



**Gonna v Mistry V.Naran Mulji & Co (Appeal 81 of 2021)
[2022] KEELRC 1369 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1369 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 81 OF 2021**

**B ONGAYA, J
JULY 8, 2022**

BETWEEN

FRANCIS SAFARI GONNA APPELLANT

AND

MISTRY V.NARAN MULJI & CO RESPONDENT

(Being an appeal from part of the judgment of Honourable M.L.Nabibya , Principal Magistrate delivered on 28.10.2021 ELRC Cause No. 232 of 2020 at Mombasa Chief Magistrate’s Court, Francis Safari Gonna –Versus- Mistry V. Naran Mulji & Company)

JUDGMENT

1. The appellant filed the memorandum of appeal on 26.11.2021 through his advocate Nyambura Kamau Advocates. The appellant is dissatisfied with part of the judgment delivered by the trial Court on 28.10.2021 upon the following grounds:
 - 1) The learned magistrate erred in law and fact in finding that the claimant’s contract of employment did not convert from casual employee to regular term employee in accordance with section 37 of the *Employment Act*.
 - 2) The learned magistrate erred in law and in fact in finding that the claimant’s forced resignation did not amount to unfair constructive dismissal.
 - 3) The learned magistrate erred in law and fact in finding that the claimant failed to prove that he was not paid salary for 157 days that he had worked prior to his forced resignation.
 - 4) The learned magistrate erred in law and fact in failing to award the claimant compensation for unfair or wrongful constructive dismissal.



- 5) The learned magistrate erred in law and in fact in finding that the claimant was not entitled to the reliefs he had sought, save for the refund of unremitted NSSF Deduction and thereby dismissing them.
- 6) The learned magistrate erred in law and in fact in finding that the claimant had failed to establish his case on the balance of probabilities.
- 7) The learned magistrate erred in law and fact in failing to interpret the law touching on Employment and Labour Relations properly hence arriving at a wrong decision.
- 8) The learned magistrate misdirected herself by failing to fully appreciate and correctly analyse the pleadings and evidence before her.

The appellant prayed for orders:

- 1) The appeal is allowed.
 - 2) The judgment of 28.10.2021 be set aside and be substituted with an order allowing the Claimant's claim with costs.
 - 3) The costs of this appeal be awarded to the appellant.
2. The appeal arises out of the statement of claim filed in the trial court on 11.03.2020 through Nyambura Kamau Advocates. The appellant alleges that he was employed by the respondent from 1.03.2017 up to 05.02.2019 as a security officer. He alleges that he was forced to resign due to lack of payment of his salary effective September 2018 to the date of resignation 05.02.2019. His case was that at separation he earned Kshs 500 per day which was below the prescribed minimum wage. The appellant's amended statement of claim was filed on 24.03.2021.
 - 3 The appellant claimed and prayed for:
 - a. One-month pay in lieu of notice (30*726.55) Kshs. 21,796.50.
 - b. Salary arrears for 01.09.2018-05.02.2019 (157*500) Kshs.78, 500.00.
 - c. Under payment for the years Kshs. 145,012.75.
 - d. Leave days for the year 2017-2019(21 days*Kshs500*2 years) Kshs 21,000.00
 - e. Severance pay for the years worked (15 days*Kshs 726.55*2years) Kshs 21,796.50
 - f. Refund of unremitted NHIF deduction (23*500) Kshs 11,500.00
 - g. Refund of unremitted NHIF deduction (23*400) Kshs 9,200.00
 - h. Overtime allowance (12hrs*66wks*195.08+12*40*204.83) Kshs 252,821.76
 - i. Unpaid rest days (12hrs*66days*260.1+12*40*273.1) Kshs 337,087.20
 - j. Public holidays(12hrs*10days*260.1+12*11*273.1) Kshs 67,261.20

Total claimed Kshs. 965,975.91.
 4. The appellant alleges that he issued a letter of resignation on 05.02.2019 to the respondent's director and he resigned on account of non-payment of salary. It is his case that the resignation amounted to constructive dismissal.
 5. The appellant prayed for judgment against the respondent for:



- a) A declaration that that the resignation was involuntary therefore it amounted to unfair or wrongful constructive dismissal.
 - b) The respondent to pay the claimant compensation, the equivalent of 12 months' salary for unfair wrongful constructive dismissal at Kshs 216,558.00
 - c) That the respondent be ordered to pay the claimant his terminal and contractual dues amounting to Kshs 965,975.91.
 - d) Costs of this claim and interests on (b) and (c).
 - e) Any other relief that this Honourable Court may deem just and fit to grant.
6. The respondent's case is based on the respondent's amended response filed on 02.08.2021 through Wandai Matheka & Co Advocates. The respondent admitted employing the appellant on casual basis as a security officer but denied that the employment was from 01.03.2017 until 05.02.2019. The respondent denied that the appellant worked continuously for 7 days a week, that he was forced to resign due to non-payment of salary and that he earned Kshs 500 per day. It was pleaded that he never worked continuously for each month effective March 2017 - but that he worked on need basis. It was denied that the director asked the claimant to resign in writing if he desired to do so on account of non-payment and as was alleged for the appellant. In the circumstances that it was a casual relationship, the respondent's case was that alleged constructive dismissal did not arise.
 7. Further, the appellant last reported on duty in January 2019 and being a casual relationship ending on a daily basis the respondent didn't make an inquiry on the appellant's whereabouts. It was prayed that the suit be dismissed with cost.
 8. This being a first appeal the Court will reevaluate the evidence before the trial Court and arrive at findings bearing into consideration that it did not by itself take the evidence as was done by the trial Court. The Court has considered all the material on record and makes pertinent findings as follows.
 9. The 1st issue for determination is whether the trial Court erred in finding that the appellant's contract of employment did not convert from casual employee to regular term employee in accordance with Section 37 of the *Employment Act*. The Court has perused the trial Court's record. The appellant's evidence was that he was employed as a security guard in March 2017 and he used to report at 6a.m until 6p.m, he worked for 6 days a week, paid on a daily basis in terms of cash money Kshs 500 payable at the end of the week, he was never absent from work, there were no leave days, off days were on Sundays and on 05.02.2019 he issued his letter of resignation to the Respondent's director. Further, in his cross examination he testifies that he was a casual worker, he does not claim for overtime, he used to rest, he has not mentioned any specific holiday worked and not paid for. His NSSF were paid and that he did not have his NHIF statement with him.
 10. The respondent's witness testified that the appellant was a casual worker who accepted Kshs 500 as his wage per day and was paid for work done on need basis. Further, he never worked for more than a week continuously.
 11. The trial Court found that the agreement was that the claimant was employed as a casual because by his own evidence, he admitted as such. It is submitted for the claimant that his testimony was that he worked 6 days a week and that evidence was not rebutted. For the respondent it is submitted that the claimant worked upon casual terms, he was never a permanent employee, he was engaged and paid at the end of the day on need basis, and, he never worked for a month continuously – so that his service never converted to one subject to minimum statutory terms per section 37 of the *Employment Act*, 2007.



12. The Court has to consider each party's account and has to determine whoever is telling the truth on a balance of probability. The appellant pleaded that he worked continuously for 7 days a week. In a contradictory manner he testified that he worked for six days with an off day being every Sunday. Further, he testified that while he earned Kshs. 500.00 per day, he was as well deducted Kshs. 200.00 for NSSF and Kshs. 500.00 for NHIF but the point in time of such deductions was not stated at all – in circumstances whereby he had pleaded and claimed for refund of NSSF and NHIF. Such seriously contradictory account cannot be trusted. On the other hand, the respondent pleaded that the appellant was employed on casual basis and he did not work continuously for more than a month. He was also engaged only on need basis. On a balance of probability, the employer's account is found more credible as it is consistent with the testimony by the respondent's witness. The trial Court did not err in finding that by his own evidence the claimant had confirmed the casual arrangement. The point is this, if he was undisputedly paid at the end of the day, nothing compelled him to report at work the following day. Nothing before the Court shows he worked continuously for over a month and on a balance of probability, the conditions for conversion to minimum statutory terms per section 37 of the Act appear not to have been established at all. The 1st ground of appeal will collapse.
13. To answer the 2nd issue, the Court returns that the appellant willingly without coercion drafted his resignation letter and presented it to the Respondent's director. The appellant testified that he resigned from the respondent's company. In its Judgement the trial court stated "He confirmed that he could not continue to work because there was no salary paid, to me there is no evidence that he was compelled to resign, he did it willingly because he felt he was working for free. For that reason, the respondent was under no obligation of taking him through any termination proceedings. The resignation was regular. I therefore refuse to find that there was any form of coercion against the claimant/ constructive termination and that the process was unfair or wrongful." The appellant's grievance by his own testimony was not that he was forced to sign a resignation letter but that after he signed the resignation letter, no terminal dues were forthcoming. In any event the alleged resignation letter was not exhibited and while the appellant stated that it was in the custody of the respondent, there was no notice to produce such alleged letter. In the circumstances, there is no reason to doubt the testimony by RW1 that after his last day of work sometimes in February 2019, the claimant never showed up to be assigned again on need basis. The allegation of unfair termination does not even begin to arise in the instant case.
14. Needless to state, if he was a casual employee, it is not conceivable that he had worked for 157 days without payment per ground 3 of appeal and which was claimed at paragraph 10(b) of the memorandum of claim.
15. The Court has examined the claims in paragraph 10 of the amended memorandum of claim. The Court considers that the claims for salary arrears, leave, underpayment, refund of NHIF and NSSF deducted, rest days, public holidays, and overtime were all continuing injuries ceasing on 05.02.2019. The suit was filed on 11.03.2020 long after the lapsing of 12 months of limitation of such continuing injuries per section 90 of the *Employment Act*, 2007. The entire appellant's suit is therefore found unjustified and without merits.
16. The Court finds that the appeal will collapse on all grounds of the memorandum of appeal.
17. In conclusion, the appeal is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 8TH JULY, 2022.

BYRAM ONGAYA



JUDGE

