



**Mkoba v Coast Agency Limited (Appeal E007 of 2022)
[2023] KEELRC 1199 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1199 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E007 OF 2022**

**M MBARŪ, J
MAY 18, 2023**

BETWEEN

JAPHET MUSA MKOBA APPELLANT

AND

COAST AGENCY LIMITED RESPONDENT

(Being an appeal from the judgment of Hon. Charles Ngure Ndegwa, Senior Principal Magistrate delivered on 27th January, 2022 in Mombasa ELRC No.298 of 2019)

JUDGMENT

1. The appellant is seeking for the setting aside of the judgment of the Principal Magistrate in Mombasa ELRC No.298 of 2019 on the findings that there was no unfair termination of his employment because no employment relationship was established and in the alternative the judgment be set aside and the claims made be assessed and awarded.
2. The appeal is that the appellant was employed by the respondent as a general worker in August, 2008 to 31st January, 2019 while earning a wage of Ksh. 6,550 per month. Terminal dues claimed were;
 - a. Notice pay at Ksh. 12,926.55;
 - b. Annual leave allowance for 10 years Ksh. 129,265.50;
 - c. House allowances for 10 years Ksh. 853,152.30;
 - d. Salary underpayments for 10 years Ksh. 753,152.30;
 - e. Public holidays Ksh. 124,400; and
 - f. Compensation at 12 months.



3. The response was that there was no employment relationship as alleged in the year 2008 but from 17th June, 2013 and employment was terminated for good cause after the appellant absconded duty in January, 2019 after reporting to work while drunk and disorderly. Notice pay is due from the appellant to the respondent due to absconding duty, the appellant was at work for 5 days in a week, and the claims made should be dismissed.
4. This being a first appeal, the court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
5. In the appeal, the appellant has 9 grounds which can be summarised that the trial court erroneously made a finding that there was no employment relationship between the parties and that the appellant had been working as a casual employee which was not factual and there being no evidence of absconding duty, the respondent had a duty to prove the reasons resulting in termination of employment which they failed to do and the judgment of the trial court should be set aside and substituted with an assessment of the claims made.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that he was employed by the respondent from August, 2008 to 31st January, 2019 as a general worker and in response, the respondent's case was that employment was from 17th June, 2013 and on such facts, the trial court erred in finding that there was no employment relationship established. Even where employment started on casual terms such converted through continuous employment for periods of over a day and the respondent called its witness Mohamed Badi Abdalla that there was employment and hence in terms of Section 37 of the *Employment Act*, 2007 (the Act) having established continuous employment, the appellant was entitled to claim terminal dues against the respondent. In the case of *Ruth Nyasuguta Areimba v Conference Caterers Ltd* [2021] eKLR the court held that based on the evidence and records produced to show there were payments in employment, there existed an employment relationship. The claims made should be assessed on the merits because there was no evidence to demonstrate that the appellant absconded duty as alleged and due process is part of the legal requirements before an employer can be found to have fairly terminated employment as held in *Donald Odeke v Fidelity Security Limited* Cause No.1998 of 2011.
8. The respondent submitted that there was admission of employment but this did not commence in the year 2008 but in June, 2013 as a general worker and the appellant absconded duty hence terminating his own employment. There was no notice issued before terminating employment after working for the respondent and earning a daily wage of Ksh.200 all at Kshs. 1,750 a week and would report to work while drunk. Under Section 35 of the Act, the appellant should have issued notice or paid in lieu of notice which he failed to do.
10. There was no underpayment of wages since the respondent relied on the Wage Orders as held in the case of *Nzau Nzilu v Board of Management Rasul Ai Amin Preparatory School* [2020] eKLR. The wages paid were daily and not monthly and hence not regulated under the Wage Orders without provisions of house allowances or pay for work during public holidays. Any claims made beyond 3 years is hence time barred pursuant to Section 90 of the Act as held in *Nyaboga Nyabonda v Menengai Oil Refineries Ltd* [2021] eKLR.
11. At the core of the appeal is whether there was employment between the parties; whether the appellant was a casual employee; and whether the Wage Orders applied to the appellant and if so if the claims for underpayments, annual leave, public holidays and house allowances are justified.



12. With regard to employment of the appellant by the respondent, the claim before the trial court was that employment was from August, 2008 to 31st January, 2019 and in response, the respondent admitted that employment was from 17th June, 2013 to sometime in January, 2019 when the appellant absconded duty. With admission of employment by the employer, the findings by the trial court that the appellant was a cleaner which are casual duties and hence he did not establish an employer-employee relationship is contrary to what was pleaded and admitted.
13. On the admission by the employer, the foundation of employment relationship was addressed from 17th June, 2013 to January, 2019. To hence lose this foundation is an error.

A casual employee is defined under Section 2 of the Act to mean;

“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;

14. Employment must start and end each day. In this case, the respondent as the employer engaged the appellant continuously for duties which did not end from 17th June, 2013 to January, 2019 on a daily wage of Ksh.200 paid weekly for days worked. The employment ended upon the alleged absconding of duty meaning the respondent expected the appellant to be at work.
15. The respondent filed payment slips in petty cash vouchers for Ksh.350, and Ksh. 1,050 and all demonstrate that the appellant was not paid daily.
16. Where employment is undertaken continuously and wages paid weekly or monthly over duties not likely to end, such an employee becomes protected under the provisions of Section 37 of the Act.
17. In the case of *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another* [2018] eKLR the court in addressing a claim as regards casual employment 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 vs. Kwekwe Mwakele & 67 others* [2017] eKLR.
18. Upon the protection under the law, the appellant’s employment was secured with right and benefits under the Act.
19. In the case of case of *Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR the court held that;

Section 37 of the *Employment Act*, 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.



20. Where the employee is retained by the same employer doing the same duties for days, week, months and over years, Section 37 of the Act steps in to secure the rights of such an employee as held in *Esther Njeri Maina v Kenyatta University* [2020] eKLR that;

The law also envisages that an employer is duty bound to issue an employee with an appointment letter detailing the nature of the relationship as envisaged under Section 9 of the *Employment Act*. The Respondent failed to issue the petitioner with a contract of employment and held her as a casual for over 3 months as she performed the same tasks, which flouts the law.

21. The duty to comply with the law in an employment relationship rests upon the employer. Where employment starts on casual terms over work not likely to end in a day, Section 9 of the Act requires the employer to issue the employee with written terms and conditions of employment and Section 10 of the Act allow the employer the latitude to issue an employment contract on fixed term, piece-rate, seasonal terms or as the case may require. To sit back and enjoy the labours of an employee under the belief there is casual employment only works to the detriment of the subject employer.

22. In this case, the appellant's employment with the respondent spanning from 2013 to 2019 was secured under the provisions of Section 37 of the Act and he enjoyed right and benefits under the Act.

23. Part of the benefits due were payment of a minimum wage in terms of Section 26 of the Act, taking of annual leave in terms of Section 28 of the Act and termination of employment in accordance with fair procedure and reasons in terms of Section 35, 41 and 45 of the Act.

24. On this basis, the trial court ought and should have analysed the claims made accordingly.

25. In June, 2013 the minimum wage for a general worker in cleaning duties was Ksh. 9,780.95 exclusive of the house allowance at 15% and total wage due per month was Kshs. 1,467.15 + 9,780.95 total Ksh. 11,248.10.

26. The appellant was earning a wage of Ksh. 6,550 and the underpayment for this period is Ksh. 4,698 and until 30th April, 2014 for 9 months there was a total underpayment of Ksh. 42,282.81.

27. From 1st May, 2014 to 30th April, 2015 the minimum wage remained constant and for the 12 months the underpayment was Kshs. 56,376.

28. From 1st May, 2015 to 30th April, 2016 the minimum wage increased to Ksh. 10,954.70 and house allowance at Kshs. 1,643 total wage Ksh. 12,597.

29. The underpayment is Ksh. 6,047 and for 12 months' total underpayment is Ksh. 72,566.46.

30. For the period of 1st May, 2016 to 30th April, 2017 the wage remained constant and the underpayment is Kshs. 72,566.46.

31. For the period of 1st May, 2017 to 30th April, 2018 the minimum wage was Ksh. 12,926.55 and house allowance Kshs. 1,938.98 and total wage Ksh. 14,865.54 and the underpayment is Ksh. 8,315.52 and until January, 2019 a total of 18 months the underpayment is Ksh. 149,679.59.

32. This addresses and underpayment and the house allowance due in terms of Section 26 and 31 of the Act.

Total underpayments are Ksh. 404,719.42.

33. Annual leave is a right secured under Section 28 of the Act and the employer must ensure the employee protected in law enjoys such annual leave with full pay or is paid in lieu thereof. Upon filing suit, the



duty is upon the employer to submit work records and evidence that annual leave was allocated or paid for in terms of Section 10(6) and (7) of the Act. Without any proof that the appellant was allowed time off in annual leave, Section 28(2) allows him payment for 18 months of annual leave based on the last basic wage due at Kshs. 12,926 for 21 days and 11 days prorated total 23 days 14 and this is assessed at Ksh. 14,218.60.

34. With regard to work during public holidays, the appellant made a general claim of 10 days for 10 years without giving particulars. Public Holidays are all gazetted and cannot be generalised.
35. Employment terminated on the basis that the appellant absconded duty. Section 44(3) and (4) of the Act allow an employer to terminate employment where the employee is in breach of the employment contract and where the employee fails to attend work. Such is gross misconduct and summary dismissal is justified. However, where the employer alleges that the employee absconded duty, the employer must demonstrate what measures were taken to summon and hear the employee and where the whereabouts of the employee are unknown, the notice due is served upon the Labour officer in terms of Section 18(5) (b) of the Act;

(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.

36. It is not sufficient to allege the employee absconded duty. In the case of *James Okeyo v Maskant Flower Limited* [2015] eKLR the court held that an employee does not dismiss himself from employment and the decision to end employment should come from the innocent party. Where the appellant is alleged to have absconded duty, the respondent should have invoked the provisions of Section 44 of the *Employment Act*, 2007 (the Act).
37. In the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR the court in addressing a similar issue held that;

The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels.

It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.

38. The employer must address misconduct at the workplace. Leaving the employee at large, if at all, such amounts to unfair labour practice resulting in a claim such as the one filed before the trial court and the result of this appeal.



39. Without any evidence of due process or notice being issued to the Labour Officer, the claim that there was unfair termination of employment should have been addressed on the merits and a finding that the respondent failed to adhere to the provisions of Section 35, 41 and 45 of the Act resulting in unfair termination of employment.
40. The appellant worked for the respondent from the year 2013 to 2019 and there is no record of misconduct. For unfair termination of employment, an award of one month is hereby found appropriate based on the last gross wage due at Ksh. 14,865.54.
41. On this basis, notice pay is due to the appellant in terms of Section 35 of the Act. the last wage was Ksh. 14,865.54.
42. As the appeal is successful on all fronts, the appellant is entitled to costs.
43. Accordingly, the judgment in Mombasa CM ELRC No.298 of 2019 is hereby set aside and judgment entered for the appellant in the following terms;
 - a. A declaration that the appellant was an employee of the respondent;
 - b. A declaration that there was unfair termination of employment;
 - c. Compensation awarded at Ksh. 14,865.54;
 - d. Notice pay Ksh. 14,596.62;
 - e. Underpayments including house allowances Ksh. 404,719.42.;
 - f. Leave pay Ksh. 14,218.60;
 - g. The dues payable shall be subject to the provisions of Section 49(2) of the *Employment Act, 2007*; and
 - h. Costs of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

.....and

