Chepkurui v County Government of Elgeyo Marakwet (Appeal E005 of 2021) [2022] KEELRC 4034 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4034 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

APPEAL E005 OF 2021

NJ ABUODHA, J

SEPTEMBER 23, 2022

BETWEEN

WILLIAM KIPKEMOI CHEPKURUI ..... APPELLANT

AND

COUNTY GOVERNMENT OF ELGEYO MARAKWET ..... RESPONDENT

(Being an Appeal from Judgment/decree of the Honourable Caroline R.T. Ateya the Senior Principal Magistrates Court at Iten read and delivered on 10.5.2021 in ITEN MELRC No. 5 of 2019, William Kipkemoi Chepkurui Vs The County Government of Elgeyo Marakwet)

JUDGMENT

1. By memorandum of appeal filed on June 7, 2021, the appellant faulted the judgment of the trial court (Hon CRT Ateya) on grounds *inter alia*.

    a. That the learned magistrate erred in law and fact in holding that the evidence tendered by the claimant did not meet the threshold necessary to prove his claim and in particular the learned judge erred in failing to evaluate the evidence in support of the appellant's claim.

    b. That the learned magistrate erred in law and fact in failing to evaluate the evidence and submissions of the appellant, applying the wrong principles of law in arriving at her judgment and failing to find that the appellant's submissions indeed raised satisfactory claim against the respondent.

    c. That the learned magistrate erred in law and fact in failing to hold that the appellant was entitled to damages for wrongful termination of his employment.

    d. That the learned magistrate erred in fact and law in his assessment of the submissions and evidence before the court and the applicable law and thus arrived at an erroneous finding.

2. In the submission in support of the appeal, Mr Kagunza for the appellant submitted in the main that section 35(1)(c) of the *Employment Act* provides that where a contract to pay wages or salary periodically in intervals of exceeding one month, the contract shall be terminable by either party at the end of the period of 28 days next following the giving of notice in wiring. According to counsel, in view of section 35(1) and 37(1) of the *Employment Act*, it was mandatory for the appellant to be issued with a notice prior to the termination of his service. Therefore, the finding that the appellants contract had lapsed and there was no need of issuing notice to the appellant was wrong finding by the trial court.

3. According to counsel, the appellant worked for the respondent as a casual employee from 2010 to 2016 whereby his service was renewed for three months save for the first contract which was for a year. The casual employment according to counsel, converted to contract of service in which wages are paid monthly, by operation of law. His termination without notice was therefore unfair and a contravention of section 35 and 41 of the *Employment Act*.

4. Mr Kagunza further submitted that section 41 of the *Employment Act* is couched in mandatory terms and whenever an employer fails to follow these mandatory terms, whatever the outcome of the process, it is bound to be unfair as the affected employee had not been accorded a hearing.

5. Mr Kagunza further submitted that the learned magistrate erred in law in failing to hold that the appellant was entitled to damages for wrongful termination of his employment. The trial court never evaluated and or considered the appellant's evidence on terminal dues in its judgment.

6. Mr Wafula for the respondent on its part supports the finding of the trial court and simply submitted that the learned trial magistrate found as a fact that the claimant was well aware that he had been employed on contract basis therefore he could not correctly claim that his termination was unfair as he was not terminated. According to counsel, the trial magistrate made a correct and right decision on the matter based on the material presented before her.

7. As observed by both counsel in the matter, the role of the court as the first appellate court was well captured in the case of *Selle & another v Associated Motor Boat Ltd & others* [1968] EA 123. That is to say, a first appeal is by way of a retrial and this court as the first appellate court has a duty to re-evaluate, re-analyze and reconsider the evidence and draw its own conclusion, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

8. The court has gone through the memorandum of appeal and submission by counsel and became of the view that the main complaint over the judgment of the trial court is that the learned trial magistrate erred in holding that the appellant being a casual employee on a three month fixed contract was not unfairly terminated. Counsel contended that the appellant having been on continuous service for over five years had been converted from a casual employee to a regular employee by operation of section 37(1) of *Employment Act* hence entitled to the processes contained under section 35(1)(c) of the Act which included being furnished with notice of termination or payment in lieu.

9. On this issue, the learned trial magistrate rendered herself as follows:

> " the claimant was well aware that he had been employed on contract. He confirms that he was never employed on a permanent basis. The last contract was for 1 year and after it lapsed the same was not renewed. He cannot no(sic) claim that his termination was unfair as he was not terminated..."

10. In response to questions during cross-examination, the appellant stated as follows:

> "...I was employed in 2010 by Iten/Tambach CC. I was employed on contract basis. It was on a temporary basis for 3 months. In 2016 I turned 60 years. In November. I was born in 1956 on 1st July. government employees retire at 60 years. I was never employed on permanent basis by EMC.I was always on contract."

11. An employee on a fixed term contract, unless provided to the contrary in the contract, is not entitled to notice of termination of the contract since the contract is usually time bound and runs out through effluxion of time. Further, an employee on a fixed term contract does not have a guarantee over renewal when the contract expires.

12. The appellant in his own statement before the trial court stated that he was always on contract. it was further in evidence before the trial courts that the claimant had attained the mandatory retirement age of 60 years hence his contract could not be renewed.

13. The court will take wisdom from the word of Lady Justice Sitati in the case of *Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus* [2020] eKLR where the learned judge observed.

> "In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on misapprehension of the law, the axe must fall on the impugned judgment."

14. The court has carefully reviewed and analyzed the evidence presented before the trial court vis-à-vis the judgment of the learned trial magistrate and has become of the view that the same is sound and sees no reason to disturb the same.

15. The appeal is therefore found without merits and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC