



**Empire Feeds Ltd v King'ou (Appeal 6 of 2020)  
[2022] KEELRC 1501 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1501 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 6 OF 2020**

**SC RUTTO, J  
JUNE 23, 2022**

**BETWEEN**

**EMPIRE FEEDS LTD ..... APPELLANT**

**AND**

**MOSES MAKAU KING'OU ..... RESPONDENT**

**JUDGMENT**

1. On January 15, 2019, the respondent filed a memorandum of claim at the Magistrate's Court at Mavoko being ELRC Case No. 18 of 2019, through which he averred that he was employed by the appellant as a casual labourer and was earning Kshs 572/= for eight hours per day and Kshs 200/= for four hours, as overtime pay. He stated that he was summarily dismissed from employment without reasonable cause and without due process. Consequently, he prayed for a declaration that the dismissal was unlawful and unfair as well as an order for the payment of Kshs 305,712/= being terminal dues and damages.
2. The appellant filed a statement of defence denying the existence of an employment relationship with the respondent. It contended that the respondent was engaged on a casual basis on 18<sup>th</sup> November, 2016 on a daily wage rate of Kshs 484/=. The appellant further stated that the respondent's dismissal was occasioned by his failure to report to work without notice and or permission.
3. The matter was canvassed by way of oral testimony and production of exhibits and subsequently, written submissions. Upon conclusion of the trial, the trial Magistrate evaluated and analyzed the record and entered Judgement in favour of the respondent and declared that his dismissal was unfair and unlawful. Subsequently, the respondent was awarded: -

Compensation for unfair termination.....Kshs 240,864/=

One months salary in lieu of notice.....Kshs 20,072/=



Annual leave .....Kshs 22,156.40/=

Public holidays.....Kshs 11,039.60/=

Service pay.....Kshs 11,580/=

Grand Total..... Kshs 305,712/=

4. The respondent was further awarded costs of the suit and interest on the decretal amount from the date of Judgment.

### **The Appeal**

5. It is the foregoing determination that provoked the instant appeal as the appellant was aggrieved. Before this court now on a first appeal is the appeal which raises the following six grounds: -
  - 1) The Learned Magistrate erred in law and in fact by awarding the respondent reliefs due to a permanent employee under the Employment Act, 2007 to the respondent who admitted being a casual labourer.
  - 2) The Learned Magistrate erred in law and in fact by holding that the appellant dismissed the Respondent when there was no evidence to support the same.
  - 3) The Learned Magistrate erred in law and in fact by holding that the appellant did not prove valid and fair reasons upon which the respondent was allegedly dismissed contrary to the evidence adduced in court to the effect that the Respondent vanished from the Appellant's workplace without any notice.
  - 4) The Learned Magistrate erred in law and in fact by declaring that the appellant was unlawfully dismissed while there is no evidence to support the same.
  - 5) The Learned Magistrate erred in law and in fact by arriving at a decision that was not supported by evidence.
  - 6) The Learned Magistrate erred in law and in fact by awarding the appellant damages for unfair termination, salary in lieu of notice, annual leave, unpaid leave days and service while the respondent was admittedly not a permanent employee.
6. The appeal was canvassed by written submissions.

### **Appellant's submissions**

7. The appellant identified the following issues for determination: -
  - a) Did the learned magistrate err in law and in fact by awarding the respondent reliefs due to a permanent employee under the Employment Act, 2007 who (sic) admitted to being a casual labourer?
  - b) Did the learned magistrate err in law and in fact by arriving at a decision that was not supported by evidence?
  - c) Should the Judgement and decree of the lower court be set aside?
8. The appellant submitted that the respondent had pleaded before the court that he was a casual employee. That he did not object or deny the muster roll for payment of casual workers that was presented at the trial Court. That further, the respondent failed to prove that he was a permanent



employee. It was the appellant's further submission that the respondent was never unfairly terminated, since he was a casual employee. The appellant supported this position with the determination in the case of *Boniface Kyalo Mutua vs Kenya Builders and Concrete Limited* (2019) eKLR. The appellant urged the court to allow the appeal with costs.

### **Respondent's submissions**

9. It was submitted on behalf of the respondent that his employment was converted from casual to term contract pursuant to section 37(1) (a) of the *Employment Act*. Reliance was placed on the case of *James Nyaboga vs Menengai Oil Refineries* (2021) eKLR. It was further submitted that the respondent was terminated without being given any reason and without being issued with a notice to that effect. The respondent buttressed its submissions on several authorities including *Samuel Wambugu Gitonga vs Nyeri County Government* (2017) eKLR, *Javan Kisoi Mulwa vs SAA Interstate Traders (K) Limited* eKLR, and *James Ashiemi Namayi vs Menengai Oil Refineries Limited* (2016) eKLR. The respondent urged the court to uphold the award by the trial court.

### **Analysis and determination**

10. Being a first appeal, I am mindful of my role as a first appellate court, as guided by the determination of the Court of Appeal in *J. S. M. v E. N. B.* [2015] eKLR, thus: -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”

11. With the above determination in mind, I am enjoined to revisit the evidence presented before the trial court afresh and analyze it in order to arrive at my own independent conclusion but noting that I did not see or hear the witnesses as they testified.
12. Having considered the record before me, the opposing submissions, the authorities cited and the law, I find the issues falling for determination by this court as being: -
  - a) Whether the respondent's employment was converted from casual to term contract?
  - b) If the answer to (a) is in the affirmative, was the respondent terminated unfairly and unlawfully?
  - c) Whether the remedies awarded to the respondent lie in law?

### **Whether there was conversion of the respondent's casual employment?\*\*\***

13. I must state that despite its significance, the trial court did not address itself to this issue. In view of the facts presenting in this case, it is appropriate to determine from the onset, whether the respondent's employment was converted from a casual engagement to a term contract, by operation of law. Why do I say so? A determination of this issue will ultimately inform whether the other issues can be logically determined. Further, it will also dispose off ground 1 of the appeal.
14. It is not dispute that the respondent's initial engagement was on a casual basis. The contest now is whether moving forward, his engagement graduated from casual employment to regular term employment by operation of law.



15. Section 2 of the *Employment Act* defines a casual employee to mean: -
- “.. an individual 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”.
16. A casual employee is therefore an employee who is engaged for 24 hours at a time. As per the provisions of section 35(1) (a) of the *Employment Act*, such engagement is terminable by either party at the end of the day, without notice.
17. Section 37 of the *Employment Act* empowers the court to convert the contract of service of an employee engaged on a casual basis, to a regular term contract. This conversion is significant in that, such an employee becomes entitled to the safeguards available to an employee on a regular contract of employment. Such safeguards include, termination with notice or payment in lieu thereof, protection from unfair termination, benefits such as leave, rest days and issuance of certificate of service.
18. The said section 37 is in the following terms: -
- (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.
  - (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
  - (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
  - (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
  - (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.
19. The claimant averred in his memorandum of claim that he was employed on or about 10<sup>th</sup> September, 2016 as a casual labourer and that he was summarily dismissed on or about 3<sup>rd</sup> February, 2018. This period translates to about one year, four months.
20. On its part, the appellant maintained that the respondent was a casual employee, who would be engaged occasionally. To support its assertion, the appellant exhibited the “day shift casual payroll from



4<sup>th</sup> to November 10, 2017”, which contained the name of the respondent. The appellant deemed this as sufficient evidence to prove that the respondent was indeed, a casual employee.

21. Beyond the day shift casual payroll, there was no other evidence from the appellant’s end to confirm that the respondent was not in its employment regularly and continuously from September 10, 2016 upto February 3, 2018 as alleged.
22. Section 10 (7) of the *Employment Act* provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. A construction of this provision is that the appellant being the employer, was under an obligation to disprove the fact that the respondent was not a casual employee.
23. In this regard, and being the party responsible for maintenance of employment records, it was under an obligation to prove by way of evidence that the respondent was engaged intermittently and not for a continuous period exceeding three months. Clearly, the appellant did not discharge its burden.
24. In absence of proof to the contrary, I am led to conclude that the contract of service of the respondent assumed permanency and was deemed to be one where wages are paid monthly. In essence, section 35 (1) (c) of the *Employment Act* became applicable to the respondent’s contract of service in terms of section 37(1). Such was the holding by the Court of Appeal in the case of *Nanyuki Water & Sewage Company Limited vs Benson Mwiti Ntiritu & 4 others* [2018] eKLR where it was held as follows;  

“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.”
25. I fully adopt and apply the holding of the Court of Appeal to the case herein.
26. Accordingly, the engagement of the respondent was converted from casual to regular term contract hence he was protected against unfair termination.
27. This finding takes me to the next issue for determination, which is whether the respondent was unfairly and unlawfully terminated.

### **Unfair and unlawful termination?**

28. This issue constituted the fulcrum of the appellant’s appeal. The respondent’s contention at the trial court, was that he was terminated without reasonable cause and without due process. The appellant on the other hand, stated that the respondent resumed work after his sick off and left on 3<sup>rd</sup> February, 2018, and never reported back. In essence, the appellant accused the respondent of desertion.
29. Section 43(1) of the *Employment Act*, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination unfair. In addition, section 45 (2) of the *Employment Act*, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee’s conduct, capacity or compatibility; or based on the operational requirements of the employer.
30. In light of the foregoing legal provisions, the onus was on the appellant to prove that indeed, the respondent absented himself from work. To this end, the appellant did not present any evidence in any



form or manner to prove the respondent's absenteeism from work. No attendance register or muster roll was produced to that effect.

31. Besides, the appellant did not state what action it took upon noting the respondent's absence.
32. Further, it is notable that desertion from employment is a ground for summary dismissal under section 44 (4) (a) of the *Employment Act*. In this regard, the appellant if at all acting prudently, was required to subject the respondent to the process contemplated under section 41 of the *Employment Act*.
33. To this end, the appellant would have asked the respondent to show cause why his employment should not be terminated for absenteeism.
34. In the case of *Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme* [2015] eKLR the court determined that: -  

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the respondent has not disclosed any action it took, if its version that the claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”
35. There was no indication by the appellant that it undertook any process akin to the one contemplated under section 41 of the *Employment Act*.
36. In absence of any proof of compliance with the mandatory provisions of section 41 of the *Employment Act*, the appellant is at fault. This is noting that it bears the burden of proving compliance with fair procedure under section 45 (2) (c) of the *Employment Act*.
37. In light of the foregoing, it is my finding that the respondent's termination was unfair and unlawful in terms of sections 43 and 45 of the *Employment Act* as the appellant did not prove reasons for his termination and further, there is no evidence that he was given an opportunity to present his explanation or defence prior to termination.
38. To that extent, the trial Court cannot be faulted and its finding that the respondent was unlawfully and unfairly terminated from employment, is confirmed.

#### **Whether the remedies awarded to the respondent lie in law?**

39. The trial court awarded the respondent maximum compensation awardable under section 49(1) (c) of the *Employment Act*, on account of unfair and unlawful termination. The Magistrate reckoned that the respondent got injured while in the employment of the appellant.
40. It is notable that the award of remedies under section 49 of the *Employment Act* is a question of judicial discretion, which is to be exercised prudently, bearing in mind that the objective of the remedies is to compensate the employee, and not necessarily punish the employer.
41. The Court of Appeal in the case of *Ol Pejeta Ranching Limited vs David Wanjau Muboro* [2017] eKLR had this to say on the issue: -

“The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been



exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention.”

42. Section 49 (4) stipulates the considerations which the trial court must take into account before determining what remedy is appropriate in each case. Such considerations include, the length of the employment relationship, the circumstances of the termination, value of any severance payable, the extent to which the employee caused or contributed to the termination, failure by the employee to reasonably mitigate the losses attributable to the unjustified termination etc.
43. The justification by the trial Magistrate for the award of maximum compensation was that the respondent had been injured while in the appellant’s employment. No further justification was provided for the award of maximum damages. With due respect, this was an extraneous consideration and fell outside section 49(4) of the *Employment Act*.
44. Further, the appellant exhibited evidence that the respondent had lodged a separate claim against it, on account of the injuries sustained. This means he was or is still pursuing separate damages for his injuries. It was therefore erroneous for the trial Magistrate to award maximum compensation based on this consideration.
45. It is also notable that the respondent admitted that he had worked for the appellant for a period of close to one year four months. The length of employment relationship is one of the considerations to be made in awarding compensatory damages for unlawful termination. This period was not that long as to justify award of the 12 months maximum compensation. As such, the same was not justified.
46. I am aligned to the reasoning in *Ol Pejeta Ranching Limited vs David Wanjau Muboro* (supra), hence find that the trial Court erred in law in awarding the maximum 12 months’ compensation for unfair dismissal.
47. Accordingly, the award set aside of 12 months’ gross salary compensation is set aside and substituted with an award of five (5) months’ salary compensation.
48. It is further noted from the evidence exhibited at the trial court, that the respondent was earning a daily wage rate of Kshs 484/=. There was no claim of underpayment by the respondent. Nonetheless, the trial Court awarded the respondent compensation based on Kshs 772/= per day, thus Kshs 20,072/= per month. The basis for this award was not provided.
49. Accordingly, the compensation based on Kshs 772/= per day is set aside and substituted with Kshs 484/= per day, hence translating to Kshs 12,584/= per month.
50. The award of one month’s salary in lieu of notice is sustained as the respondent was unfairly terminated.

### **Public holidays**

51. The trial court awarded the respondent the sum of Kshs 11,039.60, being payment for work performed during public holidays. The respondent despite pleading for this amount in his memorandum of claim, did not particularize the specific dates he worked on public holidays. Further there was no proof that the respondent worked during all the public holidays.



52. The *Court in Rogoli Ole Manadiegi v General Cargo Services Limited* [2016] eKLR had this to say in regards to the issue: -

“It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he worked on public holidays or even rest days....he did not justify the global figure claimed in overtime showing specifically how it was arrived at....”

53. I reiterate the determination in the above case and find that in absence of evidence and specific dates, the respondent claims to have worked on public holidays, the finding by the trial court on this relief was unsupported and cannot be sustained.

### **Service pay**

54. The trial Magistrate awarded the respondent the sum of Kshs 11,580/= as service pay for the period worked. It is evident from the evidence presented at the trial court that the respondent was contributing towards the National Social Security Fund (NSSF). In light thereof, he falls within the ambit of the exclusions stipulated under section 35 (6) (d) of the Act. Therefore, this relief was not available for award.

### **Annual leave**

55. The respondent was awarded the sum of Kshs 22,156.40 under this head. On its part, the appellant did not present any leave record to discount the respondent's claim. As such, the award is sustained save that the same shall be payable at the rate of Kshs 484/= per day.

### **Orders**

56. In the final analysis, the appeal partially succeeds in the following terms: -

- a) The award of 12 months' salary in compensation is set aside and substituted with a 5 months' salary in compensation for unfair termination and is pegged at Kshs 12,584/= per month. The award is therefore revised downwards to Kshs 62,920/=.
- b) The award of one month's salary in lieu of notice is sustained but revised downwards to Kshs 12,584/=.
- c) The award of annual leave is sustained but revised to Kshs 13,552/=.
- d) The award of service pay and public holidays is set aside.
- e) The total award of Kshs 305,712/= is hereby set aside and the award is determined at Kshs 89,056/=.

57. As the appeal has succeeded partially, I direct that each party will bear their own costs in this court and at the trial court.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE, 2022.**

.....  
**STELLA RUTTO**



## JUDGE

Appearance:

For the Appellant Mr. Ng'ang'a

For the Respondent Mr. Okumu

Court Assistant Barille Sora

## 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

