



REPUBLIC OF KENYA



Frodak Kenya Limited v Makunda (Employment and Labour Relations Appeal E005 of 2023) [2024] KEELRC 2233 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2233 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2023**

**JW KELI, J
SEPTEMBER 18, 2024**

BETWEEN

FRODAK KENYA LIMITED APPELLANT

AND

PHILIP LUMANYASI MAKUNDA RESPONDENT

*(An Appeal from Judgment and Decree of Hon. Reuben Sang (SPM),
Butali, delivered on 13th June 2023 in Butali MC ELR case No. 2 of 2018)*

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of Hon. Reuben Sang (SPM), Butali, delivered on 13th June 2023 in Butali MC ELR case No. 2 of 2018 between Philip Lumanyasi Makunda and Frodak Kenya Limited filed a Memorandum of Appeal dated 3rd July 2023; the Record of Appeal dated 4th August 2023 and received in Court on the 8th August 2023; and the Supplementary Record of Appeal dated 22nd July 2024 and received in court on even date (filed pursuant to ruling of 27th June 2024), seeking the following orders: -
 - a. This Appeal be allowed with costs to the appellant
 - b. The court, being the first appellate court, does re-evaluate the evidence and find that the Respondent was a piece-rated employee, entitled only to certain benefits under the [Employment Act](#).
 - c. The Trial Magistrate's awards underpayment, severance pay, leave allowance, overtime, and public holidays be set aside and their place, this court does find that the Respondent was paid all that was due to him.
2. The Appeal was premised on the following grounds:



1. The Learned Trial Magistrate grossly misdirected himself in ignoring the principles and tenets of law applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant thus arriving at a wrong conclusion of the same.
 2. The Learned Trial Magistrate grossly erred and misdirected himself when he failed to consider the fact that all the documents produced in evidence, and particularly the bundle of pay reports and contracts in addition to the Respondent's own admission while under cross-examination, pointed to the fact that the Respondent was a piece-rated employee and as such was therefore not entitled to some of the reliefs sought in the Claim.
 3. The Learned Trial Magistrate erred in law and fact when he allowed a claim for severance pay at Kshs. 56,976/-, against the Appellant, when there was no evidence in proof of the same and despite his own finding that the Respondent's employment was not terminated on account of Redundancy but lawfully by the effluxion of time.
 4. The Learned Trial Magistrate erred in law and fact when he relied on NHIF/NSSF deductions and uninterrupted earnings as a basis for awarding a claim for underpayment, while at the same time ignoring the character of piece-rate employment as prescribed before him and the Respondent's acknowledgment of having been paid all that was due to him.
 5. The Learned Trial Magistrate, further erred in principle by reducing himself to the arena of negotiations of terms of employments between the Appellant and the Respondent, when he relied on terms and allowed benefits that were not provided for under the Respondent's contract of employment.
 6. That the Learned Trial Magistrate grossly erred and misdirected himself in fact and law when, he allowed the claims for leave allowance, overtime, and public holidays when no firm basis for such awards had been established (Pg. 6-8 of the Record).
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Okong'o Wandago & Co. Advocates were dated 20th December 2023 and received in court on 16th January 2024. The Respondent's written submissions drawn by Mukabane & Kagunza Advocates were dated 4th March 2024 and received in court on 6th March 2024.

Background to the appeal

4. The Respondent filed a suit Butali CMELR E062 of 2020 against the Appellant for unlawful and unfair termination through the Memorandum of Claim dated 18th August 2018 and filed on 24th August 2018, seeking the following reliefs: -
 - a. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the Claimant is entitled to compensation of her terminal dues as outlined herein above;
 - b. The sum of Kshs. 1,480, 240/- as set out herein above;
 - c. Certificate of service;
 - d. Cost of this suit and interests as court rates from time of filing the suit until payment in full.
 - e. Any other further and better relief the Honourable Court may deem just and fit to grant.
5. The Statement of Claim was supported by the Verifying Affidavit of the claimant of 18th August 2018 and accompanied by his List of issues for determination dated on even date, the consolidated List of



witnesses and documents dated on even date, the claimant's witness statement dated 18th August 2018, his List of Documents of even date, and his Bundle of Documents (page 7-24 of the record is the Claimant's case(mis-numbered)).

6. The Appellant entered appearance in the lower court on 21st April 2022(Memorandum of Appearance dated 13th April 2022- pg. 25 of the Record) and filed the Response to Claim dated 22nd April 2022 received in court on 5th May 2022. The Response to the claim was accompanied by the Appellant/ Respondent's List of witnesses dated 22nd April 2022; the Witness statement of George Onyango Ager dated 21st April 2022, and the appellant/Respondent's List of Documents dated 22nd April 2022(Pages. 26-97 of the record).
7. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with him as the only witness on the 28th of December 2022. The defence case was heard on the 25th of April 2023 with George Onyango Ager as the defence's only witness of fact (Pg.9-11 of the Supplementary Record of Appeal).
8. The parties filed written submissions in the lower Court after the closure of the defence. The Plaintiff's submissions were dated 23rd May 2023 and filed on 24th May 2023 (in the lower court file and not in the record of Appeal). The Appellant/Respondent filed written submissions (pages 98-111 of the Record).
9. The Trial Court (Hon. Reuben Sang, SPM.) delivered its judgment on the 13th of June 2023 (pg. 14-18 of Supplementary Record) and held that the Respondent's contract had expired by effluxion of time thus he was terminated fairly, but entered judgement in favour of the Respondent for reliefs of leave allowance(calculated as a difference of the sums already paid to the respondent), severance pay and underpayment(to be calculated as per records kept of the claims)(pages 17-18 of the supplementary record of appeal).

Determination

Issues for determination.

10. The Appellant in his written submissions submitted that the trial magistrate erred in awarding the Respondent reliefs of Leave Allowance; public holidays, overtime, severance pay, and underpayment, yet the Respondent was a piece-meal employee.
11. The Respondent in his submissions identified the following issues for determination in the appeal: -
 - a. Whether the appeal is fatally defective
 - b. Whether the claimant was an employee of the respondent and if so whether his dismissal from employment by the respondent was unlawful and unfair
 - c. Whether the respondent was employed on piece rate basis
 - d. Whether the appeal on award for overtime and public holidays is misplaced.
 - e. Whether the respondent/claimant was entitled to leave allowance and underpayment.
12. The Court is guided by decision in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123 to the effect that, the court sitting at first appeal has to re-evaluate the facts and evidence before the trial court while making allowance of not having seen the witnesses to reach own conclusion. The Court having examined the issues addressed in the appeal by the parties finds the issues for determination are as follows: -



- a. Whether the appeal is fatally defective
- b. Whether the Respondent was an employee of the Appellant and on what terms.
- c. Whether the Respondent's dismissal from employment by the Appellant was unlawful and unfair.
- d. Whether the reliefs granted by the Trial Magistrate Court of Leave Allowance; public holidays, overtime, severance pay, and underpayment were merited.

Whether the appeal is fatally defective

13. The Court holds that it is functus officio on this issue pursuant to its decision dated 27th June 2024 allowing the reinstatement of the appeal as follows:-
 15. Relying on the Court of Appeal decision in *Intercounties Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 others* (2021) e KLR(*supra*) and the cited decisions therein the Court holds it was in the interest of justice to exercise its discretion in favour of allowing the prayer of setting aside its decision of 16th April 2024 and to reinstate the appeal dated 3rd July 2023 and at same time grant leave to the Applicant to file supplementary record of certified proceedings, judgment and decree of the lower court subject to throw away costs to the Respondent. '3

Whether the Respondent was an employee of the Appellant and on what terms.

14. The Appellant asked the Court, being the first appellate court, to re-evaluate the evidence before the trial court and find that the Respondent was a piece-rated employee entitled only to certain benefits under the *Employment Act*. The appellant submits that its evidence before the trial court was that the Respondent was a piece-rated worker.
15. The respondent submits that the finding of the trial court that the respondent's contract with the appellant still existed was proper in law and cannot be faulted. That Paragraph 11 of the Respondent's response to the claim found at page 27 of the record of appeal confirms that the respondent /claimant's employment was still ongoing at the time of the termination. That from the evidence presented before the trial court and on record, it was not disputed that the appellant engaged workers including the claimant on contract basis as cane loader of Butali Sugar Mills Ltd. The terms of contract did not provide for a termination clause. The respondent submits that he was employed on permanent basis and not on piece rate as alleged by the appellant as he had worked daily and continuously by dint of section 37 of the *Employment Act*.
16. The respondent to buttress his foregoing submission relied on the decision in Civil Appeal No. 20 of 2017 *Nanyuki Water and Sewerage Company Limited v Benson Mwiti Ntiritu & 4 others* (2018) where the Court of Appeal affirmed the trial court's decision and held that the respondent's contract of service assumed permanency and their engagement was deemed to be one where the wages were paid monthly and that section 35(1)(c) applied to that contract of service in terms of section 37.
17. The Trial Court on the terms of employment held: 'I therefore find that the Claimant was terminated by reason of the effluxion of time of the contract of service.' (at page 16 of the supplementary record of appeal).
18. The Respondent told the trial court that he was on contract of service and was paid Kshs. 4,080/- per month paid every two weeks. He had no record of the earnings. The Appellant's evidence through



testimony of its witness, Ager, was to the effect that the claimant had executed a contract and stated he was paid every two weeks for piece work done. The contract was for three months' renewable. There was disciplinary hearing before the termination (at page 11 of the supplementary record of appeal).

19. The Court from the foregoing proceedings of the Trial Magistrate Court, affirms the decision of the lower court that the Claimant /Respondent was a contractual worker and not piece rate.

Whether the Respondent's dismissal from employment by the Appellant was unlawful and unfair

20. The Trial Magistrate Court held: - "I therefore find that the Claimant was terminated by reason of the effluxion of time of the contract of service." (page 16 of the supplementary record of appeal). There was no cross- appeal on this finding hence this Court sitting on appeal has no basis to disturb the finding of the Trial Magistrate Court.

Whether the reliefs granted by the Trial Magistrate Court of Leave Allowance; public holidays, overtime, severance pay, and underpayment were merited.

21. The Appellant submits: - "That it was not in dispute that the respondent's employment was in the character of a piece rate employment paid Kshs. 14 to 17 per load." The Court having upheld the decision of the Trial Magistrate Court that the Respondent was on contract these submissions by the Appellant are not tenable. The Respondent serving on contractual basis was entitled to protection of statutory minimum wages. On the underpayment the Trial Magistrate Court applied the [Legal Notice No. 117 of 2015](#) setting the minimum wages at Kshs. 12,386/- and allowed prayers (a), (e) and (g) of the claim. The Trial Magistrate Court then stated that the figure already paid to the claimant through the labour office shall be discounted so that the claimant shall be entitled to the difference.
22. The Appellant raised as a ground of appeal that the Learned Trial Magistrate erred in law and fact when he allowed a claim for severance pay at Kshs. 56,976/- against the Appellant, when there was no evidence in proof of the same and despite his own finding that the Respondent's employment was not terminated on account of redundancy but lawfully by the effluxion of time.
23. The appellant further, as a ground of appeal stated that the Learned Trial Magistrate Court erred in law and fact when he relied on NHIF/NSSF deductions and uninterrupted earnings as a basis for awarding a claim for underpayment, while at the same time ignoring the character of piece-rate employment as prescribed before him and the Respondent's acknowledgment of having been paid all that was due to him.
24. The Court holds that having upheld the finding by the Trial Magistrate Court that the employment was contractual and that the Claimant was entitled to minimum statutory wages the Court finds that the only ground subject of re-evaluation is prayer (e) to wit:- "severance pay at the rate of 15 days for every completed year of service 14243 x4 total Kshs. 56,976/-."
25. The Appellant challenged the awards of severance by the Trial Magistrate Court on ground that, the trial court despite finding that the Respondent's employment was not terminated on account of redundancy but lawfully by the effluxion of time awarded severance pay. The Respondent did not submit on this ground of appeal. Severance pay is provided for under section 40(1)(g) of the [Employment Act](#) to wit:- "(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service." The Court agreed with the Appellant that the Trial Court having held that the employment had ended by effluxion of time erred in awarding severance pay which is due on declaration of redundancy.



26. The Court finds that the Respondent had no social security and hence was entitled to service pay as per section 35(5) of the Employment Act to wit: “ (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.” The Court consequently substitutes the order for severance pay with service pay for 15 days for every completed year. The trial court applied minimum wages of Kshs. 12,386 as due salary. The Court holds that the the completed years of service were 2014, 2015 and 2016 thus service pay ought to have been awarded for 15 days of every completed year thus $12386/30 \times 15 \times 3$ total Kshs. 18,579/- as service pay.
27. The Court holds that there was no decisive basis for award of prayers (b) and (c) by the trial court and there was no evidence led before Court to prove the same. The same are disallowed and set aside.
28. In conclusion the appeal is allowed with regard to the award of severance pay and prayers (b) and (c).
29. In conclusion, the Judgment and Decree of Hon. Reuben Sang (SPM), Butali, delivered on 13th June 2023 in Butali MC ELR case No. 2 of 2018 is set aside and substituted as follows:-
- The claim is allowed by:
- a. Award of accrued leave in lieu of Kshs. 56,976
 - b. Payment of service pay of Kshs. 18579/-
 - c. Payment of underpayment for Kshs. 99,672/-
- The above amounts (a,b and) subject to discount of amount paid to the claimant through the labour office.
- d. The Respondent to issue certificate of service to the claimant pursuant to the provisions of section 52 of the Employment Act.
30. Each party to bear own costs in the appeal.
31. Stay is granted of 30 days.
32. It is so Ordered.

DATED, SIGNED, AND DELIVERED ON THE 18TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT KAKAMEGA.

J.W. Keli.

JUDGE

IN THE PRESENCE OF

C/A -Macheso

For Appellant: Ms. Twena

For Respondent: Absent

