



**Sava Builders Limited v Isaka (Appeal E021 of 2022)
[2023] KEELRC 1921 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1921 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E021 OF 2022**

**B ONGAYA, J
JULY 28, 2023**

BETWEEN

SAVA BUILDERS LIMITED APPELLANT

AND

KENNEDY KYALO ISAKA RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. Kimaiyo Suter, Principal Magistrate delivered on 15.09.2022 at Mavoko in Employment and Labour Cause No. 26 of 2020)

JUDGMENT

1. The learned trial Principal Magistrate delivered the judgment in the suit before the trial Court in favour of the respondent and against the appellant for;
 - a. A declaration that the claimant's termination was unfair and unlawful.
 - b. The respondent to pay the following;
 - i. One month's salary in lieu of notice ...Kshs 30,000/=
 - ii. Leave earned Kshs 63,000/=
 - iii. CompensationKshs 300,000/=
 - iv. NSSF refund Kshs 7,000/=
 - v. TotalKshs 400,000/=
1. The appellant filed the memorandum of appeal on 13.10.2022 through Lesiko Njoroge & Gathogo Advocates. The appellant stated that the trial Court erred in law and fact and misdirected itself as follows:



- a. By failing to appreciate that the employment relationship between the appellant and the respondent entailed a day to day casual engagement which was dependent on the availability of work.
- b. By finding that the casual engagement between the appellant and the respondent had converted to term contract contemplated by section 37 of the [Employment Act](#).
- c. By failing to find that the respondent did not report to work from December 14, 2019.
- d. By finding that the respondent was terminated from employment on December 16, 2019 yet the respondent pleaded that his services were terminated on 07.12.2019.
- e. By finding that the respondent had reported to work on December 16, 2019 when he was allegedly terminated from employment without any evidential justification.
- f. By failing to take cognizance of the evidence tendered on behalf of the appellant during the hearing of the defence case.
- g. By finding that the respondent had proved its case on a balance of probability and had been unlawfully terminated from the employment without any legal and/or evidential justification and despite the glaring inconsistencies in the respondent's testimony.
- h. By failing to consider and have due regard to the appellant's case and to the facts and evidence presented in support thereof.
- i. By shifting the burden of proof to the appellant.
- j. By proceeding to pronounce judgment in favour of the respondent in total disregard of the appellant's case, written facts, evidence and submissions.

3. The appellant prayed for orders:

- a. That the appeal be allowed with costs to the appellant.
- b. That the decision in Mavoko MCELRC No 26 of 2020 be set aside and an order be made dismissing the suit with costs.
- c. That this honourable court be pleased to make such further and any other orders as it may deem just in the circumstances.

4. The appellant filed submissions on the appeal. For the respondent submissions were filed through Rakoro & Co Advocates.

5. The respondent had filed the memorandum of claim on 04.06.2020 and amended on October 4, 2021. His case was as follows. He was employed by the appellant in September, 2014 as an assistant machine operator earning Kshs 350 per day paid weekly - which rose to Kshs 400 in 2015, to Kshs 500 in March, 2016 to Kshs 700 in August, 2016 and then he was promoted to the position of machine operator with a daily wage of Kshs 1000 in November, 2017. It was his testimony that he was engaged in making wall units and used to work from 8.00 am to 5.00 pm, Monday to Friday, and, 8.00am to 4.00pm on



- Saturdays. On public holidays he worked 8.00am to 1.00pm, and that he worked throughout without offs or leave.
6. It is the respondent's case that on December 4, 2019 he was hurt and cut by a panel square machine while cutting wood and was taken to Baspen Syokimau Cottage Hospital where he was given 7 days' sick leave to 11.12.2019. That while still on sick leave, his supervisor Mr. Kumar called him on 09.12.2019, 5 days into the sick off leave, and, asked him to go back to work, despite his finger still bleeding.
 7. The respondent went to see a doctor on 16.12.2019 at the aforesaid hospital and the doctor told him that his finger was not healing because of the work he was subjecting it to, and it would rot if he didn't take care of it. The doctor wrote a letter on 16.12.2019 asking the company to give the respondent sick off of a further 10 days to allow the finger to heal.
 8. The respondent stated that when he took the letter from the doctor to the appellant, his supervisor Mr Kumar told him they could not give him sick leave and since he could not work, he should go home and never come back. It was the respondent's case that the last pay received was on 06.12.2019 though he worked up to 07.12.2019. That he went to the labour offices and was given a letter to take to the appellant, and that the appellant had responded to the letter stating that they would pay, but never did.
 9. The appellant filed a reply to amended memorandum of claim dated 26.10.2021.
 10. The appellant's witness (DW1) was Mutua Mwangagi. He testified that he was the appellant's site supervisor. His testimony was that the respondent was engaged as a casual worker to assist in the appellant's carpentry workshop on a day to day basis depending on the availability of work and that the respondent was never employed as a machine attendant as claimed. He stated that the appellant's sites are closed every public holiday and that the respondent's claim that he worked during such days were wholly untrue.
 11. He confirmed that the respondent sustained injuries on 04.12.2019 and had been given the recommended 3 days paid sick off which ended 08.12.2019. That the appellant never received the doctor's letter dated 16.12.2019 as alleged. The respondent only took a letter dated 16.12.2019 from the ministry of labour contending the claimant's sick off had not been acknowledged.
 12. It is the appellant's case that the claimant voluntarily left and absconded duty and did not return to work after the expiry of the alleged 10-day sick off and that the claimant's engagement with the respondent was never terminated as claimed. That any termination of employment must come from the appellant's head office. The stated Mr. Kumar, was an employee of the appellant and did not have any authority to terminate any employee or casual worker on behalf of the respondent.
 13. This is a first appeal and the role of the Court is to reevaluate the evidence and arrive at conclusions one way or the other bearing in mind it did not by itself take the evidence. The decision of the trial Court ought not be disturbed unless shown it misdirected itself and thereby arrived at conclusions that were not just or correct.
 14. The 1st issue in dispute is whether the respondent was terminated on 07.12.2019 or on 16.12.2019. As urged for the appellant, the respondent pleaded at paragraph 9 of the memorandum of claim (as amended) that he was terminated from employment on 07.12.2019 without substantive reason. The appellant pleaded that the respondent was injured on 04.12.2019 and given 3-days paid sick off which ended on 08.12.2019. Thereafter he reported back to work on light duties. The appellant pleaded that it received the letter from the Ministry of Labour dated 16.12.2019 but never received the letter from the Doctor dated 16.12.2019. the appellant denied that it terminated the respondent's employment on 07.12.2019 but that the respondent left employment by his voluntary absconding of work.



15. In the witness statement the respondent stated that he was injured on 04.12.2019 while on duty and given by the hospital 7 days' sick off lapsing on 11.12.2019. Further, he stated that while on sick leave his supervisor Mr. Kumar called him on 07.12.2019 being 5 days into sick off and asked him to report back on duty yet his finger was still bleeding. Further, on 16.12.2019 he visited the Hospital and the Doctor told him that if he did not take care of the injured finger, it would get to rot. The Doctor wrote a letter dated 16.12.2019 asking the appellant to give him 10 days off. When he took the letter to Mr. Kumar, he was told that he could not be given sick leave and if he could not work he should go back home and never to come back as he would be given nothing –and another machine operator was engaged in his place. He further stated, “My last pay was on 06.12.2019 though I worked up the 07.12.2019.” Up to that point, the Court finds contradictions in the respondent's account. If he got injured on 04.12.2019 and recalled on the 5th day of sick off being about 09.12.2019, then how could 07.12.2019 have been his last day at work – and obviously, he could not have been dismissed on 07.12.2019 as pleaded, while in fact, he ought to have been on sick off and the 5th day of alleged recall had not come. The respondent appears not to have exhibited the sick off chit giving him the alleged 7 days off on 04.12.2019. He has instead exhibited the one dated 16.12.2019 for 10 days off effective 16.12.2019 but which the respondent denies to have ever received. In his testimony in Court he confirmed he had not exhibited the sick off chit for the initial 7 days' off. He testified that his last day at work was on 16.12.2019 and not 07.12.2019 as he had pleaded. The appellant's case is that the respondent absconded from duty without notice and never came back. In the respondent's witness Mutua Mwangi (RW) in his statement it is admitted that the claimant was injured on 04.12.2019 while on duty and was given 3 days of sick off and returned on light duties. He returned on 16.12.2019 when he emerged with the letter from the Ministry of Labour dated 16.12.2019. His alleged letter from the hospital dated 16.12.2019 was never delivered to the respondent and after 16.12.2017 he left never to return. The trial Court appears not to address the question if termination ever took place. Instead the trial Court simply concluded that the termination was unfair because the appellant is not complying with section 35 of the [Employment Act](#) on a finding that the respondent did not serve a termination notice. In the supplementary list of documents, the appellant has exhibited the sick off sheet of 04.12.2012 showing that the respondent was given 3 days of sick off. On a balance of probability and taking into account the respondent's contradictions in his pleaded case and witness statement or testimony, there is no reason to reject the respondent's testimony and account that the appellant absconded duty. As urged for the appellant the respondent's account that on 04.12.2019 he was given 7-days of sick off contradicted the exhibited sick off sheet and then the respondent in his oral testimony hoped that sick off sheet would not be seen by the Court. It was submitted for the respondent that his pleaded date and account of separation did not matter but the Court returns that it was material as a party must be bound by the pleadings and together with the other stated incoherency in the respondent's account, the Court returns that he was not dismissed at all.
16. To answer the 2nd issue, the Court returns that the trial Court erred in returning that there had been unfair termination as no termination took place but the respondent had indeed absconded. In any event, the respondent's evidence was never that he had been terminated on December 7, 2019 as he had pleaded. His allegations must be found inconsistent with the evidence. He was never terminated and unfair termination as alleged was not correct at all. The award of Kshs. 300,000.00 compensations for unfair termination is liable to setting a side. Similarly, award of a month's salary in lieu of termination notice will be set aside. The award of NSSF is as well out of step because the respondent did not show that between February 2018 and August 2019 he had been at work and therefore NSSF due for that period. By that finding of unexplained breaks in service, it appears to the Court that the award of leave pay by the trial Court was equally unjustified.



17. The letter from the Ministry of Labour at Industrial Area is dated 14.02.2020 and refers to earlier letters dated 16.12.2019, 23.12.2019 and 16.01.2020 from the Ministry and a response of 17.12.2019 by the appellant. There is no demand for leave days and the claim for leave days appears an afterthought. Further the underpayments were awarded at a monthly flat rate whereas being a special pecuniary claim the particulars of the days worked and the amount claimed must be pleaded and then proved. It is difficult to tell the days the claimant worked subject of the underpayment claimed while breaks in the service have been established. Awarding the underpayment as claimed would, in the opinion of the Court, be a speculative venture.
18. The Court has considered that the appellant failed to maintain and exhibit complete records which would have averted the present dispute. Each party will bear own costs in the lower Court and in the appeal.

Inn conclusion the appeal is hereby determined with orders:

- a. The trial Court's judgment and decree is set aside and substituted with an order of dismissal of the respondent's suit with orders each party to bear own costs.
- b. Appeal is allowed but each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED IN COURT AT MACHAKOS THIS FRIDAY 28TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

