



Macharia v Registered Trustees, Franciscan Sisters of Immaculate, Nyeri (Appeal E017 of 2021) [2022] KEELRC 13082 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13082 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E017 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

ESTHER WAHURA MACHARIA APPELLANT

AND

**REGISTERED TRUSTEES, FRANCISCAN SISTERS OF IMMACULATE,
NYERI RESPONDENT**

(Being an Appeal from the Judgment and Decree of Honourable Nelly W. Kariuki-Principal Magistrate, Delivered on 21st October, 2021 in Nyeri CM ELRC No.17 of 2019)

JUDGMENT

1. This matter was originated by way of a memorandum of appeal dated November 18, 2021. It comes out as follows;
 - a. That the appeal be allowed in its entirety.
 - b. That the judgment of Honourable Nelly W Kariuki, Principal Magistrate, delivered on October 21, 2021 in Nyeri CMELRC No 17 of 2019, be set aside and/or varied.
 - c. That the honourable court grants any other/further reliefs as it may deem necessary.
 - d. That costs of this appeal be provided for.
2. The appellant in her written submissions dated April 24, 2022 submits that this court is bound to re-analyze and re-evaluate the evidence adduced in the trial court in a bid to reach its own findings and conclusions. In doing so, however, it should be alive to the fact that it should only interfere with the findings of the trial court when the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching the findings.



3. The gist of the appeal boards around the terms of service of the appellant. It is based on the respondents position and submission that the appellant was a casual employee which she denies.
4. In furtherance of her case, the appellant seeks to rely and submits on section 37 of the [Employment Act](#), 2007 provides as follows;

“ 37 notwithstanding any provisions of this Act, where a casual employee-

(1)

- a. Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
- b. Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.”

5. It is her case the respondent did not produce any employment records as is required of section 10 of the [Employment Act](#), 2007 and therefore has failed to prove that indeed she was a casual labourer and not a gardener or a cook.
6. Again, the purported extract of an exercise book by the respondent in support of a case of the appellants signing upon receipt of monies due did not have an official stamp and was not authentic as a document of the respondent it cannot therefore be relied on to prove a case of casual employment. Therefore, the learned magistrate erred in law and fact in finding that the appellant was a casual labourer and not entitled to the provision of sections 28 and 31 of the [Employment Act](#), 2007.
7. The respondent in her written submission dated June 21, 2022 submits in opposition to the appeal. The upshot of her case is as follows;

“The respondent in defending itself confirmed that the appellant was never its employee but was granted pace jobs for which she worked for only 2 inconsistent months and was paid on a daily basis. The respondent produced a job application by the appellant dated April 5, 2018 and at page 24 of the record of appeal. In such application she applied for a job as a chef which she was granted on a day to day basis. She was then paid a sum of Kshs 250/- which she received and duly acknowledged by signing a fact that she never denied in the trial court. In the acknowledgment the respondent confirmed that the appellant worked on a daily basis and was paid all her dues.”

8. A look at the respective cases of the parties tilts the appeal in favour of the appellant. This is because throughout the trial she comes out clear and clean on a case of permanent employment terms as per section 37 of the [Employment Act](#), 2007. She demonstrates a case of having extended long periods of continuous service to the respondent which evidence and position has not been rebutted by the respondent. The finding of casual employment and consequent dismissal of the claim is therefore based on the wrong principle of law and erroneous.
9. I am therefore inclined to allow the appeal and award relief as follows;
 - i. That the judgment of the Honourable Nelly W Kariuki Principal Magistrate delivered on October 21, 2021 be and is hereby set aside and vacated.



- ii. That the respondent be and is hereby ordered to meet and pay relief to the appellant as follows;
- i. One (1) month salary in lieu of noticeKshs 11,926.40
 - ii. Eight (8) months salary as compensation for unlawful termination of employment
Kshs 11,926.40 x 8=95,411.20
 - iii. Unpaid leave days for 4 years
(Kshs 11,926.40 x 84/30) Kshs 33,393.92
 - iv. Service pay at 15 days for each completed year of service
(Kshs 11,926.40 x 15/30 x 5=Kshs 29,816.00.
 - v. Underpayment
(May 2013 to April 2015 Kshs 4,024.15 x 24 months)Kshs 96,679.60
(May 2015 to April 2017 Kshs 5,107.10 x 24 months) Kshs 122,570.40
(May 2017 to June 2018 Kshs 6,926.40 x 14 months) Kshs 96,969.60
 - vi. Housing Allowance at 15% gross salary Kshs 11,926.40 x 15% x 60 months=Kshs
107,337.60
Total of claim Kshs 594,104.72
- iii. The costs of this appeal and the claim shall be borne by the respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mrs.Magua instructed by Magua & Mbatha Advocates for the Appellant.
2. Mr. Gitonga instructed by Gitonga Muthee & Company Advocates for the Respondent.

