



**Mutheci & another v Kimani (Appeal E013 of 2023)  
[2024] KEELRC 2847 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2847 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E013 OF 2023  
DKN MARETE, J  
OCTOBER 30, 2024**

**BETWEEN**

**MOFFAT MWANGI MUTHECI ..... 1<sup>ST</sup> APPELLANT**

**PENAROMA TECHNICAL SERVICE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CRISPIN MIRANGA KIMANI ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Memorandum of Appeal dated 30th June, 2023. It comes out thus;
  1. The Learned Magistrate erred in law and in fact by awarding the Respondent some reliefs which had not been claimed and thus had no basis and awarding some relief due to a permanent employee under the *Employment Act*, 2007 to the Respondent who admitted being a casual labourer.
  2. The Learned Magistrate erred in law and in fact by holding that the Appellants dismissed the Respondent unfairly when there was no evidence to support the same.
  3. The Learned Magistrate erred in law and in fact by holding that the Appellants never participated in the proceedings thus failing to fully appreciate the evidence of the Appellants and indeed her judgment is full of contradictions on these issues.
  4. The Learned Magistrate erred in law and in fact by holding that the issue of the Respondent being an assistant welder was not disputed and further erred in holding that the Respondent was being paid an undisputed monthly salary of Kshs.14,300/- which the trial court held was a fact that was also undisputed, yet the appellants stated unequivocally when testifying that the Respondent was not employed as neither was he qualified as an assistant welder but was a



casual labourer who not employed as neither was he qualified as an assistant welder but was a casual labourer who was paid daily wages on a weekly basis as the Respondent had requested.

5. The Learned Magistrate erred in law and in fact by holding that the Appellant was employed by the 1<sup>st</sup> Appellant, who is an individual without a basis at all as the Respondent was employed by the 2<sup>nd</sup> Respondent.
6. The Learned Magistrate erred in law and in fact by holding that the Appellants did not prove valid and fair reasons upon which the Respondent was allegedly dismissed contrary to the evidence adduced in Court to the effect that the Respondent was never dismissed/terminated from his employment.
7. That the Trial court erred in failing to appreciate the fact that the Respondent had already agreed as to the payment due to him and part payment made after the Respondent had moved to the Amalgamated Union and had agreed on payments to compensate him and indeed half of the amount had been paid over.
8. The Learned Magistrate erred in law and in fact by declaring that the Respondent was entitled to service pay and awarding the same yet it was not disputed that half of the alleged service pay had been paid to the Respondent thus unjustly enriching the Respondent to the detriment of the Appellants.
9. The Learned Magistrate erred in law and in fact by declaring that the Respondent was unlawfully dismissed while there was no evidence adduced to support the same as the best would have been a declaration of redundancy.
10. The Learned Magistrate erred in law and in fact by arriving at a decision that was not clearly supported by evidence and by disregarding the evidence of the Appellants.
11. The Learned Magistrate erred in law and in fact by awarding the Respondent damages for unfair termination, salary in lieu of notice, house allowance, unpaid leave days and service while the Respondent was admittedly not a permanent employee but a casual labourer and did not adduce evidence of those fact.
12. That Learned Magistrate erred in law and in fact by ignoring the evidence and submissions of the Appellants.

It is proposed that the appellant prays for orders;

- a. That the judgment and any resultant decree issued consequent upon the said judgement of the Chief Magistrate's court at Ruiru dated 18<sup>th</sup> January, 2023 be set aside in its entirety and the Respondent's case be dismissed with costs.
  - (b) That the Costs of this Appeal be borne by the Respondent.
  - (c) Any other Order that the Court may deem fit to grant.
2. The Appellant in opening refers this court to the authority of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, in regard to the place of a first Appellate court as follows;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

3. This position is also upheld by the Respondent.
4. The Respondent opposes the Appeal in his written submission dated 23rd November, 2023.
5. The Appellants uphold a case of no termination of employment in the circumstances. It is their case that the Respondent’s employment was always casual and was frustrated by lack of work and action when his superior, artisan Wenasalus Munywoki deserted work in September, 2020 thereby leaving the Respondent with no work to do. This is because the Respondent’s job only comprised of cleaning of materials produced by the artisan. He was therefore politely requested to take time off and return when his superior the artisan returned to work.
6. The Appellant’s further case and submission is that the Respondent was in casual employment on piece rate terms of work. His pay was on a daily basis but payable after six(6) days and always determined and measured by the work he did in that period.
7. Again, the Appellant further submit a case of no termination of the employment of the Respondent by the Claimant. She adduces evidence of an agreement between the Respondent’s Union, the Amalgamated Union of Kenya Metal Workers where the parties agreed on a payment of Kshs.28,200.00 being final dues to the Respondent in view of the eventualities leading to his termination of employment.
8. The Respondent on the other hand submits that he was not casual having worked for three consecutive years. He invokes section 37(1) of the *Employment Act*, 2007 which provides for a conversion of casual employment into permanent employment where there has been continuous employment for period exceeding one month.
9. The Respondent merely invoked reliance on the provisions of section 37(1) and (3) of the *Employment Act*, 2007 to bring out case of a conversion to permanent employment on the basis of a long period of work. He did not adduce evidence in support of such period of work or even termination of his employment. In the circumstances, the Respondent’s case of no termination of employment sounds the probable of the two.
10. It is clear that the learned magistrate came up with a findings of permanent employment and termination of the Respondent employment without any factual basis. The Respondent did not in any way adduce evidence to demonstrate permanent employment or even termination of employment by the Appellants, or at all. The findings of the learned magistrate on the same were spurious and lacking in legal and factual basis. This is because no evidence was adduced in support of the same. The test of balance of probabilities or even preponderance of evidence were never tilted in favour of the Respondent’s case.
11. I am therefore inclined to allow the appeal with orders that each party bears their cost of the same.

**DELIVERED, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF OCTOBER 2024.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

1. Mr Korir holding brief for Simba instructed by H&T Associates Advocates for the Appellant.
2. Okoth Odhiambo instructed by Lemmy Regau & Company Advocates for the Respondent.

