Chic Fashions Limited v Miwa (Appeal E094 of 2023)
[2024] KEELRC 700 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 700 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E094 OF 2023

NJ ABUODHA, J

MARCH 14, 2024

BETWEEN

CHIC FASHIONS LIMITED ..... APPELLANT

AND

STEPHEN MWIVITHI MIWA ..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. Mrs. M.W Murage (PM) CMEL No. E1340 of 2020 between Stephen Mwivithi Miwa v Chic Fashions Limited delivered on 19th May,2023)

JUDGMENT

1. By a Memorandum of Appeal dated 5th October 2023, the Appellant alleged inter alia that: -

    a. The Learned Magistrate erred in failing to consider and appreciate the uncontroverted evidence contained in the Appellant's defence that shows that' the Respondent's allegations with regard to his alleged termination were false;

    b. The Learned Magistrate failed to consider any of the submissions cited in opposition of the said Claim by the Appellant in its submissions dated 25th August 2022 more so her awarding sums for underpayment & leave allowance without her considering the uncontested contracts placed before her that confirmed that the said sums have been paid.

    c. The Learned Magistrate misdirected herself when he came to a finding that the Respondent's terms of engaged were converted pursuant to Section 37(3) of the Employment Act despite the existence of a contract between the parties that states otherwise.

2. The Appellant consequently asks the Court to set aside the orders made by the trial Court and substitute therefore an order allowing the appeal and dismissing the suit in the lower court.

3. In support of the appeal, Counsel for the Appellant, Mr. Kandere submitted among others that the Respondent both in testimony and submitted documents admitted that he was employed on contract and therefore it was the Appellant's submission that the Respondent was never a casual employee but a contracted daily paid worker/mass production machinist with specific daily tasks as provided for in Regulation of Wages (General) Order. Counsel further submitted that the Appellant paid the Respondent's wages in excess of the minimum wage and the same were inclusive of leave pay. According to Counsel, the Appellant would be called or messaged by the Appellant and informed on the availability of work as at when the same was available. Mr. Kandere further submitted that there was no clause in the Respondent's contract or documents submitted that showed the Respondent was a casual employee as alleged and that he was engaged as a machine operator.

4. Concerning absconding of duty, Counsel submitted that the learned Trial Magistrate erred in failing to consider the allegations of the Claimant absconding duty alluded to by the Appellant. According to Counsel, it was not denied by the Respondent that the Appellant communicated to him using his telephone number 0724449439 and that although he denied receiving numerous missed calls and messages sent by the Appellant, telephone records from Safaricom as submitted by the Appellant confirmed that calls and messages were sent to his number.

5. On the issue of certificate of affirmation of electronic record pursuant to section 106 of the Evidence Act, Counsel submitted that electronic evidence could neither be original copies or certified copies. In any event Safaricom had certified the call logs marked as defence exhibit 11. The Respondent having admitted that the telephone number aforesaid was his, was estopped by Section 120 of the Evidence Act from denying that he received the messages through the same medium.

6. According to Counsel, the appellant met the requirements of section 106B of the Evidence Act hence the burden shifted to the Respondent to demonstrate that he did not receive any messages and he failed to do so. To this end, Counsel relied on the case of Peter Nge'ethe Ngari t/a P.N.N Funeral Services v Standard Group Limited & another [2020] eKLR.

7. Mr. Kandere further submitted that the Trial Court should have considered the minimum wage for that cluster of employment as at the times alleged and if done, could have resulted in a finding that the wages being paid to the Respondent by the Appellant were above minimum wage and included pro rata leave. He therefore submitted that the award for underpayment and leave ought to be corrected by this appeal as tabulated and wage increments effected as per the amendments in the Regulations of Wages (General) Order as announced by Cabinet Secretary, Labour during Labour Day celebrations every year. Further, there were no submissions both by the Respondent and the Appellant that the former worked for 24 hours hence reliance on the period occasioned miscarriage of justice.

8. On the issue of conversion of the Respondent's terms of service from casual to permanent term pursuant to Section 37(3) of the Act, Counsel submitted that the Appellant availed contractual record and the contract prevailing at the material time governed relationship between the parties. To this extent Counsel relied on the case of Feba Radio (Kenya) Limited t/a Feba Radio v. Ikiyu Enterprises Limited [2017] eKLR. And Jiwaji & others v. Jiwaji & another [1968] EA 547. Counsel therefore submitted that the "specific task daily paid contracts" were not ambiguous. They bound the Respondent to the extent contained in the provisions and it was clear that they placed no obligation on the Appellant to maintain the Respondent's services upon the expiry of the day. The conversion of the Respondent's contract of employment by the trial court went against the aforesaid contract and flew against the face of the parol evidence rule.

9. The Respondent on the other hand submitted that it was not in dispute that the Respondent worked for the Appellant form 2017 to 2020 (three years). During the whole time the Appellant had issued the

Respondent with "Specific Task Daily Contract with daily payment of completion" which was signed daily by the Respondent. According to Njiru for the Respondent, the Learned Trial Magistrate was justified in observing that the Appellant was a big company with the advantage of legal advice and thus ought not to have kept employees under terms of contract that amounted to servitude. In this regard, Counsel relied on the case of Nemuel Nyageri v Laboratory & Allied Limited [2015] eKLR.

10. According to Counsel, the lower court rightly applied the provisions of Section 37 of the Employment Act when it varied the Respondent's terms of employment to terms consistent with the Employment Act. Counsel further submitted that despite the insistence by the Appellant that the Respondent was a "daily paid contracted worker", there was no such category of employees recognised under the Employment Act, 2007. The Respondent was therefore entitled to basic minimum terms and conditions of contract of service and to more favourable terms as per Section 26 of the Employment Act, 2007. Counsel further submitted that daily contract workers contracts were void by virtue of Section 92(3) of the Employment Act which provided that a term of contract of service, or foreign contract which provided a condition of service or employment less favourable to an employer than the like condition of employment provided by the Act, shall be void to the extent that it is so less favourable.

11. On the reason for termination; Counsel submitted that the Respondent was not terminated for genuine reasons. According to him, on 24th April, 2020 the Appellant elected to close down and all the employees were sent away. No agreement was ever reached with the Respondent or his union on the modalities for closure of the Appellant company and when the employees would be called back.

12. Further under the memorandum of understanding between COTU and FKE it was agreed that if any measure was to be taken due to COVID-19 pandemic, the same should be mutually agreed upon and in writing and filed with the Labour Commissioner. The requirement was not met by the Appellant prior to closing down its business. This according to Mr. Njiru amounted to unilateral change of terms of service. To this extent Counsel relied on the cases of Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School and 2 others [2014] eKLR and Esther Njeri Maina v Kenyatta University [2020] eKLR. Counsel further submitted failure by the Appellant to have an agreement on employees return to work formula created a loophole for the Appellant to get rid of employees without regard to the dictates of the Employment Act. The Appellant subsequently recalled back employees except seven including the Respondent who upon visiting the Appellant's premises were told there was no work for them.

13. On recalling the Appellant's back, Counsel submitted that no certified call or sms transcripts from Safaricom or Airtel were produced to prove the Respondent was indeed contacted. Further no evidence was adduced that the purported sms were delivered. Counsel further wondered why such an important message could be conveyed by text and not a phone call to an employee.

14. On the question of absconding duty Counsel submitted that the Appellant ought to have issued the Respondent with a show cause letter and invited them for a disciplinary hearing before termination. In this regard Counsel relied on the case of Judith Atieno Owuor v Sameer Agriculture and Livestock Limited [2020} eKLR and Boniface Francis Mwangi v BOM Iyego Secondary School [2019] eKLR.

15. On compensatory damages, the Respondent submitted that the Appellant did not contest the award of six months' salary as compensation as either manifestly excessive or based on wrong principle of law hence the Court should uphold the same.

16. On the award of one month's pay in lieu of notice, Counsel submitted that the same was lawfully awarded in line with provisions of Section 85(1)(c) and 36 of the Employment Act. Further, that the Respondent was entitled to annual leave of 21 days after every twelve consecutive months of service.

The Appellant never afforded the Respondent any leave for the years worked. No document was produced to show the Respondent ever proceeded one leave.

17. On the issue of underpayment, Mr. Njiru submitted that the Respondent operated electric sewing machines including overlock machines hence he was employed as a machine operator. The Appellant did not produce a contract to show that the Respondent was employed as a mass production machinist. They also did not produce his job description.

18. Counsel submitted that under Section 10(7) of the Employment Act, where an employer fails to produce a written contract containing prescribed particulars of employment, the burden of proving or disproving an alleged term of employment is on the employer. The Appellant did not produce a written contract showing the Respondent's job description.

19. According to Counsel, a machine operator under minimum wage regulations was supposed to earn Kshs.838/40 per day from May, 2017 to April 2018 and Kshs.880/30 from May, 2018 to April, 2020. The Respondent was paid Kshs.650 up to January, 2018 when his pay was raised to Kshs.793/- per day. Counsel therefore urged the Court to uphold the award for Kshs.30,144/- on account of underpayment.

Analysis & determination.

20. The duty of a first appellate court was well stated in the Court of Appeal in Selle vs Associated Motor Boat Company Limited [1968] E.A 123 thus:

> "An appeal to this court from a trial by the High Court is by way of retrial 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 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, this 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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

21. In determining the Appeal herein, this Court shall similarly seek to re-analyze the evidence tendered before the trial court against the court's conclusion and disposition.

22. The appellant filed 5 grounds of appeal however the court has become of the view that only three of these, if determined, will dispose of the appeal. These are grounds2, 3 and 4 in the memorandum of appeal. That is to say whether the trial court failed to consider the uncontroverted evidence tendered by the appellant which showed that the alleged termination by the respondent was false (issue of absconding duty) , second, whether the trial magistrate erred in awarding the respondent claim for underpayment and leave allowance and whether the learned Magistrate erred in converting the respondent's contract pursuant to section 37(3) of the Employment Act despite the existence of a contract between the parties which stated otherwise.

23. The Court will start with fundamental legal question of conversion of the respondent's service from the position he held to that of a regular employee in line with section 37 of the Act. The appellant maintained that the respondent was not a casual worker but one hired on "Specific Task Daily Contract with daily payment on completion.". According to the appellant, the respondent was hired on a daily basis and paid at the end of each day for work done. Further that the respondent would be called to work as at when needed. It was however not contested that the respondent worked for the appellant for approximately three years (2017-2019).

24. Section 37 of the Employment Act provides:

(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 Industrial Court on the terms and conditions of service of a casual employee, the Industrial 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.

25. Section 2 of the Act defines a casual employee as:

i. "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 appellant maintained that the respondent was not a casual employee but one who was hired on "Specific Task Daily Contract with daily payment on completion." Whereas there could be very little difference in categorization as casual or "specific task daily worker".

26. The appellant whereas denying the respondent was a casual worker, felt short of classifying the respondent as " a piece rate worker." Under section 2 of the Act however, piece work is defined as any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. That is to say a piece worker does not depend on the number of hours or days worked but on the completion of the task assigned. In other words a casual worker can well be a piece worker provided the terms of engagement provide for his payment at the end of the day and the task assigned completed.

27. From the material before the trial court, the appellant did not demonstrate that the respondent was a piece rate worker. The appellant merely relied on the contract between the parties that described the respondent as such without more. For the appellant to maintain that the respondent was not a casual worker yet continue with him on daily pay arrangement was deliberately intended to circumnavigate the provisions of section 37 of the Employment Act.

28. Section 92 of the Employment Act provides that except where otherwise provided, the provisions of the Act shall be in addition to, and not in substitution for or in derogation of, the provisions of any

other Act. The Act further provides at subsection (3) that a term of contract of service, or foreign contract of service to which the Act applies, made after the date of commencement of the Act which provides a condition of service or employment less favourable to an employee than the like condition of employment provided by the Act, shall be void to the extent that it is so less favourable, and the relevant condition of employment provided by the Act shall be deemed to have been included in and to form part of such contract or foreign contract of service as the case may be. To this extent the trial court was justified in deeming the respondent's employment as a casual contract for purposes of section 37 of the Act. This ground of appeal therefore fails.

29. On the issue of alleged termination by the respondent, the appellant maintained that it did not terminate the respondent's service and that it was the respondent who absconded duty. The appellant produced at the trial Court evidence that it attempted to contact the respondent to resume work but to no avail. The respondent acknowledged that the mobile telephone number that was used by the appellant was his but denied that he ever received the messages sent by the appellant.

30. Section 106B of the Evidence Act provides:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following —

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

32. It was not in contention that the telephone number that the appellant used to communicate to the respondent was his (the respondent). The Appellant further produced a certified print out of the communication between itself and the respondent from Safaricom in conformity with section 106B of the Evidence Act reproduced above. The appellant further produced screenshots of the several text messages sent to the respondent asking his whereabouts and when he was going to resume work. This evidence reasonably demonstrated that the appellant did make reasonable efforts to contact the respondent and the allegation by the respondent that he never received the messages from the appellant is unbelievable.

33. Under section 44 of the Employment Act, absence from work without leave or other lawful cause from the place appointed for the performance of his work is a valid ground for summary dismissal. The appellant was therefore under no obligation to continue pursuing the respondent who by his own conduct had shown that he was no longer interested in working for the appellant. This ground of appeal succeeds and the award for one month's salary in lieu of notice for termination is hereby set aside.

34. On the issue of underpayment, the appellant stated that the respondent was employed as a mass production machinist. The appellant never distinguished clearly the difference between mass production machinist and a machine operator. The trial court was therefore justified in treating the respondent as a machine operator. In 2017 the appellant was paying the claimant Kshs. 705 as daily wage. The applicable Gazetted minimum wage inclusive of house allowance then for a machine operator as per Gazette Notice number 112 of 2017, was Kshs. 703.85 per day inclusive of housing

allowance. The appellant was therefore paying the respondent way above the Gazetted minimum wage. The Gazetted Minimum Wage for 2017 was revised by Gazette Notice No. 2 of 2018 which put the minimum wage for a machine operator at Kshs. 739.05. The respondents pay was then increased to Kshs. 739.05 per day and continued until 2020 when he left employment. These payments were in line with the Gazetted minimum wage hence the issue of underpayment did not arise. The trial court therefore erred in holding that the appellant underpaid the respondent. This ground of appeal therefore succeeds with the consequence that the award for underpayment is hereby set aside.

35. Regarding leave, the Court has reviewed and considered the evidence tendered before the trial court and did not find any from the appellant which showed the respondent proceeded on leave during the period he worked. Under section 74 of the Employment Act it is the responsibility of the employer to keep employment records hence failure to produce the same reasonably leads to the conclusion that whatever an employee is alleging is most probably true. In this particular case, the appellant never produced any evidence to rebut the allegation by the respondent that he never went on leave. The award of the lower Court on this issue is therefore upheld.

36. On the award for compensation for unfair termination, the Court having found as above that the respondent absconded duty and the appellant was no longer bound to continue looking for him, this award by the trial court was erroneous and is hereby set aside.

37. In conclusion this appeal is disposed of as follows:

    i. Underpayment= The appellant did not underpay the respondent hence any award under this head is hereby set aside.

    ii. Pay in lieu of notice= The respondent having absconded duty was liable for summary dismissal hence no pay in lieu of notice. The award under this head is set aside.

    iii Compensation for unfair termination= The Court having found that the dismissal was justifiable on grounds of absconding duty, this award cannot be sustained and is hereby set aside.

    iv. The award for payment in lieu of leave was justified and this ground of appeal fails.

    v. The appeal having been partially successful, each party to bear their own costs of the appeal.

    vi. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY MARCH, 2024 DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH 2024

ABUODHA NELSON JORUM

JUDGE