Kimanthu & 3 others v Excel Chemicals Limited (Appeal E069 of 2020) [2025] KEELRC 1572 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1572 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E069 OF 2020

B ONGAYA, J

MAY 29, 2025

BETWEEN

DAMARIS MUENI KIMANTHU .... 1ST APPELLANT

JANE WAYUA KIOKO .... 2ND APPELLANT

VERONICAH MUTHINI NGAMBUA .... 3RD APPELLANT

EVERLYNE NTHENYA JOSHUA .... 4TH APPELLANT

AND

EXCEL CHEMICALS LIMITED .... RESPONDENT

(Being an appeal from the Judgment of Hon. L. L. Gicheha (Mrs.) delivered on 25th September, 2020 in Milimani CMELC No. 403 of 2019 at the Chief Magistrate's Court at Milimani Commercial Court)

JUDGMENT

1. The appellants filed a memorandum of appeal dated 22.10.2020 through Wetaba, Were & Associate Advocates. They appealed against the decision of Hon. L.L. Gicheha delivered on 25.09.2020 in Milimani CMELC No. 403 of 2019 on the following grounds:

   i. The learned magistrate erred in law by placing the burden of proof on special damages on employees who are not custodians of employment records and in complete disregard of Sections 9(1), (2), 10 and 74 of the *Employment Act*, Cap 226 Laws of Kenya.

   ii. The learned magistrate erred in law by failing to award the appellants their notice pay in accordance with Section 35(1) of the *Employment Act*, Cap 226 Laws of Kenya.

   iii. The learned magistrate erred in law by failing to award the appellants their leave pay in complete disregard of Section 28 of the *Employment Act*, Cap 226 Laws of Kenya.

iv. The learned magistrate erred in law by failing to award the appellants house allowance in complete disregard of Sections 20 and 31 of the *Employment Act*, Cap 226 Laws of Kenya.

v. The learned magistrate erred in law by placing the burden of proof of employment on the appellants and finding them to be casual employees in complete disregard of Section 37 of the *Employment Act*.

vi. The learned magistrate erred in law by failing to award the appellants for the overtime that they had worked as claimed in complete disregard of Sections 10, 18, 27 and 74 of the *Employment Act*, Cap 226 and the Minimum Wages Order, 2017.

vii. The learned magistrate erred in law by failing to award the appellants service gratuity in complete disregard of Section 35(1)5 of the *Employment Act*, Cap 226 Laws of Kenya.

viii. The learned magistrate erred in law by failing to consider the claimants' submissions more particularly with regard to special damages.

ix. The learned magistrate erred by placing reliance on incomplete records and disregarded the appellants' submissions on the incompleteness of the availed documents.

x. The learned magistrate failed to analyse the evidence and arrived at a wrong conclusion in law.

2. The appellant prayed that the Judgment delivered by Hon. L.L. Gicheha on 25.09.2020 be set aside. Additionally, as computed in the memorandum of appeal, each of the appellants be awarded –

a. one month's notice pay;

b. leave not taken;

c. damages for wrongful termination;

d. overtime; and,

e. service gratuity.

3. In response, the respondent filed its memorandum of cross-appeal dated 05.11.2020 through Munene Wambugu & Kiplagat Advocates. The cross-appeal was made on the ground that the learned trial Magistrate erred in law in failing to award to the respondent/appellant costs of defending the suit at the subordinate court.

4. The respondent, appellant in the cross-appeal, thus proposed that:

a. The appeal lodged by the respondents be dismissed with costs.

b. The cross-appeal be allowed with an order that the respondents should pay costs of defending the subordinate court cause.

5. The proceedings before the trial court reveal that the appellants/claimants filed the memorandum of claim dated 21.03.2019 and a bundle of documents. The respondent filed its response to the memorandum of claim dated 22.05.2019 and an accompanying bundle of documents. The parties also filed submissions at the trial court before the trial Magistrate rendered her judgment in the case.

6. In the Judgment dated 30.09.2020, the learned trial Magistrate found as follows:

i. It was not in dispute from the evidence that the claimants worked for the respondent and were paid 650/= per day.

ii. The claimants stated that they worked for the respondent from 01.11.2016 up to 12.01.2019, when they allegedly left employment or were dismissed.

iii. A perusal of the claimants' attendance sheets showed they started working from 2016 but the respondent ensured that they did not work continuously.

iv. Whereas the burden of proving continuous service lies with the employee who alleges that he so served, no such evidence was filed before the court, and the court relied on the records produced by the respondent, which showed that the claimants did not work continuously.

v. Therefore, the claimants' casual employment never converted to a term contract as alleged and they remained casual workers due to their intermittent service.

vi. Having found that the claimants were casual workers whose engagement provided for payment at the end of each day, their contract was terminable by either party at the close of any day without notice.

vii. Further, the employees having been paid dues at the end of every day and without claim that they were not paid, the court cannot find that the termination was unlawful.

viii. The claimants were not wrongly dismissed as there was a daily contract and the respondent had no obligation to give daily work unless it was available.

ix. Therefore, the claimants' claim cannot succeed and is dismissed.

x. There shall be no order as to costs due to the nature of the matter.

7. The appellants were dissatisfied with the trial court's Judgment and thus filed the instant appeal. They also filed a record of appeal dated 23.04.2023 and a supplementary record of appeal dated 03.12.2024 that were admitted on record.

8. The parties filed their respective submissions. The Court has considered the parties' respective positions and the material on record. In the first appeal the Court will reexamine the record of the trial Court bearing in mind that the trial Court and not this Court actually took the evidence. As established principle, the Court as appellate Court of first instance will reevaluate the evidence and make findings, and, unless is shown that the trial Court misdirected itself in a material respect, the Court will not interfere with the trial Court's findings. The Court returns as follows.

9. The 1st and main issue for determination is whether the claimants were casual employees and whether the casual employment converted to a contract of service subject to minimum terms and conditions of service as envisaged in section 37 of the *Employment Act*.

10. Section 37 of the *Employment Act* states as follows:

> " 37. Conversion of casual employment to term contract
>
> (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.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1) and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Employment and Labour Relations Court on the terms and conditions of service of a casual employee, the Employment and Labour Relations Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 86 of this Act shall apply."

11. The Court has perused the proceedings at the hearing. Each appellant testified and their respective testimonies were as follows:

a. Each was paid on daily basis for every day worked and in cash at Kshs. 650.00.

b. There were days they would report at work but find that there was no work.

c. The days they did not work was on account that there were no materials.

d. Further, there were days they did not report at work because they were casual workers.

e. Whenever there was no work they were not paid.

f. They worked for the respondent as casual workers between 1999-2019; 2003-2019; unstated period; and, 2012-2019, respectively.

12. The respondent's general manager testified as follows:

a. The appellants were casual employees.

b. The start time and end time between which each was engaged could not be recalled. However, if work was available and one was engaged then, they worked.

c. The records exhibits 1-4 showed the days each appellant worked.

13. The Court finds that the appellants and the respondent's witness mutually testified that the appellants were casual employees and were engaged to work by the respondent if they reported and there was available work to be done. The aggregate days worked or continuous service to justify conversion of their respective service to one subject to minimum terms and conditions of service in the Act and as envisaged in section 37 of the Act has not been established at all. The Court finds accordingly.

14. Section 2 of the Act provides, "casual employee" means 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. The Court returns that the trial Court did not err in finding that the appellants were casual employees. The respondent' submissions are upheld in that respect.

15. To answer the 2nd issue, the Court returns that the trial Court did not err in requiring the appellants to bear the burden of proving that their casual service had converted to one subject to minimum terms and conditions of service as envisaged in section 37 of the Act. The appellants have not shown a provision of law that would shift their burden of proving that their casual employment converted as envisaged in section 37 of the Act. The Court returns that the appellants were required to plead particulars of facts to show the basis of alleged conversion upon the tests in section 37 of the Act and then by evidence, on a balance of probabilities, prove the allegation. The material before the Court shows that they failed to do so.

16. As submitted for the respondent, the employer's duty to keep employee records does not amount to shifting of the burden of prove to the employer.

17. Section 74 of the Act states as follow,

"

" 74. Records to be kept by employer

(1)An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

(a)of a policy statement under section 6(2) where applicable;

(b)specified in section 10(3);

(c)specified in section 13;

(d)specified in sections 21 and 22;

(e)of an employee's weekly rest days specified in section 27;

(f)of an employees annual leave entitlement, days taken and days due specified in section 28;

(g)of maternity leave specified in section 29;

(h)of sick leave specified in section 30;

(i)where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;

(j)of food rations where applicable;

(k)specified in section 61;

(l)of a record of warning letters or other evidence of misconduct of an employee; and,

(m)any other particulars required to be kept under any written law or as may be prescribed by the Cabinet Secretary.

(2)An employer shall permit an authorised officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty six months to examine the record.

(3)Where an employer who employs a child maintains a register in accordance with section 61, the employer shall be deemed to have complied with this section if the register contains in relation to each child, the particulars required to be kept by the employer under subsection (1)"

18. As submitted for the respondent, in James Orwaru Nyaundi v Kilgoris Klassic Sacco Limited (Cause 1002 of 2015) [2022] KEELC 1176 (KLR) (Environment and Land) (24 February 2022) (Judgment) Ocharo Kebira J stated thus,

> " 79. Parties often place reliance on Section 74 of Act, and wrong reliance I must say, to assert that whenever an employer does not produce documents in Court where overtime, public holiday worked, untaken unpaid for leave days are alleged, there is an automatic pass to a judgment in favour of the employee. My reading of the provision does not suggest that such an implication is one that follows it. The provision only provides for the record that must be kept by an employer, nothing to do with production of the records in Court.
>
> 80. If one wanted to rely on the record[s] which is in the possession and control of the employer to prove and or fortify certain aspects of his or her case, there is a legal avenue available for attainment of that, issuance of as notice to produce under the *Evidence Act*, Cap 80, laws of Kenya. It will be only after the notice has been properly issued, and the employer fails to produce the record, that the default consequence will set in."
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> 81. The Claimant did not tender any specific in the nature mentioned herein above, the Claim for overtime, and public holidays worked compensation are declined.

19. Again in Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] KECA 198 (KLR) the Court of Appeal (Karanja, Koome & Otieno-Odek, JJ.A) held that unless the burden of prove is otherwise shifted by statute, then the employee bears the burden to prove that which he or she alleges. The Court of Appeal in that case elaborately addressed the issue as follows:

> "
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> " 12. In contrast, the respondent not only denied owing the sums claimed, but also denied that the appellant ever accrued those dues in the first place. In other words, the respondent's assertion was that the appellant's claim was in respect of fictitious labour, as he never put in the work on those days as claimed. Except where expressly provided under statute, the burden of proof in civil cases is always cast on the party who alleges (see. Sections 107-109 of the *Evidence*

Act Cap 80 Laws of Kenya). It is for the party that alleges a fact to be true to prove the existence and veracity of that fact. This is under the basic principle of Evidence that 'he who asserts must prove' (see. Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR)

That is also the purport of section 107(1) of the *Evidence Act*, which provides:

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

There is also an evidential burden that is cast upon any party who desires the court to believe the existence of a fact. That is captured in Sections 109 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

13. In this case, the appellant has been adamant that he not only worked on some public holidays and Sundays, but that he was never paid in respect thereof. The respondent has refuted both assertions; at which point the appellant contends that the respondent ought to have produced records to prove any payment effected with regard to the public holidays and Sundays worked. As stated above, the appellant never specified which Sundays he was on duty or which public holidays he worked for which he was not paid. It was not clear how he had arrived at the number of days he claimed he was owed. How then would the respondent be expected to defend such a claim? The learned Judge made a finding to the effect that the appellant had actually admitted having utilized all his leave days and paternity days and those must have included Sundays and probably public holidays. How then would the appellant have expected the learned Judge to award him pay for days which had not been proved at all?

14. Whereas we appreciate that the *employment Act* enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked. On the other hand, we note that the respondent produced before court several receipts for allowances paid to the appellant, which given the paucity of evidence in support of the appellant's claim could as well have been payments for public holidays and/or Sundays worked.

Addressing a similar issue this Court in its decision in Rogoli Ole Manadiegi vs. General Cargo Services Limited (2016) eKLR expressed as follows;

"It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the

employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days… he did not justify the global figure claimed in overtime, showing specifically how it was arrived at…"

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail."

20. Again Ndolo J in Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] KEELRC 1323 (KLR) held thus,

> " 11. This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.
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> 12. In the instant case, the Claimant told the Court that he had been issued with an employment card but he did not produce it. He also testified that he used to sign for his salary in a book which was retained by the Respondent but he did not ask for its production. This, coupled with the inconsistencies in the Claimant's evidence which I have already pointed out leads the Court to reach the conclusion that there was in fact no employment relationship between the Claimant and the Respondent capable of enforcement by this Court."

21. By the cited cases and the respondent's submissions in that respect, the Court finds that the trial Court did not err in finding that the burden to prove the conversion of employment per section 37 of the Act as was alleged vested in the makers of the allegation, the appellants. As submitted, the burden to prove the special damages claimed was not discharged. Further, in view of the claims and reliefs sought being inconsistent with the casual employment, the trial Court did not err in declining to grant the same.

22. On the cross-appeal it is submitted for the cross-appellant (the respondent) that the trial Court erred in failing to award the costs because costs follow event. The cross-respondents (appellants) had lost and they ought to have been ordered to pay the costs of the suit in the lower Court. The cross-respondents appears not to contest that position in the submissions filed for them. Nevertheless, the Court has considered the practical consequences of realizing costs of the suit in the trial Court and the costs of the appeal and cross-appeal in the circumstances that the appellants were casual employees. It should be that the Court should not make orders that escalate costs that may otherwise not be recoverable owing to the full equality of arms of the parties. The trial Court's judgment and order on costs will therefore not be disturbed and each party will bear own costs of the appeal and cross appeal.

23. In conclusion, the appeal and cross-appeal are hereby determined with orders:

    1. The appeal is dismissed andthe trial Court's judgment and decree upheld.

2. Each party to bear own costs of the appeal and cross-appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 29TH MAY, 2025

BYRAM ONGAYA

PRINCIPAL JUDGE