Ready Consultancy Company Limited v Kamotso & another (Appeal E018 of 2024) [2024] KEELRC 2463 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2463 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E018 OF 2024

M MBARŨ, J

OCTOBER 11, 2024

BETWEEN

READY CONSULTANCY COMPANY LIMITED ..... APPELLANT

AND

KAZUNGU KOMBE KAMOTSO ..... 1ST RESPONDENT

MOMBASA MAIZE MILLERS ..... 2ND RESPONDENT

(Being appeal from the judgment of Hon. L. K. Sindani delivered on 25 January 2024 in Mombasa CMELRC No.433 of 2022)

JUDGMENT

1. The appeal herein arises from the judgment delivered on 25 January 2024 in Mombasa CMELRC No.433 of 2022. The appellant is seeking that the judgment be set aside and the claim be allowed as prayed with costs.

2. The background to this appeal is a claim filed by the 1st respondent before the trial court. He claimed that the 1st respondent employed him as a cleaner from 26 December 2000 to 5 December 2018 when a contract with the 2nd respondent to manage its employees was secured. The 2nd respondent took over the management of the appellant's employees from 5 December 2018 to 30 September 2021 when the appellant retired. He claimed that he had not been issued with any written contract by either the appellant or the 2nd respondent. The appellant would pay him a daily wage of Ksh.130 from the year 2000 to 2018. When the 2nd respondent took over, he was paid a daily wage of Ksh.654 with a Ksh.200 deduction for NSSF. Work hours were from 0700 to 1900 for 6 days a week without annual leave and was only allowed one week off per year. Upon retirement, the 1st respondent went to NSSF and found that there were no remittances despite monthly deductions. He was not issued with notice terminating employment and his terminal dues were not paid. He claimed the following dues;

a. Leave allowance from 2000 to 2021 for 20 years Ksh.274,680;

b. Service pay for 20 years Ksh.196,200;

c. Refund of NSSF deductions for 20 years Ksh.99,600;

d. Certificate of service;

e. Costs of the suit.

3. In response, the appellant denied employing the 1st respondent as alleged and that his employment was from 26 December 2000 to 1st January 2009 when employment was taken over by the 2nd respondent by way of an outsourcing agreement. The 2nd respondent took over management of the appellant's employees from 1st January 2009 and not 5 December 2018. The appellant was not party or complicit to the 1st respondent's retirement on 30 September 2021 as alleged. The claims made against the appellant should be dismissed with costs.

4. The 2nd respondent in response has made mere denials and that the appellant was a casual labourer employed daily and paid when work was available. The appellant attained retirement age and was notified hence there was no wrongful termination of employment. The claims made should be dismissed with costs.

5. The trial court heard the parties and held that the 1st respondent was entitled to the following terminal dues;

a. Ksh.274,680 in leave pay;

b. a refund of Ksh.99,600 being unremitted NSSF and NHIF dues;

c. Interests in (a) and (b);

d. Certificate of service;

e. Costs of the suit.

6. Dissatisfied with the judgment, the appellant filed this appeal on seven (7) grounds.

1. That the learned magistrate erred in law and fact in failing to specify the amount payable by the appellant and the 2nd respondent;

2. The learned magistrate erred in law and fact in failing to apportion the terminal dues payable by the appellant and 2nd respondent;

3. the learned magistrate erred in law and fact in awarding the 1st respondent leave allowance amounting to Ksh.274,680;

4. The learned magistrate erred in law and fact in failing to appreciate the application of Section 90 of the *Employment Act* in awarding leave allowance and terminal dues;

5. The learned magistrate erred in law and fact in awarding a refund of unremitted NSSF and NHIF dues to the 1st respondent.

6. The learned magistrate erred in law and fact in failing to appreciate that the 1st respondent stated that his services were terminated by the 2nd respondent hence the appellant did not terminate his services.

7. The learned magistrate erred in law and fact in failing to consider the submissions of the appellant.

7. On the appeal, parties attended and agreed to address by way of written submissions. Only the appellant and the 1st respondent attended and filed written submissions.

8. The appellant submitted that employment of the 1st respondent ceased on 1st January 2009 when his employment was outsourced to the 2nd respondent following an agreement between the two employers. Subsequent employment was not regulated by the appellant as alleged. The employment relationship ceased upon the takeover by the 2nd respondent. There is no contract produced or payment statements to demonstrate any employment relationship after 1st January 2009 between the appellant and the 1st respondent. In the case of *Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited* [2017] eKLR the court held that it is not the business of the court to re-write a contract. In this case, the agreement between the appellant and the 2nd respondent on 5 January 2009 allowed the transfer of employees. In the case of *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd)* [2014] eKLR the court held that there is a distinction between an independent contractor and an employee. In this case, the 1st respondent was an employee of the 2nd respondent.

9. The claim for leave pay, service pay and unremitted statutory dues and costs for the period ending 1st January 2009 are time-barred. This should have been addressed within the meaning of Section 90 of the *Employment Act* and the appeal should be allowed.

10. The 1st respondent submitted that the appellant did not dispute the employment relationship or file any proof that terminal dues were paid in full. The appellant indeed employed the 1st respondent as a cleaner and no written contract was issued. In the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR the court held that parties are bound by their pleadings. Without any record to demonstrate payment of the claimed dues, the judgment of the trial court is proper and should be affirmed with the dismissal of the appeal.

Determination

11. This is a first appeal. The court is under a duty to re-evaluate the entire record, make an analysis and arrive at a conclusion. However, take into account that the trial court had the opportunity to hear parties in evidence.

12. The facts about the 1st respondent's employment are that, from the 26 December 2000 to 1st January 2009 he was an employee of the appellant. There was an outsourcing agreement between the appellant and the 2nd respondent with effect from 1st January 2009 to 31st December 2011. This agreement is dated 5 January 2009.

13. The appellant and the 2nd respondent agreed that;

    The contract is for the provision of labour for the security, production, and packaging services of maize and wheat flour, animal feeds and other ...

14. The parties to the outsourcing agreement also addressed the legal regulations to include;

    The contractor [appellant] shall be made responsible for all legal requirements of the employees. The contractor shall be responsible for all statutory payments to the relevant government authorities. These shall include payment of VAT, PAYE, NHIF, Training Levy & NSSF, and Withholding Tax and produce Certificates and Receipts of payment. ...

15. Inherently, this is purely a commercial contract between the appellant and 2nd respondent. The 1st respondent's employment remained under the appellant. The agreement was for the provision of staff where the appellant as the contractor was to provide his employees with identification cards and job cards which shall be submitted to the company when each employee enters the company.

16. This contract ended on 31st December 2011 and was subject to renewal.

17. The appellant filed a contract dated 4 January 2012 for the same terms and for the period of 1st January 2012 to 31st December 2012.

18. A further contract for the period of 1st January 2013 to 31st December 2013 is filed.

19. Another contract for the period of 1st January 2016 to 31st December 2017 is filed.

20. Finally, the contract for the period of 1st January 2018 to 31st December 2019 is filed.

21. The contracts cover the same terms and conditions wherein the 1st respondent was the employee of the appellant placed for work with the 2nd respondent.

22. The 2nd respondent's response comprises mere denials. There are no work records filed.

23. From the evidence before the trial court, the 1st respondent testified that he used to work for the 2nd respondent. Through a letter dated 2 September 2021 addressed to the appellant, his employment was terminated. This letter is not produced.

24. The appellant and 2nd respondent have not filed any employment contract. The assertions that he was a casual employee also have no work records.

25. Even where the employer asserts that the employee is a casual, which is not the case here, the duty to file work records is on the employer under Section 10(6) and (7) of the *Employment Act*. The appellant as the employer and the 2nd respondent as the entity where the 1st respondent was placed has also a duty to keep records of those at the shop floor as required under the *Work Injury Benefits Act* as read together with the *Employment Act*. To take a view that they only got a contract for labour provision and did not know the persons placed with them is an abdication of a legal duty to protect employees and persons placed at their disposal.

26. Even though the outsourcing agreement was that the contractor, the appellant was to be fully responsible for all work injuries, the 2nd respondent was the entity responsible for the shop floor.

27. In evidence, the appellant called Balis Odinga an employee of the 2nd respondent who testified that there was an outsourcing agreement with the appellant. It was agreed that the appellant would provide employees to the 2nd respondent, manage them and also pay them. The 2nd respondent did not take any responsibility in employment and only sourced for labour. The statutory payments were to be paid by the appellant. The appellant kept all work records.

28. The 2nd respondent cross-examined this witness who confirmed that there was no employment relationship with the 1st respondent who remained an employee of the appellant at all material times.

29. The purpose of an outsourcing agreement is gone into in the case of *Wrigley Company (East Africa) Limited v Attorney General & 2 others & another* [2013] eKLR the court held that;

> " ... it necessary to set the parameters for a credible outsourcing program as follows inter alia:
>
> a) Ordinarily, employers are not expected to outsource their core functions;

b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;

c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and

d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise."

30. This position is reiterated in the case of *Tailors and Textiles Workers Union v Chamunda Spin Limited & 2 others* [2019] eKLR and the case of *Kenya Union of Commercial Food and Allied Workers v Jamii Distributors E.A Limited* [2021] eKLR that Labour Outsourcing is gaining popularity with most organizations across the world opting for it. Of course, there has been resistance and suspicion about it but this has not prevented it from gaining ground. It is at the discretion of an organization when it comes to restructuring its business operations to sustain profitability and remain competitive. However, there is a fundamental difference between outsourcing labour as a commercial contract and outsourcing employees to a new company.

31. The agreements filed by the appellant in this case relate to the placing of its employees with the 2nd respondent under a commercial contract for the provision of labour. The employment relationship is retained by the appellant and not the 2nd respondent.

32. From the last contract ending 31st December 2019 until the letter dated 9 September 2021, the appellant and the 2nd respondent have not produced any employment contract.

33. Each contract for the provision of labour by the appellant and the 2nd respondent regulated their relationship and not that of the 1st respondent. The appellant as the employer failed to allocate the 1st respondent an employment contract under Sections 7, 9 and 10 of the *Employment Act*. This lapse continued from 26 December to 30 September 2021 when employment terminated through retirement. The appellant has not filed any employment contract on the terms and conditions applied to the 1st respondent for the duration of employment. The agreements entered into with the 2nd respondent cannot extricate the appellant from the legal duty to issue the 1st respondent with an employment contract and before termination of his employment, to issue notice and reasons leading to termination of his employment. The appellant had the legal duty to pay all statutory dues concerning the 1st respondent. There are no work records on any remittances of statutory dues.

34. The court finds that the appellant was the employee of the 1st respondent at all material times.

35. The lapse in issuing him with a contract of employment and placing him under the 2nd respondent did not change the employment status. To rely on the provisions of Section 90 of the *Employment Act* to urge a case that employment ceased on 1st January 2009 upon the *outsourcing agreement,* this is not an outsourcing agreement in the strict sense but a commercial agreement for the provision of labour and does not remove the appellant from the legal duty to apply employment terms and conditions on the 1st respondent.

36. Where the 1st respondent remained on casual terms of service from 26 December 2009 to 30 September 2021, his rights and benefits became secured under the protections of Section 37 of the *Employment Act*. In the case of *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR the Court of Appeal defined the elements of a casual employee and that where there is long service beyond 24 hours

for work not likely to end in a day, such an employee becomes protected under the provisions of Section 37 of the *Employment Act*. In the case of *Kenyatta University v Esther Njeri Maina* [2022] KECA 1201 (KLR) the court held that an employer cannot have an employee under the guise of being casual on the reasoning that it has peak and off-peak sessions. It further held that to subject an employee to such a treatment is unfair because being laid off during off-peak season does not guarantee the employee permanency and neither can the employee look for employment elsewhere during the off-peak season.

37. In this case, the appellant being the employer, should have secured the employment of the 1st respondent until his retirement. The application of Section 90 of the *Employment Act* based on the last outsourcing agreement ending on 31st December 2019 for employment ending on 30 September 2021 cannot remove the appellant from liability.

38. To this extent, the awarded terminal dues should be paid by the employer, the appellant and not the 2nd respondent.

39. The question of apportionment of liability in the payment of terminal dues under the employment relationship does not apply. The appellant as the employer is not removed from such duty under the agreement with the 2nd respondent or under the law.

40. The trial court upon the findings of liability should have assessed each claim by the 1st respondent.

41. On the claim for leave allowance for 20 years, under the provisions of Section 28(4) of the *Employment Act*, an employee is not allowed to accumulate leave days beyond 18 months unless he can demonstrate that he made an application and was denied such annual leave by the employer. Such an application can support a claim going back to 20 years. The rationale is to allow the employee to rest every year.

42. The 1st respondent testified that every year he was allowed 10 days of rest. Cumulatively, without any records that he was allowed to take his annual leave as a right under Section 28 of the *Employment Act*, he is entitled to claim for 33 days only. On the last wage of Ksh.654 per day, he is entitled to Ksh.21, 582 in annual leave pay.

43. On the claim for service pay for 20 years, without any record of the appellant adhering to the provisions of Section 35(5) and (6) of the *Employment Act*, service pay is due. The applicable rate is payment for 15 days for each full year worked. On the wage of Ksh.654 x 15 days x 20 full years, the 1st respondent is entitled to service pay at Ksh.196, 200 in service pay.

44. The claim for refund of deductions not remitted to NSSF is hence addressed in service pay. These deductions should have been remitted to the statutory body and not paid to the 1st respondent. His only claim at this stage is service pay which is addressed and redressed.

45. A certificate of service is due at the end of employment for the entire period of employment.

46. This appeal is necessitated by the appellant and as analyzed above, the appellant failed to adhere to the mandatory provisions of the law as required under Sections 7, 9 and 10 of the *Employment Act*. The appellant will meet the costs due to the 1st respondent for the lower court proceedings and this appeal.

47. Accordingly, the judgement delivered in Mombasa CMELRC No.433 of 2022 is hereby set aside and judgment entered for the 1st respondent in the following terms;

    a. The appellant was the employer of the 1st respondent;

    b. The appellant to pay the 1st respondent's terminal dues in full;

    c. Leave pay Ksh.21,582;

d. Service pay Ksh.196,200;

e. The appellant to pay the costs of proceedings before the lower court and this appeal to the 1st respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.

M. MBARŨ

JUDGE