Gathuthi Tea Factory v Kamunya (Employment and Labour Relations Appeal E023 of 2024) [2025] KEELRC 1367 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1367 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E023 OF 2024

ON MAKAU, J

MAY 9, 2025

BETWEEN

GATHUTHI TEA FACTORY ..... APPELLANT

AND

GERALD WACHIRA KAMUNYA ..... RESPONDENT

(Being an appeal from the Judgment of Honourable A.G Kibiru (CM) delivered on 21st August 2024 in Nyeri CMELRC Cause NO. E078 of 2022)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 18th September 2024, the appellant challenges the said lower court's decision on the following grounds: -

    1. The learned trial Magistrate erred in law in his failure to appreciate that the Respondent was a seasonal worker whose employment contract ended at the end of each seasonal contract, and that all dues under such contract were paid at the expiry of the contract, which fact was admitted by the Respondent.

    2. The learned trial Magistrate further erred in law and in fact by awarding a sum of Kshs.79,051/- as pro-rata leave for 59 days at the rate of Kshs.1,289/- when the particulars of that claim were neither pleased, nor proves.

    3. The learned trial Magistrate erred in law and in fact in awarding a sum of Kshs.12,980/- as overtime hours, a claim not supported by any evidence.

    4. The learned trial Magistrate erred in law and in fact in awarding a sum of Kshs.29,600/- being unremitted NSSF deductions, while the particulars of the months were not pleaded, and in

view of the Respondent's admission that the Appellant remitted NSSF for the months of the seasonal contract only.

5. The learned trial Magistrate further erred in law and in fact in awarding a sum of Kshs.25,600/- as unremitted NSSF dues, against the decision of the Court of Appeal in Nyeri C.A.C.A No.38 of 2015, The Board of Governors Hiriga Secondary School v James Gathumbi Ngetha and Geoffrey Mukuria Kariuki.

6. The learned trial Magistrate erred in law and in making a judgment that was not supported by the evidence on record.

2. The appeal seeks the following orders:

a. That the Appeal be allowed with costs to the Appellant.

b. That the Learned Trial Magistrate's judgment be substituted with an order of dismissal of the claim with costs to the Appellant.

Background

3. The respondent was employed by the Appellant as a seasonal staff in the Manufacturing Labour Section on diverse dates from March 2001. The last contract was for one month from 1st-31st July 2020 and his daily wages was Kshs.1,289 as per the CBA between his trade union and the appellant.

4. When the last contract lapsed, the appellant decided to outsource labour and advised the respondent to apply through the outsourced agency at a new rate of daily wage of Kshs.400. The respondent among other employee did not agree with the outsourcing proposal and their trade union reported a trade dispute at the Labour Office and conciliator was appointed. Conciliation was done and the conciliator made recommendation that the appellant:

a. Pays annual leaves for all the years worked.

b. Pays pro-rata leave for each completed months of service as stipulated in the CBA clause 22 (c) iii.

c. Pays 28 days' pay in lieu of notice for everyone as stipulated in the CBA clause 22(c)ii.

d. Pays Mr.Mwangi Gachunu NSSF remittance for 10 years be paid .

e. Issue certificate of service to all the workers.

5. The recommendations were not fully complied with and the respondent filed suit in the lower court seeking the following reliefs: -

a. A declaration that the termination of the claimant's employment was unfair and unlawful.

b. That the claimant is entitled to 12 months' pay being the maximum compensation under *Employment Act*, 2007 (Kshs.38,670/- x 12 months=Kshs.464,040/=).

c. That the claimant is entitled to one month's pay in lieu of notice (Kshs.38,670/=)

d. Pay in lieu of untaken leave from september 2006 - June, 2020 (Kshs.38,670 x 15 years=580,050/=).

e. Pro-rata leave for each completed month of service as stipulated in the CBA clause 22, (c) (iii).

f. Overtime hours worked between October, November and December, 2019, amounting to 69 hours at the rate of Kshs.220/- per hour which totals Kshs.15,180/-.

g. NSSF dues for seventy-seven (73) months at the rate of Kshs.400 per month amounting to Kshs.29,200/-

h. Costs of the suit and interest.

i. Any other/further relief that the Honourable Court may deem fit and just to grant.

6. The basis of the above reliefs was that the respondent had worked for the appellant for 15 years starting September 2006 till June 2020 when the appellants' Manager Mr.Mugo verbally terminated his services for no just cause. He further based the claim on the CBA and the recommendations by the conciliator.

7. The appellant filed response and amended it on 22nd March 2024. In brief the appellant averred that the respondent was employed as a seasonal worker in the year 2003 as per the CBA and her last contract was for one month in June 2020. Upon the expiry of the last contract, the claimant was paid all his dues, as provided in the CBA.

8. It further averred that it decided to outsource labour through Cyka Manpower Services at Kshs.400 per day but the workers declined and their trade union reported a trade dispute to the Ministry of Labour for conciliation. The conciliator made recommendation and it complied by remittance of NSSF for Mwangi Gichumu and issuance of certificate of service to call workers but declined the other recommendations because it had paid the respondent all her dues in accordance with the CBA.

9. Finally, it averred that the respondent is not entitled to any reliefs since his contract expired by affliction of time and all his dues were paid. He was also issued with certificate of service. Consequently, it prayed for the suit to be dismissed with costs.

10. After the hearing, both sides filed written submissions. The trial court framed two issues, whether the termination of employment was unlawful and unfair, and whether the respondent was entitled to the reliefs sought.

11. After considering the evidence adduced, the trial court found that the respondent was employed under seasonal contracts all of which ended after the expiry of the contract period. Consequently, the court concluded that the respondent's employment was not unlawfully/unfairly terminated.

12. As regards the second issue, the trial court dismissed the prayer for compensation for unfair termination and salary in lieu of notice but granted the prayer for pro-rata leave, overtime and un-remitted NSSF deductions on the basis of clause 22 (c) (iii) of the CBA equaling to Kshs.114,631. The appellant was aggrieved and appealed.

Submissions on the appeal

13. It was submitted that the award of the 59 days leave, overtime and unremitted NSSF deductions was unsupported by evidence. It was further submitted that the said claims lacked particulars to assist the court in computing the award. It was further submitted that the pay slips adduced (page 98 of the Record of Appeal) indicates that the respondent was paid all his benefits monthly including pro-rata leave earned and overtime worked. It was submitted that the respondent admitted that the employer paid NSSF contributions. Reliance was also placed on the Board of Governors Hiriga Secondary School v James Gathumbi Ngetha & Another (U.R) to urge that the procedure for recovery of the unremitted NSSF contributions was not invoked.

14. In view of the foregoing matters, the appellant urged the court to allow the appeal, set aside the impugned judgment with costs.

15. On the other hand, it was submitted for the respondent that the trial court was right in holding that there was no evidence to demonstrate that the appellant paid the respondent leave as per the CBA plus the overtime worked during the three months seasonal contracts.

16. It was further submitted that the award of the unremitted NSSF deductions was warranted in addition to award of gratuity. It was submitted that this case is distinguishable from the cited case of BOG Hiriga Secondary School v James Gathumbi & Another. Consequently, the court was urged to dismiss the appeal with costs.

Determination

17. This being a first appeal, the mandate of the court is to re-evaluate the evidence on record and make my own conclusions, guided by the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 the court held thus: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

18. Having considered the evidence on record and the submission made in this appeal, the only issue for determination is whether the award of damages granted by the trial court should be disturbed.

Disturbing the award of damages

19. There is no dispute that the trial court made a finding of fact that the respondent was entitled to award of special damages in respect of pro-rata leave, overtime pay and unremitted NSSF deductions. The question that begs answer is whether the appeal meets the threshold for disturbing the said finding of fact and the quantum of damages by the trial court.

20. In Peters v Sunday Post Limited (1958) EA 424 the court held that: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the Judge who had the advantage of seeing and hearing the witnesses... the jurisdiction to review the evidence should be exercised with caution. It is not enough for the appellate court to have come to a different conclusion."

21. In Selle & Another v Associated Motor Boat Co. Ltd, supra, the court of Appeal held that:

> " ... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retiral and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence,

evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect..."

22. The legal principles emerging from the foregoing precedents is that the first appellate court is not bound by the findings of fact by the trial court and it has jurisdiction to re-evaluate the evidence on record and make its own conclusions, but paying attention to the fact that he neither saw nor heard the witnesses when they gave their testimonies.

23. Accordingly, the appellate court has the mandate to differ with the trial court's finding of fact if the same is not supported by the evidence adduced by the witnesses. A finding of fact by the trial court that does not flow from the pleadings and evidence is perverse and may occasion miscarriage of justice, and is therefore amenable to interference by the appellate court.

24. Having considered the pleadings and evidence on record plus the rival submissions made herein, it is clear that the trial court made a finding of fact that lacked particulars in the pleadings and that was not supported by evidence. First, the court awarded 69 leave days on pro-rata basis valued at Kshs.76,051. The said numbers were not pleaded in the statement of claim on record and there was no evidence to support both the finding and the award. On the contrary, there is evidence of payslips that indicated that the respondent was paid for his leave pro-rata basis as a seasonal employee.

25. As regards the award of overtime valued at Kshs.12,980, the trial court granted the same on the basis that no evidence of payment had been tendered. The court stated that: -

> " The claimant prayed for Kshs.15,180/- being 59 overtime hours worked between October, November and December 2019. No evidence was tendered to show that the claimant was paid for overtime. I award him the claim for overtime as prayed."

26. The foregoing finding amounted to shifting of burden of proof from the respondent to the appellant contrary to the law of evidence. The burden of proof was on the party alleging that he worked overtime. He was the one bound to adduce evidence to prove that he worked overtime and the employer failed to compensate him. Without such prima facie evidence the burden of proof cannot shift to the employer.

27. Accordingly, I find that the finding that the respondent was entitled to overtime pay, was perverse as it did not flow from the evidence. The schedule of the respondent's seasonal contracts indicates that he never worked in December 2019. There are also payslips produced as evidence, that indicate that the respondent was duly paid overtime allowance on different months.

28. As regards the award of Kshs.29,600 as unmerited NSSF deductions, the trial court stated that: -

> " The claimant also prayed for NSSF deductions that were not remitted. The respondent did not tender any evidence to prove that the deductions were remitted. I award the sum prayed of Kshs.29,600."

29. Again, I have to state that the foregoing finding amounted to shifting the burden of proof from the party claiming to the employer contrary to the law of evidence. The burden was on the party seeking the court's judgment to adduce evidence to prove that he worked for 64 months, the employer deducted NSSF dues, but the same were not remitted.

30. It is without doubt that the respondent was a seasonal worker, hired on need basis and therefore he was not in continuous service. It was upon him to plead the particulars of the 64 months upon which the claim for unremitted NSSF deductions was anchored. He neither pleaded the said particulars nor adduced evidence to prove the deduction and non-remittance for the alleged 64 months.

31. It follows that the said finding and the award of unremitted NSSF deductions was also perverse as it did not flow from the evidence. There was evidence on record in the form of schedule of months worked and NSSF statement showing corresponding NSSF remittances which the trial court did not tender any evidence prove that the deductions were remitted.

32. In view of the foregoing matters, I find and hold that the appellant has demonstrated a basis for this court to disturb and set aside the award of damages by the trial court. Consequently, I allow the appeal, set aside the trial court's judgment and substitute it with an order dismissing the respondent's statement of claim. The appellant is also awarded costs of the appeal and the court below plus interest at court rates.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE