



REPUBLIC OF KENYA



**KENYA LAW**

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**Manono v Sava Builders Limited (Appeal E005 of 2022)  
[2023] KEELRC 2933 (KLR) (17 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2933 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
APPEAL E005 OF 2022  
B ONGAYA, J  
NOVEMBER 17, 2023**

**BETWEEN**

**ALEX LUSOMA MANONO ..... APPELLANT**

**AND**

**SAVA BUILDERS LIMITED ..... RESPONDENT**

*(Being an appeal from the entire Judgment delivered by Honourable Bernard Kasavuli, Principal Magistrate, delivered on 10th March, 2022 in the Chief Magistrate's Court at Mavoko ELRC Case No. 84 of 2020 Alex Lusoma Manono Vs Sava Builders Limited)*

**JUDGMENT**

1. The appellant filed the memorandum of appeal dated 04.04.2022 through the firm of C.K Nyabuto Advocates. The appellant appeals against the trial court's judgment delivered on 10.03.2022 (by Hon. Bernard Kasavuli, the learned trial Magistrate) and upon the grounds that he erred in law and fact by:
  - a. Failing to record the proceedings and submissions of the appellant herein.
  - b. Failing to take into consideration and appreciating the magnitude of the entire dispute and only selectively dealing with only some issues before the court.
  - c. Failing to consider and appreciate the provisions of section 37 of the *Employment Act*.
  - d. Failing to appreciate that the appellant had proved that he was not a casual employee but employed on permanent basis.
  - e. Failing to appreciate that the appellant had proved that he was unfairly terminated from employment.
  - f. Misdirecting himself and erred in law and fact by shifting the burden of proof from a balance of probability to proof beyond reasonable doubt, knowing that it is settled law and practice



that the burden of proof in civil cases is on a balance of probability and hence disregarding the law and fact that the appellant had proved his case and it was the respondent's duty to cast doubt on the appellant's evidence.

- g. Failing to consider the appellant's written submissions and authorities in support of the claim, causing him to arrive at an erroneous decision.
  - h. Failing to exercise his discretion in a just and fair manner and acted in a manner that was biased.
2. The appellant prayed for the following orders that:
- a. This appeal be allowed.
  - b. The Judgment of the Honourable Bernard Kasavuli delivered on 10.03.2022 be set aside in its entirety and the reliefs sought in the lower court granted.
  - c. Costs of this appeal and costs of the Chief Magistrate's Court be provided for.
  - d. Any other relief that this Honourable Court deems fit to grant.
3. Both the appellant and the respondent filed their respective submissions to the appeal, which this court has duly considered.
4. The appellant filed suit against the respondent herein vide the memorandum of claim dated 05.10.2020 and filed on 15.10.2020. His case was as follows. He was an employee of the respondent as a machine operator and had worked continuously for a period of 5 years 2 months and 10 days prior to his alleged unlawful and unfair termination contrary to the provisions of Sections 41, 44 and 45 of the *Employment Act*.
5. That the appellant performed his duties diligently and to the respondent's satisfaction until 26.10.2019 when he reported to work as usual only for the respondent's site manager to notify him that he should no longer report to work. He maintained that his termination was without any justifiable cause, against the rules of natural justice and the *Employment Act*. The appellant stated that the respondent neither gave reasons for his termination nor was he accorded any hearing prior to the same. The appellant prayed for judgment against the respondent for:
- a. A declaration that the claimant's termination of employment was unlawful and unfair.
  - b. The claimant be paid his terminal dues as set out herein below:
    - i. Full payment of one month's salary in lieu of notice ksh 16,800/-
    - ii. 20-days' pay for days worked in October 2019 ksh 12,000/-
    - iii. Annual leave accrued in 5 years ksh 90,000/-
    - iv. Overtime ksh 60,827.25/-
    - v. Public holidays ksh 19,998/-
    - vi. Weekends ksh 95,990.40/-
    - vii. 12 months' pay for unlawful termination ksh 201,600/-
    - viii. Unpaid NSSF contributions ksh 45,000/-Total claim ksh 542,215.65.
  - c. The respondent to pay costs of this claim.



- d. Interest on the above at Court rates.
  - e. The respondent to issue the claimant with a certificate of service in accordance with section 51 of the *Employment Act*, 2007.
6. The respondent filed a reply to memorandum of claim dated 11.08.2021 and filed in Court on 16.08.2021 in which it maintained that the appellant was engaged on a casual basis, on a day to day basis pending on the availability of work. The respondent denied terminating the appellant's employment and maintained that he (the appellant) voluntarily left employment and absconded duties effective 26<sup>th</sup> October, 2019 without prior notice to the respondent.
  7. The respondent maintained that the appellant is not entitled to any of the reliefs sought having voluntarily left employment. The respondent urged the trial Court to find the claim without merit and dismiss it with costs to the respondent.
  8. The trial Court in its judgment found the appellant had failed to discharge the burden of proof placed on him by dint of the provisions of section 47(5) of the *Employment Act*, 2007 thus dismissing the claim in its entirety.
  9. Aggrieved by the trial Court's decision the appellant filed the instant appeal raising the grounds as enumerated in the Amended memorandum of appeal and as further outlined herein above.
  10. As the Court of first appeal, this Court is guided by the findings in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 where the court stated:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Sarif v Ali Mohammed Solan* [1955] 22 EACA 270).”

11. The Court has considered the trial Court's judgment and the testimonies at the hearing. The trial Court found that the relationship was casual and no more. The trial Court further found that the appellant had failed to provide enough evidence to justify the remedies relied upon. Further, the trial Court found that the appellant had relied upon a NHIF statement which showed that payments had been done for August 2019 to October 2019 and there was no any other document relied upon to prove the long period of service alleged for the appellant. While alleging in his testimony he had signed a contract but copy was not given to him and as submitted for the appellant, there was no pleading in the memorandum of claim that there had been a written contract and there is no notice to produce on record. As found by the trial Court, if indeed the appellant had worked for the entire period as claimed, then why did he not exhibit the NHIF statement for the entire period? He stated in cross-examination thus, “I agree salary and NHIF are paid at the same time. I did not receive October salary”. The Court finds that by that testimony the claimant was clearly in contradiction with his pleaded case and his witness statement that he was paid on a daily basis at ksh 600.00 and per paragraph 3 of the memorandum of claim that he was paid salary per day. How then does he claim salary for October, full month? He cannot be trusted in his account. The appellant's contradictory and incoherent evidence cannot be trusted. The trial Court correctly found that the appellant had failed to establish the employment relationship that would justify the reliefs as were prayed for. The Court finds



that the employment was casual and nothing more. The period of service not having been established, what then would be the basis for computing the reliefs prayed for? The Court finds that the trial Court was correct in finding that the relationship being casual and nothing more, it would be superfluous to inquire further as the claims would be based on a finding that the tenure was as long as the claimant had alleged but which was not established at all. All grounds of appeal will collapse. In conclusion the appeal is hereby dismissed with costs and the trial Court's judgment upheld, and, file be returned to Machakos Sub-Registry forthwith.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 17<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

