constitutes gross misconduct and in the case of Simon Mbithi Mbane vs Inter Security Services Ltd (2018) eKLR it was held that;

> An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.

31. In the present case, the Court is not satisfied that the Respondent has on a balance of probabilities discharged its onus of establishing that the Appellant absconded/deserted duty. The Respondent therefore did not prove the reason for termination hence the same was unfair within the meaning of section 45 of the Act.

32. Concerning procedural fairness as provided for under section 41 of the *Employment Act* the court notes that the same was never adhered to as the respondent did not issue any show cause letter to the appellant on the issue of deserting/absconding of duties, no warning letter in his 20 year service to the Respondent was produced and the Appellant was never invited for any disciplinary hearing hence the Respondent violated the clear provisions of section 41 of the Act.

Whether the trial learned Magistrate erred in dismissing the Appellant's claim without payment of his terminal dues claimed.

40. The court having established that the Appellant was terminated unfairly, it therefore flows that he was entitled to compensation for unfair termination as provided under section 49 of the *Employment*

Act. This court is guided by the considerations set out under section 49(4) of the said Act which include that the Court ought to consider the period the Appellant served the Respondent, the nature of termination, and the fact that the Appellant did not have disciplinary issue for the 20 years he served the Respondent. The allegation that the appellant refused to convert to term employee further compounds the matter and is somehow consistent with his claim that he was terminated because he demanded that he be paid his terminal dues for the twenty year period served prior to conversion to a term employee. The foregoing makes it justifiable to award the appellant the maximum 12 month's compensation for unfair termination as was prayed before the trial court and the Court so awards. The Appellant was further entitled to notice pay as per section 35 of the Act since he was terminated without notice.

41. On the award of unpaid leave for the years worked, the court notes that the Appellant was terminated on January 2017 and he filed his claim towards the end of 2019 which was past 2 years since the cause of action arose. Courts have held that unpaid leave is a continuous injury which must be claimed within one year after cessation thereof as provided under section 90 of the *Employment Act*. In the Court of Appeal case of G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR the court held:-

> Regarding 'a continuing injury', the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

42. Further in the case of The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) while relying on India decisions the court had this to say :-

> Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.

43. Lastly Lady Keli while relying on the above Court of Appeal decisions in S S Dhillon Transporters (K) Ltd v Wamiti (Appeal E041 of 2023) [2024] KEELRC 13620 (KLR) (18 December 2024) (Judgment) stated as follows:-

> The appellant admitted and even in submissions that the respondent was not granted the right to annual leave on the basis of off days. Annual leave is a basic right of employees that cannot be taken away on the basis of off days which was not even proven. The court has in various decisions held that leave falls under continuing injury claims hence accrued every year is not granted as long as the employee was not allowed to take the same. Where the employee had a chance to take leave and fails to do so the same is limited to 18 months under

section 28(4) of the *Employment Act* as held in *Abongo v Chemelil Sugar Co Ltd (Appeal E051 of 2022)* [2023] KEELRC 2591 (KLR) (25 October 2023) (Judgment) Justice Radido in a claim for untaken leave for 76 days...

In the instant case the Appellant admitted that the Respondent had no chance to take leave. Annual leave is a claim in the nature of continuing injury. The Court of Appeal in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) considered cases of continuing injury ...

44. From the above propositions unpaid leave forms part of continuous injury which cannot be taken away by off days. The claim for the same has to be filed within 12 months after the cessation thereof. In this case the Appellant filed the same out of time hence the prayer fails.

45. In conclusion the Appeal is found merited and succeeds as follows:-

    a. The order dismissing the appellant's claim in the lower court is substituted with an order allowing the same as follows:

        i). an order awarding the claimant twelve month's salary as compensation for unfair termination.....Kshs 180,480/=

        ii) One month's salary in lieu of notice...Kshs... 15,040/=

        Total...Kshs 195,520/=

        iii. costs of this Appeal and at the trial court.

46. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION