Kibogo & 83 others v Carribean Contractors Company Ltd (Employment and Labour Relations Appeal E004 of 2022) [2022] KEELRC 1578 (KLR) (29 July 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E004 OF 2022

BOM MANANI, J

JULY 29, 2022

BETWEEN

LENUS KARISA KIBOGO & 83 OTHERS ..... APPELLANT

AND

CARRIBEAN CONTRACTORS COMPANY LTD ..... RESPONDENT

JUDGMENT

Introduction

1. This is an appeal against the judgment of the magistrate's court in Kilifi SPMEC No. E06 of 2020 delivered on 8th March 2022. In the case, the Appellants had sued the Respondent for various reliefs for alleged wrongful termination.

2. The Respondent contested the claim asserting that some of the Appellants were not known to it. There was no employer-employee relationship with some of the Appellants.

3. And for a majority of those who worked for the Respondent, they were engaged as casual employees. And while some were still in active employment, others had left employment of their own volition. Therefore, they were not entitled to the reliefs sought in the suit.

Facts of the Case

4. As indicated above, the Appellants claimed that they were employees of the Respondent having allegedly been engaged on diverse dates and in different positions. They asserted that they were supposed to have been receiving their salary on monthly basis but for some reason, the Respondent used to pay them on weekly basis.

5. It was the Appellants' case that they worked for the Respondent diligently until 2nd August 2020 when the Respondent suddenly terminated all of them. Prior to this, the Appellants indicated that the Respondent had been asked by the National Social Security Fund (NSSF) to register them with

the organization, a directive which according to the Appellants may not have been received well by the Respondent. In the Appellants' view, the Respondent's decision to terminate their contracts of employment must have been triggered by the aforesaid development.

6. Consequently, the Appellants prayed for orders declaring the Respondent's alleged action to terminate them from employment as unlawful. They also prayed for monetary compensation and other reliefs as more particularly set out in the Memorandum of Claim.

7. On its part, the Respondent admitted having had an employer-employee relation with some of the Appellants. However, it was the Respondent's case that the relationship was one of casual employment.

8. Further, the Respondent contended that some of the individuals who had filed suit were never its employees. And others were still serving employees on casual terms as had been the case earlier.

9. It was the Respondent's case that as casual employees, the Appellants who served the Respondent would be engaged only when there were tasks for them to perform. Consequently, they would be paid a day's salary at a predetermined rate. The wages earned would be paid on weekly basis depending on the number of days each person had worked. That none of the Appellants ever worked for the Respondent continuously for a period of one month.

10. It was the Respondent's case that for the time they would be hired, the Appellants were not very productive and diligent at work. As a result, the Respondent incurred considerable losses arising from: misappropriation of income meant for the Respondent by some of the Appellants; mishandling of work equipment; and general laziness by most of the Appellants.

11. That when the Respondent demanded for accountability for the funds which had been misappropriated by some of the Appellants and an explanation for the various other misconducts by most of the team at the workplace, most of the Appellants withdrew their labour and deserted the workplace in solidarity with their leaders. That as a result, the Respondent was forced to hire alternative hands to continue with its operations.

12. In the Respondent's view, the Appellants who worked for it were engaged strictly on casual basis. As such, they were not entitled to claim benefits such as leave.

Trial Court's Decision

13. The record shows that the case proceeded to full hearing with the Appellants calling two witnesses. The Respondent called one witness.

14. After hearing the parties, the trial court delivered its decision dismissing the Appellants' case. The reasons for the court's decision were as follows: -

    a. Despite the Respondent specifically denying employing three of the Appellants, Mohamed Said, Silas Charo and Nelson Kazungu, they did not provide evidence to establish that they were employees of the Respondent. Thus, the Respondent's position, both in its pleadings and evidence, that these particular Appellants were not its employees remained unchallenged.

    b. Despite the Respondent providing records suggesting that one of the Appellants, Jumaa Rubeya Hassan, left employment on 1st November 2019 long before he was allegedly terminated on 2nd August 2020, the said Appellant did not testify in rebuttal of this evidence by the defense. Consequently, the trial court held that this particular Appellant had failed to prove his assertion that he was a victim of unlawful termination on 2nd August 2020.

c. Despite the Respondent providing evidence suggesting that some of the Appellants, Alex Kazungu, Amani Karisa, David Mwanyola, Juma Charo, Mwatela Mwarabu, Said Kenga and Tom Gambo, instituted the proceedings before the trial court when they were still in the employment of the Respondent, these individuals did not testify to rebut the evidence by the Respondent. Thus, the Respondent's position in this respect was not challenged.

d. Despite the Respondent providing documentary evidence suggesting that the other Appellants were last on duty on 28th July 2020, none of them tendered evidence to controvert this position and support their position that they were on duty on 2nd August 2020, the day they say they were terminated.

e. Importantly, the trial court was of the opinion that in view of the Respondent's challenge to the Appellants' claim, it was desirable that they singularly lead evidence in rebuttal of the Respondent's case. That the Appellants failed to do this leaving only the two witnesses to testify. Consequently, it was the learned trial magistrate's finding that the Appellants failed to provide sufficient evidence to establish their case.

The Grounds of Appeal

15. Dissatisfied with the trial court's decision, the Appellants have lodged the current appeal. Through the Memorandum of Appeal dated 24th March 2022, they raise a total of twenty- two (22) grounds of appeal. From a broad viewpoint, the several grounds in effect raise the following questions for determination: -

a. Ground one (1) raises the question whether the trial court was right to find that the Respondent had two quarry sites in view of the evidence that had been tendered in the cause.

b. Grounds two (2) to six (6) challenge the trial magistrate's finding in respect of the 55th, 78th, and 83rd Appellants. Through these grounds, the Appellants raise the following questions for determination: -Whether the trial magistrate erred in law and fact by holding that these three individuals were not employees of the Respondent;Whether the trial magistrate erred in law and fact by holding that the Appellants failed to adduce evidence to rebut the evidence by the Respondent that the three individuals were not employees of the Respondent;Whether the trial magistrate erred in law and fact by holding that it was fatal to the cases of the three Appellants not to have attended court to provide evidence relating to their employment status with the Respondent;Whether the trial magistrate erred in law and fact by failing to consider the witness statements filed by the three Appellants;Whether the trial magistrate erred in law and fact by failing to consider the evidence of the two witnesses who testified in support of the three Appellants' cases.

c. Ground seven (7) raises the question whether the trial court disregarded the additional witness statement of Lenus Karisa Kiboko which drew a distinction between Alex Kazungu Nyale and Alex Kazungu Nzai and whether as a result, the court arrived at a wrong conclusion that Alex Kazungu Nzai had not been terminated at the time of institution of the case before the trial court.

d. Ground eight (8) raises the question whether the learned trial magistrate condemned the 16th, 27th, 28th, 31st, 35th, and 77th Appellants unheard.

e. Grounds nine (9) and ten (10) raise the questions: -Whether the trial court was wrong to hold that the last day the last batch of the Appellants reported to work was 28th July 2020.Whether it was wrong for the trial magistrate to have arrived at the conclusion that there was no evidence that the Appellants were on duty on 2nd August 2020 when they allege to have been sacked notwithstanding that their services were no-longer required on this date.

f. Grounds eleven (11) and twelve (12) raise the question whether the trial court erred in law and fact in holding that the failure by a majority of the Appellants to attend court and testify on their termination was fatal to their case.

g. Ground thirteen (13) suggests that the trial court erred in failing to appreciate why all the Appellants could not have testified on the trial date. That the court was at the time overcrowded and the Appellants' case had to come last on the cause list in a bid to comply with the Covid 19 containment regulations.

h. Grounds fourteen (14) and fifteen (15) raise the questions: -Whether the trial magistrate erroneously determined the Appellants' case based on matters that were not pleaded by the Respondent.Whether the trial magistrate erred in law and fact in treating the evidence by the Respondent's witness as pleadings in the cause and faulting the Appellants for failing to rebut matters which arose in the testimony of the Respondent's witness but which were not supported by the Respondent's pleadings.

i. Ground sixteen (16) raises the question whether the trial court erred in finding that the Appellants had boycotted work.

j. Ground seventeen (17) raises the question whether the trial court arrived at the correct interpretation regarding the applicability of sections 35(1) (c), 37(1) (a) and 45 of the *Employment Act* but erred in refusing to grant the prayers sought by the Appellants.

k. Ground eighteen (18) raises the question whether the trial court's finding that the Appellants were not under the full control of the Respondent was correct in view of the evidence on record.

l. Ground nineteen (19) raises the question whether the trial court erred in not finding that the Respondent was under obligation to effect statutory deductions from the Appellants' wages and submit them to the NSSF.

m. Ground twenty (20) faults the trial court's failure to hold that the release of the names of the Appellants by their representative to the NSSF was the trigger for the decision by the Respondent to terminate the Appellants.

n. Ground twenty -one (21) accuses the trial court of failing to consider the written submissions of the Appellants even as he took into consideration submissions by the Respondent.

o. Ground twenty- two (22) faults the trial magistrate for failing to grant the Appellants the reliefs they sought in their claim.

Analysis and Findings

16. When the Appeal came up for directions on 19th July 2022, the parties sought for directions that it be canvassed through written submissions. These directions were granted. At the time, the Appellants' Counsel had already filed their submissions. Subsequently, the Respondent filed its submissions as well.

17. As is the practice, it is perhaps necessary to begin with pointing out that this being a first appeal, my obligation is to re-evaluate the evidence presented before the trial magistrate and reach my own conclusions on the issues raised for determination. However, as I undertake this task, it must remain on my mind that I did not have the opportunity of taking the evidence of the witnesses in the cause. Consequently, I have no benefit of appreciating the demeanor of the witnesses who testified in the manner that the trial court did. Thus, it is necessary to make provision for these deficiencies. As a matter of fact, it is the general position of law that a court exercising appellate jurisdiction in the first instance must be careful not to upset the findings of fact by a trial court unless it is obvious that such findings were arrived at against the grain of the evidence that was presented to the trial court (see *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR).

18. I will attempt to address the many questions presented in this appeal distinctly even as it appears to me that counsel would perhaps have found a better way of condensing them instead of, as it were, attempting to generate a distinct ground of appeal from every statement that the trial court made. In fact, a closer analysis of the grounds suggests that some of them may not be founded on the pronouncements of the trial court.

19. Ground one (1) of appeal attacks the trial court's observation that the Respondent has two sites managed by the 1st and 2nd Appellants. First, I consider that this statement was really an orbiter dictum. It did not go to the root of the court's decision. As such, it ought not to have been relied on as a ground for appeal.

20. That said, the statement by the court that has triggered this ground was that the Respondent ''has two sites managed by PW1 and PW2 respectively.'' In my view, this statement does not necessarily mean that the court understood the Respondent as having only two sites. It could as well have meant that the two witnesses were in charge of two of the Respondent's sites.

21. Whatever the trial court intended to convey by the impugned statement, the Appellants' counsel do not demonstrate how the said pronouncement disadvantaged the Appellants. There is no indication how the pronouncement affected the outcome of the case, at least from the arguments presented by counsel in her submissions on the ground.

22. Grounds two (2) to six (6) of appeal challenge the trial magistrate's finding in respect of the 55th, 78th, and 83rd Appellants on several fronts. I will examine the questions presented by these grounds either jointly or separately as would be appropriate.

23. First, the Appellants challenge the trial magistrate's finding that the three Appellants were not employees of the Respondent. From the record, the trial magistrate reached this conclusion based on his observation that no evidence was presented by the Appellants to rebut the Respondent's pleadings and evidence that the three were not its employees.

24. I have examined the defense filed by the Respondent and appearing from page 127 to 133 of the Record of Appeal. At paragraph 2 of the said defense, the Respondent specifically denies employing the three Appellants.

25. As the trial magistrate observed at page 8 of the court's judgment (page 290 of the Record of Appeal), the effect of this specific denial was that upon the close of pleadings, it raised a joinder of issue on the question of employment of the three Appellants with the Respondent. As was indicated in *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR "a joinder of issue operates as a denial of every material allegation of fact made in the pleading."

26. A perusal of the witness statements filed on 5th November 2020 by PW1 and PW2, the two witnesses for the Appellants shows that they are fairly general in nature focusing on no specific individual's case (pages 36 to 39 of the Record of Appeal). Details of the content of the claims by each of the Appellants are left to the Memorandum of Claim. Even then, the details in the pleadings relate to the monetary reliefs sought by the Appellants and nothing else.

27. The only other witness statement by the witnesses that appears to have gone into details of a specific person's case and which was adopted in evidence is the one filed by PW1 on 2nd February 2021 (see page 149 of the Record of Appeal). Through this statement, PW1 sought to explain the mix up in names of one Alex Kazungu.

28. At page 301 to 308 of the Record of Appeal we have the evidence of PW1 and PW2. From this evidence, it is apparent that after introduction, PW1 identified and sought to rely on the witness statements that he had filed in the cause on 5th November 2020 and 2nd February2021. The 2nd witness, Katana Charo Nzai did much the same thing. He identified and relied on his witness statement filed on 5th November 2020 as his evidence in chief.

29. As the other Appellants had granted authority to PW1 and PW2 to plead on their behalf, it was necessary for the two to file comprehensive composite witness statements incorporating the details of the specific claims by every of the other Appellants as they had elected to rely on written statements as their evidence in chief. Alternately, the several Appellants ought to have prepared separate individual witness statements which PW1 and PW2 ought to have adopted on oath as part of their evidence in chief. They would also have elected to file affidavit evidence under rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (hereafter referred to as the ELRC rules).

30. The above position is informed by the fact that ordinarily, pleadings do not constitute evidence (see *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR). Therefore, the specific details of every Appellant's claim could only be established by reference to either oral evidence taken on oath or detailed composite or individual witness statements adopted while the witness was under oath or affidavit evidence.

31. I note that the only limited window permitting pleadings to contain evidence under rule 14(4) of the ELRC rules nevertheless indicates that such must be supported by affidavits. In any event, the pleadings by the Appellants, as mentioned above, bear no specific evidence on the issue of employment of the three Appellants or indeed any other of the Appellants. The only evidential details in them are confined to the quantum of monetary claims by every of the Appellants.

32. To the extent that PW1 and PW2 failed to take any of the courses suggested above and only adopted their general statements, they failed to provide detailed evidence to prove the employment of the 55th, 77th, and 85th Appellants given that their employment had been specifically disputed and there was a joinder of issue on this issue. The witness statements adopted by PW1 and PW2 did not contain details providing particulars of employment of the three Appellants by the Respondent. In the face of the Respondent's contestation of this fact through its pleadings and evidence tendered in court, it was necessary that the Appellants' witnesses address this matter with more specificity.

33. PW1 and PW2 having failed to provide evidence demonstrating that the three Appellants were employees of the Respondent, it was necessary for these three Appellants to specifically testify on this issue. As the record shows, neither the three Appellants nor any other witness attended court to provide proof on oath of their employment to the Respondent. In the absence of this critical evidence, it is my view that the trial court was right in holding that the three Appellants had failed to provide evidence of their employment with the Respondent. And to the extent that the fact of employment of the three Appellants to the Respondent was not proved to the required standard, their respective cases had to fail. Indeed as was pointed out in *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* [2013] eKLR, the duty to prove existence of the employer-employee relationship lies with the person alleging employment.

34. I would say that the above finding addresses the related questions: whether the trial magistrate erred in law and fact by holding that the Appellants had failed to adduce evidence to rebut the evidence by the Respondent that the three individuals were not employees of the Respondent; and whether the trial magistrate erred in law and fact by holding that it was fatal to the cases of the three Appellants not to have attended court to provide evidence relating to their employment status with the Respondent.

35. From the analysis in the preceding section of this decision, it is clear to me that neither the Appellants' witnesses nor the three individuals whose employment was specifically disputed gave evidence showing that the three individuals were employees of the Respondent. And the failure to provide this evidence including by the three Appellants themselves was, in my humble view, fatal to their case.

36. This position is further fortified by the fact that the Respondent's witness did actually testify on oath reiterating the Respondent's defense that the three were not employees of the Respondent (see page 309 of the Record of Appeal). This evidence was not rebutted by evidence from the Appellants.

37. The other question that arises from the above set of grounds of appeal is whether the trial magistrate erred in law and fact by failing to consider the witness statements filed by the three Appellants. The Record of Appeal shows that of the three Appellants under consideration, only the 55th Appellant filed a witness statement (see pages 143 to 144 of the Record of Appeal). However, neither PW1 nor PW2 adopted this statement as part of their evidence in chief in the cause while under oath. The consequence is that although there was a statement by this Appellant, it was not taken on board as evidence. In light of the foregoing, the trial magistrate was entitled not to consider the contents of the said statement.

38. The final question in relation to this set of grounds of appeal is whether the trial magistrate erred in law and fact by failing to consider the evidence of the two witnesses who testified in support of the three Appellants' cases. As pointed out earlier on, apart from PW1 and PW2 failing to adopt the statement of one of the three Appellants as evidence while under oath, they gave no specific evidence on whether the three Appellants were employees of the Respondent. There was therefore no evidence in support of the fact of employment of the three Appellants by the Respondent given by PW1 and PW2 that the trial court failed to consider.

39. In view of the foregoing, I hold that grounds two (2) to six (6) of the appeal are without merit. Thus, I will not disturb the trial court's finding on the central question that runs through the said grounds on the basis of the submissions by the Appellants.

40. Ground seven (7) raises the question whether the trial court disregarded the additional witness statement of Lenus Karisa Kiboko which drew a distinction between Alex Kazungu Nyale and Alex Kazungu Nzai and whether as a result, the court arrived at a wrong conclusion that Alex Kazungu Nzai had not been terminated at the time of institution of the case before the trial court. As will be demonstrated below, this ground is without factual basis.

41. First, from the Memorandum of Claim filed (see pages 9 to 33 of the Record of Appeal), only one claimant by the name Alex Kazungu is mentioned. He appears as number 25 in the list of claimants. Thus, from this document it is impossible to tell whether the individual the Appellants intended to include as a claimant was the Alex Kazungu Nyale who was said to have been in employment at the time of filing the claim or Alex Kazungu Nzai who had allegedly been terminated at the time. It was up to the Appellants to amend the Statement of Claim to indicate which of these two individuals was intended as the claimant in the cause. In my humble view, a mere addendum witness statement by Lenus Karisa Kiboko purporting to shade light on the mix up could not cure this anomaly.

42. Second, when giving evidence, Lenus Karisa Kiboko is quoted as saying the individual appearing as number 25 in the list of claimants was still working for the Respondent at the time the suit was filed until around February 2021 (see page 302 of the Record of Appeal). Clearly, this was an admission by the Appellants that the Alex Kazungu who had been included as a claimant in their statement of claim was working at the time they moved to court. Conversely, this was also an admission by the Appellants that the Alex Kazungu who had allegedly been terminated is not the one they had included in the Statement of Claim. Did the Appellants expect the court to allow a claim by an individual who was not a litigant before him?

43. It is in view of the confusion generated by the Appellants on the true identity of this particular claimant that the trial court correctly observed that it was difficult to determine which Alex Kazungu was included in the pleadings. In the court's view, it would perhaps have been helpful if the Alex Kazungu who was said to be the claimant had been called as a witness. This is a position I find sensible.

44. However and for me, I think that now that PW1 had admitted in evidence that the Alex Kazungu appearing as number 25 in their list of claimants was still in employment and was probably not the Alex Kazungu that was intended to have been included in the claim, the only way the Appellants would have resolved the mix up was by amending their claim to bring on board the correct claimant. However, as is clear from the record, this was not done.

45. But more importantly, coming to the question whether the trial court ignored the statement by Lenus Karisa Kiboko on this issue, I think the record demonstrates otherwise. Page 10 of the judgment of the court (page 251 of the Record of Appeal) demonstrates that the court considered this statement and gave its reasons for declining to rely on it.

46. Ground eight (8) raises the question whether the learned trial court condemned the 16th, 27th, 28th, 31st, 35th, and 77th Appellants unheard. By this ground, the Appellants suggest that whilst these individuals were present in court when the case was heard, they were not invited to testify in their own right. Yet, in his judgment, the trial court dismissed their cases on among other grounds the failure by them to give evidence.

47. In her submissions, counsel for the Appellants appears to take an entirely different tangent from that expressed in the foregoing ground of appeal on the issue under consideration. In the submissions, counsel argues that the court should have relied on the witness statements of the six (6) Appellants in ground eight (8) of the Appeal in terms of rule nine (9) of the ELRC rules. Yet, in the Memorandum of Appeal, the attack against the trial court's decision on this issue seems to have been founded on the alleged failure by the court to hear this group of Appellants notwithstanding that they were present in court during the trial.

48. This departure from the pleadings on record by counsel raises the perennial question of whether a party in a cause should be permitted to advance a case that is substantially different from that which

he has pleaded. The general position is that parties are bound by their pleadings and cannot urge a case beyond the pleadings.

49. Notwithstanding the foregoing sentiments, I will comment on the two variants of the Appellants' case under this ground. In relation to whether the six (6) Appellants listed in the ground were denied a hearing, the record shows that these people never requested to be heard in person. Similarly, there is no record of the court declining such request if it was ever made. Importantly, the record does not show that the individuals were present in court when the case was heard. All that I see at page 3 of the proceedings (page 300 of the Record of Appeal) is counsel for the Appellants stating that she was ready to proceed with the case and she had two witnesses in court.

50. However, even if it were to be assumed that by this ground, the Appellants meant that the trial court ought to have considered the witness statements of the six (6) Appellants which had purportedly been filed earlier on as counsel suggests in her submissions, a perusal of the Record of Appeal shows that out of the six (6) Appellants, only the 27th and 31st Appellants had filed witness statements (see pages 147 and 151-152 of the Record of Appeal). And as had been pointed out earlier in this decision, the principal witnesses in the cause (PW1 and PW2) did not adopt and seek to rely on these witness statements while testifying under oath. Technically, therefore the two statements could not be relied on as evidence.

51. The Appellants' counsel appears to urge the case that the court should have moved under rule 9 of the ELRC rules to admit into evidence witness statements by Appellants numbers twenty- seven (27) and thirty -one (31). This rule does not deal with filing of witness statements. It addresses requirements for filing a representative suit. By this rule, where a party files suit on behalf of others where the cause of action is common, such party must do the following: -

    a. In addition to filing the Statement of Claim, file the authority by the persons he represents. Such authority must have been signed by all the persons to be represented in the action.

    b. In addition, the party instituting the claim must provide the full schedule of the individuals on whose behalf, he has filed the action.

    c. The Statement of Claim must also set out the address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each of the claimants.

52. Whilst the current suit may have been intended to be a representative action under rule nine (9) of the ELRC rules aforesaid, it is clear to me that it is not. This is because in the current action, all the eighty-four (84) Appellants were named as the principal claimants. The suit was not just in the names of PW1 and PW2 but for the benefit of the eighty- two (82) other Appellants.

53. Rule 14 (8) of the ELRC rules makes provision for filing of witness statements. On the other hand, rule 21 of the rules makes reference to filing of affidavit evidence. Under the latter rule, instead of conducting a trial based on oral evidence taken in the normal course of a trial, the court is empowered to determine a case before it based on the pleadings, documents, affidavits and submissions by the parties.

54. This explanation is important because it demonstrates that evidence taking must be on oath or after affirmation except in the few instances where the law of evidence permits otherwise. A good example of when the law permits deviations from this general rule relates to taking the evidence of children of tender age. Such evidence may be taken without oath or affirmation.

55. The introduction into evidence of witness statements filed under rule 14 of the ELRC rules must be done during the course of an ordinary trial. A party who elects to rely on his witness statement may

either file a comprehensive statement and introduce it under oath during the trial or opt to have such statement prepared under oath in the form of an affidavit. Only then can a written witness statement qualify as evidence in judicial proceedings.

56. As the record shows PW1 and PW2 neither filed comprehensive witness statements incorporating details of the claims by the other Appellants nor did they adopt the respective statements of these Appellants under oath as their evidence in chief. At the same time, it is clear from the record that none of the Appellants in ground eight (8) of appeal filed affidavit evidence which the court declined to take into consideration. And the record does not suggest that the trial court was responsible for this state of affairs in the case. It was the Appellants, their counsel and their appointed witnesses who were in full control of the conduct of their case. It is therefore without merit for them to suggest that the court condemned the six (6) Appellants in ground eight (8) of the appeal without hearing them when it is clear that the six (6) neither filed compliant statements on oath nor did PW1 and PW2 adopt their statements if at all.

57. Grounds nine (9) and ten (10) raise two interrelated questions. First is the question whether the trial court was wrong to hold that the last day the last batch of the Appellants reported to work was 28th July 2020. The second question is whether it was wrong for the trial magistrate to have arrived at the conclusion that there was no evidence that the Appellants were on duty on 2nd August 2020 when they allege to have been terminated.

58. The record shows that in arriving at the above conclusions, the court considered the register produced in evidence by the Respondent as defense exhibit four (4) and as well exhibit one (1). From the exhibits, the trial court observed that the last of the Appellants to work for the Respondent are shown as having reported on duty on 28th July 2020. There were no entries to show that the Appellants reported on duty on 2nd August 2020.

59. The witness for the Respondent stated that 2nd of August 2020 was a Sunday. Indeed, a quick look at the calendar for the year 2020 verifies this fact a fact which the court takes judicial notice of. From the evidence given, the Appellants used to be paid for the days worked in a week on Saturdays. This evidence is consistent with the Respondent's position that Sunday was not a working day.

60. During cross examination of PW2, he stated that he was terminated on 2nd August 2020, a Saturday. This evidence is inconsistent with the entries on the calendar which show that 2nd August 2020 was a Sunday and not a Saturday.

61. Importantly, if I understand the ground of appeal on whether the Appellants were terminated on 2nd August 2020 well, what the Appellants plead is that it was erroneous for the trial magistrate to require of them to prove that they were on duty on 2nd August 2020 when in fact they were not as their services were no longer required on that day. It was therefore once again a digression from their pleadings for the Appellants' counsel to argue in their submissions that the trial court erred in holding that the Appellants were not on duty on 2nd August 2020 as there was evidence that they were. This was not their case as pleaded in ground ten (10) of the grounds of appeal.

62. Grounds eleven (11) and twelve (12) raise the question whether the trial court erred in law and fact in holding that the failure by a majority of the Appellants to attend court and testify on their termination was fatal to their case. These questions were substantially answered when I addressed grounds one (1) to six (6) of appeal. As indicated, PW1 and PW2 did not tender comprehensive witness statements providing specific details of the rest of the Appellants' claims. And neither did they adopt on oath witness statements by any of the other Appellants as their evidence in chief.

63. Under rule 21 of the ELRC rules, the court is only permitted to rely on affidavit evidence or other evidence presented on oath during oral testimony by a witness. The several Appellants neither filed affidavit evidence nor prepared witness statements to be adopted on oath by PW1 and PW2 during the trial. As a result, the only other way they could have presented their evidence is by them appearing in person and testifying orally. They did not do this. In my view and as the trial court observed, this was fatal to their claims.

64. Ground thirteen (13) suggests that the trial court erred in failing to appreciate the reasons why all the Appellants could not have testified on the trial date. That the court was at the time overcrowded and the Appellants' case had to come last on the cause list in a bid to comply with the Covid 19 containment regulations.

65. I have agonized over this ground and whether it qualifies as a ground for appeal in this matter. I say so because no part of the court's findings was premised on whether the courthouse was full during the trial of the case or on whether parties to the cause had to be kept out in an effort to contain the spread of Covid 19 infections. In my view, these are matters which were extraneous to the proceedings before the trial court and should not have found their way into the grounds for challenging the court's decision.

66. That said, I have looked at the court's record of 16th September 2021 (see pages 300 to 308 of the Record of Appeal) and nothing from the proceedings suggests what counsel alludes to in their submissions in support of this ground. There is no record showing that the trial court: had a crowded day; requested the Appellants to select only two individuals and not the rest of them to testify; kept some of the Appellants outside the courthouse.

67. On the contrary, the decision to have the Appellants represented by PW1 and PW2 appears to have been their own. This is clear from their authority to PW1 and PW2 to plead on their behalf appearing at pages 40 to 42 of the Record of Appeal.

68. However and as I have pointed out, the challenge with this arrangement appears to have been that PW1 and PW2 did not tender evidence targeting the rest of the Appellants' specific claims. They neither prepared and filed comprehensive witness statements covering the other parties' claims nor adopted witness statements prepared by these parties as evidence in chief. And neither did the parties file affidavit evidence. In the premises, the only other sensible way in which the matter would have been handled in terms of evidence taking was by the rest of the Appellants giving their own evidence under oath. And this could not be excused under any circumstances including adherence to Covid 19 containment regulations. The Appellants failed to take advantage of furnishing affidavit evidence which would have been the only other alternative to an ordinary trial.

69. Grounds fourteen (14), fifteen (15) and sixteen (16) raise two but interrelated questions to wit: whether the trial magistrate erroneously determined the Appellants' case based on matters that were not pleaded by the Respondent; and whether the trial magistrate erred in law and fact in treating the evidence by the Respondent's witness as pleadings in the cause and in faulting the Appellants for failing to rebut matters which arose in the testimony of the Respondent's witness but which were not supported by the Respondent's pleadings. The un-pleaded issue referred to above was whether the Appellants boycotted work in solidarity with PW1 and PW2. And this is raised in ground sixteen (16) of the grounds of appeal.

70. I agree with the Appellants' counsel that parties are bound by their pleadings. I have looked through the pleadings by the Respondent and it is clear to me that there was no plea to the effect that the rest of the Appellants stopped working for the Respondent in solidarity with PW1 and PW2. To this extent, the trial court was wrong in making the finding that the Appellants stopped reporting to work in solidarity

with PW1 and PW2 based on the evidence of the Respondent's witness which was not grounded in the Respondent's pleadings.

71. That said, the fact of the matter remains that the Appellants were not on duty after 28th July 2020 as demonstrated by the evidence tendered by the Respondent in support of the fact that they could not have been terminated on 2nd August 2020 as they were no longer engaged by the Respondent as at that date having voluntarily opted out of employment earlier on. Consequently, irrespective of whether the reason for not reporting to work was to express solidarity with PW1 and PW2 as the trial court had suggested, the Appellants were not on duty on 2nd August 2020. To the extent that they assert that they were unfairly terminated on 2nd August 2020, a day they are shown to have been absent renders their assertion that they were terminated while on duty on this date baseless. Thus, while faulting the trial court's observations under scrutiny in grounds fourteen (14) and fifteen (15) of appeal, I nevertheless uphold his ultimate conclusion that the Appellants did not establish a case for unfair termination against the Respondent.

72. Ground eighteen (18) raises the question whether the trial court's finding that the Appellants were not under the full control of the Respondent was correct in view of the evidence on record. The record shows that this observation was not the basis of the trial court's decision. It appears to have been made obiter dictum in the section of the decision where the court was expressing its opinion on what it would have awarded had the Appellants succeeded in their case. As such, it cannot form a ground for appeal in this matter.

73. Ground nineteen (19) raises the question whether the trial court erred in not making a finding that the Respondent was under obligation to effect statutory deductions towards social security for the Appellants from their wages and submit them to the NSSF. I have combed through the Statement of Claim filed by the Appellants before the trial court. The issue of the Respondent's statutory obligation to deduct NSSF dues from its employees' wages and remit them to the NSSF was not one of the questions that the court was invited to determine in the cause. In fact, there was no prayer for such orders in the claim. It is therefore surprising that counsel would fault the trial court for not making orders which were not the subject of litigation in the first place.

74. Ground twenty (20) faults the trial court's failure to hold that the release of the names of the Appellants by one of the Appellants to the NSSF was the trigger for the decision by the Respondent to terminate the Appellants. After analyzing the evidence presented, the trial court found as a matter of fact that some of the Appellants who had allegedly brought action against the Respondent were not employees of the Respondent. It also found as a matter of fact that some of those who sued were actually still in the Respondent's employment. Further, the trial magistrate found that many of the Respondents failed to provide evidence in support of their claim for unfair termination since they did not testify in court. The court also found as a matter of fact that all the Appellants who had been engaged by the Respondent and who were no longer on duty at the time of filing the action before the trial court had worked up to 28th July 2020.

75. In my view, the totality of these findings by the court is that there was no evidence that any of the several Appellants were ever terminated by the Respondent. Therefore, it could not be held that the Appellants had been terminated on account of their quest to be enlisted as members of the NSSF. In any event, there was no direct causal link between the Appellants' departure from work and the NSSF enlistment. The evidence given on this aspect was speculative.

76. Of course it was contrary to the law for the Respondent not to make NSSF remissions on behalf of the Appellants who were its employees before the parties severed their relationship. As it is correctly submitted by the Appellants' counsel, the NSSF Act appears to require employers to register all

employees (whether casual or indefinite or fixed term employees) with the NSSF. However, the mere non-registration of the Respondent's employees and non- remission of their NSSF dues coupled with demands by the officials of NSSF that the Respondent registers its employees does not necessarily imply that severance of the employer-employee relation between the Respondent and the Appellants who were in the Respondent's employment was triggered by this state of affairs.

77. Ground twenty -one (21) accuses the trial court of failing to consider the written submissions of the Appellants even as he took into consideration those by the Respondent. At page 247 of the Record of Appeal, the trial court stated that in his decision, he had carefully read and analyzed the pleadings, the evidence and the submissions by the parties. As a matter of fact, in every determination made by the court, he demonstrates that he has considered the case of either side as presented. It is only after analyzing evidence by the competing sides that the court reached its pronouncement on the issues it determined. I see no evidence of bias by the court as suggested by the Appellants. I see no evidence that the court relied on the Respondent's counsel's submissions in disregard of those by the Appellants' counsel.

78. Whilst a court ought to consider submissions by parties, it is not bound by such submissions. Therefore, unless there is outright evidence of bias, I will not interfere with the trial court's discretion on this ground.

79. At the centre of the dispute between the Appellants and the Respondent, in my view, was the question whether those of the Appellants that were demonstrated to have been employees of the Respondent were engaged as casual or permanent employees. Indeed, this issue is implied in ground seventeen (17) of the grounds of appeal. As indicated earlier on, the ground suggests that whilst the trial court arrived at the correct interpretation of the applicability of sections 35(1) (c), 37(1) (a) and 45 of the *Employment Act*, it erred when it failed to grant the prayers sought in the claim. To my mind, the answer to this question will largely determine the fate of the contestation between the parties.

80. The *Employment Act* defines a casual employee as "a person the terms of whose engagement provides 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." From this definition, employees engaged to work on temporary basis and are paid a daily rate fall in the category of casual employees. As indicated by George Ogembo in his book titled ''Employment Law Guide for Employers, LawAfrica Publishing (K) Ltd'' at page 113, these category of employees are paid a daily rate for the time actually worked.

81. Sometimes though, the parties may agree that the daily wage be paid on weekly or even monthly basis. This position was made clear in the decision in Josphat Njuguna v High Rise Self Group [2014] eKLR quoted with approval by the Court of Appeal in *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited* [2015] eKLR where the court stated as follows: -

> " It is a misinterpretation of section 37(1) of the *Employment Act* to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.

The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates."

82. In her submissions, counsel for the Appellants appears express a contra and perhaps incorrect position on the subject. With this case-law, I believe that the correct position on the matter is made clearer to all of us.

83. Under section 37 of the Act, casual contracts of employment graduate into term contracts if the employer retains the employee's services for a continuous period of at least one month or if the nature of the employee's engagement is such that he cannot complete the task agreed on with the employer within a number of working days whose aggregate is at least three months or more. This position has been restated in a number of judicial pronouncements (see for instance *Kesi Mohamed Salim v Kwale International Sugar Co. Ltd* [2017] eKLR).

84. I must emphasize here that my understanding of the law is that with regard to the first of the two conditions for conversion from casual to term contracts of employment, the law is that the employee demonstrates continuous service for at least one month. In other words, he must have served the employer without break, save for rest days, for a total of one calendar month. This is not the same thing as demonstrating attainment of a total number of days amounting to those that would comprise one month but accumulated from a segmented period exceeding a month (see *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another* [2018] eKLR). In the Rashid Mazuri decision before the trial court before the matter progressed to the Court of Appeal (see *Rashid Mazuri Ramadhan v Doshi & Co (Hardwares) Ltd & another* [2017] eKLR), the learned judge had this to say on the issue aforesaid: -

> " In this case the claimants have not proved that they served continuously for the period of continuous working days totaling to one month or more to qualify for the conversion of their casual employment to regular terms contract of service. I therefore find and hold that they remained casual employees throughout their entire period of service."

85. At paragraph G of their Memorandum of Claim, the Appellants suggested that they were engaged on term (or long term or permanent or indefinite) basis by pleading that their wages were intended to have been paid monthly although the Respondent used to pay them weekly. This plea is in tandem with section 18 (2) of the *Employment Act* which provides as follows: -

> " Subject to subsection (1), wages or salaries shall be deemed to be due: -
>
> a. in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;
>
> b. in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier, and on the completion of the journey, respectively."

86. On the other hand, the Respondents denied having engaged the Appellants or at least a number of them as permanent staff. In fact, it was contested by the Respondent that some of the individuals mentioned in the list of claimants were its employees either as casuals or otherwise.

87. In a rather detailed defense and witness statement which was adopted in evidence, the Respondent underscored the fact that several of the Appellants who worked for the Respondent were engaged as casuals who would only execute the assignments that were available at the time of their engagement and be paid weekly. That the salaries paid to the Appellants at weekly intervals were computed on daily basis. That as casuals, the Appellants would be engaged on need basis on different dates and earn differentiated daily pay depending on the nature of their assignments.

88. It is this defense and evidence that the Appellants were expected to controvert and establish their case to the usual standard of a balance of probabilities. The critical question is whether the record shows that the Appellants discharged this duty.

89. The record shows that witness number one, Lenus Karisa Kibogo, stated that he and the several other claimants were employees of the Respondent. He said that he used to earn a weekly salary. That his daily wage rate was Ksh. 1,100/=. He confirmed that employees would be recorded every day they worked and that they would work according to the available work.

90. The second witness, Katana Charo stated that he used to be paid Ksh. 10,200/= per week. That cumulatively in a month, this would add up to Ks. 40,800/=. It was his further evidence that payments for all employees were made every Saturday of the week.

91. None of the two witnesses gave evidence to show that the Appellants were engaged on a continuous basis for a period of at least one month or more. Neither was there evidence to show that the Appellants were involved in work at the Respondent's premises whose nature required that they remain engaged for at least three months to clear it.

92. On the other hand, the Respondent produced records of employment of the several Appellants. From the documents, I have not seen any one of them showing that any of the Appellants clocked a full month at work on continuous basis. It is therefore clear to me that based on the evidence placed before the trial magistrate those of the Appellants who were engaged by the Respondent were so engaged as casual employee.

93. The Appellants provided no other evidence from which the court could have deduced the presence of a contract of employment other than that of casual employees. This can be further deduced from the fact that their wages were paid weekly rather than monthly.

94. The accepted legal position is that most of the benefits that accrue to term contracts are not usually available to casual employees. Of course it is open to the parties to alter this position by agreeing on additional benefits that will be accorded to an employee notwithstanding that his engagement is on casual terms.

95. Commenting on the issue at page 114 of his book cited earlier in the judgment, George Ogembo states as follows: -

> " During the period he is a casual, an employee does not also benefit from a majority of terms and conditions of employment normally enjoyed by employees on permanent terms. For example, ordinarily, owing to the nature of their engagements, they do not as a matter of necessity enjoy the benefits of leave, off or rest days."

96. This position is further emphasized through judicial pronouncements including Rashid Odhiambo Aloggoh & 245 others v Haco Industries Limited [2007] eKLR where the court observed as follows: -

> " As casuals, the Applicants were clearly not entitled to all the allowances (eg. housing, leave, maternity etc) paid to permanent employees....."

97. The Appellants' counsel argues that the Appellants had converted into term employees by virtue of section 37(1) of the *Employment Act*. Thus, under section 35 of the *Employment Act*, they were entitled to the benefit of a twenty- eight (28) days' notice before termination. This is a position I do not agree with.

98. The evidence on record is clear that the Appellants were earning a daily wage paid at the close of every week whenever they worked. There was no evidence that they remained on duty continuously for a period of a full month. It is not possible therefore that their contracts converted into term contracts under section 37(1) of the *Employment Act* in order for them to be entitled to the protections relating to notice and termination with cause as envisaged under sections 41, 43 and 45 of the *Employment Act* (see Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR). This position is further fortified in Rashid Mazuri Ramadhan v Doshi & Co (Hardwares) Ltd & another [2017] eKLR where the trial court observed as follows: -

> "In this case the claim for unfair termination is founded on the mistaken believe by the claimants that their casual employment had converted to regular terms contract. In view of the finding herein above that the claimants' employment never converted to regular terms contract of service, their claim for unfair or wrongful termination is unfounded. They were casual employees who under Section 35(1) (a) of the Act were terminable without notice and without any protection by Section 35 (1) (c), 40 and 45 of the Act."

99. That being the position, the Respondent was under no obligation to issue notices to the Appellants to show cause why they had not reported to work (as would be the case with term employees) when they stayed away after 28th July 2020. Indeed, all the Respondent was to do is to ensure their outstanding wages are fully paid. Beyond this, the Respondent was free to get alternative manpower to continue with its activities.

100. This position is confirmed in the Rashid Mazuri Ramadhan v Doshi & Co (Hardwares) Ltd & another [2017] eKLR case both at the trial court and Court of Appeal level. A casual employee who does not report to work should not expect the employer to take him through a disciplinary process of seeking to establish his whereabouts and issuing a show cause as is the case with other protected contracts of service. In the case of a casual, the employer is entitled to just move on. The only restriction would perhaps be the pro-rata notice contemplated under section 35 of the *Employment Act*. Indeed, this is what the trial court in the Rashid Mazuri case said when it observed in its closing remarks as follows: -

> "For the reason that the claimants were casual employees and that they deserted their employment deliberately, I dismiss the suit with no order as to costs."

101. From the pleadings and evidence on record, it is clear to me that the Appellants were claiming for benefits that would usually accrue to term employees as opposed to casual employees. I do not think, for my part, that in view of the legal position aforesaid they were entitled to pursue these reliefs (see Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR).

Determination

102. For the several reasons I have set out in this judgment, I find that the Appellants' appeal is without merit. Accordingly, I dismiss the appeal with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF JULY, 2022

B.O. M. MANANI

JUDGE

In the presence of:

Katu for the Appellant

No appearance for the Respondent

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE