



**Mini Bakeries [Mombasa] Limited v Mose (Appeal E147 of 2023)
[2024] KEELRC 2325 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2325 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E147 OF 2023
AK NZEI, J
SEPTEMBER 24, 2024**

BETWEEN

MINI BAKERIES [MOMBASA] LIMITED PETITIONER

AND

BENARD DOGA MOSE RESPONDENT

*(Being an appeal from the judgment and resultant decree of
the Chief Magistrate Court -Mombasa [Hon. Nabibya -SRM]
delivered on 27th November 2023 in CMELRC No. E265 of 2022)*

JUDGMENT

1. The Appellant herein was the Respondent (defendant) in Mombasa Chief Magistrate’s Court Employment Case No. E265 of 2022 wherein it had been sued by the Respondent in the appeal herein. The Respondent had sought the following reliefs against the Appellant:-
 - a. One month salary in lieu of notice.....28,500
 - b. House allowance for 144 months at the rate of 15% of the basic salary (15/100x28,500x144)
.....kshs. 615,600
 - c. Unpaid leave days 21x880.30x12...
.....kshs. 221,835.60
 - d. Compensation for unfair termination kshs. 28,500x12.....kshs. 342,000
 - e. Unpaid overtime (164.90 x1hrs x30 days x144 months).....kshs. 712,368
 - f. Unpaid NHIF 500x144.....kshs. 1,992,303.60
 - g. Costs of the suit and interest.



2. The Respondent had pleaded:-
 - a. that the Respondent was in 2010 employed by the Appellant as a bakery machine operator at a basic salary of kshs. 28,500, and worked continuously until 18/12/2021 when the Appellant unprocedurally terminated his employment in complete disregard of the law.
 - b. that on 18/12/2021, the Respondent reported to the Appellant's Operations Manager that the supervisor was being corrupt in the recruitment of employees, upon which the said Operations Manager demanded that the Respondent issues a written apology for making such an allegation, which the Respondent refused to do. That the Operations Manager called the Respondent to a disciplinary hearing on the same date and verbally terminated his employment, still on the same date.
 - c. that termination of the Respondent's employment was unlawful and wrongful in that it was effected without notice and without a valid reason, the Respondent was not given a fair hearing and was not paid terminal dues.
3. Documents filed alongside the Respondent's memorandum of claim, dated 5/4/2022 and filed in court on 16/5/2024, were the Respondent's written witness statement and a list of documents dated 5/4/2022, listing 2 documents. The listed documents were copies of the Respondent's identity card and a demand letter. The Respondent filed a further list of documents dated 8/11/2022, listing one document. The further listed document was the Respondent's NSSF statement.
4. The Appellant entered appearance and filed response to the Respondent's claim, denying the same. The Appellant further pleaded:-
 - a. that the Respondent was employed by the Appellant as a casual sometimes in 2011, and that his employment as a casual was never terminated, either on 18/12/2021 or at all.
 - b. that as at 18/12/2021, the Respondent was earning daily wages of kshs. 960.10, translating to kshs. 24,962.60 monthly.
 - c. that on 20/10/2021, the Respondent, who was not on the days duty roster, wanted to report to work on the said date but was denied access to the premises by the supervisor; as a result of which the Respondent was angered and accused the supervisor of being corrupt.
 - d. that a complaint was lodged against the Respondent's actions, and he (the Respondent) was invited for a disciplinary hearing on 14/12/2021, which he attended with a shop steward and an employee of his choice.
 - e. that it was decided at the meeting that the Respondent either presents evidence on the alleged corrupt practices or issues an apology if he had no evidence. That these were to be presented either on 15th or 17th December 2021. That the Respondent neither presented evidence nor issued an apology, and did not report to work on the aforesaid two dates; and that he never reported to work ever again.
 - f. that since the Respondent was a casual who could report to work as and when he pleased, the Respondent took no further action.
5. Documents filed alongside the Appellant's Response included a written witness statement of Nancy Gacheru and a list and bundle of documents dated 14/7/2023, listing 5 documents. The listed documents included copies of the muster roll for the period between January 2017 and December 2020, payment vouchers for casuals for the months of November and December 2021, a copy of



minutes of the Disciplinary Committee held on 14th December 2021, copy of a Collective Bargaining Agreement for the period 1st May 2017 and 30th April 2017, and a copy of the NHIF Member Data summary dated 31st May 2022.

6. At the trial, the Respondent adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 3 of this judgment. He further testified that he worked continuously, daily and was paid monthly. That he never stopped working. That he was not a casual, but was employed permanently. That he never signed any employment contract.
7. The Appellant called one witness, Nancy Gacheru (RW-1), who adopted her filed witness statement as her testimony and produced in evidence the Appellant's documents referred to in paragraph 5 of this judgment. Cross-examined, RW-1 testified, from what I can decipher from the trial Court's proceedings, that the Respondent was called to a meeting and was dismissed. That the Respondent did not work continuously for 12 months. That the Respondent was to come with a witness on 14/12/2021 to explain how his superior was wrong but did not report back to work; and that since he was a casual employee, the Appellant did not take action until the trial Court suit was filed, that the Appellant had not availed proof that the documents produced in evidence by the Appellant had been signed by the Respondent.
8. The trial Court delivered its judgment on 27/11/2023 and made a finding that the Respondent was not a casual employee, in view of the evidence on record and provisions of Section 37 of the Employment Act; and that his "employment status was that of contract/permanent and not casual." The trial Court further made a finding that termination of the Respondent's employment was unfair on account of failure by the Appellant to adhere to Sections 41 and 43 of the Employment Act regarding Procedure, in that no notice or show cause was issued, and no hearing was demonstrated. The trial Court made the following awards in favour of the Respondent:-
 - a. Leave pay for (21x880x3years).....kshs. 55,440
 - b. Compensation for unlawful termination (28,500x10).....kshs. 285,000
 - c. Costs of the suit and interest.
9. 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 in introducing and determining the issue of conversion of employment without a pleading to that effect.
 - b. the learned magistrate in any event erred in law in her resolution of the pleaded issues.
 - c. the learned magistrate erred in law and fact in failing to determine whether a termination of employment had in fact been proven.
 - d. the learned magistrate erroneously exercised her discretion by awarding a manifestly high compensation in the circumstances.
10. The Appellant seeks the following reliefs on appeal:-
 - a. that the appeal be allowed.
 - b. that the judgment dated 27/11/2023, and the resultant decree, be set aside in their entirety and be substituted with an order dismissing Mombasa CM ELR Cause No. E265 of 2022 with costs.



11. This is a first appeal. As stated in *Selle & Another -vs- Associated Motor Boat & Co. Ltd & Another* [1968] E.a 123 And In *Peters-vs- Sunday Post Ltd* [1958] E.A. 424, and restated in *Mursal -vs- Manesa* [2022] eKLR,

“A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

12. A trial Court’s duty to evaluate the evidence on record in order to come to its own independent conclusion was also stated in *Abok James Odera T/a A.j. Odera & Associates -vs- John Patrick Machira T/a Machira & Company Advocates* [2013] eKLR.

13. Having stated the foregoing, and having in mind the grounds of appeal set forth by the Appellant and reproduced in paragraph 9 of this appeal, issues that fall for determination in my view, are as follows:-

- a. whether the Respondent’s employment status was that of a casual, or whether he was employed for an indefinite period of time with his salary being paid monthly.
- b. whether the Respondent’s employment was terminated by the Appellant, and if so whether the termination was unfair.
- c. whether the awards made by the trial Court in favour of the Respondent were deserved.

14. On the first issue, a casual employee is defined in Section 2 of the *Employment Act* as:-

“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.”

15. Section 37(1) of the Act on the other hand provides as follows:-

“

“(1) Notwithstanding any provision of this Act, where a causal 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 causal employee shall be deemed to be one where wages are paid monthly; and Section 35(1) (c) shall apply to the contract of service.”

16. In the present case, the Respondent pleaded, in the primary suit, that he was employed by the Appellant as a bakery machine operator in the year 2010 and worked continuously until 18/12/2021 when his employment was unlawfully terminated. On the other hand, the Appellant pleaded that the Respondent was a casual worker whose first interaction with the Appellant was in July 2011, and that his employment was not terminated, either on 18/12/2021 or at all. The Appellant further pleaded that the Respondent was earning a daily wage of kshs. 960.10, translating to kshs. 24,962.60 monthly.



No written contract regarding the Respondent's employment with the Appellant was produced in evidence. The Appellant produced in evidence a copy of what RW-1 referred to in her adopted witness statement as a representative sample of the Appellant's Muster Roll said to cover the period January 2017 to December 2020. No such document was produced in evidence regarding the period 2010 or 2011 to 2016, and the year 2021. I have noted from RW-1's adopted witness statement (at paragraph 9 thereof) that the Respondent was still working as at December 2021, "earning kshs. 960.10 translating to kshs. 24,962.66 monthly."

17. I have also noted that the aforesaid "representative sample of the Appellant's Muster Roll for the period between January 2017 and December 2020 refers to two branches of Mini Bakeries (Mombasa) Limited. The two branches are indicated as Majengo 1 And Majengo 2 respectively. The Appellant did not tell the Court in which of those two branches the Respondent worked, whether he was working in both of them at different times; and whether the Appellant had other branches in which the Respondent also worked. The Respondent pleaded and testified that he worked continuously during the entire period of employment.
18. Indeed, the Appellant pleaded, and its witness (RW-1) testified that the Respondent was verbally invited to a disciplinary hearing to be held on 14/12/2021, which the Respondent attended together with a shop steward of his choice. Would this have been necessary regarding a casual worker whose terms of engagement terminated at the end of each day and did not last for a longer period than twenty four hours at a time."
19. In view of the pleadings filed, the evidence adduced by both parties at the trial and what I have stated in this judgment, I come to the unavoidable conclusion that the Respondent was not a casual but was an employee of the Appellant whose wages were payable monthly, and to whom Section 35(1) (c) of the *Employment Act* applied. Section 37(1) of the Act, which I have reproduced at paragraph 15 of this judgment, is called in aid. I uphold the trial court's finding that the Respondent was not a casual employee.
20. On the second issue, I have taken note of RW-2's evidence (under cross examination) that the claimant was dismissed. As to whether the dismissal (termination) was unfair, the procedure for termination of employment is set out in Section 41, 43 and 45 of the *Employment Act*. Section 41 of the Act provides as follows:-

- "(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."



21. The Court of Appeal stated as follows in the case of Janet Nyandiko -vs- Kenya Commercial Bank Limited [2017] eKLR:

“Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity.

The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee upto the date of termination, the extent to which the employer has complied with Section 41. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer.”

22. In the instant case, RW-1 testified that the Respondent orally invited the Respondent to a disciplinary hearing that was to be held on 14/12/2021. The Appellant is not shown to have informed the Respondent, in a language that he understood, the reasons for which it was considering terminating his employment which reasons were to be the subject of the disciplinary hearing which the Appellant had allegedly scheduled 14/12/2021. The mandatory procedure aforesaid was not adhered to by the Appellant in terminating the Respondent’s employment. The termination was procedurally unfair. Further, no reason and/or valid reason for terminating the Respondent’s employment was demonstrated at the trial. By dint of Section 45(2) (a) of the *Employment Act*, termination of the Respondent’s employment was substantively unfair.
23. I find and hold that termination of the Respondent’s employment was unfair, and I uphold the trial court’s finding in that regard.
24. On the third issue, it is my finding that the award of kshs. 55,440 being leave pay for 3 years was made in error as the Respondent had not pleaded and/or specifically pleaded that he did not take annual leave during the period of employment, and during which years of employment. A claim based on untaken or unpaid leave days is in the nature of special damages, and must be specifically pleaded and proved. The said award of kshs. 55,440 is hereby set aside.
25. On compensation for unfair termination of employment, the trial court awarded the equivalent of ten months salary. The Appellant (RW-1) testified that the Respondent was earning kshs. 24,962.60 per month as at December 2021 when his employment was terminated. The Respondent did not rebut this assertion though he had pleaded that he was earning kshs. 28,500 per month. I accept the Appellant’s evidence that the Respondent was earning kshs. 24,962.60 per month at the time of termination. The



equivalent of ten month's salary is kshs. 249,626, which I award the Respondent. The award of kshs. 285,000 is hereby set aside.

26. I find no fault in the trial court's exercise of discretion in awarding an equivalent of ten months' salary, in view of the number of years that the Respondent had worked for the Appellant and the circumstance and manner in which the Respondent's employment was terminated.
27. The appeal succeeds partly, and having considered written submissions filed on behalf of both parties, judgment is hereby entered for the Respondent against the Appellant for kshs. 249,626 being compensation for unfair termination of employment. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
28. The Respondent is awarded interest on the awarded sum, to be calculated at court rates from the date of the trial court's judgment.
29. Each party shall bear its own costs of the appeal, but the Respondent is awarded costs of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH SEPTEMBER 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.

Appearance:

.....Appellant

.....Respondent

