



C. Dorman Ltd v Mukhwana (Employment and Labour Relations Cause E220 of 2021) [2023] KEELRC 2512 (KLR) (13 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2512 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E220 OF 2021
AN MWAURE, J
OCTOBER 13, 2023**

BETWEEN

C. DORMAN LTD CLAIMANT

AND

AGGREY AMULAKHO MUKHWANA RESPONDENT

JUDGMENT

1. The appellant filed a record of appeal dated November 9, 2021.

Appellant's case

2. The appellant aver that the trial magistrate erred in finding the respondent was unfairly terminated despite the fact that the respondent never sought such a prayer in his claim.
3. He also erred by finding the respondent was entitled to pay in lieu of leave for 25 years even though prayer was not supported by any evidence.
4. The trial magistrate awarded reliefs which were time barred. He says the reliefs were based on salary of kshs 24,279/- which was not backed by evidence while his daily wages was kshs 550/- per day making kshs 16,500/- per month. He further says the magistrate did not consider the appellant's submissions but instead sought to differentiate the authorities.
5. He says the trial magistrate erred in analysing the facts and the evidence and hence reached a wrong conclusion. He prays the appeal should be allowed.
6. He also prays the decree of the court be set aside and the lower court suit be dismissed and the costs be awarded to the respondent.
7. The court considered the respective submissions by the appellant dated April 25, 2023 and the respondent's submissions dated May 31, 2023.



Appellant's submissions.

8. The appellant submits that the respondent did not plead that he was unlawfully terminated but the court awarded him damages for unlawful termination. He referred to the case of *Stephen Ndulo Wambua vs Beatrice Mbule Mulilu & 2 Others (2019) eKLR*. Where court held that:

'...for the sake of finality and certainty each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case with due amendment properly made...'
9. The appellant also states that the trial magistrate found that the claimant was a service employee and not a casual employee and proceeded on those basis to grant the reliefs and yet the respondent had not made such a request. The appellant also referred to the case of *Angelina Musial Mutua vs Vegpro KI Ltd (2021) eKLR* where the court held "the foregoing binding precedent had not been pleaded that his employment be converted from casual to regular terms the trial court had no jurisdiction to make such a conversion which was the basis upon which it awarded the reliefs it did.
10. The appellant also avers the court awarded house allowance of 25 years even if the contract provided the respondent salary included house allowance. They relied on the case of *J. Winfred Wavila Ndunda vs Insight Management Consultant Limited (2022) eKLR* where court held that the daily wages given included house allowance as provided in the regulation of wages order 2015. The appellant avers the respondent was therefore not entitled to house allowance.
11. The appellant also avers the respondent was not entitled to leave pay of 25 years as was not supported by any evidence. He further says the trial magistrate awarded reliefs that were time barred and he failed to consider the precedents presented by the appellant.

Respondent's submissions.

12. The respondent states in his submissions that during his employment the respondent never went on leave. He says he was not given house allowance and was not given notice to terminate his employment. The respondent states he is entitled to leave as provided in section 28(1)(a) of *Employment Act*. He was also not provided with house allowance and the relevant section is 31(1) of *Employment Act*. The respondent relied on the case of Paul Wachuri Ndong vs Keroche Breweries Ltd Case 374 Nakuru where court awarded leave, notice and service pay.
13. The respondent states he fully supports the judgment and prays the appeal be dismissed with costs to the respondent.

Analysis and determination

14. The issues for determination is whether the respondent was unlawfully terminated and in relation to that was he entitled to the reliefs he was awarded at the trial court.
15. The court would first deal with the matter pertaining to the status of the respondent whether he was employed on casual basis or was he employed on permanent basis in what is known as service term.
16. The trial court in its judgment handled that issue ably and found the respondent's employment was not casual as he had worked for the appellant from around 1991 to January 26, 2017. The appellant by his letter dated January 26, 2017 here they affirmed that respondent worked for the respondent from 1991 to December 2016. The term of an employee who has worked for an employer for that period of time cannot be regarded as a casual employee.



17. The court considered the response by the appellant dated September 18, 2019 and nowhere did they state that the respondent was a casual employee. They actually confirmed that the respondent worked for them for 25 years. Their defence is that the respondent retired voluntarily in order to access his retirement benefits from NSSF. In other words the appellant did not deny that the respondent was their employee on permanent basis. No records were adduced to establish the respondent was a casual employee.
18. Section 37(1) of Employment Act provides:
- (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.
19. Section 35(1) of the act provides that where a contract to pay wages or salary periodically in intervals of or exceeding one month the contract shall be terminable by either party at the end of the period of 28 days next following the giving of notice writing.
20. Also persuaded by the case of *Joseph Okelo adbiambo vs YJ ELM (2012) eKLR* where the court held that under section 37 (3) of the act an employee who after converting from casual employment works continually for two or more months becomes entitled to such terms and conditions of service as would have been entitled to under the act had he not initially not been employed as a casual employee.
21. The court is satisfied that the trial magistrate was right to find that the respondent was a term employee and not a casual employee.
22. The respondent was not given any reason for termination except a casual letter informing him that they acknowledged his services. There is no notice of termination of service and no evidence on policy of retirement and details like his age at retirement. There is also no evidence that the claimant was paid any dues at all as the appellant's letter of retirement is very vague.
23. The appellant acted in violation of sections 43 and 41 and 45 of *Employment Act*. Section 43(1) states:
- In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
24. Equally section 41(1) of employment act states:
- (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



25. And section 45(1) of the *Employment Act* provides:

No employer shall terminate the employment of an employee unfairly.

26. The appellant failed to comply with fair labour practices and therefore the court is in agreement with the findings of the trial court that indeed the respondent was unfairly terminated and so deserved some reliefs.

27. The court however finds glaring errors on the part of the trial magistrate in the reliefs awarded.

28. The court will award the one-month salary in lieu of notice. The court will work with the figures in the claim which is kshs 24,279 which figure the appellant did not oppose in their pleadings.

a. Pay in lieu of notice kshs 24,279/-

b. Leave pay for 25 years was not proved and there is no evidence to back this prayer. There is no evidence that respondent applied for leave for all the twenty five years and was denied. To make a claim of leave untaken after 25 years is suspect. The prayer is declined. Leave will only be awarded for the last year of his employment at one-month equivalent kshs 24,279.

c. House allowance was never raised throughout the 25 years of employment and does not hold water to claim it only after termination of service. The court disagrees with the trial magistrate that such a claim can be sustained after lapse of 25 years. So, the same is declined. The court therefore enters judgment for an aggregate award of kshs 48,279/- as the full payment of the respondent. The same replaces the relief awarded by the trial court.

d. It is unfortunate the claimant did not pray for general damages. The total award of kshs 48,279/- will attract interest at court rates from the date of termination till full payment.

e. Claimant is also awarded costs of this appeal and costs at the lower court as already awarded therein.

f. Certificate of service should also be released to him within 30 days.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF OCTOBER 2023.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

