Charunga v Bhiamani t/a Alamdaar Automobile (Appeal E082 of 2022)
[2024] KEELRC 2461 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2461 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E082 OF 2022

AK NZEI, J

OCTOBER 11, 2024

BETWEEN

MAMBO SAWA CHARUNGA ..... APPELLANT

AND

SHABIR BHIAMANI T/A ALAMDAAR AUTOMOBILE ..... RESPONDENT

JUDGMENT

1. The Appellant was the Claimant in Mombasa Chief Magistrate's Court ELR Case No. 373 of 2019 whereby he had sued the Respondent herein seeking the following reliefs:-

    a. A declaration that his termination by the Respondent was unfair.

    b. Leave allowance for the period between 23rd January, 2017 to 2nd March, 2019 (21/30 x 7,500 x 2 years) ..... Kshs.10,500/=.

    c. Service pay for the period between 23rd January, 2017 to 2nd March, 2019 (1/2 x 7,500/= x 2 years) ...Kshs.7,500/=.

    d. Underpayment for the period between 23rd January, 2017 to 2nd March, 2019 ..... Kshs.139,431/=.

    e. 12 months compensation for unlawful termination (7,500 x 12 months) ..... Kshs.90,000/=.

    f. Costs of the claim and interest thereon at Court rates.

    g. Certificate of service.

    h. Any other relief that the Honourable Court may deem fit to grant.

2. The Appellant had pleaded:-

a. That the Appellant had been engaged as a Messenger by the Respondent on 23rd January, 2017 and worked until 1st March, 2019 when he was terminated from employment.

b. That the Appellant was earning a monthly salary of Kshs.7,500/= and worked for 6 days per week.

c. That the Appellant reported on duty on 1st March, 2019 and while going about his duties, there arose a misunderstanding between the Appellant and a colleague of his, who then told the Appellant that he would ensure that his employment was terminated.

d. That on 2nd March, 2019, the Appellant reported on duty and was told by the Manager that his employment had been terminated.

e. That the Appellant's employment was terminated without notice, the Appellant was not given a chance to defend himself, and that the termination was unfair.

f. That the Appellant never proceeded on leave during the period of employment, contrary to Section 28 of the *Employment Act*.

g. That for the period of 2 years that the Appellant worked for the Respondents, NSSF deductions were made from the Appellant's salary but were never remitted; contrary to Section 21 of the *Employment Act*.

h. That the Appellant was being underpaid contrary to Legal Notice Nos. 117 and 112 (No. 12 of 2007).

i. That the Appellant's services were terminated without reason, contrary to Sections 35 and 43, and that the termination was unfair.

j. That the Respondent had refused to pay the Appellant's terminal dues.

3. Documents filed alongside the Appellant's Memorandum of Claim included the Appellant's written witness statement dated 24th April, 2019 and an evenly dated list of documents listing 5 documents. The listed documents included copies of the Appellant's Identity Card, NSSF statement, demand letter from Thabit, Wampy & Kitonga Advocates and Legal Notice Nos.117 (No. 12 of 2007) and 112 (No. 12 of 2007).

4. The Respondent entered appearance on 30th October, 2020 and filed Reply to the Appellant's Claim on 17th November, 2021, denying the same. In particular, the Respondent denied ever employing the Appellant and/or terminating his employment, and stated that it was a stranger to the Appellant's allegations in that regard. The Respondent further pleaded that there had never been an employment contract between the Appellant and the Respondent, verbal or written, and called for the claim to be dismissed with costs.

5. The Respondent filed a witness statement of Shabbir Bhimani dated 12th November, 2021. The Appellant filed a supplementary list of documents dated 3rd February, 2022, listing copies of some eleven (11) Delivery Notes bearing different dates during the years 2017, 2018 and 2019 and shown to have been issued to the Respondent by different companies.

6. At the trial, the Appellant adopted his filed witness statement as his testimony and produced in evidence the listed documents. Cross-examined, the Appellant testified that he had been employed by the Respondent on 23rd January, 2017, though he did not have any records in that regard. That he worked as a Messenger, earning Kshs.7,500/= which was paid weekly. That the documents produced by him in evidence (exhibit Nos. 7 – 15) were delivery notes for the (Respondent) company which

he used to be send to collect on behalf of the Respondent from other companies, and that he used to sign them.

7. The Respondent called one witness, Shabir Bhimani (DW-1), who adopted his filed witness statement as his testimony. He further testified that the Appellant's brother had taken the Appellant to him as a casual to do delivery jobs, and was being paid. That the Appellant could be send to deliver goods. That when he collected goods, he would sign on the delivery notes. That the Respondent (DW-1) did not know how the Appellant got the documents that he produced in court. That the Appellant was not an employee and could therefore not be issued with notice or be terminated. That there was no letter of appointment, and that there were no records of the Appellant's reporting to work. That the Appellant used to be called when there was work.

8. The trial court delivered its Judgment on 15th September, 2022 and dismissed the Appellant's Claim, making a finding that the Appellant was a casual who had been employed on casual basis, to carry out duties whenever they were available. That there was no basis for issuance of a termination notice. It was the trial Court's further finding that the Appellant had failed to discharge the burden of confirming his employment status.

9. Aggrieved by the foregoing Judgment, the Appellant preferred the present appeal, and set for 12 grounds of appeal, which I summarise as follows:-

    a. That the Honourable Magistrate erred in law and in fact by dismissing the Appellant's Claim against the weight of evidence presented and the applicable law.

    b. That the Honourable Magistrate erred in law and in fact by failing to appreciate that the Respondent/employer had a duty under the law to issue the Claimant with a written contract to enable him to understand the terms of the contract regardless of the nature of engagement.

    c. That the Honourable Magistrate erred in law and in fact by holding that the Appellant was a casual without factoring in the length of time that the Appellant had worked for the Respondent, and failing to appreciate the fact that the Appellant's terms of employment had converted from casual to contract by operation of the law.

    d. That the Honourable Magistrate erred in law and in fact by failing to appreciate that an employer who claims that an employee is a casual is expected to produce a casuals' register in proof; and failing to appreciate that an employer has a legal duty to keep records relating to the Claimant's employment for the entire period of employment.

    e. That the Honourable Magistrate erred in law and in fact by shifting the duty to produce employment records to the Appellant, and failing to appreciate the fact that such duty was on the employer.

    f. The Honourable Magistrate erred in law and in fact by disregarding the Respondent's witness statement which shows that the Appellant worked under the Respondent's supervisor.

10. The Appellant seeks the following reliefs on appeal:-

    a. That the appeal be allowed.

    b. That the (trial court's) Judgment dated 15th September, 2022 be set aside.

    c. That the Claimant's claim be allowed.

    d. That the costs of the claim and of the appeal be awarded to the Appellant.

11. This is a first appeal, and this Court's duty as a first appellate court is well settled. As stated in *Mursal & Another – vs – Manesa & Another (suing as the Legal Administrators of Dalphine Kanini Manesa (Civil Appeal No. E020 OF 2021*) (2020) KEHC (KLR):-

> " 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 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. This duty was 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 PAGE 424".

12. I will handle the grounds of appeal, which in my view are summarised in ground No. (a) above, together. Having considered the pleadings filed in the trial court and evidence presented, the following issues fall for determination:-

    a. Whether the Appellant was a casual employee.

    b. Whether termination of the Appellant's employment was unfair.

    c. Whether reliefs sought in the trial court were merited.

13. On the first issue, the Appellant pleaded and testified that he had been employed by the Respondent as a Messenger on 23rd January, 2017 and worked until 1st March, 2019 when his employment was unfairly terminated by the Respondent. That he was earning Kshs.7,500/= per month and worked continuously without even taking leave during the said period. It was the Appellant's evidence that whenever he was send to pick something from other companies, or to deliver something on behalf of the Respondent Company, he used to sign delivery notes. The Appellant produced in evidence copies of such delivery notes, signed by him on various dates during the years 2017, 2018 and 2019. The Respondent did not dispute the authenticity of the said delivery notes.

14. Indeed, DW-1 confirmed in evidence that the Appellant used to sign the delivery notes in issue, and only wondered how the Appellant had gotten the documents produced in Court. All that the Respondent told the trial court was that the Appellant had been employed as a casual, assigned delivery work whenever such work was available. That there was no contract, and that the Respondent "did not have records on the Appellant's reporting to work." The Respondent did not, therefore, tender any records in evidence in prove of his allegation that the Appellant was a casual. The documents (delivery notes) signed by the Appellant during the period of his employment stand as testimony against the Respondent's allegations.

15. Section 2 of the *Employment Act* defines a casual employee 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."

16. It is trite that an employer who alleges that an employee is a casual should produce a casuals' register in evidence in proof. The Respondent did not produce any such register or other employment records, including clock-in records/data to demonstrate that the Appellant was a casual employee. It was stated

as follows in the case of John Cherera Mghendi – vs – Revital Health Care (EPZ) Limited (2020) eKLR:-

> "21. . . . Because the issue of the nature and status of the Claimant's employment was in contest, the original attendance register was a critical piece of evidence that the Respondent ought to have availed to the Court. In its absence, the averment that the Claimant was a casual employee remained unverified and unproved.
>
> 22. Sections 10 and 74 of the *Employment Act* place the responsibility of keeping employment records on the employer, and where an employer fails to provide employment particulars, Section 10(7) of the Act shifts the burden of proof of terms of employment to the employer.
>
> 23. In the circumstances, the Court adopts the Claimant's testimony that he worked throughout from 1st August, 2012 until October 2017."

17. Section 10(7) of the *Employment Act* provides as follows:-

> "If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."

18. The Respondent herein, being the employer, failed to prove its allegation that the Appellant was a casual employee. The Appellant's testimony that he worked continuously from 23rd January, 2017 to 1st March, 2019, coupled with the documentary evidence in that regard, is lucid and was not rebutted, and accept the same, and find and hold that the Appellant was not a casual employee, but was an employee to whom Section 35(1) of the *employment Act* applied.

19. On the second issue, the Respondent was not shown to have complied with Sections 35(1), 41 and 43(1) of the *Employment Act* in terminating the Appellant's employment, and was not shown to have acted in accordance with justice and equity. The Appellant testified that he reported on duty on 2nd March, 2019 and was informed by the Respondent's Manager that his employment had been terminated. Section 45(4)(b) provides that termination of employment shall be unfair:-

> "Where it is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee."

20. I find and hold that termination of the Appellant's employment was substantively and procedurally unfair.

21. On the third issue, and having made a finding that termination of the Appellant's employment was unfair, and having taken into account the circumstances and the manner in which the Appellant's employment was terminated, I award the Appellant the equivalent of eight months' salary, which is Kshs.7,500 x 8 =Kshs.60,000/=. The Respondent did not rebut the Appellant's evidence that his salary at the time of termination was Kshs.7,500/=.

22. The claim based on alleged underpayment was not proved, as no evidence was adduced by the Appellant regarding the same. I have looked at both the Appellant's written statement which he adopted as his testimony at the trial, as well as his oral evidence at the trial, and it is my finding that the claim was not proved. The same is declined.

23. The claim for Kshs.7,500/= being payment in lieu of notice is allowed.

24. The prayer for issuance of a Certificate of Service is allowed pursuant to Section 51(1) of the *Employment Act*.

25. In sum, and having considered written submissions filed on behalf of both parties herein, the trial court's judgment delivered on 15th September, 2022 dismissing the Appellant's suit with costs is hereby set aside, and Judgment is hereby entered for the Appellant against the Respondent as follows:-

    a. Compensation for unfair termination of employment Kshs.60,000/=.

    b. One month salary in lieu of notice Kshs.7,500/=

    Total Kshs.67,500/=

26. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.

27. The Respondent shall issue a Certificate of Service to the Appellant pursuant to Section 51(1) of the *Employment Act*. This shall be done within thirty days from the date of this Judgement.

28. Costs of the appeal are awarded to the Appellant, and shall be taxed on the lower scale.

29. The Appellant is also awarded costs of proceedings in the Court below.

30. The Appellant is awarded interest on the awarded sum, to be calculated at court rates from the date of the trial court's Judgement.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 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 Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

DRAFT