



Githaiga v Rugi Farmers Co-operative Society Limited (Employment and Labour Relations Appeal E020 of 2022) [2023] KEELRC 1894 (KLR) (1 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 1894 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E020 OF 2022
ON MAKAU, J
AUGUST 1, 2023**

BETWEEN

SIMON WERU GITHAIGA APPELLANT

AND

RUGI FARMERS CO-OPERATIVE SOCIETY LIMITED RESPONDENT

(Being an Appeal against the Judgment and decree of Honorable D.K.Matutu, Principal Magistrate at Mukurwe-ini delivered on 11th October, 2022 in ELRC Case No.E01 of 2020)

JUDGMENT

1. By a memorandum of appeal dated November 7, 2022 the appellant seeks to dislodge the judgment of the subordinate court delivered on October 11, 2022 on the following grounds:
 1. The learned trial magistrate erred in law and fact in holding that the appellant was employed on a casual basis yet he had worked for the respondent from December 1, 2011 to February 13, 2019, a period of over 8 years and had even been enrolled on NHIF and NSSF.
 2. The learned trial magistrate erred in law and fact in holding that there was no contract of service presented by either of the parties, yet from the evidence presented it was clear that the contract of service between the appellant and the respondent was oral a fact that was not in dispute and which as per the *employment act*, it is a contract that can confer rights and can be enforced.
 3. The learned trial magistrate erred in law and fact in holding that no documentation was issued by the respondent yet he clearly testified that he was orally terminated by the respondent.
 4. The learned trial magistrate erred in law and fact in holding that the appellant had not proved his case on a balance of probabilities and consequently denying the appellant his dues.
2. The appellant seeks for the following reliefs:



- a. The appeal be allowed.
- b. The judgment and decree of the learned trial court be set aside and be appropriately reviewed.
- c. Costs of the appeal.

Background

3. On November 4, 2020, the appellant (the claimant in the Lower court) sued the respondent alleging that he had been in continuous employment from December 1, 2011 to February 13, 2019 when the respondent dismissed for unknown reasons. He contended that the termination was unfair and unlawful and prayed for;
 - a. Maximum compensation of 12 months' salary for unfair/unlawful termination.....Kshs.89,100.00
 - b. Pay in lieu of 2 months' notice.....Kshs.14,850.00
 - c. Unpaid leave for each completed year...Kshs.36,383.00
 - d. Unpaid house allowanceKshs.95,781.00
4. The respondent filed Reply to the claim denying liability to pay the claimant the damages sought and averred that the claimant was only employed as a casual employee being paid after every two weeks.
5. During the hearing each side had one witness who they all adopted their written statements and produced the bundle of documents in the lists filed by the respective party. Each witness was cross examined by counsel for the opposite side. The appellant's case was that he worked for the respondent continuously from December 1, 2011 to February 13, 2019 when his services were terminated for unknown reasons and without being accorded a hearing. He fortified the said position by Banks Statements, and NSSF statement. However DW1 contended that the appellant was a casual employee whose services were only required during the peak season. Therefore he denied the appellant's claims stating that he was not in continuous service from 2011 to 2019 as alleged.
6. After the hearing both parties filed submissions. The claimant submitted that his continuous service as casual employee had converted him into a permanent employee by dint of section 37 of the [Employment Act](#); that he was entitled to fairness before termination of his services; and that he was entitled to the reliefs sought in the suit.
7. The respondent on the other hand, maintained its position that the appellant was not in continuous service and therefore his casual employment never converted to permanent employment. It was argued that the claimant was earning varying wages and the statutory deductions also varied depending on the days worked when he was seasonally engaged during coffee harvest season. On the above basis the court was urged to dismiss the suit.
8. After the hearing, the trial court (Hon.D.K.Matutu-PM) considered the evidence and the submission and found that the claimant had failed to prove his case on balance of probabilities and dismissed with costs. In his view the claimant did not establish that he had been in continuous employment for him to assume the status of a permanent employee. Consequently, the claim for unfair termination was found to be untenable.



Submissions in the Appeal

9. The respondent did not participate in the appeal despite being served with the Record of the Appeal. Consequently, only the appellant has filed written submissions in support of the appeal.
10. With respect to ground number 1 of the appeal, the appellant urged that the trial court erred in law and fact in holding that the appellant did not convert into a permanent employee yet there was evidence that he had worked for the respondent for 8 years continuously. He submitted that page 10-15 of the record of Appeal provides proof that the appellant was paid his salary on monthly basis and at the end of each day. To fortify his case he relied on *Ndao Mabupa Daluh v Crown Petroleum (K) Ltd* (2013) eKLR where the court held that continuous engagement of the claimant as casual employee converted him to a permanent employee under section 37 of the [Employment Act](#) and therefore protected from arbitrary termination.
11. As regards ground number 2 of the appeal, it was submitted that the trial court erred in holding that there was no contract of service between the parties herein. He submitted that there was evidence of employment relationship between them and the burden was upon the respondent to disprove the said relationship by documentary evidence.
12. As regards ground number 3 of the appeal, it was submitted that RW1 had admitted during cross-examination that the termination of appellant's services was done orally. The appellant maintained that the termination was without any justifiable reason.
13. Finally it was submitted that the trial court erred in finding that the appellant did not prove his case on balance of probabilities and as such not entitled to the relief sought. It was submitted that there was sufficient evidence that the appellant had converted to permanent employment and that he was relieved from his duties by the respondent without prior notice or any justification. Consequently, it was submitted that the appeal has merits and it should be allowed and the prayers sought granted.

Mandate of the court

14. As a first appellate court, my mandate is to reconsider the evidence on record and re-evaluate it so as to draw my own independent conclusions, and ensure that the conclusions reached by the trial court are consistent with evidence. (See *Sanitam (EA) Ltd v Rentokil* (2006) 2 KLR 70).
15. In the instant appeal I have carefully considered the pleadings, evidence and submissions presented before trial court, and this court. The following issues comment themselves for determination:-
 - a. Whether the claimant was a casual employee as at February 13, 2019.
 - b. Whether the claimant resigned or he was unfairly dismissed by the respondent.
 - c. Whether the claimant is entitled to reliefs sought in the lower court suit.

Appellant's nature of Employment

16. As correctly observed by the trial court, the parties did not table before the court any written contract of employment. Consequently, the court is left to consider the oral testimony and the documentary evidence tendered to see whether the Appellant's casual employment had converted to a contract for indefinite term.
17. The Appellant testified that he worked for the respondent continuously from December 2022 to February 13, 2019 when his services were terminated by the respondent. He backed the said allegation



with NSSF statement for 2011 to 2015. It shows that his employer was the respondent and remittances were made from December 2011 to January 2015 but with gaps in November and December 2012, and again in May, July to October 2014. The appellant did not produce statement for 2016 to 2019 to prove that the respondent remitted NSSF contribution for him. The only reasonable inference to draw from the failure to produce the full NSSF statement is that it was not favourable to him.

18. The appellant produced bank statements to prove that he was in continuous employment by the respondent. The statements are for the period from January 2017 to February 2019. Failure to produce earlier statements means that they were not supportive of his case. The statement for 2017 shows only payment for casual wages for January 2017 and salary advance in December 2017. The said evidence does not support the allegation by the appellant that he was serving continuously.
19. However, in the year 2018, the bank statement shows that the claimant was paid salary every month. The payment was received in the middle of the month and at the end of the month though the pay had small variations in some months. The said trend continued up to February 13, 2019 when the claimant received the pay for January 2019. It follows that from December 2017 to January 2019, the claimant worked continuously and he was paid his wages as a casual employee.
20. Section 37(1) of the *Employment Act* provides that;
 - (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;
 - (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.”
21. The claimant worked continuously from December 2017 to January 2019 on casual basis and therefore his casual employment converted to a contract for indefinite period terminable by notice under section 35 (1) (c) of the *Employment Act* and subject to tenets of fair termination under section 45 of the Act.

Unfair termination

22. Section 45 (2) of the *Employment Act* provides that:-
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”
23. In this case the claimant testified that he was dismissed without any just cause and without being heard. The respondent denied the alleged termination and averred that the claimant resigned from



employment to seek greener pastures. However during cross examination, DW1 states in line number 2 of page 68 of the record of appeal that;

We issued the recommendation letter. We relieved him from work.”

24. The respondent did not explain the reason for the termination to the claimant and never gave him any hearing. He was also not served with a prior notice under section 35 of the *Employment Act*. Consequently, I find and hold that the claimant did not resign but his employment was terminated by the respondent unfairly and unlawfully within the meaning of Section 45 of the Act. In that respect, I am satisfied that the trial court erred in finding that the appellant had not proved unfair termination on a balance of probabilities.

Reliefs

25. In view of the finding that the claimant’s employment had converted to permanent service, and that the same was unfairly terminated by the respondent, I further find that he is entitled to payment of salary in lieu of notice and compensation for unfair termination under section 49 of the *Employment Act*. I award him one month salary in lieu of notice under section 35 of the Act and 3 months’ salary compensation considering that he served continuously just for over one year, and that he did not cause the termination through misconduct.
26. The claim for leave lacks particulars but since from December 2017 to January 2019 the appellant served continuously, he is entitled to leave for 14 months on prorata basis at the rate of 1.75 leave days per month of service equaling to 24.5 leave days.
27. The appellant further sought house allowance of Kshs.95,781.00 but pleaded no particulars. DW1 stated in his oral evidence that the claimant was not entitled to house allowance. Section 31 (1) of the *Employment Act* obliges an employer to provide reasonable housing to his employee or pay to the employee sufficient sum as house rent in addition to the employee’s wages or salary.
28. Consequently, I find and hold that the claimant is entitled to house allowance for the 14 months he worked continuously from December 2017 to January 2019. The conventional rate as per the emerging jurisprudence is 15% the basic salary. In making the awards herein above, I am satisfied that the trial court fell into error by concluding that the appellant was not entitled to the reliefs sought in his suit.

Conclusion

29. I have found that from December 2017 to January 2019 the appellant worked for the respondent continuously as a casual employee and that converted him to an employee for an indefinite period pursuant to section 37(1) of the *Employment Act*. I have further found that the appellant never resigned but his services were terminated by the respondent unfairly for no valid reason, and without being accorded any hearing or prior notice. Finally I have found that the appellant is entitled to salary in lieu of notice, compensation for unfair termination, leave and house allowance for 14 months from December 2017 to January 2019. Consequently, I allow the appeal, set aside the impugned judgment and substitute therewith a judgment in favour of the appellant against the respondent for payment of the following:

- a. Notice.....Kshs.7,425.00
- b. Compensation.....Kshs.22,275.00
- c. Leave.....Kshs.6,063.75
- d. House Allowance.....Kshs.15,592.50



Kshs.66,948.75

The award is subject to statutory deductions but in addition to costs and interest at court rate from the date hereof.

DATED, SIGNED AND DELIVERED AT NYERI THIS 1ST DAY OF AUGUST, 2023.

ONESMUS N MAKAU

JUDGE

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

