Tangale v West Kenya Sugar Company Limited (Appeal E011 of 2024)
[2025] KEELRC 1118 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1118 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

APPEAL E011 OF 2024

DN NDERITU, J

APRIL 4, 2025

BETWEEN

TITO LUCHELI TANGALE ..... APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgment in Kakamega Chief Magistrate's Court ELRC Cause No. 36 of 2020 by Hon. J. Ndururi(SPM) dated and delivered on 22nd March, 2024)

JUDGMENT

I. Introduction

1. In a judgment delivered on 22nd March, 2024 the lower trial court dismissed the appellant's entire claim and awarded costs to the respondent.

2. Dissatisfied with the said judgment the appellant through Mwakio Kirwa & Co. Advocates commenced this appeal by way of a memorandum of appeal dated 22nd April, 2024 raising the following grounds of appeal –

    1. That the learned magistrate erred in law and in fact by failing to direct his mind properly on the provision of the *Employment Act*.

    2. That the learned magistrate erred in law and in fact in his judgment, that the appellant was not entitled to remedies sought in his statement of claim.

    3. That the learned magistrate erred both in law and fact by holding that the respondent did not engage in unfair labour practices against the appellant.

    4. That the learned magistrate erred both in law and in fact in dismissing the appellant's statement of claim in its entirety citing grounds in his judgment.

5. That the learned trial magistrate erred in law and in fact in failing to consider or give proper attention to the evidence adduced in court by the appellant in support of his claim.

6. That the trial magistrate erred in law and in fact in failing to evaluate, analyze, consider, and determine all the issues rose during the trial therefore arriving at an erroneous judgment.

7. That the learned trial judgment erred in law and in fact in misdirecting himself and deciding on extraneous issues which were neither pleaded nor proved.

8. That learned magistrate is in the circumstances misconceived, unfair and unjust.

9. That the learned trial magistrate exhibited bias in his judgment against the appellant's case.

3. The appellant is seeking for the following reliefs –

a. This appeal be allowed;

b. The judgment of Honorable J. Ndururi, delivered on 22nd March, 2024 in Chief Magistrates Court at Kakamega be set aside and/or varied;

c. The Costs of this appeal be awarded to the appellant.

d. This Honourable court makes such and further orders as it deems fit and just to meet the ends of justice.

4. The respondent opposed the appeal through O&M Law LLP Advocates.

5. The appeal was canvassed by way of written submissions. Counsel for the appellant, Miss Chumo, filed written submissions dated 13th January, 2025, while Miss Chitala for the respondent filed submissions dated 3rd February, 2025.

II. Submissions by Counsel

6. In the submissions, counsel for the appellant concentrated on three issues –Whether the appellant's employment was converted from casual to term contract; Whether the trial magistrate erred by failing to award the appellant the terminal dues stated in the statement of claim; and Whether the appellant's case was proven on a balance of probability; and, Whether the lower court erred in granting judgment against his favour.

7. On the first issue, it is submitted that the employment of the appellant converted from casual employment to term contract under the provisions of Section 37 of the *Employment Act* (The Act) as the appellant worked for the respondent continuously from 1st May, 2012 to April, 2017.

8. It is submitted that the respondent's failure to avail an attendance register defeated its allegation that the appellant worked intermittently. It is asserted that the cane delivery report adduced by the respondent could not be a proof that the appellant had not attended work continuously, since the appellant could have been on off days on the alleged days and period covered in the report. The appellant cited a plethora of decisions to buttress the assertion that his employment had converted from a casual labourer to a term contract – See Nanyuki Water and Sewerage Company Limited v Benson Ntiritu & 4 others (2018) eKLR; Humphrey Omondi V Vishnu Builders Limited (2013) eKLR; Silas Mutwiri V Haggai Multi-Cargo Handling Services Limited (2013) eKLR; Kesi Mohmed Salim V Kwale International Sugar Co. Ltd (2017) eKLR & Njega V Prime Steel Mills Limited KEELRC 391 KLR.

9. On the second issue, the appellant's counsel cited Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, & Donald Odeke V Fidelity Security Limited (2012) eKLR, asserting that his termination was unlawful and unprocedural contrary to the provisions of Sections 41, 43 & 45(2) of the Act. It is submitted that the appellant was neither informed of the reason for his termination nor accorded a hearing. It was alluded that due to an error on the appellant's advocate's part, the appellant's statement indicated that the reason for his termination was the failure to repair a tractor(pg.11). The appellant's position is that he had been injured and granted permission to be absent, but later when he reported to work, he was informed that his work records could not be traced, thus he could not continue working for the respondent.

10. On the third issue, counsel cited Peter Otabong Ekisa v County Government of Busia (2017) eKLR, asserting that the appellant proved his case on a balance of probabilities by adducing evidence, which was corroborated by the respondent's witness, that his NSSF deductions had been remitted by the respondent as his employer.

11. On the other hand, the respondent's counsel submitted on three issues – What is the nature of the relationship between the appellant and the company; Whether the burden of proof shifted to the company; and, Whether the appellant is entitled to notice pay or any of the reliefs sought.

12. On the first issue, it is submitted that no formal contract of employment was ever issued to the appellant nor was there evidence that he was on regular and constant pay of salary from the respondent. It is submitted that the NHIF, NSSF, and the welfare membership cards produced in court by the appellant are not of themselves proof of continuous employment or a contract of employment.

13. It is submitted that the appellant, according to the cane haulage report availed and produced in court, delivered cane intermittently between 2015 and 2017 and his pay varied from time to time based on piece-work done at the agreed piece-rate based on the availability of work and availability of the appellant to work.

14. Citing Krystalline Salt Limited v Kwekwe Mwakele and 67 others (2017) eKLR & Josephat Njuguna v High Rise Self Group (20140eKLR, it is submitted that the lower trial court arrived at the right finding that the appellant was a piece-rate worker as the appellant testified that he worked when he wished. It is submitted that payments to the appellant were made on diverse dates, and no evidence that the appellant had earned a consistent monthly salary of Kshs8,840/= was adduced.

15. On the second issue, counsel cited Protus Wanjala Mukite V Anglo African Properties t/a Jambo Mutara Lodge Laikipia (2021) eKLR; Joshua Asakhulu v West Kenya Sugar Company Limited (2023) eKLR; and Casmir Nyakundi Nyaberi V Mwakikar Agencies Limited (2016) eKLR, and urged the court to uphold that the appellant had the burden of proof of employment and unfair termination but he failed to do so. It is asserted that the appellant could not prove the specific date in April, 2017 when he was dismissed. It is submitted that the respondent's records showed that the appellant had loaded cane up to 30th April, 2017 and did not show up again for work.

16. On reliefs, the third issue, counsel cited Charles Kithuka & 19 others v DPL Festive limited (2022) eKLR, asserting that the appellant was a piece-work sugarcane loader and that he was only paid based on the haul that he made and delivered to the respondent's factory at an agreed piece-rate.

17. It is further submitted that having been a piece-rate worker, the respondent was not entitled to leave from work. Basing her arguments on Krystalline Salt Limited V Kwekwe Mwakela & 67 Others (supra); Twiga Construction Limited V Julius Nyamai Mulatia (2018) eKLR, and Ryce Motors Limited & another v Elias Muroki (1996) eKLR, counsel for the respondent submitted that other than basic

minimum pay for work done, the appellant was not entitled to any other pay or benefits from the respondent.

III. ISSUES FOR DETERMINATION

18. The court has perused the record of appeal, the supplementary record of appeal 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 appellant terminated or how did the employment relationship, if any, terminate?

    c. If the appellant 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

19. 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 Selle V & Another V Associated Motor Boat Co. Ltd & Others (1968) EA 123

20. As per his pleadings and evidence in the lower trial court, the appellant's case is that he was engaged by the respondent as a cane-loader for the period from 2012 to April, 2017 when he was terminated without notice or due process. He stated that his last known monthly salary was Kshs8,840/=.

21. He further stated that while on duty he sustained an injury and asked for time-off to seek medical attention in a hospital. He stated that when he reported back to duty he was dismissed.

22. It is the appellant's case that the respondent violated Sections 41, 45 & 47 of the Act in terminating him in the manner and style that it did.

23. It is on the basis of the foregoing that the appellant prayed for the following reliefs in the lower trial court –

    i. A declaration that the claimant's services were unprocedurally, unlawfully, and unfairly terminated and in the circumstance the claimant is entitled to compensation of his terminal dues as outlined above.

    ii. The sum of Kshs288,413.427/=.

        BROKEN DOWN AS –

        a. One month's pay in lieu of notice.....Kshs11,623.165/=

        b. Leave dues (3 years).....Kshs30,220.229/=

        c. House allowance.....Kshs56,094.405/=

        d. Service pay/gratuity.....Kshs17,434.748/=

e. Underpayment.....Kshs33,562.90/=

f. Compensation.....Kshs139,477.98/=

iii. Certificate of Service.

iv. Cost of this suit and interests at court rates from time of filing the suit until payment in full; and

v. Any other relief the honourable court may deem just and fit to grant.

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

25. However, it was pleaded that from 11th July, 2015 to 9th June, 2017 the respondent engaged the appellant 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 evidenced through the loader cane haulage, cane delivery, and payment reports – see pg. 29-49 of the record of appeal. It was pleaded that after 9th June, 2017 the appellant did not offer any services to the respondent and never showed up for allocation of work.

26. It was further pleaded that the deductions made from the appellant's pay for remittance to National Social Security Fund (NSSF) were only made in the months the appellant worked. The appellant produced the records of the haulage done by the respondent for the period delineated above.

27. Both parties called one witness each during the trial. In his testimony in the lower trial court, the appellant stated that he worked all days of the week and month from 6.00 am. He stated that he took a sick-off but when he returned to work he was informed that his details were unavailable and he could no longer work for the respondent.

28. In cross-examination, the appellant conceded that he received his wages on daily basis and that his pay depended on the tonnage delivered.

29. The respondent called Duncan Obwawo (RW1), the human resources manager, as its witness during the trial. He adopted his filed statement and produced the filed documents as exhibits. He stated that the records held by the respondent and availed in court confirmed that the appellant was engaged by the respondent in 2015 and not in 2012 as alleged by the appellant. He stated that from the records, the appellant did not work on each day as alleged but he was only engaged on a 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 9th June, 2017 and thereafter he did not return to work.

30. In cross-examination, RW1 stated that while the respondent kept and maintained records of its employees, no such records of employment were available for the appellant for the year 2012 as he was not working then, and that the records available showed the appellant worked from 2015 as a piece-rate worker.

31. 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 respondent, the 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.

32. The first duty of 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 appellant was basically a cane-loader and, as per the records availed and produced during the trial by the respondent, 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 respondent show, and the appellant did not call evidence to the contrary, the appellant did not work on each day of each and every month. His pay was not based on the number of hours or days worked but rather on the weight of the cane that he loaded.

33. In my considered view, the appellant was neither a casual, neither permanent and pensionable or what is sometimes referred to as a 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 every fortnight was calculated and based on the work done in the form of the weight of the cane loaded.

34. Based on Section 2 of the 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.

35. 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 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.

36. 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.

37. The respondent availed and produced the records of the work performed by the appellant. If the appellant felt that the records were false or manufactured for this cause, 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 the respondent to confirm that the appellant indeed worked each day from 6.00 am as he alleged.

38. 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 appellant, the employee, to prove his employment, including the nature, terms and conditions thereof, and also the alleged unlawful termination. It is only after the appellant had proved the foregoing that the respondent, 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 Act.

39. 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 appellant to prove his employment and termination. In the considered view of the court the appellant failed to do so.

40. In the judgment by the lower trial court, pgs. 66-67 of the record of appeal, the trial court held that "on the other hand, the respondent has explained that the claimant used to offer himself for daily piece work employment and would be paid in accordance with the tonnage delivered to the respondent's factory. The respondent produced the claimant's record which shows the claimant was not receiving a fixed

amount as salary, but rather wages calculated in accordance with the tonnage of cane delivered. The record also shows that the claimant was not on duty each and every day. These documents corroborate the respondent's case. In conclusion, I find that the claimant has not proved any of his claims on a balance of probabilities. I therefore proceed to dismiss the memorandum of claim with costs to the respondent."

41. In my considered view, the lower trial court arrived at the right decision that the appellant was on piece-work and paid at an agreed piece-rate and remained so for the entire period between 2015 and 2017 after which the relationship terminated.

42. On termination, the lower trial court found that the appellant did not prove his case on a balance of probabilities (pg. 67 of the record of appeal). This court finds no reason for disturbing that finding. In any event, having been working on a 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 appellant was free and entitled to walk away as he did. He could absent himself from work if he wished. He did not adduce evidence that he had requested for permission to be away as alleged. The respondent adduced evidence that the appellant worked beyond the date he alleges he was dismissed of April, 2017 on 9th June, 2017(see pg. 29 of the record of appeal). The appellant's position, in the absence of the contrary proof, was in fact contradictory as he was not aware of the last day he worked for the respondent or he could not tell. Therefore, the relationship between the parties just came to an end, and that was it.

V. Compensation

43. The lower trial court declined to award notice pay, leave pay, house allowance, service pay/gratuity, underpayment, compensation equivalent to 12 months' gross salary, the claim on certificate of service, costs of the cause, and interest thereon as claimed in the memorandum of claim.

44. This court agrees with the findings by the lower trial court except on the claim for the certificate of service. Firstly, as noted and discussed above, the appellant was engaged on a 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 payment of the piece-rate. The court has found that the appellant did not prove that he was terminated let alone unlawfully terminated and, thus, the claim for notice pay and compensation could not stand.

45. There was no proof that the appellant worked on month-to-month basis as the court has found. The claim for house allowance could not stand as the appellant did not work every day, nor was his pay based on the hours worked.

46. Further, in my considered view, I find and hold that workers on piece-work arrangements are not entitled to leave as they are not obligated to report to work each day like a regular employee. In fact, such workers hold the key to their off and leave 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.

47. There was no contract between the appellant and the respondent that entitled the appellant to gratuity/service pay. Indeed, the appellant conceded that the respondent paid NSSF dues on his behalf. Section 35(6) of the Act disentitles an employee from double payment of Social Security benefits from NSSF and service pay. Service pay is only payable under Section 35(5) of the Act only to employees who are not covered under the different social security mechanisms, which is not the case with the appellant who was a member of NSSF.

48. It has been alleged that the pay made to the appellant was below the minimum payable during the material time. The court has held that the appellant was paid for the cumulative weight of the cane loaded for all the days worked in a particular month. There was no evidence that the appellant had received a fixed monthly salary. The appellant conceded that he was paid as per the tonnage of the cane he delivered. He did not prove that the amount paid for each tonnage was below the minimum wage. The appellant failed to prove that he was underpaid.

72. The trial court did not award the appellant the claim for a certificate of service. A certificate of service is under Section 51 of the Act available to an employee who works for an employer for at least four consecutive weeks. While the appellant worked intermittently as a piece rate worker, his record spans from 2015 to 2017. The award of the certificate is a right that is unconditional. The appellant left the employment of the respondent in 2017. This court orders that a certificate of service be issued by the respondent in the name of the appellant and that the same be delivered to his counsel on record within 30 days of this judgment without fail.

49. The net effect of all the foregoing is that the appeal herein is partially allowed and the judgment of the trial lower court is upheld as stated and discussed above.

50. The court shall not interfere with the award of costs by the trial court.

51. In the interest of justice, fairness, and equity each party shall meet own costs in this appeal.

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

V. Orders

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

    a. The appeal shall succeed only to the extent that the appellant is entitled to an appropriate certificate of service under Section 51 of the Act.

    b. The award of costs in the lower court shall remain undisturbed.

    c. Each party shall meet own costs for this appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 4TH DAY OF APRIL, 2025.

.....

DAVID NDERITU

JUDGE