



**Musyimi Mwangangi v David Kinuthia t/a Impress Communications Printers & Stationery  
(Civil Appeal E061 of 2020) [2022] KEELRC 12891 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12891 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL E061 OF 2020**

**L NDOLO, J  
OCTOBER 13, 2022**

**BETWEEN**

**MUSYIMI MWANGANGI ..... APPELLANT**

**AND**

**DAVID KINUTHIA T/A IMPRESS COMMUNICATIONS PRINTERS &  
STATIONERY ..... RESPONDENT**

*(Appeal from the judgment of Hon. L.L Gicheha, CM delivered  
on 30th September 2020 in Milimani CMCC No. 1695 of 2018)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgment of Hon. L.L Gicheha, CM delivered on 30<sup>th</sup> September 2020 in Milimani CMCC No. 1695 of 2018, by which the Appellant's claim against the Respondent was dismissed.
2. In his Memorandum of Appeal dated 14<sup>th</sup> October 2020, the Appellant raises the following grounds of appeal:
  - a. The learned Magistrate erred in both law and fact by failing to substantially consider the Appellant's evidence;
  - b. The learned Magistrate erred in both law and fact by failing to fairly and objectively evaluate the evidence before the court and therefore reached an unjust finding;
  - c. The learned Magistrate erred in both law and fact by misconstruing the legal principles underpinning the law of employment in Kenya and the *Employment Act*, 2007;



- d. The learned Magistrate erred in law and fact by making a finding that the Appellant was not an employee of the Respondent but a casual worker and therefore not entitled to remedies and damages sought in the suit;
  - e. The learned Magistrate erred in law by failing to appreciate the provisions of the [Employment Act, 2007](#);
  - f. The learned Magistrate erred in law in the manner she analysed the evidence and her application of the law to the facts.
3. This being a first appeal, I am required to re-evaluate the evidence and draw my own conclusions, bearing in mind that I have had no opportunity to encounter the witnesses first hand.
  4. The duty of a first appellate court was restated by Mativo J (as he then was) in [Bwire v Wayo & Sailoki \[2022\] KECH 7 \(KLR\)](#) in the following terms:

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others*)...

A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons.”

5. A reading of the impugned judgment indicates that the trial court dismissed the Appellant’s claim on its finding that he was a casual employee and therefore not entitled to the remedies sought.
6. In her judgment, the learned trial Magistrate states as follows:

“On whether the Claimant was a casual worker, the court must interrogate the relationship and confirm if he was a casual worker. Section 2 of the [Employment Act](#) defines a casual worker to mean a person the terms of whose engagement provides for his payment at the end of every day and who is not engaged for a period longer than 24 hours at a time.

The Plaintiff has produced an alleged register which shows that he was working from 1/8/2014-2016.

The Defendant allege (sic) that the said register did not emanate from his office.

I have looked at the Mpesa statements and I note that there were payment made to the Defendant during 2016-paid by Mpesa.

They range from 270/= to 14,000/=. If the Claimant was being paid 14,000 per month I would have expected more mpesa payments from the Respondent to cater for his salary.

Further the register he has produced shows he was working from Monday to Sunday save for a few days he was not there on Sunday.

Even his hours are peculiar he was working from 8 am – 6 pm or even 9 pm.



This makes the register suspicious and it appears it has been created for this case. Further there should have been a signature by the supervisor at the end of the week to corroborate the information at the register.

The Claimant may have been working [for] the respondent but I highly doubt he was a permanent worker.

If he was, it would have come out in payments as he must have been paid monthly, secondly the register would have shown proper working hours and days which would have been 8-5 pm and days Monday to Friday or Saturday.”

7. Having found as above, the learned trial Magistrate drew the following conclusion:

“The Claimant being a casual worker whose terms of engagement provides for payment at the end of each day and when not engaged for a period longer than twenty four hours at a time. It means the contract between them was terminable by either party at the close of any day without notice. The employee having been paid his dues at the end of every day and having no claim that he was not paid, the court cannot find that the termination of employment was unlawful as there was a daily contract and the respondent had no obligation to give him daily work unless available.”

8. In reaching this verdict, the learned trial Magistrate appears to have employed the general common law principle which provides that the burden of proof of a matter rests on the person alleging it. While this principle would be applicable in common law contracts, it does not always apply in employment contracts.

9. To this end, Section 9 (7) of the Employment Act shifts the burden of proof to the employer by stating:

7. If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

10. In his Statement of Defence filed at the trial court the Respondent pleaded as follows:

“The Respondent...states that the Claimant was a Causal Laborer with no written employment contract in the business and was on and off the Respondent premises working only and when called upon when casual binding jobs were available.”

11. The Respondent buttressed this averment by his witness statement dated 17<sup>th</sup> October 2016 in which he testified thus:

“The above named was a casual labourer with no written contract in our business. He was on and off our premises working only and when casual binding jobs were available. On several occasions, he was asked to leave due to violence and causing havoc in the office. He has also been involved in stealing and selling office equipment e.g. printing plates, portable machines and printing papers.”

12. In its decision in Reef Hotel Limited v Josephine Chivatsi [2021] eKLR this Court held that:

“...the defining feature of casual employment is not payment based on a daily wage, as opposed to a monthly salary, but rather a continuous employment period of less than a month or piece work performed within an aggregate period of less than three months. This



then is the essence of Section 37 of the Employment Act under which the Court can infer a term contract.”

13. In the submissions filed on behalf of the Appellant, reference was made to several decisions of this Court (variously constituted) where casual employment extending beyond the period of one month were deemed to have been converted to term contract by virtue of Section 37 of the Employment Act (see Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited [2013] eKLR, Kesi Mohamed Salim v Kwale International Sugar Co. Ltd [2017] eKLR; and Francis Ndirangu Wachira v Betty Wairimu Maina [2019] eKLR).
14. Having taken the position that the Appellant was a casual employee, it was incumbent upon the Respondent to produce employment records to show that the Appellant was indeed a casual employee. This was an important piece of evidence because casual employment is determined by the length of employment period meaning that any employee who works beyond this period ceases to be a casual employee by operation of law.
15. Flowing from the foregoing, I find and hold that it was not enough for the Respondent to simply state that the Appellant was a casual employee. The corollary finding is that the trial court fell into error in adopting the Respondent’s word without supporting evidence.
16. In light of its finding that the Appellant was a casual employee, the trial court did not consider the claim on merit. I will therefore proceed to do so.
17. The Appellant accused the Respondent of terminating his employment without justifiable cause and in violation of due procedure. In his defence, the Respondent stated that the Appellant himself left the place of employment without notice. This statement was however not backed by any evidence and the Appellant’s assertion that his employment was terminated unlawfully and unfairly was not dislodged.
18. This appeal therefore succeeds with the consequence that the judgment of the trial court dismissing the Appellant’s claim is set aside and replaced with an order allowing the claim in the following terms:
  - a. Six (6) months’ salary in compensation based on the Appellant’s length of service plus the Respondent’s unlawful conduct in executing the termination;
  - b. 1 month’s salary in lieu of notice.
19. The claims for leave pay, salary arrears, service pay and overtime were not proved and are disallowed.
20. Finally, I enter judgment in favour of the Appellant in the sum of Kshs. 98,000 being 6 months’ salary in compensation plus 1 month’s salary in lieu of notice.
21. This amount will attract interest at court rates from the date of judgment until payment in full.
22. The Appellant will have the costs of this appeal and of the proceedings in the lower court.

**DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER 2022**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Mwangi for the Appellant

Miss Muriithi for the Respondent

