Cypriano Agencies v Katamu (Employment and Labour Relations Appeal E045 of 2022) [2023] KEELRC 1353 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1353 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E045 OF 2022

JW KELI, J

MAY 30, 2023

BETWEEN

CYPRIANO AGENCIES ..... APPELLANT

AND

CHARLES KATAMU ..... RESPONDENT

(Appeal against the entire judgment of Hon. Njalale (SRM) delivered on the 6th October 2022 at Butali CMELRC No. E013 of 2021)

JUDGMENT

1. The Appellant being dissatisfied with the Judgement of Hon. Njalale (SRM) delivered on the 6th October 2022 in Butali CMELRC No. E013 of 2021 filed Memorandum of Appeal dated 3rd November 2022 against the entire decision seeking that the appeal be allowed and the judgment of the lower court dated the 6th October 2022 be set aside with costs at appeal and in the suit to be born by the respondent.
2. The appeal was premised on the following grounds:-
    1. That the Learned Magistrate erred in law and fact in finding that the appellant had not proved its case on a balance of probability contrary to the evidence on record.
    2. That the Learned Magistrate erred in law and fact in making a finding not based on the evidence on record.
    3. That the Learned Magistrate erred in law and fact by failing to consider the intervals the respondent was contracted for service by the appellant as shown in the National Security Fund statement.

4. That the Learned Magistrate erred in law and fact by failing to appreciate that the respondent was employed as a casual labourer whose contract of employment would be renewed from time to time.

5. That the Learned Magistrate erred in law and fact in believing and relying on the respondent's submissions without any evidential value attached to them.

6. That the Learned Magistrate erred in law and fact by ignoring and or failing to consider in totality the Appellant's pleadings and submissions.

7. That the Learned Magistrate applied the wrong principles in law in making her findings and granting house allowance to the respondent.

8. That the Learned Magistrate erred in law and fact in awarding the respondent damages amounting to Kshs. 317,204.75/=

Background to the Appeal

3. The Respondent/Claimant sought vide statement of claim dated 1st December 2021 before the magistrate court the following reliefs:-

   a. One month's pay in liue if notice Kshs. 45,000/=

   b. Compensation for unfair termination 12 months salary @ 11250 per month total Kshs. 135,000/-

   c. House alloance for 105 months worked total award Kshs. 177,187/-

   d. Costs and interests of the suit from filing of the suit until payment in full,

   e. Any other further and better relief this honourable court deems fit and just to grant.

4. The trial magistrate Hon. Njalale(SRM) in Judgment delivered on the 6th October 2022 entered judgment for the claimant against the appellant in the following terms:-

   a. One-month salary in lieu of notice – Kshs. 11,057.00/-

   b. Compensation for unfair termination Kshs 132,000/-

   c. House allowance Kshs 174,147.75/-

   Total Kshs 317,204.75/-

   Certificate of service by the 2nd respondent

   Costs of the suit and interest from the date of judgment.

Hearing

5. The court directed that the appeal be canvassed by way of written submissions. The Appellants' written submission's drawn by MNO Advocates LLP were dated 17th March , 2023 and received in court on the 21st March 2023. The Respondent's written submission's drawn by Mwakio Kirwa Advocates were dated 11th April 2023 and received in court on the 18th April 2023.

Determination

6. The principles which guide this court in an appeal from a trial court are settled In *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

7. Further in *David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another* Nyeri HCCA No. 43 of 2013 the court opined:- 'It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions."

Issues for determination

8. The Appellant in written submissions identified the following issues for determination in the appeal:-

   a. Whether the trial court erred in law and fact by failing to consider the intervals the respondent was contracted for service by the Appellant

   b. Whether the trial court erred in law and fact by applying the wrong principles in law in making her findings and grating damages to the respondent.

9. The respondent in written submissions identified the following issues for Determination in the appeal:-

   a. Whether the respondent's employment was converted from casual to term contract

   b. Whether the trial court applied the wrong principles when making a finding on damages to the respondent.

10. The court will adopt the issues raised by the parties summarized as follows:-

    a. Whether the respondent's employment converted from casual to term contract

    b. Whether the trial court applied the wrong principles when making a finding and awarding on damages to the respondent.

Issue 1. whether the respondent's employment converted from casual to term contract

Appellant's submissions

11. The appellant relied on the National Social Security Fund statement (page 14 of the record) to submit that in year 2019/2020 the respondent worked only for 6 months after renewing consecutive fixed term contracts for the month of November 2019 to April 2020, for 2018/2019 the respondent only worked for 11 months after renewing consecutive fixed term contracts from month of November 2018

to September 2019 in the year 2017/2018. That the statement showed he worked for only 7 months after renewing consecutive fixed term contracts which were only accounted for the year 2018, from March to September. That from the foregoing the respondent was neither a permanent employee nor did he work continuously for a period amounting to 13 months or more since 2017. That at page 14 of the record of appeal the respondent did not work from July 2017 to February 2018 and October 2018 to October 2019.

12. The appellant further submitted that the respondent having not worked continuously for 13 months his case did not meet the threshold of having been employed continuously for thirteen or more months in order to have the right to complain of having been unfairly terminated and relied on the provisions of section 45 of the *Employment Act* which provides:-' (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated."

13. The appellant further submits that the fixed term of contract had no rights beyond the term and there was no automatic renewal and relied on the decision in *Margaret A. Ochieng v National Water Conservation & Pipeline Corporation* (2014)eKLR where Justice Rika held :- ''36. Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment. The Respondent changed its policy, to suit its operations, and the Claimant did not protest at the time the policy shifted in 2008. She instead embraced the change, applied for the new position and executed a contract for a period of three years. She went on to serve the period, and was at all times aware of the expiry date. She wrote to the Respondent on several occasions, acknowledging that her three years would expire or expired on 16th December 2011." The appellant further relied on decision of Court of Appeal in *Registered trustees of the Presbyterian Church of East Africa v Ruth Gathoni Ngotho* (2017) eKLR where the court held :-'29. Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. ''

14. The appellant based on the foregoing submissions submits that the trial court erred in law and fact by failing to consider the National Social Security Fund Statement which showed intervals, the employment contracts and the provisions of the *Employment Act*.

The respondent's Submissions

15. The respondent submits that it was not in dispute that the claimant was a casual labourer. That the NSSF statements(at page 14 of the record)indicated the respondent worked continuously from 2013 until time of termination in 2020 and not when required as alluded by the appellant. That having worked from 2013 to 2020 as casual his employment converted to contract of service under section 37 of the *Employment Act*. That the employment contracts(at page 33 to 53 of the record) indicated the claimant worked continuously and that he agreed with trial court his employment converted to contract of service and was protected by dint of section 45 of the *Employment Act*.

16. The respondent relied on several decisions on conversion of casual employment which the court looked at among them Court of Appeal no. 20 of 2017; *Nanyuki water and Sewerage Company limited v Benson Ntiritu & 4 others* (2018) where the court of appeal affirmed the trial court decision and held the respondent's contract of service assumed permanency and were deemed to be ones where the wages are paid monthly and section 35(1)(c) applied to the contract of service in terms of section 37.

Decision on issue 1

17. The trial court on the issue held at Page 74:-

> 'I have considered the written statements, the muster roll and the contracts between the 2nd respondent and the claimant hereto produced and the same indicated that the claimant worked from 2013 to April 2022. The plaintiff produced National Security Fund statement which indicated the said claimant worked continuously for the 2nd respondent and not on need basis as indicated by the 2nd respondent. In view of the above I find and hold that the claimant casual employment converted to monthly salary within the meaning of section 37 (1)(a) of the *Employment Act* and thereby became protected from unfair and wrongful termination by the employer by dint of section 45 of the *Employment Act*."

18. At the trial, the claimant in his witness statement (page 9) stated that he was permanently employed by the respondent as a loader stationed and performing work belonging to the 1st respondent effective 1st july 2013 at daily wage increased to 375/- as time of termination. At page 14 of the record of appeal was NSSF statement indicating remittances from 2013 july to April 2020.

19. At the trial, the response by the appellant(page 21) disputed the permanent employment claim and stated the claimant was employed as casual labourer whose contract of service would be renewed from time to time with last renewal of 1st April 2020 at daily rate of Kshs. 370 per day. The witness statement of Michael Otumbo(page 29) at paragraph 2 stated the claimant was a loader from July 2013 for 78 days which contract was regularly renewed until April 2020 when it was renewed for further 78 days at Kshs. 370 per day to 30th June 2020. The court then finds that from the witness statement of Otumbo it was admitted the claimant worked regularly and the court holds this was a continuous employment from July 2013 with contracts being renewed regularly from July 2013 to 2020. The court finds that in all contracts the respondent was always referred as a casual worker on daily rates(from page 33 of the record).

20. The court finds that the said contracts were clear the claimant was working on casual basis. A casual worker is defined under the *Employment Act* as "casual employee" means 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; ''

21. The court finds that claimant was engaged for more than 24 hours and for more than three months continuously in 2013 by the Appellant hence section 37 of the *Employment Act* applied to wit:- '37. Conversion of causal employment to term contract (1) Notwithstanding any provisions of this Act, where a casual employee— (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service". The Court of Appeal in *Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR considered a similar case of casual workers engaged for lengthy periods as follows:- 'Finally, among the authorities we have considered on this aspect, this Court in *Chemelil Sugar Company vs Ebrahim Ochieng Otuon & 2 Others* [2015] eKLR was of the view that employees who, on the facts of that case, were initially engaged as casual employees and worked in various capacities for periods ranging between one year and fifteen years, had their respective contracts

of service converted to term contracts by operation of law under section 37 of the *Employment Act*. The Court stated:

> " Those provisions are self-explanatory. The respondents' employment with the appellant were automatically converted into term contracts by operation of that provision."
>
> 'Adverting now to the facts of this case, the respondents pleaded and testified that they were initially engaged as casual workers and were to be paid on daily rates but were paid monthly. They also pleaded and testified that they had variously worked for periods in excess of 30 days over a period of four to seven years. They pleaded unfair labour practice in the failure by the appellant to comply with section 37 and instead terminating their services without compliance with section 35 of the *Act*.... we do not blame the trial court for its summary conclusion that the respondents were engaged as casual employees and that they had worked for a period of continuous days equivalent in aggregate to not less than a month and the job they performed could not reasonably be completed in less than three months or more. Consequently, we find and hold, as the trial court did, that the contracts of service of the respondents assumed permanency and were "deemed to be ones where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service" in terms of section 37." I uphold the foregoing decision to uphold the trial court decision that the claimant's casual employment converted to monthly salary within the meaning of section 37(1)(a) of the *Employment Act* and thereby the claimant became protected from unfair and wrongful termination by the employer by dint of section 45 of the *Employment Act*.

22. The court holds that the claimant having served continuously in excess of 30 days over a period of over 6 years as casual on daily rates at work which appeared to be permanent and regularly as stated by DW (Otambo) the term of employment converted to permanent terms. The Court of Appeal has further pronounced itself on similar engagement of workers on short term contracts or on casual basis for a long time as being unfair labour practice in NRB Civil Appeal No. 261 of 2017 *Kenyatta University Versus Esther Njeri Maina* 'By being retained to what in essence was casual employment, we are further in agreement with the learned judge's summation that the respondent's constitutional rights were infringed. She was treated as a non-permanent employee and this is tantamount to unfair labour practices and thus denying her all the rights of a permanent employee."

23. In the upshot the court upholds that decision of the trial leant magistrate that ' the claimant casual employment converted to monthly salary within the meaning of section 37 (1)(a) of the *Employment Act* and thereby became protected from unfair and wrongful termination by the employer by dint of section 45 of the *Employment Act*."

Issue 2:- Whether the trial court applied the wrong principles when making a finding and awarding on damages to the respondent.

The appellant's submissions

24. The appellant submits that the reason for the termination was absconding of duty as evidenced by the muster roll that the claimant deserted his work station on the 1st, 2nd and 7th April 2020 without any notice to the appellant which act fell under section 44(4) of the *Employment Act* as gross misconduct which reads:- ' (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful

grounds for the dismissal if— (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work; '' That they produced notice to show cause dated 13th April 2020, 9 days notice for disciplinary hearing dated 27th April following which disciplinary meeting occurred on the 6th May 2020 and dismissal letter dated 7th May 2020 which were all sent to the respondent's last known address (pages 54-57). The claimant did not respond and he was paid his dues(page 59) and certificate issued.

25. The appellant further submits that the trial court erred in law an fact by awarding the respondent damages as proper notices were sent and ignored, that the nature of employment of the respondent being of fixed term did not meet the threshold set out under section 45 (3) of the *Employment Act* and the claimant absconded duty hence not deserving of award of damages under section 49 (1)(b) of the *Employment Act* and the award of pay in liue of notice. The appellant relied on decision by Ocharo J to effect that the fixed term having come to an end unfair termination was automatically not available as held in *Ronald Ongori Gwako v Styroplast Limited*(2022)eKLR and the Court of Appeal decision in *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho*(2017)eKLR where the court held:- 'bearing the foregoing in mind we note the fixed term contract carries no rights , obligations , or expectations beyond the expiry date'' and relying on the decision submits that any claim brought on termination of fixed contract or summary dismissal following gross misconduct ought not be maintained, that the nature of the nature of fixed contract was temporary.

Respondent's' Submissions

26. The respondent submits that his employment converted from casual employment to term contract and the dismissal did not comply with section 45. The respondent relied on the decision in Ruth Nyasunguta Areimba v Conference Caterers Limited (2021) where the court held that under section 37(3) of the *Act* an employee who after converting from casual employment works continuously for two months or more from date of employment becomes entitled to such conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee. The respondent submits that it was not in dispute the respondent was involved in accident on the 24th April 2019 in the course of employment and the appellant supervisor took him to hospital and he was to do light duties on discharge but the employer asked him to go home and get a medical report. That DW 1 agreed the respondent should not be at work and the allegation of desertion was thus not true. That there was no prove of service of the alleged notices. The respondent relied on the decision in *Antony Mkala Chitavi v Malindi Water & Sewerage Company Ltd*(20130 eKLR where among others the court in a case of summary dismissal there is an obligation on the employer to hear and consider the representations by the employee before making the decision to dismiss or give other sanctions. That the award pay in liue of notice award was justified for lack of termination notice.

27. The respondent submits on award of house allowance that there was no prove by appellant that house allowance was paid as required under section 31 (1) of the *Employment Act*.

28. The Respondent submits on award of damages for unfair termination that the respondent was unfairly and unlawfully terminated and compensated under section 49(1) of the *Employment Act* and relied in Antony Chitavi case(*supra*) where the court held;- ''on the finding of the court that the claimant was unfairly terminated from his employment with the respondent that basis alone gave him remedies available under section 49 of the *Employment Act*.''

Decision on 2nd Issue

29. The trial court made the following observations on the issue at page 73. 'it was not dispute the claimant was involved in accident on the 24th April 2019 while in the course of his employment. It is also not in dispute that the 2nd respondent's supervisor took him to hospital where he was hospitalized and upon discharge the doctor in his report indicated that the claimant ought to be given light duties. DW1 indicated in his testimony that on the claimant's return to work, he transferred him to bagging which was light duties. It was the claimant's case that, on 7/4/2020 while in the cause of his employment , the supervisor mandated him to do heavy work of loading and on informing him that he could only do light duties, he was informed to go back home. The claimant reported the issue to DW1 who informed him to get a second medical report. In essence the said DW1 agreed with the decision of the supervisor that the claimant should not be at work." The Appellant led evidence that the claimant did not return to work and wrote him show cause followed by invitation to disciplinary hearing which it was indicated was posted to the claimant's known postal address. The trial court found no evidence of service of the notices of the show cause letter dated 13th April 2020 or the invitation to the disciplinary dated 27th April 2020. The trial court on basis of the foregoing held there was no compliance with section 41 of the *Employment Act* and declared the dismissal of the claimant as wrongful and unlawful as prayed. The court then awarded notice in liue, house allowance for months worked and compensation for unfair termination for 12 months.

30. The appellant produced the show cause letter dated 13th April 2020 and invitation to disciplinary 27th April 2020 addressed to the claimant at his last known postal address which address was not in dispute(At pages 54 and 55 of the record respectively). On the face of it there was no prove of service. DW1 confirmed he could not prove whether he had served the notices on the claimant (page 87) and that he did not pay one month notice to the claimant. DW further confirmed he did not pay house allowance stating it was included in the salary.

31. The court finds the holding by the learnt magistrate that the termination was unlawful and unfair to be based on the law pursuant to section 41 of the *Employment Act* which requires notification of reason for termination and hearing. The appellant stated it was summary dismissal for absconding of duty under section 44. The court did not find a reason to disturb the holding of the trial court that DW agreed with the supervisor the claimant should not be at work due to his injury. Even if he was unlawfully not at place of work the applicable procedure was under 41 (2) of the *Employment Act* to wit:- ''Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make." The court upholds the finding the trial court that notices for show cause and invitation to disciplinary hearing having not been served then there was unfair termination. The court finds no basis to disturb the holding of the trial court and upholds the decision in *Antony Mkala Chitavi v Malindi Water & Sewerage Company Ltd*(2013) eKLR that :- 'on the finding of the court that the claimant was unfairly terminated from his employment with the respondent that basis alone gave him remedies available under section 49 of the *Employment Act*"

32. The claimant's employment having converted to permanency contract basis as held earlier the claimant was entitled to all terms and conditions of employment including procedural fairness. The court did not find relevancy of the authorities cited by the appellant on fixed contracts as even under those contracts in event of unfair termination during the contract period the employee is entitled To procedural fairness. The reasons for termination were not proved by the respondent who admitted he

had other rolls and further he was aware that the claimant had been told to leave and get a medical report. The court on finding in lawful and unfair termination applieS section 49 of the *Employment Act* to guide it on the award remedies. '49. Remedies for wrongful dismissal and unfair termination (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." The court finds the awards by the trial were all allowed under section 49(1) being notice in liue , house allowance which DW admitted was not paid and being a statutory right under section 31 and compensation for unfair termination under 49(1(c). The actual award amounts was not challenged. The court found the same was justified taking into consideration the respondent had worked for the appellant on causal basis from July 2013 to April 2020 and being denied rights of other employees like leave , paternity leave, and related leaves among others and had not contributed to his dismissal. There was no prior disciplinary issues. The court find no basis to disturb the awards by the trial court.

33. In the upshot the judgment of Hon. Njalale in Butali CM ELRC no. e013 of 2021 between Charles Katamu and Cypriano Agencies and another delivered on the 6th October 2022 is upheld in its entirely and the appeal dismissed with costs to the respondent.

34. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF MAY 2023.

JEMIMAH KELI

JUDGE

In the presence of :-

Court Assistant: Lucy Macheso

Appellant : absent

Respondent: absent