



REPUBLIC OF KENYA



**KENYA LAW**  
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**Prajapati v Wanjala (Employment and Labour Relations Appeal  
26 of 2023) [2024] KEELRC 649 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 649 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 26 OF 2023**

**JW KELI, J**

**MARCH 14, 2024**

**FORMERLY BUNGOMA E048 OF 2022**

**BETWEEN**

**BHANUBHAI PRAJAPATI ..... APPELLANT**

**AND**

**CHRISTINE NASIMIYU WANJALA ..... RESPONDENT**

*(An Appeal from Judgment of Hon. J.N. Maragia (SRM) delivered on  
14<sup>th</sup> December 2022 in KAKAMEGA MCELR NO. E062 OF 2020)*

**JUDGMENT**

1. The Appellant, being dissatisfied with the Judgment of Hon. J.N. Maragia (SRM), delivered on 14/12/2022 in Kakamega CMELR E062 of 2020 between Christine Nasimiyu Wanjala and Bhanubhai Prajapati filed a Memorandum of Appeal dated 16<sup>th</sup> December 2022 and Record of Appeal received in Court on the 16<sup>th</sup> January 2024, seeking the following orders: -
  - a. That the Appeal be allowed.
  - b. That Honourable Court set aside the Judgment delivered by Hon J.N Maragia (SRM) on 14<sup>th</sup> December 2022.
  - c. Costs both at the trial court and this Appeal be awarded to the Appellant.
2. The Appeal was premised on the following grounds:
  1. That the learned Magistrate erred in law and in framing up issues for determination particularly items 4 and 5 in her judgment and failed to appreciate there was a dully amended statement of defense on record which the Honourable court should have considered in framing its issues for determination.



2. That the learned Magistrate erred in law and fact in coming to a conclusion that the termination was unlawful and that the Claimant was entitled to the minimum monthly wages instead of payments made on the daily record and the judgment itself confirms that the Claimant used to be engaged by the Respondent for 3 days and that still she would work for other people at a pay.
3. That the learned Magistrate erred in law and fact failing to take into account the Appellant's testimony and submission hence her judgment is a miscarriage of the justice and an affront to the constitutional right to the Appellant to enjoy protection of law.
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by J.W Nafuye Company Advocates were dated 16<sup>th</sup> January 2024 and received in court on an even date. The Respondent's written submissions drawn by Luvayi F. & Co. Advocates were dated 19<sup>th</sup> February 2024 and received in court on an even date.

### **Background to the appeal**

4. The Respondent filed a suit in Kakamega CMELR E062 of 2020 against the Appellant for unfair termination through the Statement of Claim dated 16<sup>th</sup> August 2021 and filed on 17<sup>th</sup> August 2021, seeking the following reliefs: -
  - a. A declaration that the claimant was unlawfully dismissed from employment;
  - b. Compensation for unfair and unlawful termination at 12 months' salary and Salary in lieu of Notice.
  - c. Compensation for failure to accord leave, overworking, and underpayment.
  - d. General damages for loss of income and earnings.
  - e. An order for the issue of Certificate of service
  - f. Costs of this suit and interests at courts rate.
  - g. Any other relief the court may deem fit and necessary to so grant.
5. The Statement of Claim was supported by the Verifying Affidavit of 16<sup>th</sup> August 2021 and accompanied by the List of Witnesses dated on even date, the Respondent's witness statement dated 16<sup>th</sup> August 2021, her List of Documents of even date, and her Bundle of Documents (page 2-22 of the record is the Respondent/Claimant's case).
6. The Appellant entered appearance in the lower court on 27<sup>th</sup> August 2021(Memorandum of Appearance dated 26<sup>th</sup> August 2021 available in the lower court file and not in the record) and filed the Memorandum of Defence and Counterclaim dated 26<sup>th</sup> August 2021 received in court on 27<sup>th</sup> August 2021(Pages. 23-26 of the record).
7. The Respondent on 22<sup>nd</sup> October 2021, filed a Reply to Defence to Statement of Claim & Defence to Counterclaim dated 18<sup>th</sup> October 2021(Available in the lower court file and not in the record).
8. Through a Notice of Motion application dated 21<sup>st</sup> December 2021 and filed on an even date, the Appellant sought leave to amend his Memorandum of Defence and Counterclaim (Pages 27-34 of the Record). Leave was given on 16<sup>th</sup> February 2022(Page 61 of the Record).



9. The Amended Statement dated 24<sup>th</sup> February 2022 was filed on an even date accompanied by the Appellant's written statement dated 12<sup>th</sup> November 2021, (Pages 35-40 of the Record is the Defence case) and a witness statement of Peter Macharia dated 12<sup>th</sup> November 2021 (Available in the lower court file and not in the record).
10. The Respondent /Claimant on 21<sup>st</sup> March 2022 filed a reply to the Amended Statement of Defence dated on an even date (Available in the lower court file and not in the record).
11. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with her as the only witness on the 22<sup>nd</sup> of June 2022. The defence case was heard on the 12<sup>th</sup> of October 2022 with the Appellant as the only witness (pages 62-65 of the record).
12. The parties filed submissions in the lower Court after the closure of the defence. The Plaintiff's submissions (pages 41-50 of the Record). The Appellant/Respondent filed written submissions (pages 51-58 of the Record).
13. The trial Court (Hon. J.N. Maragia, SRM.) delivered its judgment on the 14<sup>th</sup> of December 2022 (pages 73-76) in favour of the Respondent/Claimant and awarded the Claimant maximum compensation of 12 months' salary of Kshs. 121, 285.2/-, underpayment of Kshs. 499,711.2/-; Certificate of Service, and costs and interest.

## **DETERMINATION**

### **Issues for determination.**

14. The Appellant in his written submissions submitted on the Grounds of Appeal raised: -
  1. Ground 1- The Learned Magistrate erred in law and in framing up issues for determination particularly items 4 and 5 in her judgment and failed to appreciate there was a duly amended statement of defence on record which the Honourable court should have considered in framing its issues for determination.
  2. Ground 2- The Learned Magistrate erred in law and fact in coming to a conclusion that the termination was unlawful and that the Claimant was entitled to the minimum monthly wages instead of payments made on the daily record and the judgment itself confirms that the Claimant used to be engaged by the Respondent for 3 days and that still she would work for other people at a pay.
  3. Ground 3- The Learned Magistrate erred in law and fact failing to take into account the Appellant's testimony and submission hence her judgment is a miscarriage of the justice and an affront to the constitutional right to the Appellant to enjoy protection of law.
15. The Respondent in her submissions submitted on the Appellant's issues and reframed them as follows:-
  1. Whether the Learned Magistrate erred in law in framing issue Number 4 and 5 for determination by failing to appreciate there was a duly amended statement of defence on record
  2. Whether the Learned Magistrate erred in law and fact in coming to a conclusion that the termination was unlawful.
  3. Whether the trial court failed to consider the appellant's testimony and submissions and whether the judgment was a miscarriage of justice.



16. 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.
17. The court guided by Selle's decision, 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 its conclusion, finds the issues for determination in the appeal are as follows: -
  - a. Whether the Learned Magistrate erred in law in framing issue Number 4 and 5 for determination by failing to appreciate there was a duly amended statement of defence on record
  - b. Whether the Learned Magistrate erred in law and fact in coming to a conclusion that the termination was unlawful.

**Issue 1. Whether the Learned Magistrate erred in law in framing issue Number 4 and 5 for determination by failing to appreciate there was a duly amended statement of defence on record**

18. The appellant/ respondent on the 16<sup>th</sup> January 2021 filed in the trial court its memorandum of defence and counterclaim dated 26<sup>th</sup> August 2021 . The Appellant on the 21<sup>st</sup> December 2021 filed in court a Notice of Motion application dated on an even date seeking to amend the memorandum of defence and counterclaim as per annexed draft.
19. On the 16<sup>th</sup> February 2022, the parties by consent allowed the application by the appellant(page 60-61 of the record). The amended statement of defence was then filed in court on the 24<sup>th</sup> of February 2022(pages 35-38 of the record).  
The trial court framed as issues for determination no. 4 'whether the Respondent did advance the claimant some loan and 5 "if 4 above is in the affirmative whether the loan was settled" .
20. The trial court in its judgement held that "on the last two issues (4&5) the respondent did not produce any evidence that he advanced the claimant some monies that remained unsettled.'
21. This Court finds that the trial court erroneously framed as issues for determination no. 4 and 5 as the defendant had amended his statement of defence and done away with the counterclaim. That limb of appeal succeeds.

**Issue 2. Whether the Learned Magistrate erred in law and fact in coming to a conclusion that the termination was unlawful.**

22. The appellant submits that the conclusion of unlawful termination and holding that the claimant was entitled to basic minimum monthly wages instead of payments made on daily rate when in fact the evidence on record and judgement itself confirms the claimant used to be engaged by the Respondent for 3 days and that she would still work for other people. The appellant relies on the definition of piece rate work under section 2 of the *Employment Act* and the provision of section 18 of the Act. Section 2 of the Act defines "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; section 18 reads:
  - (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled—



- (a) 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
- (b) 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.”
23. The Appellant submits he complied with the law , the Respondent being “mama fua” slang for women who wash laundry at a fee and he paid her Kshs. 500 while the minimum wage for that work in 2015 was Kshs. 484.30 daily rate.
24. The appellant submits no notice was required for the employment under section 35 of the Act.
25. The appellant to buttress the foregoing submissions relied on the decision in Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware ) Limited & another (2018)eKLR where the Court of Appeal found no notice for workers who worked for 2 days in a week and paid daily wages; and in Peter Wambani v Bethuel Ndung’u t/a Maji Pump Ventures(2020)eKLR where the court found that a claim by a worker paid per day for a given task and without payment of wages per month for unfair termination, had no legal foundation.
26. On this issue the respondent submits that she led evidence before trial court that her services of a househelp were paid cash on monthly basis. That her services having been terminated abruptly she was entitled to notice, under section 36 of the Employment Act. The respondent submits that even if she was a casual labourer , there was conversion of this engagement of casual to term contract as she was engaged in 2014 and her services terminated in 2021. She relied on section 37 of the Employment Act on conversion to wit : “37. Conversion of casual employment to term contract (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. (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.” To buttress this submission the Respondent relied on the decision in Empire Feeds Limited v King’ou(2022).
27. The Respondent submits that the submission on Kshs. 500 daily payment for washing was new evidence.



## Analysis and decision

28. The Claimant in the Statement of claim said she was engaged by the Appellant vide oral contract to work as a househelp from Monday to Saturday 7 am to 7pm. That sometimes she was engaged on Sunday. That she was engaged on Kshs. 3000 pm and later in March 2020 increased to 4000/-.
29. That in February 2019, the appellant recommended her to Pan Africa Chemicals for help in cooking Indian food, that upon demand she would share proceeds of the side hustle with the respondent, that at same time she would also attend to her normal duties at the respondent's home. That on the 30<sup>th</sup> March 2021, she was terminated without viable reason(pg. 2-3). In her statement, she stated that at Pan Africa Chemical she was paid Kshs. 6000/- monthly and gave the appellant Kshs. 1500 as a token for the recommendation (page 7) . That in August 2019 she dropped the Pan Africa Chemicals job as the wife of the respondent would quarrel and insult her over the house chores.
30. The defence denied all the foregoing. In the statement of the appellant, he knew the claimant who offered laundry services for same day payment and no notice was required. That his wife cooked under their traditions. That the injuries alleged were not inflicted in his home and there was no police report.
31. At the hearing, the Respondent produced as evidence of demand notice and photos of the burn.
32. During cross-examination, she stated that she was employee of the respondent at Kshs 3000. That in course of employment they agree she could do other household chores on hire and they could share the payment ; that worked at Pan Africa in 2019 for cooking and washing dishes. That she worked there for 9 months, that she worked at Pan Africa from 6 am 3pm and went to the respondent's house for more work. That she sustained an injury at the respondent's house. She was paid in cash. She was recommended to Pan Africa by the respondent and worked at his instructions(62-63).
33. The Respondent at the hearing denied having employed the Respondent and stated he engaged her on a casual basis of 3 days per week.
34. The respondent stated that he never recommended the respondent to Pan Africa nor did they take her money paid at Pan Africa. During cross-examination, the Respondent told the court that he did not recall receiving any letter from Pan Africa. That he did not state anywhere that the respondent left her home to work for Pan Africa. That he paid her Kshs. 20000 but that did not prevent her from making a legal claim. That she was his house help and helped his wife with washing clothing. He did not know when the respondent left for Pan Africa and was still working for him in 2021. That he was aware she burnt her hands but not at his place, that he never received any money from the respondent.
35. In judgment, the Learned Magistrate held that during cross-examination the appellant admitted that the appellant worked for him as a househelp to assist the wife in cleaning, cooking and performing household chores. The trial court found that the claimant worked of the respondent in the stated period.
36. The court having analyzed the facts and evidence before court, finds that there was evidence before the trial court that the claimant was not a full time employee of the appellant. During cross-examination, the appellant testified that in course of employment they agreed she could do other household chores on hire and they could share the payment , that she worked at Pan Africa in 2019 cooking and washing dishes.
37. That she worked there for 9 months, that she worked at Pan Africa 6 am 3pM and went to the respondent's house for more work. For 9 good months, she was on a monthly salary of KSh. 6000 with Pan Africa and yet claimed underpayment for the entire period. The trial court did not address this



- issue. The court having evaluated the evidence and there being no evidence of monthly salary payment by the Respondent, the court finds the claimant was not a full-time employee of the appellant as on her own admission she was working at Pan Africa for 9 months in 2019 with a monthly salary. She could as well have sued the Pan Africa who was her employer.
38. The court finds that the Respondent's case of casual employment on full-time basis was not proved on a balance of probabilities. Her own evidence of working for a monthly salary for 9 months in 2019 at Pan Africa Chemicals contradicts her claim of having been engaged from 7.30 am to 7.00pm from 2014 to 2021. For conversion of employment to occur the casual employee ought to have worked continuously to wit: "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."
  39. The Respondent's evidence at cross-examination collaborated the respondent's position that she worked for task. That would explain why she could work at Pan Africa on full time basis and in the evening pass by the respondent's place. The Respondent did not produce evidence of having to share proceeds of what she called a side hustle with the employer. A side hustle for an employer cannot be within the official working hours. The respondent stated she worked 6.30 am to 3pm. That is 8 hours of work and hence the main job.
  40. The Magistrate only picked the statement by the DW that the respondent was his househelp without contextualizing the statement against evidence before the court, of the claim that she was engaged for a task and did other jobs like one at Pan Africa Chemicals which was a full time employment from 6.30 am to 3pm.
  41. The court taking into consideration the foregoing finds that the Respondent was not a full - time employee of the appellant to deserve notice or be said to be unfairly terminated.
  42. In the upshot, the court on appeal having re-evaluated the evidence as per *Selle's* case finds that on a balance of probabilities, the Respondent was not a full-time employee of the appellant, and hence her engagement could not have converted to term contract under section 37 of the *Employment Act*. There was evidence of a 9 months full-time employment with Pan Africa Chemicals as per the respondent's testimony.
  43. The court finds that the claimant did not prove her case on a balance of probabilities of employment on term contract or continuous casual engagement. This finding led this Court to find that the claim for unfair termination and all other terminal benefits had no legal foundation.
  44. In Conclusion, the Court allows the appeal and sets aside the judgement and Decree delivered on the 14<sup>th</sup> December 2022 of Hon. J.N Maragi, SRM In Kakamega MCELR No. 62 of 2021 and in place enters judgement that the claim dated 16<sup>th</sup> August 2021 is dismissed with costs.
  45. The court to temper justice with mercy orders each party to bear own cost in the appeal.
  46. It is so ordered.

**DATED, SIGNED, AND DELIVERED ON THE 14<sup>TH</sup> DAY OF MARCH 2024 IN OPEN COURT AT KAKAMEGA**

**J.W. KELI**



## **JUDGE**

In the presence of

C/A Lucy Macheso

For Appellant: Nafuye Advocate

For Respondent: Luvayi Advocate

