Mutua v Mastermind Tobacco Kenya Limited (Appeal E006 of 2023)
[2025] KEELRC 1700 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1700 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

APPEAL E006 OF 2023

B ONGAYA, J

JUNE 12, 2025

BETWEEN

BENSON KASYOKA MUTUA ..... APPELLANT

AND

MASTERMIND TOBACCO KENYA LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Barbara Ojoo, Senior Principal Magistrate delivered on 16.08.2023 at Mavoko in CMELRC No. E071 of 2021)

JUDGMENT

1. The learned trial Senior Principal Magistrate delivered the Judgment in the suit before the trial Court in favour of the respondent against the appellant and for orders that the appellant's suit be dismissed with no orders as to costs.

2. The appellant filed the memorandum of appeal dated 19.08.2023 through Mirara & Associates Advocates. The appellant stated that the trial Court erred in law and fact and misdirected itself as follows:

    a. By disregarding the appellant's pleadings, submissions and evidence therefore arriving at an unjust conclusion.

    b. By disregarding the evidence that the respondent did not follow the lawful procedure to declare the appellant redundant.

    c. By disregarding the evidence that the respondent did not consult the appellant, the respondent did not issue the appellant a notice of redundancy nor was the labour office notified of any such intention and the respondent followed no criteria to declare the appellant redundant.

    d. By disregarding the evidence that the respondent commenced redundancy proceedings in the year 2021 after the appellant's contract expired in December 2020.

e. By disregarding the evidence that the respondent unlawfully run down the appellant's contract of employment through systematic and forced unpaid leave notices.

f. By disregarding the evidence that the respondent constructively dismissed the appellant from employment.

g. By failing to fully analyse the evidence tendered by the appellant and giving undue weight to the respondent's case and least weight to the appellant's case.

3. The appellant prayed for orders:

a. This appeal be allowed.

b. The judgment and decree of Honourable Barbara Ojoo be set aside and substituted by an award as prayed for in the Appellant's Memorandum of Claim dated 06.08.2021.

c. Costs of this appeal and in the Trial court be awarded to the appellant.

4. The appellant filed submissions on the appeal. No submissions were filed for the respondent. The appeal proceeded upon the record of appeal and the appellant's submissions.

5. The Appellant's case as pleaded before the trial Court was as follows:

a. That he was employed by the respondent in October, 2007 as a casual in the production department located along Mombasa road on a daily wage of Kshs 275.

b. In the period January, 2010 to December 2010 his daily wage was increased to Kshs 325.

c. On 24.01.2011 he was offered a contract of employment by the respondent in the position of general worker, machine attendant, with effect from 01.01.2011 on a starting monthly salary of Kshs 8,942.70.

d. On 28.01.2014 his contract of employment was renewed for another three years under the same terms.

e. On 31.12.2016 he was offered a new contract of employment by the respondent, for the position of downtime recorder for a fixed term of three years with effect from 01.01.2017 to 31.12.2019 at a gross salary of Kshs 16,400.

f. On 31.01.2020 he was offered another contract of employment by the respondent in the position of downtime recorder for a fixed term, effective 01.01.2020 to 31.12.2021, at a salary of Kshs 17,220.

g. On 04.09.2020 in the course of his duties, the appellant together with other employees were summoned by the factory manager, one Mr. Ngachau who informed them that there was a letter requiring them to proceed on unpaid leave for three months. That after the month ending November, 2020, they would resume their duties with the respondent, while some of them would proceed on unpaid leave for a further period.

h. They were issued with the letters, which were dated 02.09.2020.

i. The appellant states that he was not consulted nor was there any written consent accepting to go on unpaid leave.

j. On 17.11.2020 the appellant received a text message from the human resource department, informing him that his unpaid leave had been extended for a further period of 6 months with

effect from 04.12.2020 and that he should get in touch with the department for his letter confirming the same.

k. In December, 2020 the appellant visited the respondent's offices and was handed a letter dated 12.11.2020 to that effect.

l. On 31.05.2021 the appellant received another text message from human resource department informing him that his unpaid leave had been extended for a further period of 6 months and that he should get in touch with the department for his letter confirming the same. Sometime in June 2020, he received a letter dated 24.05.2021 to that effect.

m. The appellant stated that the respondent withheld his salary from September, 2020.

n. It is the appellant's case that he never had a disciplinary issue with the respondent and that his contract of employment was due to expire on 31.12.2021 and it is his belief that the respondent intended to run down the contract unfairly.

o. That the respondent's conduct forced him to leave the respondent's employment.

p. That the respondent only paid him basic salary with no house allowance, in violation of section 31 of the *Employment Act*, 2007.

q. That since January 2011, the respondent had been underpaying him during his engagement, since he had been working as a production clerk and not a downtime recorder. As production clerk, his duty involved doing hourly reports and he used to be the last person to leave the premises of the respondent.

r. The appellant stated that, from the day he started employment with the respondent, he has never gone on leave nor has he been paid for the same, and that the respondent stopped paying NSSF and NHIF contributions in August, 2020.

s. It is the appellant's case that the respondent's conduct and intolerable working conditions forced him to leave the respondent's employment, therefore amounting to constructive dismissal and that he is entitled to service pay for each full year worked in accordance with section 35(5) of the *Employment Act*.

t. The appellant claimed and prayed as follows:

    i. Unpaid house allowance for entire period served from October 2007 to December 2021 house allowance at a sum of Kshs.270, 744.30 as particularised in paragraph 22 of the statement of claim.

    ii. Due but untaken annual leave throughout period served being Kshs.131, 610.81.

    iii. Withheld and unpaid monthly salaries for September 2020 to December 2021 Kshs.17, 200 x 16 =Kshs.275, 200.00.

    iv. Service pay Kshs.240, 800.00.

    v. A certificate of service.

    vi. Costs and compounded interest from the date of filing suit until payment in full.

    vii. Any other relief that the Court may deem fit to grant.

6. On the part of the respondent an amended memorandum of response dated 14.03.2023 was filed through Agnes & Mathews Law LLP. It was stated that the appellant worked at the

respondent's tobacco manufacturing factory as a downtime recorder. The respondent further pleaded as follows:

a. The nature of the appellant's job alongside other employees of the respondent that worked in the factory required their in-person presence at the factory.

b. Government directives aimed at curbing the spread of COVID-19 led to shut down of the respondent's tobacco manufacturing factory and consequential job losses or freezing of jobs that could not be remotely performed such as the appellant's job of a downtime recorder, which required the appellant's in person presence at the respondent's factory.

c. The respondent stated that it was incumbent upon the respondent's management to make commercial judgment on how to enable the respondent continue teetering along, in the brink of insolvency.

d. That one of the commercial judgments that the respondent made on or about 20.08.2020 was to restructure its workforce by freezing jobs that had become redundant as a result of the closure of the respondent's tobacco manufacturing factory.

e. The appellant who worked in-person at the factory, was placed on temporary redundancy with effect from 04.09.2020 and was notified and the said notice was issued to the Ministry of Labour, Machakos County.

f. Before freezing the appellant's employment, the respondent discussed with all affected employees at the production department meeting held on 01.09.2020 of its predicament and decision.

g. The respondent stated that it applied a distinct criteria in declaring the temporary redundancy, with the affected employees being "members of staff in areas of operation that may not be regularly required" on account of the shutdown of the respondent's factory due to COVID-19 pandemic.

h. The respondent maintained that it did not force the appellant to leave employment or run down the appellant's contract of service unfairly as the temporary redundancy arose from the consequences of COVID-19 pandemic on the respondent's business, which pandemic the respondent never caused.

i. The appellant per paragraph 8 of statement of claim was paid a consolidated monthly salary of Kshs.17, 220.00 and section 31 of the *Employment Act*, 2007 was not breached as alleged.

j. The appellant was employed as a downtime recorder per contract of 31.01.2020 and not as a production clerk as was alleged.

k. It was admitted that the respondent stopped remitting NHIF and NSSF in August 2020 because the appellant had been temporarily been declared redundant from 04.09.2020. Service pay was not available per section 35(6) of the Act because the appellant had admitted that he was a member of NSSF.

l. The respondent prayed that the appellant's suit in the trial Court be dismissed with costs.

7. This is a first appeal and the role of the Court is to revaluate the evidence and arrive at conclusions one way or the other bearing in mind it did not by itself take the evidence. The decision of the trial Court ought not be disturbed unless it shown that the trial Court misdirected itself in material respect and thereby arrived at conclusions that were not just or correct.

8. The Court has considered the material on record and returns as follows.

9. It has been submitted for the appellant that the main issue for determination is whether the continuous forced unpaid leave amounted to constructive dismissal. It was submitted that the appellant was sent on a compulsory unpaid leave which ran till expiration of his contract and that state of limbo necessitated the filing of the suit. Further the compulsory leave was a unilateral decision made without compliance with section 10(5) of the Act to the effect that revision of employment contracts should be done in consultation with the employee. It was submitted that by placing the appellant on extended compulsory unpaid leave for 14 months until his contract of service lapsed, the respondent's actions were deliberate, targeted, and meant to frustrate him out of employment, amounting to constructive termination as was held by Marete J in Joseph Aleper & Another –Versus- Lodwar Water and Sanitation Company Limited [2013] KEELRC 60 (KLR). Absence of explanation and consultation meant the respondent did not intent to recall the appellant back to work. The further submission was that the respondent had made a judgment to declare a redundancy per the prevailing COVID 19 situation but failed to invoke the proper procedure per section 40 of the Act and per definition of redundancy in section 2 of the Act – loss of employment , occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer, where services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. That the appellant had been subjected to involuntary loss of employment.

10. It was further submitted that the respondent addressed to all staff the memo of 20.08.2022 conveying that the respondent had decided to restructure the business operations to reduce costs and optimise available resources so that staff in areas of operation that may not be regularly required would be send on unpaid leave. It was urged that the appellant never received the memo and no evidence showed that he had been served. The memo was titled "unpaid leave" and not "redundancy notice." It was submitted for the appellant that the unpaid leave notices were such and not redundancy notices, as was urged for the respondent.

11. Further it was submitted for the appellant that the respondent exhibited the letter dated 31.03.2022 declaring the appellant redundant after the appellant's term contract had lapsed on 31.12.2021. It is also submitted that in the letter dated 25.01.2022 the labour officer advised the respondent to either return the employees to their jobs or declare them redundant and pay them dues per law and, the letter showed the illegality of terminating the appellant's employment by extended unpaid leaves until the contract had lapsed on 31.12.2021.

12. The Court has considered the submissions made for the appellant as against the trial Court's findings in the judgment delivered on 16.08.2023. The Court returns as follows:

    a. The trial Court, finding against the respondent's plea of res judicata in view that the labour officer at Athi River had entertained and advised the respondent on the dispute herein, returned that the labour officer did not exercise judicial power and was no such competent Court so that the advisory by the labour officer could not amount to a

decision to render the suit res judicata. The Court agrees with the finding and in any event, the appellant was not dissatisfied with that finding.

b. The trial Court found that the separation did not amount to constructive dismissal because the evidence was that the effects of COVID - 19 resulted in the unpaid leaves which were extended until appellant's contract lapsed on 31.12.2021. The Court finds that the trial Court did not err. By the appellant's own testimony, his problem was that after the initial unpaid leave, he was not recalled but his unpaid leave was extended. By that testimony it appears to the Court that the appellant's grievance was not that the unpaid leave was imposed but that it was extended. The Court finds that the appellant knew he was an in person worker who could not work remotely but only physically. He understood that he was proceeding on unpaid leave because he could not continue working in view of the impact of COVID -19 situation. It is the finding of the Court that contrary to the submission for the appellant that the unpaid leave was unilaterally imposed, it was not so imposed but it was agreed upon between the parties in view of the persisting COVID -19 situation. The Court further finds that in view that the COVID – 19 situation persisted and being the sole cause of the unpaid leave, it appears that the respondent was entitled to extent the periods of unpaid leave as was done. The appellant failed to establish unilateral imposition of unpaid leave that was extended as was done by the respondent. Further, after the contract lapsed, the respondent paid the appellant a net sum of Kshs.77, 228.50 as had been advised by the labour officer and in view of the redundancy situation occasioned by the COVI – 19 situation. The Court finds that with respect to the final two year term contract, the payment was substantially fair within section 40 of the Act on redundancy. It is noteworthy that the redundancy payment would be only with respect to the last two year term contract, the appellant having confirmed that the previous term contracts had been finalised and duly performed as concluded.

c. The Court further finds that by the submissions for the claimant, the contract lapsed when the unpaid leaves were extended until or around 31.12.2021, the due date for lapsing of the term contract of two years. Further, there were no procedural failures because parties were in an understanding that the appellant would be recalled once COVID – 19 situation subsided but which never happened until the two year contract lapsed. The Court finds that the respondent adopted a fair procedure in the circumstances of the case.

d. Accordingly, the Court has upheld the trial Court's finding that there was no unfair constructive dismissal on account of unpaid leave. While making that find, the Court considers that the trial Court misdirected itself in finding that there had been lawful redundancy whereas the evidence was that the claimant's contract had lapsed by effluxion of time on 31.12.2021. Save for that misdirection, the Court finds that the trial Court did not err in finding that there had been no unfair termination in light of the prevailing COVID – 19 situation which essentially had precipitated the circumstances of unpaid leave that was extended without recall of the appellant and until the term contract lapsed.

e. On the remedies the Court returns as follows:

    i. Service pay was not due in view that the appellant was a member of NSSF and as submitted and pleaded for the respondent before the trial Court.

ii. Leave was not due as claimed because the appellant by own evidence before the trial Court confirmed to have signed leave forms showing that the leave due was -23 days. Thus, he owed the respondent the 23 leave days and his claims on leave was unfounded.

iii. The underpayments were based on claims he was a production clerk and not a downtime recorder. The trial Court correctly found that the contract of service designated him a downtime recorder and the under payment based on minimum statutory wages for a production clerk is found to have been unjustified. In any event the appellant testified that for the term contracts had been duly performed with finality and he had no dispute in that regard - his dispute being that after the unpaid leave, which the Court has found was a mutual understanding in view of the COVID-19 situation, he was not recalled.

iv. The renewal contract of 31.12.2016 referred to gross salary of Kshs. 16, 400.00 per month as a downtime recorder. The last contract of 31.01.2020 referred to consolidated salary of Kshs.17, 200.00 per month as downtime recorder. The Court returns that as was submitted for the respondent before the trial Court the agreed salary was consolidated and with inclusive provision for housing. The appellant testified that the contracts had been satisfactorily been finalised and the Court returns that the claim for house allowance was a pure afterthought.

f. Parties mutually agreed on unpaid leave in view of COVID-19 situation with a recall. COVID – 19 situation persisted until the appellant's contract lapsed. In the circumstances, the claimed salary arrears for 16 months until date contract lapsed appears to the Court to have been inconsistent with the claimed salary arrears. In the circumstances that the appellant never worked for known and agreed circumstance of COVID-19, no salary arrears or 16 months' salaries can be due to the appellant as was claimed.

g. The appellant was entitled to the statutory certificate of service. In that consideration no costs of the appeal. The trial Court's dismissal of the suit with no order on costs would otherwise be upheld.

In conclusion the appeal is determined with orders:

a. The trial Court's final order dismissing the suit with no costs is varied to determination of the suit with no costs and, the respondent to deliver the certificate of service.

b. No costs of the appeal.

c. The Deputy Registrar to forthwith return the case file to Machakos Sub-Registry as closed.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 12TH JUNE, 2025.

BYRAM ONGAYA,

PRINCIPAL JUDGE