



REPUBLIC OF KENYA



KENYA LAW
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**Maingi v Milcon's Limited (Appeal E043 of 2022)
[2023] KEELRC 811 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 811 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E043 OF 2022
M MBARÚ, J
MARCH 28, 2023**

BETWEEN

STEPHEN KITHEKA MAINGI APPELLANT

AND

MILCON'S LIMITED RESPONDENT

*(Being an appeal from the judgment of the Hon. P. Wambugu, Principal Magistrate,
and Nairobi CMCLRC Cause No.492 of 2018 delivered on 24th March, 2022)*

JUDGMENT

1. Following judgment in CMELRC No 492 of 2018 delivered on 24th March, 2022 the appellant aggrieved filed the appeal herein on 13 grounds which can be summarised as follows;
 1. That the trial court failed to make a finding that the appellant was entitled to a Certificate of Service upon termination of employment, found that he was a casual employee which was in error upon shifting the burden of proof of the validity of reasons for termination of employment from the employer to the appellant, the employee. The trial court erred in law and in fact in failing to make a finding that employment terminated without notice and that the appellant had not produced an itemised payment statement which was a matter subjecting the appellant to unfair labour practices and hence should have been awarded compensation. The discharge of the respondent from liability and its statutory obligations was wrong and in error and the judgment should be set aside and the appellant awarded his entitlements with costs.
2. Both parties attended and agreed to address the appeal by way of written submissions.
3. The appellant filed two sets of written submissions.
4. The appellant submitted that employment is not contested save for the nature of his employment, whether on casual or other terms. According to the appellant, his employment contract was verbal and



- he worked for 22 months for the respondent continuously and without any break and the findings by the trial court that there was casual employment was in error. The appellant testified before the trial court that on 10th January, 2017 he was employed by the respondent as a heavy commercial driver at a daily wage of Ksh 600 paid at intervals of two weeks and worked until 27th October, 2018 when his employment was terminated without notice and without payment of terminal dues. No reasons were given for termination of employment. The daily wages paid were an underpayment, there was no payment statement issued or statutory dues remitted for him to the NSSF and NHIF and he was not issued with a Certificate of Service.
5. The appellant submitted that before the trial court, the respondent called Joyce Were as the sole witness and who testified that he had been a good employee whose employment was on casual terms and was terminated due to reduced work flow. She testified that the appellant was paid terminal dues amounting to Ksh 89, 900 and he signed a petty cash voucher for the payments.
 6. The appellant submitted that the trial court in judgment erred in law and in fact in failing to make a finding that he was not a casual employee in terms of Section 37 of the *Employment Act* (the Act) since he had continuously worked for the respondent for 22 months and he was thus entitled to notice pay and compensation for unfair termination of employment together with reasons leading to termination of employment as held in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR.
 7. An employee who is continuously employed is entitled to annual leave in terms of Section 28 of the *Act*, payment of notice pay in terms of Section 35 of the *Act*, and an itemised statement with statutory deductions and which the respondent failed to do as held in *Josephine M Ndungu & Others v Plan International Inc.* [2019] eKLR; *Anthony Njenga Kuria v Bata Shoe Co. (K) Ltd* [2017] eKLR and for these reasons, the claims made should be allowed and the judgment of the trial court be set aside and the prayers sought be allowed with an award for underpayments, notice pay, compensation, certificate of service and costs.
 8. The respondent submitted that the appellant was hired as a casual on and off basis on 10th January, 2017 and was paid an agreed daily wage for his services. The appellant was engaged as a daily casual driver whenever work was available and paid based on his daily contract. The wage paid daily was as agreed when the appellant was hired and upon exit a certificate of service was issued. The appellant testified under oath that he had a daily wage paid at Ksh 600 paid after every two weeks and hence he remained a casual employee on piece rate work and hence he cannot invoke the provisions of Section 37(5) of the *Act*. The trial court properly made its findings that there was casual employment pursuant to Section 47(5) of the *Act* and the appellant had the burden of proof with regard to unfair termination of employment which he failed to discharge.
 9. At the end of employment, the parties held a meeting on 4th December, 2018 and the appellant was accompanied by a union representative and it was established that he was a casual employee and a settlement of Ksh 80, 000 was agreed upon and settled. The appellant accepted the settlement.
 10. The respondent submitted that the appellant would be paid his wages every two weeks without need for an itemised payment statement since he was a casual employee which did not require statutory deductions or notice before his employment terminated. This resulted from reduced work and by consent terminal dues were paid. The appellant engaged his trade union and upon negotiations there was a settlement which the appellant accepted and is therefore estopped from negating its terms through the appeal. The appellant has since accepted payment of Ksh 87, 900 signifying acceptance of the settlement as a casual employee as held in *Idd Salim Mwadele & 19 others v Kwale International*



Sugar Company Limited Civil Appeal No 13 of 2018; Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another Civil Appeal No 43 of 2017.

11. As a first appeal, this court is required to re-assess the evidence and make own analysis taking into account the trial court had the benefit of hearing the parties in evidence.
12. The appellant filed his Memorandum of Claim before the trial court on the grounds that he was employed by the respondent on 10th January, 2017 on an oral contract as a driver and paid a daily wage of Ksh 600 paid after every two weeks. He worked until 27th October, 2018 when at the end of day his employment was terminated and his two weeks' wages were not paid. The appellant was claiming the following dues;
 - a. Underpayments for the year 2017 at Ksh 65,490;
 - b. Underpayments for the year 2018 Ksh 434,160;
 - c. Annual leave Ksh 78,978;
 - d. Notice pay Ksh 42,120;
 - e. Service pay Ksh 39,132;
 - f. Unpaid wages Ksh 8,400;
 - g. Damages for unfair termination of employment;
 - h. Certificate of service and costs.
13. In reply, the respondent's case was that the appellant was a casual employee hired on a needs basis paid an agreed wage and the claims made had no legal basis. Upon reduced work, the casual employment of the appellant was not required and there is no liability to settle the claims made. In evidence the respondent's case was also that upon termination of employment the appellant engaged the trade union and upon which a meeting was held and the matter settled with payment of Ksh 89, 900.
14. Upon judgment, the trial court held that the appellant had failed to proof his case on the required threshold and dismissed the claim.
15. It is not contested that the appellant was employed by the respondent as a driver on 10th January, 2017 and his daily wages of Ksh 600 paid every two weeks. There is no record filed by the respondent as the employer on the number of days the appellant was engaged in any given week, month or year to ascertain the total number of days worked in each period. There is no record of how often the appellant was paid for the two weeks.
16. The fact of the appellant working continuously for the respondent beyond the day and the payment of his wages after every two weeks converted his employment from casual terms to an employee protected under the provisions of Section 37 of the Act, with rights and benefits under the law. He became entitled to a minimum wage, notice before his employment terminated and the attendant benefits. The findings by the trial court that the appellant failed to prove his case on the given facts was in error based on the legal threshold under Section 47 read together with Section 37 of the Act.
17. On a proper analysis of the given facts, the claims made should and ought to have been assessed in this regard, the appellant being protected pursuant to Section 37 of the Act as held in Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR held that;

Our reading of Section 37 of the *Employment Act* reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been



engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR.

18. The fact that the appellant was being paid his wages every two weeks instead of each end of day converted his employment to one protected in law.
19. On the claim for notice pay before employment terminated, such is due. Employment was on oral terms and the wage due is the minimum under the Wage Orders as of the period of employment, that is January, 2017. For a driver of a commercial vehicle, the wage was Ksh 24, 719.50
20. The appellant was earning Ksh 600 per day and for 30 days he had Ksh 18, 000 less Ksh 6, 716 and for the period of January, to April, 2017 he is entitled to Ksh 26, 864 in underpayments.
21. For the period of May, 2017 to October, 2018 the wage was Ksh 29, 169.00 and the appellant was paid Ksh 18, 000 less Kshs.11, 169. For the 18 months, there was underpayment of Ksh 201, 042.
Total underpayments are Ksh 227,906.
22. Notice pay for the appellant is Ksh 29, 169 based on the last wage due.
23. Leave pay is due based on the basic wage and three-quarter days for the months not exceeding a full year all total due is Ksh 43, 753.50 in annual leave pay.
24. On the claim for unpaid wages, such is included in the tabulations for the wages due for the entire period of employment in assessing underpayments.
25. On the claim for compensation for unfair termination of employment, the evidence by the respondent that there was less work which led to the appellant being laid off is not contested. Upon an operational requirement, an employer is allowed under Section 40 read together with Section 45 (5) of the Act to terminate employment for good cause save notice should issue and which is allocated above.
26. The evidence that the matter was addressed and the appellant received ksh 89, 900 is not challenged.
27. A Certificate of Service should issue at the end of employment pursuant to Section 51 of the Employment Act, 2007.
28. Accordingly, the appeal herein is allowed and the judgment of the lower court set aside and the following orders issued;
 - a. Underpayment awarded at Ksh 227,906;
 - b. Notice pay Ksh 29,169;
 - c. Leave pay Ksh 43,753.50;
 - d. Dues (a), (b) and (c) above shall be paid less Ksh 89,900 received by the appellant;
 - e. The dues (d) above shall be subject to statutory deductions;
 - f. A Certificate of Service shall issue; and
 - g. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF MARCH, 2023.

M. MBARÚ JUDGE

In the presence of:



Court Assistant: Japhet Muthaine

