Orangi v Kenyenya Teachers Training College (Appeal E013 of 2022) [2023] KEELRC 3085 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3085 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E013 OF 2022

CN BAARI, J

NOVEMBER 30, 2023

BETWEEN

PHILIP ITIRA ORANGI ..... APPELLANT

AND

KENYENYA TEACHERS TRAINING COLLEGE ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. K. Mutai (SRM) delivered on 25th April, 2022 in Kisii CMELRC NO. 7 OF 2020)

JUDGMENT

1. This appeal arises from a Judgment rendered on 25th April, 2022, where the Trial Court found that the Appellant was not unfairly dismissed.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 20th May, 2022.
3. The appeal is premised on the grounds That:
    i. That the Learned Trial Magistrate erred both in law and fact in not finding that the Claimant's employment had been converted into permanent employment under S.37 (I) (a), 2 & 3 of the *Employment Act*, having worked for the Respondent from 2nd September, 2012 to September, 2019.
    ii. That the Learned Trial Magistrate erred both in law and fact in failing to appreciate the relevant and applicable provisions of the *Employment Act*, 2007, in relation to termination of employment and redundancy.
    iii. That the Learned Trial Magistrate erred both in law and fact by considering very flimsy and extraneous matters not placed before the Court in reaching his decision which is erroneous and not supported by any provisions of the *Employment Act*, 2007,

iv. That the Learned Trial Magistrate erred both in law and fact by wrongfully exercising his discretion in failing to appreciate the provisions of S.37 (1) (a), 2 & 3 of the *Employment Act* and thereby reached the wrong and unfair determination.

v. That the Learned Trial Magistrate erred both in law and fact in arriving at a conclusion that there is no evidence tendered before the Court to show that the Appellant was unlawfully dismissed from employment, when indeed, there was no notice issued to the Appellant as by law required.

vi. That the Learned Trial Magistrate erred both in law and fact in failing to appreciate that the Appellant's employment was permanent and pensionable.

4. It is the Appellant's prayer that the judgment and decree of the Honourable P.K. Mutai (SRM) made on the 25th April, 2022, in Kisii ELRC No. 7 of 2020, be set aside and judgment entered in favour of the Appellant against the Respondent as pleaded in the Statement of Claim dated 21st February, 2020.

5. That in the alternative, the appeal be allowed and this Honourable Court be at liberty to make its own finding as it may deem just and expedient. The Appellant further seeks that he be granted costs of this appeal.

6. Submissions on the appeal were filed for both parties.

The Appellant's Submissions

7. It is the Appellant's submission that he worked for the Respondent from 2nd September, 2012 to 2nd September, 2019, as a casual employee, and as such, his casual employment converted to a contract of service in accordance with Section 37(1)(a) of the *Employment Act*. The Appellant had reliance in the case of Humphrey Omondi v Vishnu Builders Ltd (2013) eKLR, for the holding that if a casual employee works for a continuous period of working days equal to one month or more, he converts to an employee under a contract of service for payment of monthly salary under Section 37 of the Act, and the employer is barred by Section 45 of the Act from dismissing the employee unfairly.

8. The Appellant further submits that since he ceased being a casual employee, his termination is unfair and unlawful. He sought to rely on the decision in Joseph Okelo Adhiambo & Another v Y.J. Elmi and 2 Others (2012) eKLR and John Mwaniki Kihimo KAK Enterprises (2013) KLR to buttress this position.

9. It is the Appellant's submission that the Respondent summarily dismissed him from service by way of a letter dated 2nd September, 2019, and which termination was to take effect from 3rd September, 2019. It is his further submission that the Respondent has not demonstrated that a notice of not less than a month was issued to both him and the area Labour Officer prior to the termination.

10. It is further submitted that there is no evidence on the criteria that the Respondent applied in selecting the Appellant for termination, and there is no evidence of payment of pending leave days prior to the termination.

11. It is the Appellant's submission that the Respondent breached statutory requirements contained in Section 40 of the *Employment Act*, which require a redundancy process to be transparent, consultative and genuine.

12. The Appellant submits that he was entitled to remedies for wrongful dismissal and unfair termination as provided under Section 49 of the *Employment Act* 2007.

13. It is finally submitted that the Appellant's termination was unlawful and un-procedural, and the Learned Trial Magistrate erred in both law and fact in arriving at a conclusion that there was nothing to show that the Appellant was unlawfully dismissed.

14. The Appellant prays that his claim at the Lower Court be allowed with costs. He further prays that he be awarded the costs of this appeal.

The Respondent's Submissions

15. The Respondent submits that the Appellant was engaged under a fixed-term contract which was set for a duration of three months, and which had a predetermined end date and which was not renewed. It is the Respondent's submission that the Appellant's contract was renewed on a need basis depending on performance and availability of funds.

16. It is further submitted for the Respondent that failure to renew the Appellant's contract was necessitated by unforeseeable circumstances arising from the global COVID-19 pandemic, economic constrains faced by the school and low enrollment of students.

17. It is the Respondent's submission that the closure of the college and the ensuing financial strain, adversely affected both casual and permanent employees leading to employees even those employed on permanent terms, experiencing delayed or unpaid wages due to the economic hardship caused by the pandemic.

18. It is submitted that the Respondent's actions were not only guided by the principles of fairness and justice enshrined in *the Constitution* of Kenya 2010, but also by the obligation to manage its scarce resources prudently during challenging times.

19. It is the Respondent's submission that Section 40,43 and 45 of the Employment and *Labour Relations Act*, is not applicable in the case before court.

20. The Respondent submits that the Trial Court was right in finding that failure to renew the Appellant's contract was not malicious, but rather a necessary and justifiable measure taken in response to the extraordinary circumstances posed by the COVID-19 pandemic.

21. The Respondent implore this Court to uphold the Lower Court's decision, arguing that it is founded upon sound legal principles, precedents, and a well-established framework within *the Constitution* of Kenya 2010, and the Employment and *Labour Relations Act*.

22. They pray that this appeal be dismissed with costs.

Analysis and Determination

23. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized into two as follows: -

    a. That the Learned Trial Magistrate erred both in law and fact in not finding that the Claimant's employment had been converted into permanent employment under S.37 (I) (a), 2 & 3 of the *Employment Act*, having worked for the Respondent from 2nd September, 2012 to September, 2019.

    b. That the Learned Trial Magistrate erred both in law and fact in failing to appreciate the relevant and applicable provisions of the *Employment Act*, 2007, in relation to termination of employment and redundancy.

24. In United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A, Madan J.A had this to say on appeals:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

25. The Trial Court held that from the Appellant's terms of engagement, there was nothing to show that he was unlawfully dismissed and that the only relief he was entitled to, was issuance of a certificate of service and proceeded to dismiss the claim, hence this appeal.

26. The Appellant's position is that he served the Respondent from September, 2012 until September, 2019, when he was terminated vide a letter issued on 2nd September, 2019, and whose effective date was 3rd September, 2019.

27. It is the Appellant's assertion that having served the Respondent for 7 years, he could no longer be regarded as a casual employee, as by Section 37 of the *Employment Act*, his term of service converted to term contract.

28. The Respondent's assertion is that the Appellant was a casual labourer on a three months fixed term contract.

29. The *Employment Act*, 2007, defines a casual employee as:

> " 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;"

30. Further, Section 37 of the same Act provides thus: -

> " Notwithstanding any provisions of this Act, where a casual employee 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, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(l)(c) shall apply to that contract of service."

31. Section 35 (I)(c) goes on to say: -

> " that where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing."

32. The foregone provisions are clear as day, that by working from September, 2012 to September, 2019, the Appellant's casual service converted by operation of law to a term contract and for which termination notice applied.

33. In John Mwaniki Kihimo v. KAK Enterprises [2013) eKLR the court held that under Section 37(3) of the Act, an employee who after converting from casual employment works continuously for two or more months from the date of employment, the employee becomes entitled to such terms and

conditions of service, as he would have been entitled to under the Act, had he not initially been employed as a casual employee.

34. Further, the Respondent has attributed its inability to renew the Appellant's contract to financial constrains resulting from both Covid.19 and low student numbers/enrolment. In the case of Fatuma Abdi v Kenya School of Monetary Studies (2017) eKLR Justice M. Mbaru held thus:

> " Where an employer is faced with financial difficulties, the law has adequately addressed the same at section 40 of the *Employment Act*. For an employer to fail to address termination of employment pursuant to the provisions of the law and ride on the technicality of a fixed term contract, such is to engage in unfair labour practice."

35. I am in agreement with the foregone decision of the Court that an employer, cannot resort to short cuts when the law has clearly provided a solution to an employer faced with financial difficulties, such as those in the present case.

36. The Court of Appeal in Nanyuki Water and Sewerage Company Limited vs. Benson Mwiti Ntiritu and 4 Others (2018), considered the issue of casual employment as follows: -

> " A declaration 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."

37. The Appellant had by virtue of conversion of his casual contract become entitled to notice and fair process, and the Respondent was duty bound to issue him, his union or labour officer notice of the intended redundancy as stipulated under Section 40 of the *Employment Act*. A one day notice is untenable.

38. I therefore return that the Appellant was not a casual employee and was entitled to fair process. I further hold that the manner in which the Appellant's contract was terminated amounts to an unlawful and unfair termination.

39. The decision of the Trial Court is therefore set aside and substituted with a finding that the Appellant was unfairly terminated.

40. The finding of an unfair termination entitles the Appellant to compensation in accordance with Sections 49 and 50 of the *Employment Act*.

41. The termination of the Appellant resulted from a would-be redundancy situation, and for this reason, the Appellant would still have left the service of the Respondent.

42. I in the circumstances, award the Appellant four (4) months salary in compensation for the unfair termination.

43. On the claim for pay in lieu of notice, no evidence was led to prove that the Appellant was entitled to three (3) months' notice. The notice period applicable is thus the one month statutory notice per Section 35(1) of the *Employment Act*.

44. The Appellant is awarded therefore, one month salary in lieu of notice.

45. On the joint claims of service pay and unpaid leave, the Respondent did not show that the Appellant utilized his leave days. Further, the Appellant served on various contracts between 2012 and 2019, and which contracts were separate and distinct.

46. In the premise the contract in issue herein, is his final contract and hence the leave and service severance pay payable is only in relation to the last contract.

47. In the premise, I award the Appellant an equivalent of one month salary on account of leave not taken and an equal amount for severance pay.

48. In whole, the Court makes orders as follows: -

    i. That the decision of the Trial Court is set aside and substituted with a finding that the Appellant was unfairly terminated.

    ii. The Appellant is awarded 4 months' salary in compensation for the unfair termination at Kshs. 28,600/-

    iii. One month salary in lieu of notice at Kshs. 7,150/-

    iv. Service pay at Kshs. 7,150/-

    v. Unpaid leave at Kshs. 7,150/-

    vi. Costs of both the suit before the Lower Court and this appeal.

49. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30TH DAY OF NOVEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

MS. Rotich h/b for Mr. Kimani for the Appellant

Mr. Mweke h/b for Ms. Osebe for the Respondent

Erwin Ongor - Court Assistant