



REPUBLIC OF KENYA



Mistry Naran Mulji and Company v Chengo (Employment and Labour Relations Appeal E042 of 2023) [2024] KEELRC 2049 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2049 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E042 OF 2023**

**AK NZEI, J
JULY 31, 2024**

**BETWEEN
MISTRY NARAN MULJI AND COMPANY APPELLANT
AND
FREDRICK CHARO CHENGO RESPONDENT**

*(Being an appeal against the judgment of Hon. D.W. Mburu –
SPM in CM CC(ELRC) 16/2019 delivered on 20th April 2023)*

JUDGMENT

1. The Appellant herein was the Respondent in Mombasa Chief Magistrate’s Court Employment Case No. 16 of 2019 whereby he had been sued by the Respondent herein. The Respondent had pleaded in the said suit:-
 - a. That he had been employed by the Appellant as a day shift guard/watchman from 15/9/2000, earning a monthly salary of Kshs. 12,000.
 - b. That the Respondent worked six days a week from 6.00 a.m. to 6.00 p.m. for a period of 18 consecutive years, during which he worked on public holidays and was never given a single annual leave.
 - c. That on or about 9/1/2018, the Appellant abruptly and without notice or payment in lieu thereof summarily terminated the Respondent’s employment; thereby violating the mandatory provisions of the [Employment Act](#).
 - d. That underpayment of the Respondent’s monthly wages was in violation of the mandatory provisions of the Legislative Supplement No. 52 of the [Labour Institutions Act](#).
2. The Respondent sought the following reliefs against the Appellant: -



- a. A declaration that termination of the Respondent's employment was procedurally unfair.
 - b. Underpayment of monthly wages, inclusive of house allowance, from 1/5/2015 to 8/1/2018 Kshs. 42,249.
 - c. Unpaid overtime of 4 hours from 1/5/2015 to 8/1/2018, exclusive of monthly wages and house allowance Kshs. 343,226
 - d. Unpaid overtime of 4 hours from 1/5/2009 to 30/4/2015 Kshs. 348,758.
 - e. Severance payment for 17 years Kshs. 127,500.
 - f. Public holidays served Kshs. 59,223.
 - g. Leave for 17 years Kshs. 114,316.
 - h. One-month salary in lieu of notice Kshs. 12,927.
 - i. Compensation for unfair termination (12 months x 12,926.55) Kshs. 155,124.
 - j. Certificate of service.
 - k. Costs of the suit and interests at Court rates on the claimed sums.
3. Documents filed alongside the Respondent's Memorandum of Claim dated 26/6/2018 and filed in Court on 27/6/2018 included the Claimant's written witness statement and a list of documents dated 26/6/2018, listing some 4 documents. The listed documents included a P9 A Form from Kenya Revenue Authority (KRA) for the year 2017 (dated 23/5/2018) among other documents. The said document indicated the Respondent's employer then as the Appellant herein.
 4. The Appellant defended the said suit vide a Statement of Response dated 13/9/2018 and denied the Respondent's claim. In particular, the Appellant denied having employed the Respondent as pleaded by him, and further pleaded that the Appellant had engaged the Respondent as a casual in March 2017, upon which he worked in March, May, August and November 2017; and that the Appellant did not terminate the Respondent's employment as the terms of his employment ended on daily basis.
 5. It was the Appellant's further pleading that it was on the foregoing terms that the Appellant last showed up for work in the month of November 2017 and the Appellant did not bother inquiring about his whereabouts since the terms of engagement were strictly on casual basis.
 6. A written witness statement of Peter Ouma Ajulu was filed by the Appellant alongside the said response to claim.
 7. On 12/3/2021, the Respondent filed a further list of documents, listing the Appellant's letter to the NSSF dated 8/2//2016, vide which the Appellant informed NSSF that the Respondent was its employee. The Respondent's name is listed as No. 16 in the list of 50 employees of the Appellant. The said letter did not state the dates of employment of the said employees, or any of them.
 8. At the trial, the Respondent herein, being the Claimant in the primary suit, testified and adopted his filed witness statement as his testimony. He also produced in evidence the documents referred to in paragraphs 3 and 7 of this Judgment. He further testified that he was sacked without notice and without any payment, that he was not a casual, and that he was being paid weekly by the Appellant. That the Appellant had not given him an employment letter.
 9. The Appellant called one witness, Peter Ouma (RW-1), who adopted his filed witness statement as his testimony. He further testified that the Appellant was a casual who had not worked continuously.



10. Cross-examined, RW-1 testified that he was employed permanently by the Appellant, and that the Respondent was a casual. That the Appellant had a register of casuals which the casuals used to sign, but which the Appellant (RW-1) had not produced in Court.
11. The trial Court delivered its Judgment on 20/4/2023 and made a finding that the Respondent was not a casual worker but a regular employee of the Appellant; in view of the documentary records produced in Court, and particularly the NSSF records. Further, the trial Court found that the Respondent's employment had been unfairly terminated, and awarded him Kshs. 38,708 being the equivalent of 3 month's salary as compensation. The Court also awarded the Respondent Kshs. 12,927 being payment in lieu of notice and Kshs. 12,927 being payment for unpaid leave days accrued during the year 2017. The other money claims were declined for being time-barred pursuant to Section 90 of the Employment Act.
12. The trial Court also awarded the Respondent costs of the trial Court suit and interest at Court rates, and ordered the Appellant to issue the Respondent with a certificate of service.
13. Aggrieved by the said Judgment, the Appellant preferred the present appeal, and set forth the following grounds of appeal:-
 - a. The Learned Magistrate erred in law and in fact in finding that the Respondent was employed as a night shift guard.
 - b. The Learned Magistrate erred in law and in fact in finding that the Respondent was unfairly terminated.
 - c. The Learned Magistrate erred in law and in fact in awarding the Respondent Kshs. 12,927 being payment of one month (salary) in lieu of notice, yet there was no evidence to prove that he was unfairly terminated.
 - d. The Learned Magistrate erred in law and in fact in awarding the Respondent Kshs. 38,781 being three months' compensation for unfair termination despite the evidence provided by the Appellant.
 - e. The Learned Magistrate erred in law and in fact by completely disregarding the Appellant's evidence on record.
 - f. The Learned Magistrate erred in law and in fact by shifting the burden of proof from the Respondent to the Appellant.
14. The Appellant sought the following reliefs on appeal:-
 - a. That the entire Judgment of Hon. D. W. Mburu (SPM) in Mombasa CMCC (ELR) Case No. 16 of 2019 (formerly ELR Cause No. 447 of 2018) delivered on 20th April 2023 be set aside, and be substituted with an order dismissing the suit.
 - b. That the appeal be allowed.
 - c. That the Appellant be awarded costs of the Appeal.
15. This is a first appeal, and the evidence presented before the trial Court, which I have set out in this Judgment, is before this Court for fresh evaluation. This Court, however, takes cognizance of the fact that it neither saw nor heard the witnesses testify first hand. The foregoing is the duty of a first Appellate Court as stated in the case of *Peters v Sunday Post Ltd*[1958]E.A. 424.



16. I will handle the grounds of appeal together, and in my view, the following issues fall for determination:-
 - a. whether the Respondent was employed as a casual, or whether he was a regular employee of the Appellant.
 - b. whether the Respondent's employment was unfairly terminated by the Appellant.
 - c. whether reliefs sought by the Respondent in the trial Court were deserved.
17. On the first issue, the Respondent pleaded that he had been employed by the Appellant on 15/9/2000, while the Appellant on the other side pleaded that the Respondent had been employed as a casual worker in March 2017, and worked during the months of March, May, August and November 2017, and last showed up for work in November 2017. Although RW-1 testified that the Appellant had a register of casuals whereon casual workers signed, such records were not produced in evidence by the Appellant.
18. The Respondent on the other hand testified that he worked for the period pleaded by him, that he was not given an employment contract and that he used to be paid weekly. That the Appellant did construction work. This nature of the Appellant's business was confirmed by RW-1 in his evidence in Court.
19. The date of commencement of a contract of employment is, by dint of Section 10(1) of the Employment Act, one of the particulars that must be included in a contract of employment. The said Section obligates an employer to have the contract of employment written down. Where the employer fails to have the terms or particulars of an employment contract written down, Section 10(7) of the Act provides as follows:-

“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 in the employer.”
20. The foregoing statutory provision places on the Appellant the burden of proving the date of commencement of employment that it alludes to. The Appellant did not discharge and/or shift that burden.
21. As already stated in this Judgment, the Respondent produced in evidence KRA and NSSF documents demonstrating that the Respondent was in the Appellant's employment long before the year 2017. No evidence was tendered by the Appellant to show that the Respondent was working as a casual. Indeed, the Appellant's letter to the NSSF dated 8/2/2016 confirmed that the Respondent and 49 others were the Appellant's employees/staff. The Appellant never reproached the authenticity of the said letter.
22. In view of the evidence on record, coupled with the provisions of Section 37(1) of the Employment Act, the Appellant's allegation that the Respondent was a casual employee must fall by the way side. I return a finding that the Respondent was not a casual, but was a regular employee of the Appellant, employed for an indefinite period of time. I uphold the trial Court's finding in that regard.
23. On the second issue, the Respondent pleaded and testified that his employment was on 9/1/2018 abruptly and summarily terminated by the Appellant without notice or payment in lieu thereof. The Appellant on the other hand pleaded and testified (RW-1) that the Respondent did not show up to work after November 2017; in other words, that he absconded duty. By dint of Section 44(4) (a) of the Employment Act, absconding of duty by an employee without leave/permission or lawful cause



- amounts to gross misconduct by the employee. The employer of such an employee becomes entitled to commence disciplinary action against such employee pursuant to Section 41 of the *Employment Act*.
24. An employer alleging desertion or absconding of duty by an employee must always demonstrate what action he took when the employee failed to turn up at the place appointed for performance of his duties. It can never be the employer's word against the employee's word when it comes to allegations of absconding and/or deserting duty. Action must be demonstrated by the employer. Where action is not demonstrated, and termination by the employer is alleged, the employer will, more often than not, be found to have terminated the employee's employment.
25. The trial Court cited the case of Joseph Nzioka v Smart Coatings Limited[2017] eKLR, which I find persuasive, and where the Court stated as follows:-
- “Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”
26. Further, the trial Court cited the case of Boniface Francis Mwangi v Bom Iyengo Secondary School[2019] eKLR, which I also find persuasive, and where the Court states as follows:-
- “It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”
27. In view of the evidence on record, and on a balance of probability, I reject the Appellant's allegation that the Respondent failed to turn up to work after November 2017, and hold that the Respondent's employment was unfairly terminated by the Appellant. Unfairly because the Respondent was not shown to have been issued with a termination notice pursuant to Section 35(1) (c) of the *Employment Act*, no valid reason for the termination was given pursuant to Section 45(2) (a) of the Act, and the mandatory procedure set out in Section 41 of the Act is not shown to have been adhered to before termination. I uphold the trial Court's finding on unfairness in terminating the Respondent's employment.
28. On the third issue, the cause of action leading to institution of the suit herein is shown to have accrued on 8/1/2018. The memorandum of claim is shown to have been filed on 17/6/2018. The claims falling in the category of continuing injury as contemplated in Section 89(formerly Section 90) of the *Employment Act*, like the alleged underpayment, unpaid leave during the period of employment and unpaid house allowance; which accrued from month to month during the period of employment, were raised within 12 months from the date of cessation thereof. The trial Court, however, did not consider their merits or otherwise. The trial Court made a finding that the claims were statute barred, save for leave pay for the year 2017. There is no cross-appeal herein. I will, therefore, leave the issue of the said declined claims to lie.
29. I uphold the award of kshs. 12,927 as the Respondent was not shown to have been issued with a termination notice pursuant to Section 35(1) (c) of the *Employment Act*. Further, I uphold the award of kshs. 12,927 being leave pay regarding the year 2017 as awarded by the trial Court. The Appellant did not demonstrate, as required of it under Section 74(g) of the *Employment Act*, that the Respondent had taken annual leave during the said leave earning year.
30. On the issue of compensation for unfair termination of employment, and having made a finding that the Respondent's employment was unfairly terminated, I uphold the award of an equivalent of



3 months' salary made by the trial Court. The Respondent did not file a cross-appeal on the said award, otherwise I would have awarded him the equivalent of 9 months' salary, taking into account the number of years worked and the unfairness in termination of his employment.

31. Further, I uphold the trial Court's finding that the Respondent be issued with a certificate of service pursuant to Section 51 of the *Employment Act*.

32. The summary of all the foregoing is that the appeal fails, and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST JULY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... **Appellant**

.....**Respondent**

