



**Cerapack Products Limited v Makau (Employment and Labour Relations
Appeal E100 of 2022) [2023] KEELRC 1695 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1695 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E100 OF 2022**

K OCHARO, J

JULY 6, 2023

BETWEEN

CERAPACK PRODUCTS LIMITED APPELLANT

AND

BENADETTA MUNYIVA MAKAU RESPONDENT

JUDGMENT

1. The Appellant herein was a Respondent in the Milimani Commercial Court Employment and Labour Relation Cause No E 1200 of 2021, whilst the Respondent was the Claimant. The claim was commenced by way of a memorandum of claim dated June 2, 2021. In her pleadings, the respondent contended that she was at all material times an employee of the Appellant having first come into the employment in the year 2011. That on the March 9, 2020, the Appellant summarily dismissed her from employment on the untrue ground that she had declined to sign a new contract. She sought salary for the days she worked in the month of March 2020; one month's salary in lieu of notice; compensation to an extent of 12 months' gross salary; compensation for unutilized leave days for 9 years; compensation for underpaid salary for the years 2013 – 2020; unremitted NSSF contributions for 3 months; pending arrears; and certificate of service; and costs.
2. Upon being served with the summons to enter an appearance, the Appellant did file a memorandum of appearance and a memorandum of defence dated October 26, 2021.
3. On the 21st of March 2022, the matter was heard before the learned trial Magistrate. Upon hearing both parties, he rendered himself on the matter, through the judgment dated June 17, 2022.

The Appeal

4. Aggrieved by the learned trial Magistrates judgment, the Appellant filed the appeal herein, putting force six grounds thus:



- i. That the learned Magistrate erred in law and in fact in finding that the Respondent was a permanent employee of the Appellant, contrary to evidence adduced.
- ii. That the learned Magistrate erred in law and fact in finding that the Respondent was underpaid in the years 2013 to 2020, contrary to evidence adduced.
- iii. That the learned Magistrate erred in law and in fact in awarding the Respondent unpaid salary for the month of March 2020 whilst the Respondent was not in the Appellant's employment during that month.
- iv. That the learned Magistrate erred in law and fact in finding that the Respondent was entitled to one month's notice.
- v. That the learned Magistrate erred in law and in fact in finding that the Respondent was entitled to unpaid leave.
- vi. That the learned Magistrate erred in law and in fact in awarding the Respondent damages for unlawful termination.

The Appellant's submissions

5. In submitting for the appeal, Counsel for the appellant compressed the six grounds and argued them under two crafted issues for determination, thus:
 - a. Whether the learned Magistrate erred in finding the Respondent was wrongfully terminated by the Appellant.
 - b. Whether the learned Magistrate erred in awarding the Respondent the reliefs he did.
6. Counsel submitted that the learned trial Magistrate erred in finding that the Respondent was a permanent employee of the Appellant arguing that the Respondent did not put forth documentary evidence or any form of evidence, to show that she was a permanent employee. In her own evidence, she stated that was paid fortnightly and for days worked in a month, a fact testament that she was a casual employee.
7. Section 2 of the *Employment Act* defines a casual employee as:

“a person the terms of whose employment provide for his payment at the end of each day and who is not engaged for a longer period that is twenty-four hours at a time.”

The respondent was a casual employee. Her claim for unfair termination was without foundation.”
8. It was argued that there was ample evidence on record, including the Respondent's under cross-examination, that her employment with the Appellant was all through under various three months fixed term contracts. The last of such contracts was that which lapsed in or about the month of March 2020. That thereafter she did not apply for renewal of the contract/employment but absconded duty. After absconding, the Appellant's effort to contact her failed, leaving it with no option other than to summarily dismiss her from employment. The Respondent's conduct of absconding duty was one that could legally attract a section of summary dismissal under section 44(1) of the *Employment Act*. The appellant rightfully dismissed the Respondent, therefore.
9. To support the foregoing submissions reliance was placed on the holding in *Joseph Njoroge Kimani v Summer Rep* (2014) eKLR.



10. It was further submitted that the learned trial magistrate erred in law when he awarded Kshs 130,776 for the Respondent, yet the latter had not placed any evidence before him to prove the same. Equally, the award of Ksh51,450/- under the leave “unpaid leave” was not merited. These were special damages sought which required to be specifically proved. To buttress this point, the decision in *Hahn v Sign* (1985) KLR 716, was cited.

The Respondent’s submissions

11. Counsel for the Respondent submitted that section 2 of the *Employment Act* defines who a casual employee is, thus:

“Casual employee means a person that terms of whose engagement provide for the payment at the end of ...pay and who is not engaged for a long period than twenty-four hours at a time.”

And that by operation of the law, section 37 of the *Employment Act*, casual employment is convertible into term employment, and the employer to whom the conversion relates gets to enjoy the rights and protection accorded to term contract employees, provide for under the Act.

12. To support the foregoing submissions Counsel placed reliance on the holding in *Silas Mutwiri vs Haggai Multi-Cargo Handling Services Limited* (2013) eKLR and *Rapid Kate Services Limited v John Mutisya & 2 others* (2018) eKLR.
13. Counsel further submitted that in any event in the circumstances of this matter, she cannot fit in the definition of “casual employee”. This considering the Appellant’s witnesses and her, evidence that she was being paid fortnightly.
14. That from whatever angle one looks at it, whether that her employment got converted from casual employee status to term employment by operation of the law, or that in the circumstances of the matter she was never a casual employee, the protections and rights encapsulated in section 45 of the *Employment Act* applied to her.
15. It was further submitted that the Appellant’s witness testified that the Respondent’s employment was terminated because she absconded duty. There was no sufficient evidence to establish this ground. For instance, the witness did not at all testify as regards when the Respondent exactly absconded duty. There was nothing placed before the trial Court to demonstrate that indeed the Appellant made attempts to reach her.
16. Where an employer alleges the reason for termination of his or her employee’s contract to be desertion of duty, that employer bears the duty to demonstrate the efforts it made towards getting the employee to resume duty. To support this submission, Counsel placed reliance on the case of *Silas Wandera v Principal Barister Girls High School* (2020) eKLR.
17. Counsel summed up the submissions by stating that, the Respondent having proved that at the time of termination of her employment, she was not a casual employee as was alleged by the Appellant, the learned trial Magistrate did not err in awarding the Respondent the reliefs he did.

Analysis and determination

18. From the onset let me appreciate the scope, ambit, and power of a first Appellant Court while deciding first appeals. The jurisdiction of the first Appellate Court while hearing an appeal is wide like that of



a trial Court. It is open for it to assess all issues of fact and law in the appeal. It is duty upon the first Appellate Court to consider and appreciate the entire evidence and may come to a different conclusion away from that of the trial Court. The judgment of a first Appellate Court must be in texture one that reflects the court's conscious application of mind, and record findings supported by reason on all issues along with contentions put forth and pressed by the parties. If the first Appellate Court has addressed the findings of fact, it must scrutinize the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding.

19. In the case of *Prudential Assurance Company of Kenya Limited v Sukhinder Singh Jutley and Another* (2007) eKLR, on the role of a first Appellate Court, the Court of Appeal stated:

“As a first Appellate Court, it is our duty to treat the evidence and material tendered before the Superior Court to a fresh and exhaustive scrutiny and draw our own conclusion bearing in mind that we have not seen or heard the witness and giving due allowance for this –*Selle v Associated Motor Boat Company Ltd* (1968) EA 123”.

In dealing with this appeal I will consider the foregoing premise.

20. There can be no doubt that though the Appellant has over split its grounds of appeal herein, the appeal hereby revolves around two principal issues; the nature of the Respondent's contract of employment at the material time and whether she was entitled to the reliefs that she, sought and got granted by the trial Magistrate.
21. At the hearing before the trial Magistrate and in the submissions filed herein, the Appellant asserted that the Respondent was a casual employee, and therefore not entitled to the protection and rights available to term employees under the *Employment Act*. On the other hand, the Respondent maintained all through that she was a term employee, not a casual employee as alleged by the Appellant.
22. However, a keen consideration of the memorandum of defence filed by the Appellant before the trial Court clearly reveals that it totally denied that the Respondent was its employee at any material time. It pleaded in paragraphs 3 and 4 thus:

3. The Respondent denies the claim made in paragraph 3 of the memorandum and in particular denies that the Claimant was at any material time its employee and puts the Claimant to strict proof thereof.
4. The Respondent denies the claim made in paragraph 4 of the memorandum and in particular denies that on September 1, 2011, it employed the Claimant as a parking attendant on a gross pay of Kshs 10,500 per month as alleged and puts the Claimant to strict proof as to the allegations.”

In the pleadings, the Appellant did not allege that the Respondent was a casual employee at any time or at all.

23. This court has not lost sight of the fact that in paragraph 13 of the memorandum of response, the Appellant pleaded on a “without prejudice” thus:

“13. Without prejudice to the foregoing defence, the Respondent states that the Claimant's employment contract expired naturally in 2020 after which she failed to apply for a renewal of the same and failed to show up to work following the same to date.”



24. In the case of *Josephine Mwendu vs- University of Nairobi* [2021] eKLR, this Court emphasized the importance of and the effect of failure by a party to lead evidence at the trial which is in conformity with the pleadings thus:
31. No doubt, numerous judicial attentions have been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that cannot be ascertained from its pleadings. In *Adetoun Oladeji [NIG] Ltd vs Nigeria Breweries PLC S.C 91/2002*, Judge Pius Aderemi J.S.C expressed himself;
- “.....It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded,”
32. Sir Jack Jacob in his Article entitled “The Present Importance of pleadings” cited with approval by the learned Judges of the Malawi Supreme Court in *Malawi Railways Ltd v- Nyasulu [1998] MWSC*, aptly captures it thus;
- “As the parties are adversaries, it is left to each one of them to formulate his own case, subject to the basic rules of pleadings.....for the sake of certainty and finality, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by pleadings of the parties as they are themselves. It is no part on the duty of the Court to enter upon inquiry into the case before it, other than to adjudicate upon specific matters in dispute which the parties themselves have raised by way of pleadings. To do so would be to enter upon the realm of speculation. Moreover, such event the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or a defence not made or raised by or against a party is equivalent not to hearing him at all and thus be a denial of justice.....In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is not strictly adhered to. In such an agenda there is no room for an item called “any other business” in the sense that points other than those raised may not be raised without notice.”
33. The Respondent having not pleaded irregularity and or illegality of the contract of employment, cannot be allowed to rely on it to defeat the Claimant's case.”
25. Drawing support from the foregoing judicial pronouncements, I do not hesitate at this point to state that having not pleaded that the Respondent was a casual employee at any time, it was not available for the Appellant to contend before the trial Magistrate that she was at the material time, and therefore unentitled to the vast protection and rights contemplated under the *Employment Act 2007* for the other categories of employees envisaged under section 35 of the Act, Protection and rights including those provided for under section 35 and 36 (dealing with entitlement to termination notice), section 41 (procedural fairness), and section 43, 44, and 45 (which speak to substitutive fairness).
26. The Respondent contended, and indeed the Appellant's witness admitted before the trial Court, that she worked continuously for the Appellant for nine (9) continuous years. The admission presents a considerable difficulty for one to fully and truly comprehend what informs the Appellant's argument that the Respondent was at all material times its casual employee. To agree with this kind of argument shall be no less than completely ignoring the legal definition of a “casual employee” and or characteristics of a casual employment contract.



27. Looking at the testimony of the appellant’s witness, and its submissions, a clear impression emerges why the Appellant held that the employment was in nature casual. The witness asserted that the respondent’s pay was computed at a daily rate, and paid fortnightly. In my view, applying the daily wage amount to arrive at the salary payable at the end of two weeks and thereafter at the end of the month for the other two weeks was just a computation formula that had nothing to affect the fundamental characteristic of the employment relationship between the Respondent and the Appellant.
28. Section 2 of the [Employment Act, 2007](#) defines a casual employee, thus:
- “Casual employee” means a person the term of whose engagement provides 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.”
29. The Appellant did not contend and prove that the Respondent’s employment was one that would be terminated at the end of each day of her work. By reason of this premise and the foregoing premises, I am not persuaded that the Respondent was at the material time or at say time at all a casual employee of the Appellant. Further, I am not persuaded that in the circumstances I should venture into the business of interrogating whether or not there was conversion of a casual employment into a term employment by operation of the law.
30. However, I would state that even if I were to venture into approaching the matter from the angle of “conversion of casual employment by operation of the law” as the trial Magistrate did, I would agree with his interpretation of the law and reasoning and come to the conclusion as he did.
31. By reason of the foregoing premises, the first ground of appeal fails.
32. I now turn to consider the 2nd limb of the appeal. The appellant challenged the learned trial Magistrate’s award on the Respondent’s claim for underpaid salary during the period 2013 to 2020, arguing that the same was without evidence in support. It is surprising that neither Counsel for the Appellant nor for the Respondent submitted with sufficient detail on this ground. All that they did was a casual mention of the figures that the learned trial Magistrate awarded under the head. I have no doubt in my mind that this on the part of the Appellant’s Counsel, this was occasioned by the blur owing to the approach the Appellant gave to the employer-employee relationship between it and the Respondent. Approach which as I have indicated hereinbefore was obviously erroneous. I equally note that the learned trial Magistrate just made the award without in any member availing the reasoning behind it. This was clearly as result of the manner in which he structured his judgment, depriving it of the essential characteristics of an ideal judgment, as I will further comment in the penultimate paragraph of this judgment.
33. The Respondent’s pleadings, and the demand letter by its Counsel to the Appellant, which letter was tendered as evidence without any objection from the latter, expressly brought forth what the former held to be the salary that she was entitled to earn legally, what she earned all through while in employment, and the difference between the two, the underpaid amounts. In my view, the Respondent’s claim under this head was anchored on the provisions of section 48 of the [Labour Institutions Act, 2007](#) which provides:
- (1) Notwithstanding anything contained in this Act or any other written law –
- a. The minimum rates of remuneration or conditions of employment established in a wages order constitutes a term of employment of any employee to whom the wages order applies and may not be varied by agreement.



- b. If the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provided for less favourable conditions of employment, the wages or conditions established by the wages order shall be inserted in the contract in substitution for those terms.
 - (2) An employer who fails to –
 - (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration, or
 - b. Provides an employee with conditions of employment prescribed in the order, Commits an offence.
 - (3)
 - (4) Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide the employee with the conditions of employment prescribed in the order then –
 - (a) if the employer is found guilty of the offence, evidence may be given of any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence and
 - (b) On proof of such contravention, the court may order the employer to pay the difference between the amount which ought to have been paid and the amount actually paid.
.....”
 - (5) The powers given by this section for recovery of sums due from the employer to an employee shall be in addition to and not in derogation of any right to recover such sums by proceedings provided that no person shall be liable to pay twice in respect of the same cause of action.
34. Imperative of state that by dint of the provisions of this section any minimum wage or condition of employment provided for on an applicable wages order cannot be out contracted.
35. In the circumstances all that counsel for the parties and the trial Magistrate were required to do was to refer to the relevant wages orders for the years in issue and consider whether: the Respondent belonged to one of those categories of employees to whom the wages orders applied and: the salary that she was receiving was below what the wages orders. Consideration which I will shortly undertake hereinafter. In my view, the stipulation in any wages order are matters of law not fact evidence needed not to be adduced on them.
36. Having said as I have hereinabove, it is imperative to state that the Respondent’s pleadings and more specifically on the claim for “underpaid salary”, and the learned trial Magistrate’s award thereof was without care of the provisions of sections 90 of the *Employment Act*, which provides for limitation of actions in regard to employment litigation, thus;
- “90. Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the Act neglect or default complained of



37. Considering the provisions of section 90 of the Act, the learned trial magistrate's award would not have been for the period outside the years 2017 to 2020. Any award that was made touching on a period beyond this, was erroneously so awarded as it was in breach of the stipulations of section 90 of the Act.
38. It becomes imperative at this point to consider the relevant wage orders for the period. In the court's view, for the year 2017 the Regulations of wages (General) (Amendments), were relevant, and applicable to the Respondent. The Respondent falls under the category "General Labourer." The minimum wage provided was Kshs 12,926.55.
39. For the period 2018 – 2020, the relevant wage order was that of 2018, which provided for a minimum wage of Kshs 13,572.
40. I have carefully considered the material that was placed before the trial Court and agree with the Court that at all material times, the Respondent was paid below the minimum wage. However, I note that quite erroneously, the learned trial Magistrate made an award for a number of years beyond what section 90 of the Act contemplates.
41. By reason of the premises, the award by the learned trial Magistrate must be disturbed. The award for the period 2013 – 2016 is set aside. Consequently, under the head "underpayments", the Respondent is granted Kshs 109,984/-.
42. The Appellant contended that the learned trial Magistrate erred in law when he awarded the Appellant one month's salary in lieu of notice. I gain the impression that the attack on the award is anchored on the position that the Appellant took from the onset that the Respondent was a casual employee and therefore not entitled to any of the termination notices contemplated under section 35 of the Employment Act. Having found as I have hereinabove that the position was misguided, I hold that there is no basis upon which this can disturb the award.
43. It should be pointed out that section 44(2) of the Employment Act prohibits termination of a contract of service without notice not unless the termination is rightfully under the provision of the section. It provides:
- “(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.”
44. Section 44 of the Employment Act speaks to summary dismissal. The material that was placed before the trial Court did not establish that the Respondent was dismissed summarily on the ground(s) obtaining in section 44(4) or any in character similar to any of those grounds.
45. By reason of the premise(s) the Appellant had no right to dismiss the Respondent from employment without notice. This entitles him to payment of salary in lieu of notice pursuant to the provisions of section 36 of the Employment Act.
46. Section 49 of the Employment Act provides for the remedies available to an employee whose employment has been found to have been terminated unfairly and/or wrongfully. The remedies include the compensatory award contemplated under section 49(1)(c) of the Act. An award of the relief (compensatory) is discretionary, effected depending on the circumstances of each case. The learned trial magistrate exercised his discretion and awarded the Respondent two month's gross salary. The Appellant has not brought forth any grounds that can form basis for setting aside an award by the trial Magistrate born out of an exercise of a discretionary power. The attack on the award collapses.



47. Substantially this court is not persuaded that the learned trial Magistrate erred in making an award under the head “unpaid leave”. However, I have a problem with the extent of the award. Again, the learned trial Magistrate ran afoul of the provisions of section 90 of the *Employment Act* and awarded compensation for a period of 7 (seven) years. Considering the provisions of the law, he would only award compensation for 3 (three) years. Consequently, the award is reduced to Kshs 22,050/-.
48. An ideal judgment is one that concisely brings forth the parties’ respective evidence, issues for determination, determination on each of the issues, and the reasons thereof. With great respect, all these lacked in the learned trial Magistrate’s judgment.
49. By reason of the foregoing premises, the Appellant’s appeal herein succeeds only to a very limited extent, thus:
- a. The award by the trial Magistrate under the head “underpayments” is hereby reduced to Kshs 109,984/-.
 - b. The award under the head “unpaid leave is hereby reduced to Kshs 22,050/-.
50. In the premises of the Appellant’s limited success in the appeal each party shall bear its costs of the appeal. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF JULY, 2023.

OCHARO KEBIRA

JUDGE

In Presence of:

Mr. Mutonyi for the Respondent

Mr. Muturi for Claimant

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

