



**Mini Bakeries (Nairobi) Limited v Obare (Appeal 6 of 2020)
[2022] KEELRC 1646 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1646 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL 6 OF 2020
HS WASILWA, J
JUNE 7, 2022**

BETWEEN

MINI BAKERIES (NAIROBI) LIMITED APPELLANT

AND

ALEX OKOTH OBARE RESPONDENT

JUDGMENT

1. The Appellant herein being dissatisfied with the judgment of Hon. L. Arika (SPM) delivered on 29th May, 2020 at Nakuru Chief Magistrates Court under CMCC ELRC Cause No. 25 of 2019 preferred this Appeal by way of Memorandum of Appeal dated June 13, 2020, and filed on the June 15, 2020 through the firm of P.N Khisa Advocates. It comes out as follows;
 1. That the Learned trial Magistrate misdirected herself in addressing the question of whether the Respondent was an employee of the appellant when it was not an issue of contention.
 2. That the Learned trial Magistrate erred in law and in fact by delivering the Judgement without looking into the triable issues both of law and of fact raised by the Appellant's Defence witness.
 3. That the Learned trial Magistrate erred in law in disregarding the weight of the Appellant's evidence on desertion of employment by the Respondent and failing to make a finding on the claim of unfair termination.
 4. That the Learned trial Magistrate erred in law and in fact in disregarding the weight of the appellant's evidence that the Respondent was an active and contributing member of the Bakery, Confectionary, Food Manufacturing and Allied Workers' Union (Kenya) (the 'Union'), when she awarded overtime, off duties, leave for one (1) year and seven (7) months.
 5. That the Learned trial Magistrate erred in law and in fact in disregarding the weight of the appellant's evidence that the respondent's terms and conditions of employment were



governed by the between the Appellant and the Union, when she awarded overtime, off duties, Collective Bargaining Agreement leave for one (1) year and seven (7) months.

6. That the Learned trial Magistrate failed to consider the submissions of the defence and to distinguish the authorities placed before her.
7. That the Learned trial Magistrate failed to disclose the basis in law or fact for making an unsupported award for damages.
8. That the Learned trial Magistrate erred in law in granting an award to the Respondent that was grossly and unfairly excessive in the circumstances.

It prays for orders That;

- a. This appeal be allowed.
- b. The judgment of May 29, 2020 and any consequential orders made thereof be set aside.
- c. The Employment and Labour Relations Court as the appellate Court do re-evaluate the evidence and declare that respondent's employment with the appellant was not unfairly terminated.
- d. The Employment and Labour Relations Court as the appellate Court do re-evaluate the evidence and declare that Respondent was a member of the Union and therefore his terms and conditions of employment were governed by the Collective Bargaining Agreement between the Appellant and the Union.
- e. The award on quantum on one month's gross wages in lieu of notice, normal overtime, off duties and leave days be dismissed and/or set aside.
- f. In the alternative the High Court do order that the matter be heard de novo for determination of all the issues.
- g. The costs of the appeal be awarded to the Appellant in any event.

Brief facts

2. The respondent /claimant in the lower court avers that he was employed by the appellant on the November 14, 2016 as a turn boy in the company's branch situated at Nakuru at a salary of Kshs 39,900. He avers that he reported to work every day of the week at 3am till 5pm without any rest day or overtime pay. He avers that it was agreed that the respondent would deduct Kshs. 400 monthly for security which was to be refunded upon separation from the company but that none was paid to him on termination. He stated that the Respondent deducted NSSF and failed to remit the same to the statutory body as mandated by law. He also states that on the April 25, 2018 at around 5 pm, while still at his place of work, he was attacked by unknown people and rushed to Mother Kevin Hospital for treatment and later the matter was reported to Kaptembwa Police station where he was Issued with OB. No. 03/25/04/18. He stated that he served the Appellant for 1 year 7 months without going for his leave. He also stated that his services were terminated abruptly on the June 13, 2018 without any notice or hearing.
3. The respondent on the other hand admitted to employing the Claimant/Respondent as its turn boy in their offices in Nakuru from although that the employment commenced from May, 2017 to April, 2018. The respondent/appellant herein denied the overtime claim by the respondent and avers that the respondent was a member of Bakery confectionary, food manufacturing and Allied workers Union (Kenya) and his working hours are regulated by the CBA between it and the Union which ran from



May 1, 2017 to April 30, 2020. He added that if any overtime was worked then the same was duly paid for. It is the appellant case that the claimant never worked for more than 6 consecutive days as such not entitled to off days pay as pleaded. It was also stated that the claimant deserted and or absconded work from May,2018 and never reported back to work as such he did not work for the month of May and June 2018. The Respondent thus maintain that the claimant's services were not terminated but that the claimant absconded duty.

4. This appeal proceeded by way of written submissions with the appellant filling on May 13, 2022 while the respondent filed on May 17, 2022.

Appellant's submissions.

5. The appellant submitted that this being a first appeal this Court is obliged to re-evaluate both the facts and the law in making its determination and cited the case of *PNN V ZWN* [2017] Eklr and submitted on each of the grounds of appeal.
6. On the first ground, the appellant submitted that, the trial Court erred in determining the issue of employment relationship when the same was not in dispute. He argued that the appellant's witness Solomon Kavita admitted in his witness statement that the Respondent was their employee who was employed on casual basis and subject to the CBA between it and the Union, which the Respondent was a member.
7. On prayer 2 and 3 of the memorandum of appeal, the Appellant submitted that the appellant's witness testified that he did rational change of the appellant and the respondent was allocated different duties and instead of taking up the same absconded duty. He added that the appellant followed up on the desertion of duty by calling the Respondent who refused to pick up his calls. It was also argued that the evidence of the respondent's absence from work was furnished before the trial court which was the musters roll showing the claimant last day of work as April, 2018 and no entry for May and June which the Respondent alleged to have work. This evidence according to the appellant was ignored by the trial Court.
8. The appellant in support of its case relied on the case of *Julius Muana Ngigi v Cobra Security Company Limited* [2021] eklr and argued that a party in a case of absconding duty has the duty to show the employee was absent from work and efforts taken on tracing the said employee.
9. Similarly, the appellant relied on the case of *Tabitha Mumbua Kimongo V Shrink Pack Limited* [2017] eklr where the court found in favour of the respondent and held that the employee had absconded duty and was not unfairly terminated as alleged.
10. With regards to ground 4 and 5 of the memorandum of appeal, the appellant submitted that the respondent was a member of the trade union as such his terms of employment were governed by the CBA in place at the said time. He argued that the payment voucher produced during hearing shows that the respondent was an active member of the Union whose dues were deducted and remitted to the Union. Accordingly, that the trial court erred in disregarding the membership of the respondent to the Union and awarding the overtime, off duties and leave for 1 year 7 months.
11. On the award given, the appellant submitted that the trial court erred in awarding the respondent notice pay of Kshs 39,900, when there was no evidence tabled before the court to demonstrate that the respondent earned such an amount. On the contract, it submitted that the claimant was earning Kshs. 1,049 per day and the master roll shows that the respondent worked on an aggregate of 19 to 20 days in a month which salary on the highest could have been Kshs 20,980, therefore that the Kshs 39,900 awarded by the trial court was not based on any evidence.



12. On overtime pay, the appellant submitted that the Respondent was paid each day for the overtime worked if any. It was argued that all the payment vouchers between July 25, 2017 to March 9, 2018 shows a column written “O/T” which refers to overtime, affirming that indeed the Respondent was paid for overtime worked for all the days and the trial court’s decision of awarding further overtime in its judgement was misdirected.
13. On off days’ pay, it was submitted that the muster roll produced as evidence before the trial Court shows that the Respondent never worked for 6 consecutive days as such not entitled to off day or payment in lieu thereof.
14. On the payment of leave, the appellant submitted that the respondent worked for 11 months at its employment and was paid in accordance with clause 26(d)(ii) of the CBA which pay was inclusive and for Hours worked only.

Respondent’s Submissions.

15. The respondent submitted that the decision of the trial court was sound in all aspects both in analysis of facts and the law. It was argued that the appeal as argued is not meritorious and merely aimed at delaying the respondent from enjoying his fruits of judgement. He supported his argument by citing the case of *Musera V Mwechelesi and another* [2007] KLR 159 where the Court held that:-

“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate Court we must indeed be very slow to interfere with the trial Judge’s findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”

16. On the 1st, 2nd and 3rd ground of appeal, the appellant submitted that the respondent pleaded and testified during hearing that he was verbally terminated on the June 13, 2018 by the appellant’s operations manager which evidence was not controverted as the appellant was not present during hearing. Accordingly, that the trial court rightfully found in his favour and held his termination to be unfair in the circumstances.
17. On ground number 4 and 5, the respondent submitted that the allegation by the appellant that the trial Court erred in failing to consider the term of CBA in making its decision is misadvised as the terms of service that ought to guide any employment relationship ought to be incorporated in an employment agreement and those stated in the statute such as *employment Act, Work Injury and Benefits Act, Occupational safety and health Act* among others. He argued further that the appellant contradicted itself when it at one point insist that the respondent was a casual employee who was retained on ad hoc basis and on another point avers that the employee was a paid up Union member who was governed by the terms of the CBA. He therefore argued that these contradictions should be used against them.
18. On ground number 6, 7 and 8, it was submitted that the trial court considered both parties’ cases before making its decision and the allegation in the said grounds are without any basis.
19. In conclusion, the respondent urged this Court to dismiss this appeal with costs.
20. I have examined all the evidence and submissions of the parties herein. This being an appeal in the first instance, this court indeed has the duty to re-examine the facts of this case and reach its finding.



21. From the evidence adduced in the lower court by the claimant, the claimant was a turnboy for the appellant herein and served them for 1 year 7 months. He indicated that he served the respondents from November 14, 2016.
22. He testified that he worked as a turnboy 7 days a week. He indicated that on 25/4/2018 at around 5pm he was on duty when he was attacked by unknown people and the incident was reported to Kaptembwo Police Station via OB. No. 03/25/04/18 and he was issued with a P3 form. He was treated at Mother Kelvin Hospital.
23. He produced his P3 Form, treatment notes, employment agreement, turn boy duty roster for May and June 2018 and receipt for 50/= security deduction as exhibits.
24. He indicated that the Respondents Appellants used to deduct 400/= monthly as security and NSSF due but never remitted to the relevant body.
25. The claimant testified that on June 13, 2018, the appellant's Manager one Solomon Kavitu called him to his office and informed him that his services had been terminated. He indicated that he was not given any notice and neither was he subjected to any hearing. No valid reasons were given for his termination.
26. The claimant had sought to be paid 1 months salary in lieu of notice, overtime and off duty pay, holiday pay, leave for 1 year y weeks and service pay. He also sought to be paid refund of kshs.50/= deductions for security pay and compensation for unlawful termination.
27. In their defence, the respondents admitted employing the claimant respondent as a turnboy at its Nakuru Branch but deny employing him from November 14, 2016.
28. The respondent appellants defence was denial of all averments made by the claimant respondent.
29. They aver that the claimant was a member of the Bakeries Union as such his working hours were regulated by the CBA for the period May 1, 2017 and April 30, 2020. They aver that the claimant never worked for 6 consecutive days.
30. The respondent appellants aver that the claimant absconded duty in April 2018 and that he was not terminated.
31. From my assessment of this evidence, the claimant established that he was indeed an employee of the respondent. The respondent confirmed employing the claimant in their pleadings though they denied employing him on November 14, 2016.
32. In the lower Court, the respondents testified that the Claimant was a casual and worked from May 2017. He continued to work up to April 2018. The Respondents submitted their master roll to show how he was working and only when work was available.
33. The Claimant also produced the duty roster for turn boys for May and June 2018 and it shows that he worked the entire 2 months.
34. The claimant also produced receipt showing he sold bread over the period of March and April 2018. While considering the period within which the claimant worked, the respondents appellants submitted and rightly produced the CBA that governed their working relationship between the appellants and union members for which the claimant one.



35. Under Clause 21 of the CBA, it was provided that;-

“Casual employees are eligible for conversion into permanent employment in accordance with the *Employment Act, 2007*...”

36. The claimant basically fell under this category having served the respondents from 2017 May as submitted by the respondent to April 2018 being 1 year.

37. Section 9 (1) & (2) of the *Employment Act 2007* states as follows;-

“9.

General provision of contract of service

(1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not 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, shall be in writing.

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(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).”

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(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).”

38. It is indeed envisaged that where an employee works for an aggregate period equivalent to 3 months or more the contract shall be in writing.

39. The claimant worked for over 3 months but the respondents didn’t supply him with any written contract.

40. Section 10 (7) of the *Employment Act* states as follows:-

(7) 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.”

41. Since the appellants failed to issue the respondent herein with a written contract, the onus of proving or disproving the terms of the contract rests on the appellant.

42. Though the appellants kept referring to the claimant as a casual employee having worked for a period of over 3 months sometimes continuously, his contract converted from casual to one which is permanent.

43. The respondents have averred that they didn’t terminate the claimant respondent but that he absconded duty. The respondent having converted to a permanent employee, the provisions of section 41 of *Employment Act* would have come into play.

44. There is no indication that the Claimant was issued with a show cause letter to explain why his services should not be terminated for absenteeism.

45. There is no evidence of any effort made to try and locate him through his last known address.

46. He was never subjected to any disciplinary hearing. It is therefore my finding that the claimant was unfairly and unlawfully terminated.

47. The lower court made a finding that the claimant was terminated unfairly and found in his favour.

48. The respondents contend that the trial court awarded the claimant what he was not entitled to including 1 month salary in lieu of notice, overtime, holiday pay, leave days etc.

49. As concerns notice pay, I find the claimant was entitled to the same having made a finding that he was unfairly terminated without notice.

50. As concerns overtime, the appellant content that the respondent was always paid this as per the payment voucher exhibited.

51. I have looked at the vouchers submitted. I note that the claimant was always paid a certain amount of money per hour. The amount paid was payable according to hours worked.

52. In the circumstances, the issue of overtime would not arise if he remained a casual.

53. However as indicated, the claimant ceased to be a casual employee after 3 months and so was entitled to a salary payable on an 8 hour day shift.



54. Any hours worked beyond 8 qualify as overtime where he was entitled to a double payment of the hourly pay. This was never paid. This also applies for holiday day pay where there is no evidence that he was paid double the hourly rate when he worked during holidays.
55. The argument by the respondent that the trial court failed to consider relevant information in reaching its verdict is not supported by evidence because the respondents appellants never submitted the relevant evidence before the court.
56. The court was well guided by awarding the respondent claimant as awarded based on the claimant's evidence and on the documents presented before court.
57. I find the appeal has no merit and I dismiss it accordingly.
58. Costs of this appeal and of the lower court to the respondent claimants.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Khisa for Appellant – present

Korongu for Respondent – absent

Court Assistant - Fred

