Kitui Flor Mills Limited v Katiru (Appeal E264 of 2024)
[2025] KEELRC 2099 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2099 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E264 OF 2024

M MBARŨ, J

JULY 17, 2025

BETWEEN

KITUI FLOR MILLS LIMITED ..... APPELLANT

AND

LENA KATIRU ..... RESPONDENT

(Being an appeal from the judgment of Hon. J. B. Kalo delivered on 5 December 2024 in Mombasa CMELRC No. E763 of 2023)

JUDGMENT

1. The appeal arises from the judgment delivered on 5 December 2024 in Mombasa CMELRC No. E763 of 2023. The appellant is seeking that the judgment be set aside and the claim dismissed with costs.

2. The respondent filed a claim before the trial court, arguing that she was employed by the appellant as a packer at the Mombasa department from 27 November 1997, a position she held for 23 years. There was no written contract.

3. The claim was that from 1997 to 2018, the respondent worked from 7 am to 5 pm, 7 days a week, including on public holidays. From 2019 to 2020, she worked from 7:00 a.m. to 3:00 p.m., 6 days a week. She was paid her wage weekly at a daily rate of Ksh. 600. She claimed that there were no remittances to the NSSF, NHIF, or PAYE for the 23 years of service. There was no house allowance paid, nor were overtime or rest days worked for 21 years.

4. The claim was that on 27 November 2020, the respondent reported to work, and Evans, the parking department supervisor, informed her that there were allegations against her and that she should therefore go home. The allegations were not disclosed. This resulted in unfair termination of employment. The respondent claimed the following;

    a. Notice pay Ksh 14,400,

b. Salary for days worked in November 2020, Ksh 14,400,

c. 12months' compensation Ksh 172,400,

d. Underpayments for 12 public holidays for 23 years, Ksh 165,600,

e. Unpaid off days for 21 years, Ksh 655,200,

f. Unpaid off days for 2 years, 2018 to 2020, Ksh 62,400,

g. Unpaid overtime for 21 years, Ksh 1,310,400,

h. Unpaid overtime for Sunday worked for 21 years, ksh.262,080,

i. Unpaid leave for 23 years, Ksh.221,760,

j. Service pay for 23 years, Ksh.165,600,

k. House allowances for 276 months Ksh.896,160,

l. Costs of the suit.

5. In reply, the appellant's case was that the respondent's claim related to a mistaken identity, as she had never been employed by them as alleged. The employees in its packaging department work from 8:00 a.m. to 5:00 p.m., 6 days a week. The appellant has several 8-hour shifts per week, 6 days a week. It is not accurate to state that the respondent worked for 23 years without a break, which is misleading. Wages are paid monthly and not weekly to all employees and are issued with pay slips. As an entity, the appellant remits all statutory deductions to NSSF, NHIF and PAYE and the claims made are without merit.

6. In the trial court's judgment, it was held that the appellant failed to produce work records to challenge the claim, and therefore, the claim was allowed as pleaded, with costs and interest.

7. Aggrieved, the appellant filed the appeal on 16 grounds.

8. The appeal is based on the contention that the learned magistrate erred in both law and fact by shifting the burden of proof regarding the employer-employee relationship to the appellant, rather than to the respondent, who is the employee. There was no proof of the employment relationship on the alleged 23 years of service.

9. The trial court erred in relying on the medical examination certificate applications issued by the Municipal Council of Mombasa and the County Government of Mombasa as conclusive proof of employment of the respondent by the appellant. The court failed to consider that the respondent introduced the medical examination certificate, not the employer. Despite noting that some certificates referred to Dola Flour Mills as the alleged employer, the trial court relied on these records as conclusive evidence of employment.

10. Other grounds of appeal are that the trial court erred in finding that the respondent had proven the entire claim without providing any analysis or reasons. The award of overtime, public holidays, and unpaid days off was all awarded without any reasons being given. The court failed to appreciate the importance of section 90 of the *Employment Act*, which provides limits claims to 12 months of continuing injury. The alleged unpaid days for 23 years, work during Sundays for 21 years, and annual leave for 23 years were unjustly awarded. These awards informed the applicable procedures for claims up to 3 years.

11. The trial court failed to take note that the entire claim was time-barred under section 90 of the *Employment Act*. According to the documents presented, the medical examination should have been on 15 January 2020, not 15 July 2020. Hence, the entire judgment should be set aside with costs.

12. The appellant submitted that the trial Court erred in shifting the burden of proof from the Respondent to the Appellant, whether the Court erred in allowing the Respondent's entire claim without providing an analysis of each of the prayers sought in the claim and whether the court erred in allowing the Respondent entire claim while failing to ascertain whether the Respondent had proved any of her prayers sought in the claim under sections 107 and 109 of the *Evidence Act* on the burden of proof and argued that the burden of proof lies in he who alleges and supported that argument by citing the case of Casmir Nyankuru Nyaberi V Mwakikar Agencies Limited [2016] eklr, and the case of Samuel Wambugu Ndirangu Vs 2NK Sacco Society Limited [2019] eklr.

13. A claim can only succeed if the requisite evidentiary burden and standard of proof are satisfied. This can only be achieved upon the successful finding of the existence of an employer-employee relationship, which, by law, rests with the employee, not the employer. The trial Court erred in shifting that burden to the employer when it had determined in its judgment that the claimant did not have any documentation on her employment with the Respondent. Still, it went ahead to hold that the employer's failure in producing their Employment records, such as payroll, to ascertain the nonexistence of the employee, was a basis for holding that the Respondent herein was an employee of the Appellant.

14. The Appellant submitted that the Respondent had tendered in evidence a medical examination certificate Application form, which showed her employer as Dola Flour Mills, and not the Respondent, which is a different entity and not the same as the Respondent. The Medical Examination certificate, 'Form D', that the court relied on in finding the Respondent an employee of the Appellant. It was submitted that the certificate was filled using information provided by the Respondent, not the employer. Therefore, the Court ought not to have relied on such a document in determining the duration of the Respondent's employment, especially for the period between 17 June 2014 and 22 June 2016.

15. Concerning the Medical certificate showing that the Respondent is fit to work for Kitui Flour Mills, it was argued that the said certificate was time-bound for only 6 months, from 26 June 2018, to 15 January 2020, and there is no indication that the Respondent worked beyond the stated period. In any event, even if the court were to rely on these documents, it ought to have concluded that the employment was not consistent for the said period, and due to these inconsistencies, the trial Court should have found that the claimant failed to prove her case. Reliance was placed on the case of Owiti V C&A Security Services (Cause 2402 of 2016) KEELRC 4104 (KLR), where the Court refused to decide on the prayers sought since the claimant had not established any employment relationship with the Respondent. The documents tendered in evidence during the trial only showed that the Respondent was fit to work in the food industry and did not show that she was an employee of the Appellant. Hence, the trial Court erred in shifting the burden of proof to the Appellant.

16. The Appellant submitted that the Respondent claimed 21 years' worth of leave on the basis that she used to work 7 days each week, then 2 years' worth of leave on allegations that she was working 6 days a week. In addition to these off days is the claim for Sundays, which amounts to double compensation and unjust enrichment.

17. The claim for public Holidays and overtime should have been dismissed as it was not proved. To support this, reliance was placed on several cases, including the case of Mburu V Gillys Security

Investigations Services Ltd (Cause 779 of 2018) [2024] KEELRC 1348 (KLR), where the court rejected the overtime claim due to insufficient evidence.

18. The claim of unpaid leave, unpaid public holidays, and unpaid overtime, which are continuous injuries and time-barred by dint of section 90 of the *Employment Act*.

19. The Respondent submitted that the burden of disproving any employment relationship is upon the Employer as the custodian of records, as was stated in Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited 120161 KEELRC 1323 (KLR). He argued that the shifting of the burden of proof in this case was occasioned by the Appellant's failure to provide the Respondent with a written contract and instead treated her as a casual employee for 23 years, contrary to the law.

20. The Respondent was not issued an employment contract; she proved her employment to the Appellant by stating the date of her employment, her role, and the names of her supervisors. In addition, she tendered further evidence showing her employment, such as KUCFAW's membership card, which indicates that she was the Appellant's employee and the Certificate of Medical Examinations issued by Municipal Council of Mombasa and/or County Government of Mombasa for the years 2018 and 2019, which showed the Appellant as her employer.

21. The Respondent submitted that the Appellant's defence cannot be relied on because it contradicted itself by pleading in its witness's statement that the Respondent's name was not in their permanent and casual employees list; however, on cross-examination, the same witness confirmed that the Respondent was employed from 2017.

22. In admitting to employing 20-30 casual employees at a time and the Respondent claiming to have been used as a casual employee for 23 years, it was incumbent upon the Appellant to disprove that fact. Considering that the Employer is required under sections 10 (7) and 74 of the *Employment Act* to have all records of its employees, with the burden placed on them to prove or disprove an alleged term of employment contract and/or engagement. Where a party has custody or is in control of evidence that party refuses and or fails to produce to ascertain a particular fact, the court is entitled to make an adverse inference that if such evidence were produced, it would be unfavourable to such a party. In support of this reliance was placed in the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR in the case of Everflora Limited v Silikhan l2024l KEELRC 239 (KLR), where the Court reiterated the legal duty on the employer to produce employment records while re-affirming this Court decision in Abigael Jepkosgei Yator vs. China Hanan International Co. Ltd [2018] eKLR.

23. The Respondent submitted concerning the award of compensation for unfair termination and argued that it is a discretionary award that can only be upset on demonstration that the discretion was capricious or was wrongfully applied. However, considering the length of service of the Respondent and the evidence tendered in support of the claim, the award as granted by the trial Court was proper. She thus urged this Court to dismiss the Appeal with costs to her.

Determination

24. This is a first appeal. The court is mandated to reevaluate the evidence before the trial court, as well as the judgment on whether to allow the appeal. A first appellate court is guided by principles set out in Selle & another v Associated Motor Boat Co. Ltd and Peter v SundayPost Ltd, that,

> A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties, and unless restricted by law, the entire case is open to rehearing on both questions of fact and law. The Judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by

reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court...

25. The appellant denied the employment relationship with the respondent. However, the trial court relied on the medical application certificates issued to the respondent under Dola Flour Mills, as well as two others issued to the appellant.

26. Whereas the employer must submit work records under an employment Claim in terms of Section 10(7) and 74 of the *Employment Act*, a medical examination certificate is not a primary record of proof of employment.

27. Upon the respondent's response and the employment relationship being challenged, the burden shifted to them to prove the same. In the medical examination certificate produced by the respondent, the name of the employer is not listed.

28. However, the appellant called Fatma Iddi Mohamed, who testified that there was a packaging department and employees would be taken on demand for a period of up to two weeks. The records of such instances would have largely resolved the employment matter. The rationale is that every employer is required to keep records of all employees on the shop floor, including casual employees.

29. Without the records provided by the appellant as the employer, the learned magistrate was correct in finding that the respondent's claim of being an employee was not challenged in any material way. See Baruk v Board of Management St George's High School [2024] KEELRC 1491 (KLR) and Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018] KEELRC 2541 (KLR).

30. The appellant has raised the argument that the respondent's claims were time-barred under Section 90 (now Section 89) of the *Employment Act*.

31. These grounds were not followed in the written submissions.

32. Save to urge the court that the medical examination certificates issued to the respondent are valid from 26 June 2018 to 15 January 2020. The claim was that the respondent was employed until November 2020, yet there is no medical certificate covering this period.

33. Where employment ceased in November 2020, the respondent filed her claim on 28 November 2023. She claimed that her employment was terminated through oral notice on 27 November 2020.

34. Under Section 89 of the *Employment Act* (the Act), an employee who alleges that her employment was terminated unfairly is allowed three years to pursue her case. Time starts running on the date employment ceased.

35. In this case, time started running on 27 November 2020 based on the facts set out by the respondent as the claimant. A proper calculation of 3 years would result in 26 in 2020. To file the claim on 28 November 2023 is outside the limitation period and contrary to section 89 of the Act.

36. The Court of Appeal in Attorney General v Andrew Maina Githinji & Another (2016) eKLR, held that once the employee received the termination notice, the termination took effect and the cause of action accrued, and that was the date from which the time began to run.

37. Section 89 of the Act is couched in mandatory terms. The time provided therein is not elastic and, hence, incapable of enlargement. The Court of Appeal, while dealing with the issue of limitation in the case of Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR, held that their hands were tied as Section 89 of the Act, because it is in mandatory terms that a claim based on a contract of employment must be filed within 3 years. In David Ngugi Waweru v Attorney General & Another

[2017] eKLR, the Court of Appeal held that there is no room to extend time in cases of limitation under Section 89 of the *Employment Act*.

38. From the pleadings, the question of law should have been addressed instantly and before the trial court could proceed further with the hearings. It is allowed that even on appeal, where an objection on a point of law arises, such an issue can be addressed. It is only fair that such matters be addressed at the earliest to avoid the wastage of crucial judicial time. Had the appellant well-articulated the objection on time limitations, the matter should have ended at that point, without the need for the instant appeal.

39. The filing of the claim before the trial court was outside the limitation period; the trial court lacked the requisite jurisdiction to hear the matter and make its determination.

40. On this basis, the appeal has merit. The judgment of the trial court is hereby set aside in its entirety. Each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 17 JULY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....