West Kenya Sugar Company Limited v Lukamasia (Civil Appeal E007 of 2024) [2025] KEELRC 306 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 306 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

CIVIL APPEAL E007 OF 2024

DN NDERITU, J

FEBRUARY 6, 2025

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

MATHEW NATHAN LUKAMASIA ..... RESPONDENT

(Being an appeal from the judgment and decree in Kakamega Chief Magistrate's Court ELRC Cause No. 03 of 2019 by Hon. Angelina Odawo (PM) dated and delivered on 6th March, 2024)

JUDGMENT

I. Introduction

1. In a judgment delivered on 6th March, 2024 the lower trial court entered judgment in favour of the respondent in the sum of Kshs82,649.12 comprised of Kshs70,127.12 for leave earned and Kshs12,522/= for one month's salary in lieu of notice. It was also ordered that the respondent be issued with a certificate of service. He was also awarded costs of the cause.

2. Dissatisfied with the above judgment the appellant through O & M LAW LLP Advocates commenced this appeal by way of a memorandum of appeal dated 2nd April, 2022 raising the following grounds of appeal –

    1. That the learned magistrate erred in law and in fact in failing to consider, identify and appreciate the fact that the respondent was engaged by the appellant as a cane loader on a piece rate basis and not as a casual employee on various dates and the same was never converted into a formal employment.

    2. That the learned magistrate erred in law and in fact in failing to consider and appreciate the loader cane haulage and payment reports produced by the appellant during the trial court's hearing, showcasing separate and distinct records of the respondent's engagement and

accordingly erred in not concluding that the respondent was hire subject to the availability of cane for haulage and effectively rendering him a piece rate worker.

3. That the learned magistrate erred in law and in fact in failing to consider that the nature of the respondent's engagement with the appellant was directly and substantially dependent on whether cane haulage work was available and even then, it was further dependent on the respondent's availability.

4. That the learned magistrate erred in law and in fact in concluding that the respondent was a casual worker and in proceeding to convert the respondent's employment to contractual employment pursuant to Section 37 of the *Employment Act*, whose wages were paid monthly and whose termination would require notice, failure of which payment in lieu should be made.

5. That the learned magistrate erred in law and in fact in finding that indeed the respondent failed to prove his claim of unfair termination as against the appellant but proceeded to award the respondent one month's salary in lieu of notice.

6. That the learned magistrate erred in law and in fact in awarding the claimant notice pay and pro-rate leave despite finding that the respondent's claim as to the date of his alleged termination from employment by the appellant was incoherent and unsupported by evidence.

7. That the learned magistrate erred in law and in fact by finding that the respondent be granted pro rate leave for the years worked between 1998-2020, without the respondent tendering sufficient evidence to prove the same.

8. That the learned magistrate erred in law and in fact by acknowledging in her analysis of the award for underpayment of wages that the respondent was a piece rate worker but proceeded to convert the said engagement to formal employment under section 37.

9. That the learned magistrate erred in law and in fact in awarding costs of the suit and interests thereto to the respondent despite finding that he has failed to prove that he was unlawfully terminated from employment.

10. That the learned magistrate erred in law and in fact in failing to appreciate the significance of the documentary evidence tendered in support of the appellant's case.

11. That the learned magistrate erred in law and in fact in entering judgment for the respondent of one month's salary in lieu of notice and prorate leave while the same are remedies not available to the respondent due to the nature of his piece rate employment with the appellant.

12. That the learned magistrate erred in law and in fact in misapprehending and disregarding the evidence on record and tendered by the appellant and/or failing to consider the said evidence in totality.

13. That the learned magistrate erred in law and in fact in arriving at conclusions and inferences which are not supported by evidence and/or based on any documentation.

14. Other grounds and reasons to be adduced at the hearing hereof.

3. The appellant is seeking for the following reliefs –

a. This appeal be allowed;

b. The judgment by the Honorable Angeline Odawo (PM) dated and delivered on 6th March 2024 in Kakamega ELRC Cause No. E047 of 2021 and the consequential decree be set aside with costs;

c. That the costs of this appeal be borne by the respondent and those of the trial court be awarded to the appellant; and

d. Such further or other reliefs as this Honorable court may deem just and fit to grant in the circumstances of this appeal.

4. The respondent opposed the appeal through V. A. Shibanda & Co Advocates.

5. The appeal was canvassed by way of written submissions. Counsel for the appellant, Miss Waweru, filed written submissions dated 12th August, 2024 and Miss Shibanda for the respondent filed written submissions dated 14th October, 2024.

II. Submissions by Counsel

6. Counsel for the appellant reminded the court of its role and duty as a first appeal court. The court has to re-evaluate the evidence and arrive at its own conclusions but bearing in mind that it neither heard nor recorded the evidence – see Selle & Another V Associated Motor Boat Co. Ltd & Others (1968) EA 123 and Peters V Sunday Post Limited (1958) EA 424.

7. In her submissions, counsel for the appellant condensed her arguments into three thematic areas. Grounds 1 to 4 were combined under the issue – Whether the trial court erred in finding that the respondent had been converted to formal employment as per the principles set out in Section 37 of the *Employment Act*. Grounds 5 to 13 were put under the issue – Whether the trial court erred in law by shifting the burden of proof of termination to the appellant. Grounds 8 to 11 were argued under the issue – Whether the respondent is entitled to the reliefs granted by the trial court.

8. On the first issue, it is submitted that the trial court erred in fact and law in misapplying Section 37 of the *Employment Act* and thereby converting the respondent's piece-work contract into casual employment. It is submitted that while the lower trial court acknowledged that the respondent was on piece-work employment it nonetheless granted him reliefs that he was not entitled to in such an employment relationship.

9. It is further submitted that the respondent contradicted himself in his testimony in court and did not establish a specific employment relationship with the appellant. It is submitted that the evidence on record is that no formal contract of employment was ever issued to the respondent and or that he was on regular and constant pay of salary from the appellant. It is further submitted that the NHIF, NSSF, and the welfare membership card produced in court by the respondent are not of themselves a proof of continuous employment or a contract of employment.

10. It is submitted that the respondent, according to the haulage records availed and produced in court, delivered cane intermittently and his pay varied from time to time based on piece-work done at the agreed piece-rate based on availability of work and availability of the respondent.

11. In the foregoing circumstances, it is submitted that though the lower trial court correctly cited Section 107 of the *Evidence Act*, it failed to apply the same to the circumstances, evidence, and facts of the case thereby arriving at the wrong decision. Further, it is submitted that the trial lower court misapplied Section 37 of the *Employment Act* and hence unlawfully and against the weight of the evidence adduced converted the employment of respondent from piece-work to formal or contractual.

12. On the second thematic issue, it is submitted that the trial court misapprehended and misapplied Section 47(5) of the *Employment Act*. It is submitted that it was upon the respondent to prove employment and unfair termination thereof. Citing Protus Wanjala Mukite V Anglo Africann Properties t/a Jambo Mutara Lodge Laikipia (2021) eKLR and Casmir Nyakundi Nyaberi V Mwakikar Agencies Limited (2016) eKLR, it is submitted that in the trial the respondent failed to prove employment and unfair termination.

13. On reliefs, the third thematic issue, it is submitted that having failed to prove employment and termination it was wrong and unlawful for the lower trial court to award the respondent as it did. It is submitted that the respondent was a piece-work sugarcane loader and he was only paid based on the haul that he made and delivered to the appellant's factory at an agreed piece-rate. It is submitted that the respondent's relationship with the appellant did not fall within the ambit of Section 35 of the *Employment Act*.

14. In the circumstances and in view of the above, it is submitted that the respondent was neither entitled to one month's notice pay of Kshs12,522/= nor any other pay or notice or at all.

15. It is further submitted that having been a piece-rate worker, the respondent was not entitled to leave from the appellant. Basing her arguments on Krystalline Salt Limited V Kwekwe Mwakwele & 67 Others (2017) eKLR and Godfrey Otieno Owuor V Rea Vipingo Plantations Ltd (2022) eKLR counsel for the appellant submitted that other than basic minimum pay for work done, the respondent was not entitled to any other pay or benefits from the appellant.

16. On the other hand, counsel for the respondent submitted that the evidence on record demonstrated that the respondent was in continuous and uninterrupted employment of the appellant at the rate of Kshs128/= per day payable at the end of each month. It is submitted that the appellant, as the keeper and custodian of the employment records, failed to produce documents to dislodge the evidence by the respondent.

17. Further, it is submitted that the evidence by the respondent is that he was terminated when he sustained an injury on his right hand and admitted into hospital from 21st to 27th of July, 2020. It is submitted that the evidence by the respondent is that he had worked for the appellant since 1998. The court is urged to accept and affirm that evidence since the appellant did not avail any records to the contrary.

18. It is further submitted that the respondent, even as a piece-work employee was entitled to a notice before termination. Counsel cited Wilfred K. Onyango V DHL Excel Supply Chain Kenya Limited (2017) eKLR and Section 35 of the *Employment Act* in support of that assertion.

19. It is submitted that the evidence on record is that the respondent was an employee of the appellant for 22yrs and if the appellant desired to dislodge that oral evidence by the respondent it ought to have produced records to prove otherwise. It is submitted that it is incomprehensible that the appellant failed to issue a formal contract to the respondent yet it now expects the respondent to have produced a written contract during the trial which contract it did not issue to him in the first place.

20. It is submitted that the appellant failed to accord the respondent both substantive and procedural due process before termination and as such the termination was unfair and unlawful. It is further submitted that the respondent proved employment and unfair termination while the appellant failed to justify the reasons and or the circumstances for the dismissal under Section 45 of the *Employment Act*. Further, it is submitted that the appellant failed to demonstrate that the respondent was afforded due process.

21. It is further submitted that the appellant failed to disapprove the evidence by the respondent that he was not allowed to take leave. It is submitted that the appellant failed to avail employment records for

the respondent to show and prove that he took leave. Further, it is submitted that the appellant did not disapprove the evidence by the respondent that he was not issued with a notice of termination or a certificate of service.

22. The court is urged to uphold the decision of the lower trial court and dismiss the appeal with costs.

III. Issues for Determination

23. The court has perused the record of appeal, including, but not limited to, the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, the following issues commend themselves to the court for determination –

    a. What was the nature, terms, and conditions of the employment relationship between the appellant and the respondent?

    b. Was the respondent terminated or how did the employment relationship, if any, terminate?

    c. If the respondent was terminated, was the termination unfair and unlawful?

    d. Did the lower trial court arrive at the correct decision in regard to the above issues and the reliefs awarded?

    e. What are the appropriate orders for this court to make in regard to the above issues and on costs?

IV. The Employment & Termination

24. As the first appellate court, this court is obligated to evaluate the evidence on record and arrive at its own conclusions but bearing in mind that it neither heard nor recorded the evidence during the trial – see Sielle V & Another V Associated Motor Boat Co. Ltd & Others (supra).

25. As per his pleadings and evidence in the lower trial court, the respondent's case is that he was engaged by the respondent as a cane-loader for the period from 1998 to 16th August, 2020 when he was terminated without notice or due process and without payment and settlement of his terminal dues. He stated that his last known monthly salary was Kshs3,584/= at the rate of Kshs128/= per day.

26. He further stated that while on duty he sustained an injury on his right hand on 21st July, 2020 and was admitted to a local hospital but the appellant abandoned him and failed and or refused to settle the medical bills.

27. It is the respondent's case that the appellant violated Sections 41, 43, 45, 46, & 47 of the *Employment Act* in terminating him in the manner that it did.

28. It is on the basis of the foregoing that the respondent prayed for the following reliefs –

    i. September salary Kshs.12,522.70/=

    ii. One month's salary in lieu of notice Kshs.12,522.70/=

    iii. Prorate leave Kshs.70,127.12/=

    iv. Under payment of wages Kshs.857,521.8/=

    v. Public holidays Kshs.105,600/=

    vi. Overtime for extra hours worked Kshs.237,600/=

vii. Rest days Kshs.160,290.56/=

12 months compensation salary Kshs.150,272.4/=

viii. Costs of this suit

ix. Certificate of service

x. House allowance Kshs.180,326.88/=

29. In its memorandum of response to the claim the appellant denied having engaged the respondent as claimed and or terminating him as alleged.

30. However, it was pleaded that during the period 2016 to 2021 the appellant engaged the respondent as a cane-loader on a casual-on-demand and piece-rate basis. It was denied that the parties entered into any formal contract of employment at any time or at all. The days in which the respondent worked during the above period were tabulated in paragraph 6 of the said response – see pg. 23 of the record of appeal. It was pleaded that after 27th April, 2021 the respondent did not offer any services to the respondent and never showed up for allocation of work.

31. It was further pleaded that the deductions made from the respondent's pay for remittance to NHIF and NSSF were not based on any contractual obligations on the part of the appellant but on an agreement between the appellant and the cane-loaders welfare group. It is stated that that arrangement did not entitle the respondent to gratuity and or pension from the appellant.

32. It was pleaded that as at the time the respondent voluntarily failed to show up for allocation of work the piece-work relationship ended as the appellant was not obligated to look for him as he was not their regular employee or on any other type or form of contract.

33. The appellant produced the records of the haulage done by the respondent for the period delineated above.

34. Both parties called one witness each during the trial. In his testimony in the lower trial court the respondent stated that he worked all days of the week and month from 4am till 5pm and only got days off when the machines were under maintenance. He stated that when he injured his hand at work he was orally terminated and told that there was no more work for him to perform.

35. In cross-examination the respondent stated that he was engaged by the respondent in 1998 but he was not issued with a formal letter of appointment or a contract. He stated that his last day of work was 18th August, 2020.

36. The appellant called Duncan Obwawo (RW1), the human resources manager, as a witness. He adopted his filed statement and produced the filed documents as exhibits. He stated that the records held by the appellant and availed in court confirmed that the respondent was engaged by the appellant in 2016 and not in 1998 as alleged by the respondent. He stated that from the records the respondent did not work on each day as alleged but he was only engaged on need basis and allocated piece-work at an agreed piece-rate pay. He stated that as per the records the respondent was last engaged on 27th April, 2021 and thereafter he did not return to work.

37. In cross-examination, RW1 stated that while the appellant kept and maintained records of its employees, including those of employees injured at work and or hospitalized, no such records were available for the respondent as he was not injured at work and was not hospitalized as alleged.

38. The law in Kenya recognizes several forms of employment based on the period, nature, terms, and conditions of the engagement. As stated in Krystalline Salt Limited V Kwekwe Mwakele & 67 Others (supra), cited by counsel for the appellant, the *Employment Act* recognizes four major types of employment – contract for specified period of time; contract for unspecified period of time, contract for a specific piece of work or piece-work at a specific piece-rate, and casual employment.

39. The first duty for this court is to determine, based on the evidence on record and the law applicable, the nature and classification of the employment relationship between the appellant and the respondent. As far as the court understands the dispute between the parties and the evidence availed during the trial, the respondent was basically a cane-loader and, as per the records availed and produced during the trial by the appellant, he was paid for the cumulative weight of the cane loaded for all the days worked in a particular month. As far as the records availed and produced by the appellant show, and the respondent did not call evidence to the contrary, the appellant did not work on each day of each month. He also did not report to work at 4am and left at 5pm as he alleged because his pay was not based on the number of hours or days worked but rather on the weight of the cane that he loaded.

40. In my considered view, the respondent was neither a casual, nor permanent and pensionable or what is sometimes referred to as regular employee, nor was he on a fixed-term contract. He was not a month-to-month employee as records show and demonstrate that he was not obligated to report to work each day and indeed he did not report to work each day. His pay at the end of the month was calculated and based on the work done in the form of the weight of the cane loaded.

41. Based on Section 2 of the *Employment Act* wherein "piece work" is defined as "any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance" the court is of the considered view that this is the definition that properly captures the employment relationship between the appellant and the respondent.

42. In view of the foregoing and the above finding by the court, the respondent was not a casual employee and as such Section 37 of the *Employment Act* did not apply to him. In other words, the employment of the respondent was not capable of conversion to term contract or month to month employment.

43. What then is a piece-work or piece-rate employee entitled to? In Krystalline Salt Limited V Kwekwe Mwakele & 67 Others (supra) the Court of Appeal opined that at the very minimum such an employee is entitled to the minimum pay. I must add that besides the minimum pay, such an employee is entitled to any other agreed benefits based on the oral or written contract by and between the parties, or indeed any other benefit conferred by the law.

44. It has not been alleged that the pay made to the respondent was below the minimum payable during the material time. It has also not been alleged or proved that the appellant failed and or refused to pay any arrears.

45. Further, in my considered view, I find and hold that workers on piece-work arrangement are not entitled to leave as they are not obligated to report to work each day. In fact, such workers hold the key to their off and leave days as they can rest whenever they opt not to go to work. The court agrees with the holding in Godfrey Otieno Owuor V Rea Vipingo Plantations Ltd (supra) in this regard.

46. The appellant availed and produced the records of the work performed by the respondent. There was no legal obligation on the part of the appellant to make the respondent sign such records. If the respondent, as he did, felt that the records were false or manufactured as he alleged, he ought to have called evidence to corroborate his position. He, for example, should have called a co-worker who was with him during the time that he served to confirm that the respondent indeed worked each day from 4am to 5pm.

47. The basic tenet of the law of evidence does not change and holds true as capsulated in Section 107 of the *Evidence Act* – that he who alleges must prove. Throughout the trial it was incumbent upon the respondent, the employee, to prove his employment, including the nature, terms and conditions thereof, and also the alleged unlawful termination. Its only after the respondent had proved the foregoing that the appellant, the employer, was to be called upon to justify the reason and the procedure applied in the termination. This is the import and essence of Sections 41 to 47 of the *Employment Act*.

48. If the court was to view or hold otherwise such a holding would lead to an absurdity whereby employees or purported employees would merely allege employment without a shred of evidence and then an employer is called upon to disapprove the mere allegations. That is not the basis and foundation of the adversarial legal system that applies in the Republic of Kenya. It was incumbent upon the respondent to prove his employment and termination. In the considered view of the court the respondent failed to do so.

49. In the judgment by the lower trial court, pgs. 109 to 115 of the record of appeal, the trial court held (pg. 111) that "This court is of the view that the period within which the claimant worked for the respondent was so long such that the employment can be deemed to no longer have been on a price (sic!) rate basis but converted to contractual employment." The trial court then proceeded to purport to apply Section 37 of the *Employment Act* in converting the prolonged piece-work-piece-rate relationship to contractual employment.

50. In my considered view, the lower trial court erred in law in purporting to convert the employment relationship between the parties as above. This is because Section 37 of the *employment Act* does not refer or apply to piece-work or piece-rate employment but to casual employment. As it is noted above, and the trial lower court made the same conclusion, the respondent was on piece-work-piece-rate employment with the appellant whereby he was paid based on cane loaded. That is different and distinguishable from casual employment.

51. 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." This is different from the definition of piece-work or for that matter piece-worker as referenced above.

52. It is therefore evidently clear that the lower trial court erred in law in converting the piece-work performed by the respondent into casual employment and thereafter contractual and further erred in applying Section 37 of the *Employment Act* where is was and is not applicable.

53. It is the finding and holding of this court that the respondent was on piece-work and paid at an agreed piece-rate and remained so for the entire period between 2016 and 2021 when the relationship terminated.

54. On termination, the lower trial court found (pg. 112-113 of the record of appeal) that the respondent stopped working on his own volition and hence the issue of unfair termination did not arise. This court finds no reason for disturbing that finding. In any event, having been working on piece-work-piece-rate arrangement the relationship between the parties terminated at the end of each encounter and conclusion of each piece-work. No notice was therefore due at any point. The respondent was free and entitled to walk away as he did. The relationship between the parties just came to an end, and that was it.

V. Compensation

55. The lower trial court awarded the respondent as stated elsewhere in this judgment. In summary, the respondent was denied claim on salary for September, 2021; he was awarded one month's salary in lieu

of notice in the sum of Kshs12,522/=; was granted prorata leave at Kshs70,127.12; was denied claim on underpayments; was denied pay for public holidays, overtime, house allowance, and rest days; was denied compensation equivalent to 12 months' gross salary; he was awarded the claim on certificate of service; and he was awarded costs of the cause and interest thereon and on the awarded total sum of Kshs82,649.12.

56. This court agrees with the findings by the lower trial court except on the following aspects in regard to the specific awards made and ordered. Firstly, as noted and discussed above, the respondent was engaged on piece-work-piece-rate basis. In that arrangement he was not entitled to notice as the relationship subsisted as long as the piece-work was undertaken and ended and terminated upon completion thereof and the piece-rate agreed paid. The lower court was thus wrong in law and fact in awarding to the respondent notice-pay of Kshs12,522/= and the same is hereby set aside.

57. Likewise, in the employment relationship discussed above the respondent was not entitled to leave or leave pay as he was not obligated to report to work like a regular employee. As stated above, piece-work-piece-rate and casual employees hold the keys to their leave or off days as they have the discretion on when and whether to go to work and can thus schedule when and for how long they wish to rest.

58. In the circumstances, this court shall set aside the award of Kshs70,127.12 awarded to the respondent as prorata leave and substitute therefore nil. The lower trial court erred in law and fact in making that award.

59. The net effect of all the foregoing is that the appeal herein is allowed and the judgment of the trial lower court set aside as stated and discussed above.

60. In the interest of justice, fairness, and equity each party shall meet own costs both in the lower court and in this appeal.

61. The foregoing paragraphs answer to all the issues raised above for determination.

VI. Orders

62. Flowing from the foregoing, the court makes the following orders –

    a. The appeal shall succeed to the extent that the award of Kshs82,649.12 to the respondent is hereby set aside.

    b. The respondent is entitled to an appropriate certificate of service under Section 51 of the *Employment Act*.

    c. Each party shall meet own costs for this appeal and for the proceedings in the lower trial court.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 6TH DAY OF FEBRUARY, 2025.

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DAVID NDERITU

JUDGE