Asakhulu v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 1 of 2023) [2024] KEELRC 705 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 705 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL 1 OF 2023

JW KELI, J

MARCH 14, 2024

BETWEEN

JOSHUA ASAKHULU ..... APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT

(Appeal against the Judgment and /or Decree of Hon. J.R. Ndururi (P.M) delivered on 26th January 2023 in Kakamega CMELR E036 OF 2020)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and /or Decree of Hon. J.R. Ndururi (P.M) delivered on 26th January 2023 in Kakamega CMELR E036 OF 2020 between Joshua Asakhulu and West Kenya Sugar company Limited filed Memorandum of Appeal dated 30th February 2023 and record of appeal received in Court on the 4th December 2023 seeking the following orders:-

    1. That this Honourable Court be pleased to set aside the judgment delivered on 26/01/2023 and all consequential orders.

        In the Alternative that:

    2. That this Honourable Court finds that the Claimant's employment was unlawfully terminated

    3. That this Honourable Court finds that the Claimant was employed on term contract and unlawfully terminated by the Respondent and therefore award the reliefs sought as prayed.

    4. That the Respondents do pay the costs of this appeal.

    5. That such further relief as may appear just to the Honourable Court.

2. The Appeal was premised on the following grounds: -

   i. That the learned Magistrate erred in law and fact in finding that the claimant was a piece rate worker.

   ii. That the learned Magistrate erred in law and fact by failing to consider that even if the claimant was a piece rate worker he was entitled to notice before termination and payment in lieu of notice.

   iii. That the learned Magistrate erred in law and fact in finding that the claimant's NSSF deductions were being made by West Kenya Truck Drivers and Loaders Welfare Association when the NSSF statement clearly indicated that it was West Kenya Sugar Company Limited that was remitting.

   iv. That the learned Magistrate erred in law and fact in finding that the Claimant was a member of Kenya Truck Drivers and Loaders Welfare Association when there was no evidence to prove the same, and whereby the Claimant was not part of the agreement between the Respondent and the said Kenya Truck Drivers and Loaders Welfare Association.

   v. That the learned Magistrate erred in law and fact in failing to find that the Respondent never produced a master roll to prove their allegations according to section 10(6) and (7) of the *Employment Act*.

   vi. That the learned Magistrate erred in law and fact in finding the claimant only worked for the Respondent in the year 2019 to 2020 yet the NSSF statement shows the Respondent started remitting NSSF on behalf of the claimant in the year 2012 till the year 2020.

   vii. That the learned Magistrate erred in law and fact by dismissing the entire suit based on a wrong assumption that the Claimant did not prove that he was unlawfully terminated yet the Respondents admitted that they never issued termination notice, they never subjected the claimant to any disciplinary hearing neither did they issue notice to show cause or a certificate of service.

   viii. That the learned Magistrate erred in law and fact by issuing orders that costs be awarded to the Respondent.

3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by V.A. Shibanda & Company Advocates were dated 5th February 2024 and received in Court on an even date. The Respondent's written submissions drawn by O&M LAW Advocates were dated 19th February 2024 and received in Court on an even date.

Background to the appeal

4. The Appellant filed a suit in Kakamega CMELR Case No. E36 of 2020 against the Respondent for alleged unfair termination of employment vide statement of claim dated 25th September 2020 seeking the following reliefs: -

   a. May salary Kshs 12,522.70/-

   b. One month's salary in lieu of Notice Kshs 12,522.70/-

   c. Prorate leave Kshs. 96,424.79/-

   d. Underpayment of wages Kshs. 369,098 .4/-

e. Public holidays Kshs, 145,200/-

f. Overtime for extra hours worked Kshs. 118,800/-

g. Rest days Kshs. 220,399.52/-

h. 12 months' salary compensation Kshs. 150,272.4/-

i. Costs of this suit

j. Certificate of service

k. House allowance Kshs. 247,949.46/-(page 3-16 of the record was the claimant's case)

5. The Respondent entered appearance through the law firm of O& M LAW LLP Advocates and filed pleadings in defence and documents (pages 17-32 of the record is the defence case). At pages 29 and 30 of the record of appeal were request for particulars and notice of non-admission of documents by the Defendants.

6. The Claimant filed reply to defence (page 33 of the record).

7. The Trial Court proceeded with the hearing of the Claimant's case with him as only witness on the 3rd March 2022. The defence case was heard on the 3rd November 2022 with one witness (pages 67-72 of the record are the trial Court's proceedings).

8. The parties filed submissions in the lower Court after closure of defence. The Plaintiff's submissions were filed (page 39-53). The Defendant also filed written submissions (pages 54-63).

9. The trial Court (J.R Ndururi P.M.) delivered its judgment on the 26th January 2023 (pages 54-63) dismissing the claim with costs to the Respondent.

Determination

Issues for determination.

10. The Appeal was canvassed by way of written submissions.

11. The Appellant in his written submissions submitted on the following issues: -

a. Whether there was employment contract between the Appellant and the Respondent.

b. If so, which type of employment contract was there between the Appellant and the Respondent, was it term employment or on piece rate basis?

c. Whether the Appellant was unlawfully terminated and if so is he entitled to the reliefs sought.

12. The Respondent in its submissions identified the following issues for determination in the appeal: -

a. Whether the trial Court erred in finding that the Appellant was a piece rate worker.

i. What was the nature of the relationship between the Appellant and the Respondent?

b. Whether the trial Court erred in finding that the NSSF and NHIF deductions were made pursuant to an agreement between the Respondent and the Drivers and Welfare Association;

c. Whether the trial Court erred in dismissing the suit.

13. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See Selle & Another v Associated Motor Boat Co. Ltd & Others (1948)EA123.

14. The Court guided by Selle's decision(supra), that the Court sitting at first appeal has to evaluate the facts and evidence before the trial Court while making allowance of not having seen the witnesses to reach own conclusion, finds the issues for determination in the appeal are as follows: -

    a. Whether the trial Court erred in finding that the Appellant was a piece rate worker.

    b. Whether the Appellant was unfairly dismissed from employment.

    c. Whether the Appellant was entitled to reliefs sought.

Issue 1 . Whether the trial Court erred in finding that the Appellant was a piece rate worker.

15. It was ground of appeal that the learned Magistrate erred in law and fact in finding that the claimant was a piece rate worker.

16. The Appellant submits that the Respondent produced a print out or list of days when the claimant attended work however the trial Court failed to consider that the Respondent never produced in Court a master roll for the period the claimant claimed to have been an employee as required under section 10(6) and (7) of the *Employment Act* to wit :-'' (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment. (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.''

17. The Appellant further relied on the decision in Edwin Kabogo Munene v Equity Bank Limited industrial 1132 of 2012 to effect that the employer was obliged to produce records under section 74 of the *Employment Act* failing which an adverse inference can be drawn that the claimant's assertions on the point are true.

18. That on the finding by the trial Court that the Appellant failed to produce evidence of how much he was paid erred by not taking into account the Regulations wages (General amendment) which stated wages of the cane loader like the Appellant and further failed to find the Appellant was underpaid.

19. The Appellant submits he was a casual worker 2009 to 2020 and worked every day until his employment was terminated except when he was unwell he would stay at home. That the subordinate Court referred to the case in Silas Mutwiri v Haggai Cargo Handling Services Limited (2013)e KLR to wit:- ''The position is that where an employee is employed on casual basis and works for more than three consecutive months, the contract of service is automatically converted to a term contract. ''

20. The Appellant submits that the claimant produced his NSSF and NHIF statements for 2009 to 2020 which showed constant same amount contributions, that he was not paid for work done but monthly salary of 8000. That the respondent produced printout of work attendance records, number of trips and tonnage of cane loaded by the appellant but did not produce payroll to show how much the claimant was being paid yet they had responsibility of keeping records. That his employment had converted to contract service. The Appellant relied on the decision in Owour v Rea Vipingo Plantations Ltd(2022)e KLR where the Court awarded 1 month notice in lieu of notice and 6 months' salary compensation for unfair termination stating the employer failed to produced records of payment of claimant's wages and adopted the salary as claimed.

The Respondent's submissions

21. The respondent submitted on burden of proof as stated in section 47(5)of the *employment act* and contended that the appellant failed to prove that he was employed by the Respondent. That the Appellant gave conflicting accounts of his alleged employment being : in statement of claim he alleged that he was employed at undisclosed date in 2012. In his witness statement alleged that he was employment at undisclosed dated in 2009 . In his NSSF provisional statement stated he was employed in 2007.

22. The respondent submits that the appellant did not give account of how his employment was terminated. That on the contrary they produced evidene of the engagement of the appellant to show he loaded cane upto 10th April 2020 after which he was not seen again. That the appellant did not produce evidence of having worked and been paid in May 2020 when he says his services were terminated.

23. The Respondent submits it produced the agreement with the Drivers and Loaders Welfare Association on remittance of NSSF dues to explain the basis of the produced NSSF statements.

24. The respondent to buttress its submissions that the appellant did not prove his claim at trial court relied on decisions of the court. In Protus Wanjala Murike v Aglo African Properties t/a Jambo Mutara Lodge Laikipia (2021)e KLR where D.K Marete J held that, ''it binds the claimants at the onset bring out the case of unlawful termination for employment to which the respondent shall adduce evidence in justification failure of which a claim is lost.'' Further in Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited (2016)e KLR where Justice Ndolo Observed: -'' 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. ''

Analysis and decision

25. In the statement of claim dated 25th September 2020 the Appellant stated he was employed by the respondent on or about 2012 as a cane loader earning sum of Kshs. 8000. No specific date or month is disclosed of employment. The Appellant states he served for 11 years and 4 months when his employment was terminated without warning or show cause letter. His employment was terminated in May 2020 (no specific date). That he used to work 4 am to 7 pm without overtime. In witness statement, the claimant stated he was employed as a cane loader on or about 2009 (no specific date) That he was paid Kshs. 8000 monthly and was deducted NHIF and NSSF which the employer was not remitting and was dismissed without notice sometime in May 2020. That the Respondent withheld monthly salary for 132 months. The claimant produced NSSF and NHIF statement and WEKSCOL Welfare membership card, NSSF Card NHIF Card and demand letter as his evidence.

26. In defence the Respondent stated that in the period 2019 to 2020 it engaged the appellant on casual on demand piece rate basis. That he worked intermittently and was paid for days worked. The Defence produced record of days worked by the Claimant in the period from January to December 2019 and January to April 2020(page 28). The defence stated that the NSSF AND NHIF deductions was made pursuant to an agreement between the Respondent and West Kenya Drivers and Loaders Welfare group of which claimant was a member. That deductions were done on behalf of the welfare group with

authorisation of the Appellant. The Respondent produced a record of driver cane haulage report as at 14th February 2021 (pages 29-31) and the agreement with the West Kenya Drivers and Loaders welfare group(page 32).

27. During cross-examination the Appellant told the trial Court he never made application for employment. That he used to report to the transport manager. He had no evidence of having been paid Kshs. 8000 per month. That he used to receive payment via MPESA. He admitted that the payments would fluctuate, that one could leave early and stated no one would fail to attend to work. He testified that his gate pass was taken way by one Shimenga who was working in the transport section. That it was true they would be given farmers' slip and once they returned it would be put in a computer showing tonnage, that he was a member of the West Kenya Welfare for Drivers and Loaders. That the chairman was Kakai. He had no document to support claims for monthly wages of Kshs. 12,522. On re-exam the Appellant told the trial Court that he would fail to report to duty if he was sick. That without gate pass an employee cannot access the premises.(pages 68 and 69)

28. The defence produced its bundle of documents as D-exhibits 1 and 2. During cross-examination, DW(Human Resources Manager of the Respondent) told the Court that cane loaders were under the transport department. That it was the drivers who were given cane slips before proceeding to the farms. After the cane is collected it is taken to a weighbridge and a ticket is issued to show the haulage. The Appellant was not paid for the days he did not work. He admitted NSSF and NHIF were remitted consistently and he did not have the document in Court. He admitted they Respondent paid cane loaders via MPESA(Pages 71-72).

29. On re-examination, DW stated the welfare group was called the West Kenya Drivers and Loaders Association. That from the NSSF statements he could not tell who made the contributions. That the MPESA records were with the appellant and he had not produced any payslips. That they did not keep records of cane loaders as they do piece rate work (page 72).

30. In the Judgment on this issue the trial Court relied on definition of types of employment as stated by CA in Krystalline Salt Ltd v Kwekwe Mwakele (2017)e KLR "The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.....The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer."

31. The trial court cited the definition of piece rate work under section 2 of the *Employment Act* to wit:- ''piece work" means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance;''

32. The trial Court found the NSSF statement indicated the Appellant was registered on 17th April 2014 though it ran from 2012 to April 2020. That the claim for payment of Kshs. 8000 was not supported by any documents.

33. That defence produced analysis of days worked from January 2019 to April 2020 by the Appellant and tonnage of cane loaded to show that he was paid on basis of cane loaded and not monthly salary(page 28).

34. That the Respondent led evidence that the NSSF and NHIF Deductions were based on an agreement between it and the Drivers and Loaders welfare group of 4th June 2012(page 32) and the claimant was a member (page 13). The trial Court at page 62 made its analysis of evidence before it and came to conclusion that this was a piece rate worker and the issue of notice requirement was not proved.

35. The Court is guided by Selle's decision. The Court had no benefit of seeing the witness.

36. The appellant relied on the NSSF and NHIF statements indicating monthly deductions as proof of engagement on a monthly basis. The NSSF document states that the Appellant was registered on 3rd November 2012 and the date of employment was 1st August 2007(Page 11). It was his evidence he was employed sometime in 2012 without giving dates. The Court finds that the NSSF statement was not evidence of monthly salary or continuous employment with the Respondent as the date of employment was indicated as 2007 and there were gaps like January 2020 it indicated 0. The remittances were explained by the Respondent and the agreement with the Welfare group produced(page 32) and not rebutted and indeed the claimant produced his welfare membership card(page 13).

37. The claimant told the trial Court he was paid monthly Kshs. 8000 vide MPESA. He did not produce the MPESA statement to prove the monthly payment and of the Kshs. 8000. The respondent on other hand produced evidence of the Appellant being engaged as a loader and paid per tonnage haulage (D - exhibit 1 at page 28).

38. The burden of proof is explained under section 107(1) and (2) of the *Evidence Act* to wit:- ''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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'' The *Employment Act* under section 47 (5) delineates the burden of proof in employment claims to wit:- ''47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.''

39. The Appellant had burden to prove he was paid monthly salary of Kshs. 8000 and this was information within his possession being his MPESA records. That was not a record in possession of the employer. The Court is mindful of the proviso of section 108 of *evidence act* to wit:- ''108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'' It would be unreasonable to place a burden on production of record of employee beyond the record produced at page 28 of the wages payment to the Appellant. The Appellant had his MPESA statement and the defence having denied the monthly Kshs. 8000 it was upon him to provide proof which was in his possession, namely, his MPESA statement.

40. The Court further found the claim did not specify the specific date in 2020 he was stopped from working and that was probably he was a piece rate worker not obliged to report daily. The Court holds that the Respondent discharged its burden of proving that Appellant was a piece rate worker and was not stopped for issuance of notice to arise. I do uphold the decision of the court on prove of employment claims in Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited (2016)e KLR where Justice Ndolo Observed: -'' 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. '' The Appellant had the burden of proving his allegations on employment on continuous basis at Kshs.8000. He stated he was paid by MPESA and hence had access to his statement. The Respondent on its part

discharged its burden by producing records and documents to prove the Appellant was engaged on piece rate basis and paid upto 10th April 2020.

41. The Court finds no basis to interfere with the finding of the trial Court to effect that the claimant was a piece rate worker paid her tonnage loaded.

42. The Court upholds the finding the Appellant was a piece rate worker.

Issue 2. Whether the Appellant was unfairly dismissed from employment.

43. The appellant submits that even if he was a piece rate worker he was entitled to notice and relied on Owour v Rea Vipingo Plantations Ltd(2022)e KLR where the Court held that a piece rate worker was entitled to notice under section 18(1) (b)and 35(1)(c) of the *Employment Act*.

44. The Respondent submits that the Appellant being a piece rate worker it was not disputed he was paid for work done. That he left on his own accord by failing to show up which was within the nature of his work. The Respondent relied on the decision in Charles Kithuka & 19th Others V DPL Festive limited (2020)e KLR to the effect that the claimant's work was not terminated and he left on own accord hence prayers for notice and compensation are declined.

45. In the instant case, the claimant in his evidence-in-chief did not inform the Court how he was terminated from employment. He said it was the transport manager who took the gate pass. At re-exam, he said he only failed to report to work when sick. Section 47 of the *Employment Act* (supra) requires the employee to lay basis for the unfair termination. In his written statement, the claimant stated he was dismissed on or about May 2020 without notice or pay. The Court finds that this was a vague statement as to the date of termination of work.

46. An employee who alleges unfair dismissal should lay the basis of the termination and this includes the actual date of termination, any evidence of the termination, and demonstrate the unfairness. The date of termination is a critical element in a claim of unfair termination. The blanket statement of on or about May 2020 leads the Court to agree with the Trial Court that the basis for the notice was not laid down. It is more likely than not that the Appellant stayed away from work as a cane loader for his own reasons.

47. The Court finds no basis to interfere with the decision of the trial Court on the issue of unfair termination.

Issue 3. Whether the Appellant was entitled to reliefs sought.

48. The Court found that the Appellant was paid per tonnage. The Appellant urges he was entitled to one-month notice. I have looked into the decision relied on by the Appellant to the effect that notice to piece rate worker is necessary in Owour v Rea Vipingo Plantations Ltd(2022)e KLR . The court in the case relied on section 18(1)b as read with section 35(1)(c) of the *Employment Act* to hold that the claimant was entitled to 28 days notice as a piece rate worker. I reproduce the cited law:- ''18. When wages or salaries due (1) (b) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.''

''35. Termination notice (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

c. where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.''(emphasis given)

49. It is my reading of the law that section 35 of the *Employment Act* states termination notice does not apply to contract to perform specific work (piece rate work) and consequently I am not persuaded by the cited decision. The Court further found there was no prove of monthly payment of Kshs. 8000 as claimed so notice would still not apply even if the court upheld the cited decision.

50. The Court holds that the appeal on claims for underpayment and all other reliefs dismissed by trial court have no foundation as per the foregoing re-evaluation of evidence before the trial court. The court finds no evidence was placed before the trial court on claims of underpayment , rest days, public holidays, leave and overtime. These are claims in nature of special damages and must be specifically proved as held in Twiga Construction Limited v Julius Nyamai Mulatia [2018] eKLR where Justice Ndolo held as follows:- ''9. Apart from the claims for notice and leave pay which are admitted by the Respondent in its Defence, the Claimant claims underpayment and compensation for working on public holidays and weekly rest days. He also claims tools allowance at Kshs. 125 per month. All these claims are in the nature of special damages which must be specifically proved. Apart from his word, the Claimant did not provide any evidence to support any of these claims which therefore fail and are dismissed.''

51. The Court holds that the reliefs sought were not merited. The decision of the trial Court is uphold on this issue.

Conclusion

52. In the upshot the Court upholds the entire judgment of Hon. J.R. Ndururi (P.M) delivered on 26th January 2023 in Kakamega CMELR E036 of 2020 between the parties.

53. The appeal is dismissed. To temper justice with mercy I order each party to bear own cost in this appeal.

54. It is so Ordered.

DATED, SIGNED AND DELIVERED ON THE 14TH MARCH 2024 IN OPEN COURT AT KAKAMEGA

J.W. Keli

JUDGE

In The Presence Of

C/A Lucy Macheso

For Appellant:- Shibanda Advocate

For Respondent: - Muhindi Advocate