Gold Crown Beverages (K) Limited v Mane (Civil Appeal E077 of 2023) [2024] KEELRC 1362 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1362 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL E077 OF 2023

M MBARŨ, J

JUNE 6, 2024

BETWEEN

GOLD CROWN BEVERAGES (K) LIMITED ..... APPELLANT

AND

OMAR RASHID MANE ..... RESPONDENT

(Being an appeal from the judgment of the Hon. R.N Akee delivered on 27 July 2023 in Mombasa CMELR Cause No. E404 of 2021)

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMELR Cause No. 404 of 2021. The respondent filed a memorandum of claim dated 23rd June, 2021 seeking;
    a. Payment of her terminal and contractual dues amounting to Kshs. 435,545.50/=.
    b. Costs and Interests of this suit.
    c. Any other relief that the Court may deem fit to grant.
2. The claim by the respondent was that he was employed by the respondent as a helper for the machine operator on 6 April 2019, earning a basic monthly wage of Kshs.18, 360. He was verbally terminated on 22 May 2021 after reporting to work. His claim was that during his employment, he was not allowed to proceed for leave and he also worked overtime without compensation.
3. In response, the appellant denied that the respondent was its employee but was instead a causal labourer engaged from time to time. Further, the respondent/claimant was not terminated but instead left employment of his own volition on account of ill health and inability to perform duties assigned to him. Additionally, he utilized all his leave days, and all his NHIF deductions were remitted. The

respondent/claimant's salary was consolidated and inclusive of house allowance. He was also a member of a pension scheme and is therefore not entitled to any service pay as prayed.

4. In the judgment by the learned magistrate judgment for the respondent was awarded in the following terms;

    a. One month's notice pay Ksh18,360/-

    b. Unpaid leave days 21*612*2 of Ksh 25,704/-

    c. 12 months Compensation Ksh.220,320/-

    d. Costs of the suit from the date of being instituted and interest.

5. Aggrieved by the judgment, the appellant filed the memorandum of appeal seeking the following On the grounds that;

    1. The Learned Magistrate erred in law and fact in finding that the appellant unlawfully and unfairly terminated the respondent's employment.

    2. The Learned Magistrate erred in law and fact in finding that the respondent was unlawfully and unfairly terminated on 22nd May 2021 despite there being evidence showing that the respondent was at work until 26th May 2021.

    3. The Learned Magistrate erred in law and fact in failing to find that the respondent was a casual employee despite evidence of attendance records proving the same.

    4. The Learned Magistrate erred in law and fact in assuming that the respondent earned a monthly salary of Kshs. 18,360.00

    5. The Learned Magistrate erred in law and fact in awarding the respondent compensation for unlawful termination.

    6. The Learned Magistrate erred in law and fact in awarding compensation equivalent to 12 months' pay without laying any legal basis for the same.

    7. The Learned Magistrate erred in law and fact in awarding the respondent one month's salary in lieu of notice.

    8. The Learned Magistrate erred in law and fact in awarding the respondent payment in lieu of leave days despite evidence that the Respondent was a casual employee and hence not entitled to leave.

    9. The Learned Magistrate erred in law and in fact in finding for the respondent against the weight of evidence and submissions presented by the appellant.

    10. The Learned Magistrate erred in law and fact in considering extraneous matters which were not supported by evidence.

6. Both parties attended and agreed to address the appeal by way of written submissions.

7. The appellant submitted that the date of engagement was 1st February 2020 as per the biometric casual's attendance register produced with no evidence contradicting this. As per the said register, the respondent worked on 22 May 2021, when he alleged his employment was terminated and also worked on 24 to 26 May 2021. In the case of *Jumaa Chome Ndio v Kaluworks Limited* [2020] eKLR the court held that an employee pleaded that on 30th May 2016, his employment was terminated but when he appeared in court this changed to 20th April 2014 and upon cross-examination, he testified

that his employment was terminated on 20th October 2014. In *Mohamed Bocha Gobu versus BGP Kenya Limited* (2020) eKLR the court held that an employee who dithers on the date of termination of employment cannot be said to have discharged their burden of proof.

8. The appellant submitted that the respondent was a causal employee as provided by section 2 of the *Employment Act*, 2007 (the Act) as held in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* (2017) eKLR where the Court held that;

> The *Employment Act* recognises 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.
>
> Piece work form of employment is defined in section 2 to mean; "...any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance"
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> In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it. 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. An employee under piece work arrangement, though not entitled to all or some of the benefits of the other forms of employment, is at least entitled to minimum wage.

9. The respondent's work attendance was not continuous as the record shows that in February 2020, he worked for 13 days. The respondent was not engaged again until May 2020 when he worked for 5 days. He was later on engaged again in August 2020 when he worked for 5 days. In January 2021 he worked for 14 days, in April 2021 for 9 days and in May 2021 he worked for 11 days. Further, the respondent's wages were paid daily and computed weekly. In the case of *Josphat Njuguna v High Rise Self Group* (2014) eKLR the court held that;

> Whereas section 2 of the *Employment Act* defines a casual employee as a person whose engagement provides 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, it does not mean that a casual employee who is not paid at the end of each day and who is hired for more than 24 hours automatically becomes a regular or what is mundanely called permanent employee. It is a misinterpretation of section 37(1) of the *Employment Act* to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.

10. In the case of *Livingstone Oundo v Polypies Limited (Steel Division)* 2016 eKLR the Court held that;

> Going through the entire record from 2011 to 2013, the highest number of days the Claimant was at work was 9 days in each given month. Even the days worked in May 2012 at 9 days or the 7 days worked in August and September 2012 were not even and were staggered throughout the months. Therefore, such a record becomes a vital determining factor as to the nature of employment between the parties. Even where there was production work ongoing with the respondent, the Claimant was not engaged continuously and for periods

longer than 9 days in any given month and such 9 days in any case were not in the same series or sequence as these were spread out through the month.

11. The respondent was a casual employee, it cannot be said that his employment was terminated.

Determination

12. This is a first appeal and as held in *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 that upon appeal this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, this court must reconsider the evidence, evaluate it and draw its 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.

13. On the question of whether the respondent was an employee of the appellant, on page 15 of the record of appeal, the respondent provided his NSSF statement for the period of 1st April 2019 to 31st May 2021. Even though an NSSF statement is not a primary record that confirms employment, the fact of the appellant deducting and remitting such statutory dues for the respondent is only done within the employment relationship. The remittances to NSSF are monthly.

14. A casual employee as held in the case of *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* (2017) eKLR cited above, is employed each day and wages are paid at the end of the day. Continued employment of such persons for work that is not likely to end within a day and the employee continues to report for work to the same employer, the employee becomes protected under the provisions of Section 37 of the *Act*. The employee is secured with the rights and benefits thereof.

15. The records on pages 27-32 are casual employee attendance logs for some months in 2020 and 2021, which indicate that the respondent did not work for all the working days in the given months. The appellant provides a compiled record of documents indicating the amount to be paid in their payroll at Kshs. 25,000 for the respondent. The Appellant's bank statements from NCBA bank are also provided, together with lists for NHIF and NSSF contributions.

16. During the hearing before the learned magistrate, the appellant called its witness and upon cross-examination, testified that he did not have Mpesa messages to show that payments were made. During the re-examination, he stated that the attendance records could not be amended. Further, the respondent did not abscond duty but instead just failed to show up to work.

17. Hence the evidence by the respondent that he worked for 6 days each week and was verbally terminated on 22 May 2021 while he was earning Kshs. 18,360 per month was not challenged in any material way. For his continued employment by the appellant, he fell under the definitions of Section 2 and 37 of the *Act*;

Section 2 of the Act provides that;

> " casual employee" means a person the terms of whose engagement provides 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.

18. Section 37 of the *Act* provides for the conversion of casual employment to a term contract as follows;

(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.

19. In the case of *Esther Njeri Maina v Kenyatta University* [2020] eKLR the court held that;

> The law also envisages that an employer is duty bound to issue an employee with an appointment letter detailing the nature of the relationship as envisaged under Section 9 of the *Employment Act*. The Respondent failed to issue the petitioner with a contract of employment and held her as a casual for over 3 months as she performed the same tasks, which flouts the law.

20. These findings emphasize Civil Appeal No. 20 of 2017, *Nanyuki Water and Sewerage Company Limited vs. Benson Mwiti Ntiritu and 4 others* [2018], where the Court of Appeal considered the issue of casual employment and held that;

> A declaration that Section 37 of the *Employment Act*, 2007 applies to the employment of the Respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which Section 35(1)(c) of the Act applies. The Respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.

21. On the issues as to whether there was unlawful and unfair termination of employment, upon the findings above that the respondent was an employee of the appellant, he was entitled to notice and reasons before his employment. Under Section 43 of the Act, the employer bears the burden to give and prove reasons leading to termination of employment. In the case of *Empire Feeds Ltd v King'ou* (Appeal 6 of 2020) [2022] KEELRC 1501 (KLR) (23 June 2022) (Judgment) the held that;

> Section 43(1) of the *Employment Act*, places the burden of proving reasons for termination on an employer and failure to do so and renders such termination unfair. In addition, section 45 (2) of the *Employment Act*, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
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> In light of the foregoing legal provisions, the onus was on the appellant to prove that indeed, the respondent absented himself from work. To this end, the appellant did not present any evidence in any form or manner to prove the respondent's absenteeism from work. No attendance register or muster roll was produced to that effect.
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> Besides, the appellant did not state what action it took upon noting the respondent's absence.

22. From the foregoing, the respondent in this case was an employee of the appellant. Additionally, he was unfairly terminated from employment. The learned magistrate well-awarded notice pay and compensation.

23. However, the award of compensation is discretionary, save it must be based on sound judicial principles and reasoning. In the case of *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR, the Court held that;

> The import of discretion by an appellate court to further interfere with a decision of an order or Judgment of another court exercising a judicial function is a weighty matter only to be done within the confines of the principles in *Price and Another v Hilder* [1996] KLR 95 which laid down the following guidelines that:
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> > In considering the exercise of judicial discretion, as to whether or not to set aside a judgment the court considers whether, in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.

24. Although the respondent was an employee of the appellant, he served for under two (2) years. He was paid all his due wages save for the matters addressed above with regard to the unfair termination of his employment. The appellant well undertook its civic duty and paid statutory dues which are not contested and hence are in good standing and to award 12 months compensation was not justified. In this regard, an award of two months' compensation based on the last wage earned is hereby found appropriate at Ksh.18, 360 x 2 = 36,720.

25. Taking annual leave is a right secured under Section 28 of the Act. Upon the protections the respondent enjoyed with his employment was this right. The claim for unpaid leave days for the 2 years and award thereof is justified at Ksh 25,704.

26. On the award for costs and interests, in employment claims and unlike commercial disputes, costs do not follow the cause. The award should apply the principles outlined under Section 12 (4) of the *Employment and Labour Relations Court Act*, 2011. The court must justify why the discretion thereof is applied in favour of the party being awarded costs. In this regard, the costs awarded are not justified and each party is to bear its costs for the lower court proceedings and this appeal.

27. Accordingly, the appeal partially succeeds and judgment in Mombasa CMELRC No. E404 of 2021 is hereby reviewed and the following orders are issued;

28.

a. A declaration that the respondent was an employee of the appellant and his employment was terminated unfairly;

b. Compensation Ksh.36,720;

c. Notice pay Ksh.18,360;

d. Leave pay ksh.25,704;

e. Each party is to bear its costs for the lower court and this appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....