



REPUBLIC OF KENYA



KENYA LAW
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**Cementers Limited v Muthami (Appeal 47 of 2019)
[2022] KEELRC 4038 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4038 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 47 OF 2019
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

CEMENTERS LIMITED APPELLANT

AND

ALEXANDER KILONZI MUTHAMI RESPONDENT

*(An Appeal from the Judgment of the Resident Magistrate Hon. D.O. Mbeja,
delivered on 30th September 2019, in Nairobi Chief Magistrate's Court
Employment and Labour Relations Court Cause Number 400 of 2018)*

JUDGMENT

1. The appellant was ordered by the trial court, in the judgment dated September 30, 2019, to pay to the respondent, is former employee, a sum of Kshs 468,160, comprising compensation for unfair termination, and terminal benefits. The appellant was also ordered to pay to the respondent costs and interest.
2. The appellant was dissatisfied with the judgment, and has filed a memorandum of appeal, dated October 24, 2019. There are 10 grounds raised by the appellant in its appeal. They are: -
 - i. The trial court failed to evaluate evidence correctly, and therefore arrived at a wrong judgment.
 - ii. The trial court failed to take into account extensive material placed before him.
 - iii. The trial court failed to consider the written submissions filed by the appellant.
 - iv. The trial court failed to appreciate that the respondent was employed on fixed term contract.
 - v. The trial court failed to appreciate that the respondent's contract expired, and not terminated by the appellant.



- vi. The trial court failed to evaluate the respondent's prayers properly.
 - vii. The trial court erred in granting the respondent notice pay, the respondent's contract having been a fixed term contract, which expired.
 - viii. The trial court awarded the respondent annual leave and pro-rata leave without evidence.
 - ix. The trial court erred in awarding the respondent house allowance, while he was on a daily wage, which includes house allowance.
 - x. The trial court erred in awarding the respondent compensation equivalent of 12 months' salary.
3. The appellant prays the court to uphold the grounds of appeal above.
 4. Parties agreed to have the appeal considered and determined on the strength of the record of appeal. They confirmed filing and exchange of submissions on November 16, 2021. Judgment was reserved for March 31, 2022. However, the record of appeal was misplaced and the court was not able to prepare its judgment. It was confirmed that the record had been filed at the last mention, on July 29, 2022.
 5. The grounds of appeal, raise the following issues: whether the respondent established his case to the required standard; whether the trial court appreciated in full the evidence before it; whether the trial court applied the law appropriately; and whether the remedies availed to the respondent were sustainable.

The Court Finds: -

6. The judgment of the trial court states at page 119 of the record of appeal, that " this court is satisfied that the claimant has established a *prima facie* case, against the respondent on a balance of probabilities, all circumstances of the case considered."
7. This statement is problematic. Did the respondent establish his case on a balance of probability, or just establish a *prima facie* case? Did he prove, on a balance of probability, that he was unfairly dismissed or his contract wrongfully terminated?
8. The appellant would be justified in feeling that the trial court did not correctly evaluate evidence. The use of the term *prima facie* by the trial court, corroborates the grounds in the memorandum of appeal, which speak to lack of adequate evidence placed before the trial court, to support the reliefs granted in the judgment.
9. The trial court did not look at the individual prayers made by the respondent, against his evidence, in granting the reliefs. The judgment states at page 119 and 120 of the record of appeal that: -

"guided by the circumstances obtaining in the instant case, the evidence so far adduced, together with the submissions filed, judgment is entered in favour of the claimant against the respondent as sought in the statement of claim, all circumstances of this case considered."
10. The statement above is generalized, and does not explain on what evidence, each relief was granted. Evidence is described as "so far adduced." This, viewed with the use of '*prima facie*,' suggests that evidence was not complete, or was inadequate.
11. Parties agreed that the respondent was paid a daily wage of Kshs 700. The contracts before the trial court indicate the wage was paid in cash at the end of the week. A daily wage includes the housing element, under the Regulation of Wages [general] [amendment] Order, as submitted by the appellant.



12. Not only was grant of house allowance wrong in principle; it was mathematically imprecise. The respondent told the trial court that he worked for 6 days a week, which in a month, would result in a salary of Kshs 16,800. What was the award of house allowance on a monthly rate of Kshs 18,200 premised upon?
13. There are other important pieces of evidence, availed by the parties, which are not shown to have been fully evaluated by the trial court. The respondent served under 3 different fixed-term contracts. The first was for 11 months, May 30, 2016 to April 29, 2016. The second was for 9 months, commencing April 30, 2017 and ending on December 30, 2017. The third and last was for 5 months, beginning March 31, 2018 to August 31, 2018. It is not true that the respondent worked for 4 years and 4 months in continuity.
14. The 3 contracts uniformly stated that, "previous employment does not count as part of your continuous period of employment, which is considered to be temporary." This clause does not seem to have come to the attention of the trial court, in concluding that the respondent was regularized, under section 37 of the Employment Act. Parties agreed of their own volition, that the respondent would serve on limited-term contracts, each independent of the other.
15. The respondent does not appear consistent on the period served. In his submissions dated November 15, 2021, he states that he was employed on casual basis, from April 12, 2015. In his witness statement dated November 6, 2018, the employment date is given as April 12, 2017. In his evidence on trial, the date given is April 12, 2015. These contradictions were not resolved on trial.
16. The parties intended that the respondent would serve on fixed term contracts, each independent of the other, with terminal benefits payable at the end of each contract. In the last contract for instance, the respondent was offered terminal dues based on the period of 5 months contracted, computed at Kshs 16,975 [page 28 of the record of appeal]. This includes notice pay and pro-rata leave. This document does not again, seem to have featured in the judgment of the trial court. The pay sheet at page 32 of the record of appeal, indicates that *pro-rata* leave was computed and offered to the respondent. This document too, was not mentioned in the judgment.
17. Should the respondent have pleaded these items again, based on the entire, unclear, period allegedly worked? Should he have been awarded reliefs based on 4 years and 4 months of service?
18. On cross-examination, the respondent testified that, "I was not issued with a letter of termination. I don't have proof of termination." [page 110 of the record of appeal]. How does an employee who makes such concessions, be found to have discharged his evidential burden, under section 47[5] of the Employment Act? This evidence does not appear to have come to the attention of the trial court, in concluding that the respondent's contract was unfairly terminated by the appellant, and in granting him compensation equivalent of 12 months' salary. The concessions by the respondent above, would support the position held by the appellant, that the respondent was on a fixed-term contract which lapsed. The respondent himself testified that he did not have proof of termination.
19. Section 47[5] of the Employment Act places the burden of proof in establishing that unfair termination of wrongful dismissal has occurred, on the shoulders of the employee. The employer is required to give reasons justifying termination, only upon the employee showing that unfair termination or wrongful dismissal has occurred. There was no evidence before the trial court showing that unfair termination or wrongful dismissal occurred.
20. The award of compensation equivalent of 12 months' salary, even were it to be held that the respondent proved unfair termination, does not appear to have factored in, the matters under section 49 of the



Employment Act, as read together with section 50. The trial court did not explain why it considered maximum compensation suitable.

21. The evidence before the trial court was that the respondent worked on fixed-term contract, which expired. He was offered his contractual dues upon expiry of the relevant contract. There was no evidence to establish that he was owed terminal dues, or that his contract was unfairly terminated, to justify compensation.

It is ordered: -

- a. The appeal is allowed.
- b. No order on the cost.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH
DAY OF SEPTEMBER, 2022**

JAMES RIKA

JUDGE

Rika J

Court Assistant: Emmanuel Kieron

Mucheru Law LLP, Advocates for the Appellant

Ngigi Njuguna & Company Advocates for the Respondent

