



**Masiga & 15 others v Menengai Farmers Limited (Civil Appeal
E069 of 2021) [2022] KEELRC 4140 (KLR) (4 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4140 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E069 OF 2021**

M MBARŪ, J

APRIL 4, 2022

BETWEEN

LILIAN NIGHT MASIGA & 15 OTHERS APPELLANT

AND

MENENGAI FARMERS LIMITED RESPONDENT

*(An appeal from the judgement of Hon. Obura following judgement
delivered on 25th June, 2021 in Nairobi MCELRC No.30 of 2020)*

JUDGMENT

1. The facts leading to the appeal herein were that the appellants were employees of the respondent as general labourers on oral contract and continued working on a daily wage of Ksh 416 without taking annual leave. The respondent then introduced term contracts and continued working until December 31, 2019 when the respondent terminated their employment on account of failing to sign the employment contracts. That such action was not based on notice, hearing or any reasons given.
2. The appellants filed suit claiming notice pay, annual leave pay, unlawful deductions, service pay, off days' pay, compensation for unfair termination of employment and issuance of certificate of service.
3. In response, the respondent's case was that the appellants would be engaged by the respondent as and when work was available on seasonal basis and for purposes of picking tea. Seasonal contracts were provided for in the CBA entered between the respondent and other planters in Limuru and Kenya Plantation and Agriculture Workers Union. The appellants would be paid based on the quantity of tea picked by each employee per kilogram and within the minimum wage.
4. The appellants being general seasonal workers were placed on a fixed term contract for a period of 3 months and the last contracts signed expired on October 31, 2019.



5. The appellants then disappeared. At the end of each contract, the respondent would pay for leave days accrued.
6. The trial court delivered judgement on June 25, 2021 and dismissed the claims made by the appellants save for issuance of certificates of service.
7. Aggrieved, the appellants filed the appeal on 8 grounds being that;
 1. The magistrate erred in law and in fact by holding that the claimants were employed on seasonal fixed term contracts which do not exist in law;
 2. The magistrate erred in law and in fact by holding that the claimants were not entitled to illegal reduction of wages when in fact the law prohibits wage reductions;
 3. The magistrate erred in law and in fact by failing to take into account the evidence provided by the claimants that they were employed on diverse dates between 1997 and 2014 and not 2011 to 2014;
 4. The magistrate erred in law and in fact by stating that the claimants were offered new contract to sign and voluntarily declined to sign when in fact there was no such new contracts
 5. The magistrate erred in law and in fact by holding that the claimants were not unfairly terminated;
 6. The magistrate erred in law and in fact on termination dates being December 31, 2019 and not October 31, 2019 apart from Pharine Okaka;
 7. The magistrate erred in law and in fact by ignoring the claimants' prayer for rest days and never addressed it.
 8. Entering judgement dismissing the claimants' claim yet they had proved their case on a balance of probabilities.
8. Parties attended court and agreed to admit the CBA between the respondent and Kenya Plantation and Agricultural Workers Union by consent and to address the appeal by way of written submissions.
9. Only the appellants filed written submissions.
10. The appellants submitted that they were employed as general labourers by the respondent in different dates with duties to pick tea, dig and clear tea bushes. The appellants were members of a trade union, Kenya Plantation and Agricultural Workers union and guided under the CBA.
11. The CBA provided for seasonal employment at clause 20 but had no provisions for fixed term contracts of fixed term seasonal contract and it was erroneous for the trial court to hold that the appellants were employed under seasonal fixed term contract contrary to section 10(2) of the *Employment Act*. The 1st appellant's contract had no end date.
12. The appellants also submitted that the trial court erred in failing to address the issue of illegally deducted wages contrary to section 17 of the *Employment Act* read together with section 19 and 10 and the CBA where the respondent made a deduction from their wages. In *Kenya County Government Workers Union v Wajir County Government & another* [2020] eKLR the court held that the employer has no right to deduct wages before consulting with the employee.
13. The trial court erred in failing to find that the appellants were employed between 1998 to 2014 and not 2011 to 2014. Such finding in the judgement is in error.



14. The documents presented to the appellants to sign were termination of a fixed term contract and not new contracts were issued. The appellants were not engaged on fixed term contracts at all and having served as general labourers for long they became permanent employees under section 37 of the [Employment Act](#).
15. The finding that there was no unfair termination of employment was erroneous. Under the CBA the respondent was required to issue notice before employment terminated. No notice issued and where they were alleged to have failed to report to work, no show cause notices issued to allow for a hearing. No due process was followed as held in [Mary Chemweno Kiptui v Kenya Pipeline Company Limited](#) [2014] eKLR.
16. The date employment terminated was December 31, 2019 and not October 31, 2019. These findings led to a judgement which should be set aside and the appellants awarded notice pay, service gratuity pay, annual leave pay, compensation for unfair termination of employment and costs.

Determination

17. As a first appeal the court is required to re-evaluate the evidence on record and ensure that the trial court acted within the settled principles of law as held in *Selle & Another versus Associated Motor Boat Co Ltd & Others* [1968] EA.
18. Therefore this court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyse the same, evaluate and arrive at its own independent conclusions, but always remembering, and giving allowance to the fact that the trial court had the advantage of hearing the parties.
19. In this appeal, the issues which emerge for determination are whether the trial court applied the correct principles of law in making its findings in dismissing the appellants' case and whether the court should review and or set aside the judgement.
20. Before the trial court, the appellants at the claimants' pleaded that they were employed on various dates from 1998 as casual general labourers until December 31, 2019 when their employment was terminated on account of filing to sign termination letters.
21. Under paragraph 12 of the memorandum of claim, the appellants stated that the respondent should tabulate and pay the claimants all their benefits before compelling them to re-apply for their positions.
22. It is trite in employment and labour relations that the employer has the legal duty to keep work records and once suit is filed to file the same with the court. Such records remain the true reflection of the employment relationship unless otherwise proved in terms of section 10(6) and (7) of the [Employment Act](#), 2007.
23. In this regard, the respondent in defence before the trial court filed fixed term contracts with regard to the appellants, the last such contract expired on October 31, 2019. The respondent has attached the term contracts as part of the record.
24. Fixed term contracts are lawful and legitimate mode of employment in terms of section 10(3) (c) of the [Employment Act](#), 2007;
 - (c) Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

Equally, the employer has the prerogative to issue seasonal/piece-work contracts based on the need, reason, purpose, time and type of work to be performed in terms



of section 18 of the Employment Act, 2007. In this regard, where an employee is under a seasonal and or piece-work contract, the consideration and wage due is paid in accordance with the proportion to the amount of work which has been performed, upon completion of the work, or a daily rate or as agreed in terms of section 18(1)(b) of the Act;

- b) In the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.
25. In the case of Jamii Bora Bank Limited v Minnie Mbue [2021] eKLR the court held that parties to a fixed term contract have the liberty to agree on a start and end date of the employment relationship. And in the case of Apex Steel Limited v Dominic Mutuamuendo [2020] eKLR the court held that;
- ... the general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. It further relied on Johnstone Luvisia v Allpack Industries Limited [2019] eKLR where this court declined to give a declaration of unfair termination where a fixed term contract had come to an end. Therefore, it submitted that, in this case also, the respondent was not unlawfully dismissed but it is his fixed term contract that lapsed.
26. On the records filed by the employer, the trial court assessed the nature of employment and arrived at correct finding that the appellants were lastly serving under term contracts and each came to an end and when offered new contract they declined to sign.
27. Under the term contracts, the appellants were paid for annual leave pro-rated. The respondent filed the schedule of such payments.
28. Under the term contracts, each for a fixed period, payment was made for work done and application of section 28 of the Employment Act 2007 for allocation of annual leave does not apply.
29. On the grounds that there were unlawful and illegal wage deductions contrary to section 17 and 19 of the Employment Act, the appellants' produced payment statements for various months in picking a few in this regard, the court notes that;

in July, 2017 Liko Onesmus Mwau had a wage of Ksh 10, 838.88; total earning of Ksh 13, 302;

less PAYE Ksh126;

NSSF Ksh200; NHIF Ksh 500; COTU Ksh 416;

Advance Ksh 3, 000; MEFA Sacco Ksh 1, 000;

In November, 2019 Keuya George Morara had a gross wage of Ksh 7, 375
prorated leave Ksh 3, 446;

Less PAYE Ksh 1, 070; NSSF Ksh 200;

Advance Ksh 750; milk Ksh 600

In November, 2019 Ambula Josephine Akuru had a wage of Ksh 25, 016 Prorated leave ksh 2, 019;

Less PAYE Ksh 1, 245; NSSF Ksh 200;



NHIF Ksh 850;

Advance Ksh 3, 500; MIFA Sacco Ksh 3, 000

30. Cumulatively, all deductions related to statutory payments to PAYE, NSSF and NHIF, which is a legal requirement and the parties have since agreed and consented to produce a CBA between the employer and Kenya Plantation and Agricultural workers Union and under which union dues are deducted pursuant to section 19 of the Employment Act, 2007. Such is lawful and valid.
31. Further, the deduction from an employee's wage of any salary advanced and payments to a sacco where the employee is a member and secured through the wage is lawful and legitimate. Section 19(1) of the Employment Act, 2007 directs the employer to effect wage deductions with regard to monies authorised under a CBA, an amount the employee has requested to be applied in a given manner and where the employee is repaying a loan and which includes payment to a sacco of the employee's choice;
- f. any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;
 - g. any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;
 - h. an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and ...
32. The trial court in its assessment of the matter, though no particular findings are made in this regard, the records assessed by this court, the deductions effected against the wages due to the appellants were lawful and justified.
33. Further, any claims relating to the period of 1997 and 2014 and where the appellants filed suit before the trial court on January 17, 2020 are time barred pursuant to section 90 of the Employment Act, 2007 and cannot be revived through this appeal. employment having been converted to term contract started and ended on the agreed term/period and to urge a case going back to the period of 1997 to 2014 is to ignore the mandatory provisions of the law.
34. On the issue of pay for rest days, a term contract applies for the sole purpose of ensuring that the employee gives his/her labours for a consideration. for each day the employee is at work, there is a payment.
35. As outlined above, the payment statements filed by the appellants and the wage schedules filed by the respondents outline a payment of prorated leave days. For each term contract, the employer factored the leave due and was paid thereof.
36. Accordingly, the court analysis of the record and findings by the Hon Magistrate in Nairobi CMELRC 30 of 2020 cannot be faulted. The appeal is found without merit and is hereby dismissed. costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 4TH DAY OF APRIL, 2022.

M. MBARU

JUDGE

In the presence of:



Court Assistant: Okodoi

..... and

