



**Zamzam Wholesalers Limited v Otieno (Appeal E152 of 2024)
[2024] KEELRC 13453 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E152 OF 2024
M MBARÚ, J
DECEMBER 16, 2024**

BETWEEN

ZAMZAM WHOLESALERS LIMITED APPELLANT

AND

CAVINOUMA OTIENO RESPONDENT

*(Being appeal from the judgment of Hon. RN Akee delivered
on 27 June 2024 in Mombasa CMELRC E334 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 27 June 2024 in Mombasa CMELRC E334 of 2021. The appellant is seeking that the judgment be set aside and the claims by the respondent dismissed with costs.
2. The background of the appeal is a claim that the respondent filed before the trial court on the basis that the appellant employed him on a casual basis as a storekeeper on 3 June 2019 at a wage of Ksh.14 300 per month. He worked until 21 April 2021, when his employment was terminated due to redundancy. He claimed that on 10 April 2021, he got sick and asked for permission to go home due to illness. He resumed work on 14 April 2021 but was summoned on 21 April 2021 and told that work was low and the appellant could not afford to pay his wages and should go home. He was paid Ksh.1, 700 and believes that his employment was terminated for taking time off due to illness. He claims that there was an unfair termination of employment and underpayments since, under the Wage Orders, he was entitled to Ksh.26, 132.60 per month. He never took annual leave or paid severance pay. He claimed the following dues:
 1. Notice pay Ksh.26,132.60;
 2. Underpayments Ksh.283,982.40;



3. Leave allowances for 2 years Ksh.42,982.40;
 4. Service pay for 2 years Ksh.30,153;
 5. Overtime of 3 hours per day Ksh.235,198.08;
 6. 20 public holidays Ksh.40,204;
 7. 12 months compensation Ksh.313,591.20;
 8. Certificate of service;
 9. Costs of the suit.
2. In response to the respondent's claims, the appellant vehemently denies the existence of an employment relationship as alleged. The appellant argues that the respondent's claims lack substantial proof and should be dismissed. The appellant also presents a CR12 form to support their position on the directorship of the company.
 3. In the judgment by the learned magistrate, the court held that judgment was entered as per the statement of claim. Except for prayers (e) and (f). Costs of the suit and interest from the date of judgment.
 4. Aggrieved by the judgment, the appellant filed this appeal on eight grounds that the learned magistrate erred in law and fact in failing to consider whether there was an employer-employee relationship between the parties and that there was no termination of employment as alleged over a redundancy. The court failed to ascertain whether the alleged redundancy was unfair or due process was followed, and the awards and notice pay were not justified. The underpayments were awarded without proper analysis under the wage bill 2019 despite this being disputed. The award for leave was not justified since the employment relationship was disputed and, hence, in case of unfair termination.
 5. Both parties attended and agreed to address the appeal through written submissions.
 6. The appellant submitted that the response allegations that the appellant employed him were not proved. He relied on Exhibit (1), which was purported to have been issued by the appellant, but this letter was denied. It was fraudulent and lacked essential identifiers such as the company seal. The appellant filed CR12, which clearly shows no relationship with the person identified in the letter produced by the respondent in court as proof of his employment.
 7. Without proof of the employment relationship, the claim made that there was a redundancy leading to termination of employment and the awards by the trial court are unjustified. Under Section 47(5) of the *Employment Act*, the respondent failed to establish a prima facie case against the appellant to justify the allegations of unfair employment termination. In the case of *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* [2013] eKLR, the court held that without the employment relationship being provided, the court would lack jurisdiction. In *Casmir Nyankuru Nyhaberi v Mwakikar Agencies Limited* [2016] eKLR, the court held that the employer must keep work records. Still, in this case, the appellant did not have any work records from the respondent. This position is reiterated in the case of *Samuel Wambugu Ndirangu v 2NK Sacco Limited* [2019] eKLR.
 8. The appellant submitted that they produced the CR12 form to show the appellant's legitimate directors, which the trial court failed to consider on the merits. The respondent alleged that the employment letter was fraudulent and the letter produced was not from the appellant. The awards by the trial court were not justified, and the judgment should be set aside and claims dismissed with costs.



9. The respondent submitted that under the *Employment Act*, the burden of proof, as encapsulated in Section 107 of the *Evidence Act*, adopts the reserve burden of proof. In employment matters, the onus lies with the employee to prove that he was unfairly terminated and the employer to confirm that the employee's services were procedurally terminated. In *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others* [2019] eKLR, the court held that the standard of proof is on the balance of probability not beyond a reasonable doubt, and all the employer is required to prove the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. In *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR, the Court held that the standard of proof is set out under Section 47(5) of the *Employment Act*. The employee must adduce prima facie evidence that there was no valid reason to dismiss him from employment. Once that is done, the employer bears the burden of justifying the dismissal. The employer bears the evidential burden of rebuttal. If the employer cannot rebut the claimant's evidence, then the employee is said to have proven that there was no valid reason to dismiss him based on a balance of probabilities.
10. The respondent submitted that the appellant failed to challenge the evidence that there was employment, and Victor Ochieng Ouma confirmed that, indeed, the Respondent was employed by the Appellant herein and that by the time he was joining the Appellant's business as a loader, he found the Respondent already used by the Appellant. There was no dispute that Mohammed and Abdi-Rashid were employees and supervisors. The appeal should be dismissed with costs.

Determination

11. This is a first appeal. The court's mandate is to review, re-assess, and analyse the entire record and make conclusions. However, the trial court had to see and hear witnesses testify in court.
12. The appellant disputes the employment relationship. The case is that the respondent submitted Exhibit (1), which is fraudulent and does not bear the company seal, and that the persons named are not directors as listed in the CR12 form.
13. The respondent submitted that he was an employee. He found Victor Ochieng Ouma, a loader, and was supervised by Mohammed and Abdi-Rashid.
14. Indeed, to support his claim, the respondent submitted a letter dated 26 April 2021 as a recommendation letter issued by the appellant. Abdi Salam Husein, a director, signs it. The appellant asserts that this letter was issued fraudulently, and Abdi Salam Husein is not a director under the CR12 form.
15. Exhibit (1) issued post-employment. A recommendation letter is not similar to a certificate of Service under Section 51 of the *Employment Act*. One is optional, while the other is a statutory requirement.
16. A recommendation letter cannot apply to negate employment.
17. During a hearing before the trial court, the respondent confirmed that he was employed on casual terms as a labourer. Mohamed Hassan and Ibrahim Bolo terminated his employment.
18. In response, the appellant filed the CR12 form, which indicates that the directors are Abdirashid Hussein Jillo, Abdiwali Osma Mohamed, and Ibrahim Bulif Abdullahi.
19. Upon this evidence, the respondent did nothing.
20. He did not retreat to address these facts or file a response to the appellant's submissions where the employment relationship was challenged.



21. The variances in the employment relationship should have been addressed as a first point of determination. The claims made had no basis without establishing the employment relationship as pleaded.
22. The respondent relied on Victor Ochieng Ouma's evidence to support his case, namely that he was employed as a loader.
23. The trial court's record is that Victor Ochieng Ouma was not called as a witness to allow the appellant a fair chance to cross-examine him and establish the veracity of his case.
24. The variances cannot be ignored. The respondent's lapse in replying to the response once he was notified of the appellant's directorship renders a fatal blow to his case. The trial court should have examined these facts to establish the authorship of the letter of recommendation and whether there was indeed an employment relationship in the first place.
25. Whereas employment on casual terms is allowed under the *Employment Act*, the employee bears the burden of proof under Section 47(5) of the *Employment Act* that there was employment and was unfairly terminated by the employer before shifting to the employer to demonstrate that the termination was lawful.
26. In the case of Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers v Mary Immaculate Primary School [2013] KEELRC 899 (KLR), the court held that;

The burden of proof in employment cases is set out in section 47(5) of the *Employment Act*. For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.
27. This position is reiterated in the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] KEELRC 323 (KLR);

The interpretation given to the section by courts is that all the employee needs to do to discharge the burden of proof on him/her is to present prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination.
28. In the case of Josephine M. Ndungu & others v Plan International Inc [2019] eKLR, the court held that;

Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The burden is discharged once he establishes a prima facie case that the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.
29. Without discharging this burden, there is no basis for the employer to justify the employment relationship and termination of employment. This goes to the root of the matter since, with the employment relationship challenged without proof, the court is denied jurisdiction to hear the claim, and the appeal is justified.
30. The awards by the trial court are without a foundation and proof of the employment relationship.



- 31. The appellant should have addressed this legal issue instantly before proceeding to trial to avoid wasting time and resources, which led to this appeal. No costs shall be issued.
- 32. Accordingly, the court finds no proof of the employment relationship and the trial court lacked jurisdiction to hear the claim. Judgment in Mombasa CMELRC E334 of 2021 is hereby set aside. There are no orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

