



**Del Monte Kenya Limited v Tinaga (Appeal E003 of 2021)
[2022] KEELRC 4100 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4100 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E003 OF 2021
DKN MARETE, J
SEPTEMBER 28, 2022**

BETWEEN

DEL MONTE KENYA LIMITED APPELLANT

AND

GILBERT OMANGI TINAGA RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Appeal dated 16th July, 2021. It comes out as follows;
 - a) That the learned trial magistrate erred in law and in fact in holding and finding that the respondent was an employee of the Appellant as at 17th January, 2018 when in fact he was not an employee of the Appellant.
 - b) That the Learned trial Magistrate erred in law and in fact in holding and finding that the plaintiff/respondent proved his case against the defendant/appellant to the required standards.
 - c) That the Learned trial Magistrate erred in law and in failing to find that the contract of service between the Appellant and the respondent lapsed on 30th September, 2017 and therefore the Respondent was not on contract of service as at 17th January, 2018 when his services were allegedly unfairly terminated.
 - d) That the Learned trial Magistrate erred in law and in fact in shifting the onus of prove to the appellant whereas it was upon the respondent to prove his case against the appellant.



- e) That the Learned trial Magistrate erred in law and in fact in declaring that the respondent's termination was wrongful and unfair when in fact there was no contract of service between the appellant and the respondent.
- f) That the Learned trial Magistrate erred in law and in holding that the respondent is entitled to compensation for unlawful loss of employment and other terminal benefits to wit; leave days, house allowance, service pay, salary in lieu of notice and certificate of service.
- g) That the Learned trial Magistrate erred in law and in failing to consider the defence case.
- h) That the Learned trial Magistrate erred in law and in fact by ignoring the appellant's submissions in his judgment without proper reasons to do so.
 - i) That the Learned trial Magistrate erred in law and in fact in coming to the conclusion that he did contrary to the evidence on record.
- j) That the Learned trial Magistrate erred in law and in fact by arriving at the conclusion he did while relying on extraneous material and/or facts which did not form part of the proceedings.
- k) That the Learned trial Magistrate erred in law and in fact in coming to the conclusion that he did without any or any reason or sufficient cause.

2 She prays thus;

- a. That this appeal be allowed.
- b. The judgment of the Lower Court be set aside and the Respondent's suit against the appellant be dismissed with costs to the appellant.
- c. Costs of the appeal.

- 3. The appellant in her written submissions dated 8th December, 2021 submits that the Respondent was employed by the Appellant on a fixed term contract signed *inter partes* on 27th July, 2017 effective on 1st August, 2017 and set to expire on 30th September, 2017.
- 4. The Respondent was therefore not in employment on 17th January, 2018 as alleged as his contract of service had expired on 30th September, 2017 and was not renewed as per the testimony of DW1 Martha Atudo.
- 5. The Respondent did not produce any payslips after September, 2017 to prove that he was in employment of the Appellant as at 17th January, 2018. Again, she cannot be expected to proffer employment records for periods after the expiry of the employment contract *inter partes*.
- 6. The Appellant systematically pursues her grounds of appeal and submits that the learned magistrate erred in coming up with a finding of unlawful termination of employment in the midst of overwhelming evidence to the contrary. She prays that the appeal be allowed.
- 7. The Respondent disapproves knowledge or even participation in the drawing and execution of the fixed term contract. It is his case that this was a forgery and fraudulent with a view to scuttling him out of employment.



8. The Respondent supports his case of not signing the fixed term contract by alluding to the Appellant's witness testimony that she was not present and was not able to authenticate the Respondent's signing of the contract.
9. His production of payslips for the months of January, April and June, 2017 is further testimony that he continued in employment all this time and after the alleged fixed term contract.
10. The Respondent further buttresses his case by relying on Section 37 of the *Employment Act* 2007 which mandates permanent employment in cases where a casual worker serves for a continuous period of not less than one month or the equivalent of 3 months or more. Therefore, the claimant was entitled to a notice of termination of employment as is required by the law.
11. The Respondents further submits a case of their application of Section 74 of the *Employment Act* which burdens the employer to maintain employment records as follows;

“An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the payable salary and its duration; the statutory deductions made on the salary; hours of work setting out the rest day/s; annual leave taken or due and any records for any leave taken with regard to sickness or as the case may be.”
12. The Respondent's further case relies on the NSSF statements which were originated by Soloplant (K) Ltd. This is an indication of the appellant's failure to remit his NSSF dues as is required of the law. He therefore claims service pay and house allowance.
13. It is all clear that the Respondent had been working for the Appellant for long periods before the purported fixed term contract. He adduced evidence and produced payslips for January, April and June, 2017 periods outside the contract. He further produced NSSF statements, albeit for another firm as a demonstration that the appellant never met her side of the bargain in remission of NSSF dues.
14. Looking at the signatures on the fixed term contract, the verifying affidavit and witness statement in support of the claim, a stark difference is noted. There is a high likelihood that the Respondent was not party to the making of the fixed term contract. It is also likely that the appellant concocted this to supplement his case for lawful termination of employment.
15. The law is clear on the role of an employer to keep and maintain records of employment. Sections 10 and 74 of the *Employment Act*, 2007 are not statutory decorations but statements of law. The appellant cannot therefore be allowed to deem this a shift of the burden of proof to herself. This is trite law.
16. Overall and principally, this appeal is determinable on two major issues. This is the authenticity of the fixed term contract and the learned Magistrate's observations on the burden of proof. The Respondent's case and submission is that he was not involved or was party to the execution of the fixed term contract. The Appellant was not able to rebut this even on the evidence of her witness Martha Atudo, DW1 at trial. She testified that she did not witness the Respondent sign the agreement, or at all.
17. Section 47(5) of the *Employment Act*, 2007 relied on by the learned Magistrate comes out as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”



18. Inasmuch as the learned Magistrate did not come out very clearly on this, she cannot be rightly accused of meddling the burden of proof in the circumstances. This is because the statute is as clear as daylight. The employee opens with laying a case of unlawful termination of employment. When this is done, the burden of justifying lawful termination of employment shifts to the employer.
19. The learned Magistrate therefore did not unduly transfer the burden of proof of unlawful termination to the Appellant. This was a case of shifting and balancing the various levels of proof of the parties to the case. It was well done.
20. The circumstances of this appeal tilts it in favour of the Respondent. The various complaints raised in the Memorandum of Appeal are not substantiated to fruition, or at all. The balance of probabilities and preponderance of evidence sway in favour of the Respondent.
21. I am therefore inclined to dismiss the appeal and further make a consideration of the award in terms of the prayers by the Respondent.
22. The learned magistrate did not make a specific award to the Respondent at trial. He has now pleaded that this court makes awards in terms of the law. This is a necessary precaution with a view to satiating the requirements of the overriding objectives of this court as spelt out in Sections 3 and 3A of the *Employment and Labour Relations Court Act*, 2014.
23. I therefore order relief as follows;
 - i. A declaration be and is hereby issued that the termination of employment of the Respondent by the Appellant was wrongful, unfair and unlawful.
 - ii. One (1) months salary in lieu of noticeKshs.9,880.00
 - iii. Twelve (12) months salary as compensation for unlawful termination of employment – Kshs.9,880.00 x 12Kshs.118,560.00
Total of claim Kshs.128,440.00
 - iv. The costs of the claim and appeal shall be borne by the Appellants.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Miss. Wayua holding brief for Uvyu instructed by M. M. Uvyu & Company Advocates for the Appellant.
2. Miss. Kiongera instructed by Wairimu Kiongera & Company Advocates for the Respondent.

