



REPUBLIC OF KENYA



**Ramji Haribhai Devani Ltd v Otsieno (Civil Appeal 91 of 2007)
[2024] KEHC 1635 (KLR) (Civ) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL 91 OF 2007**

AN ONGERI, J

FEBRUARY 23, 2024

BETWEEN

RAMJI HARIBHAI DEVANI LTD APPELLANT

AND

ROSELYN OTSIENO RESPONDENT

*(Being an appeal from judgment and decree of Toigat (RM) in
Milimani CMCC No. 12108 of 2005 delivered on 24/1/2007)*

JUDGMENT

1. The respondent filed Milimani CMCC 12108 of 2005 seeking her employer the appellant one month salary in lieu of notice amounting to Kshs 5,434 four months salary in lieu of leave not taken amounting to Kshs 21,736 and 15 days severance pay of Kshs 10,868.
2. The plaintiff's case was that she was employed by the appellant in March 2001 as a permanent employee at a salary of Kshs 5,434 per month.
3. Further, that the appellant terminated her services without justifiable reasons.
4. The appellant's case was that the respondent was a casual employee who left work voluntarily.
5. The trial court found that the respondent was a permanent employee of the appellant.
6. Further, that the respondent was paid salary in lieu of notice.
7. The court ordered the appellant to pay the respondent severance pay of Kshs 2,558 and Kshs 4,180 being leave allowance and also Kshs 5,016 being salary in lieu of notice of making a total award of Kshs 11,574.



8. The appellant appealed to this court on the following grounds;
 - i. The learned magistrate erred in law and in fact in holding that the plaintiff/respondent was a permanent employee and therefore entitled to salary in the lieu of notice.
 - ii. The learned magistrate erred in law and in fact in holding that the plaintiff was entitled to severance pay when she had not been declared redundant.
 - iii. The learned magistrate erred in law in holding that the plaintiff/respondent was entitled to leave allowance for one year.
 - iv. The learned magistrate erred in law and in fact in awarding the plaintiff the sum of Kshs 11,574.00 together with costs in the case.
9. The respondent did not file submissions. The appellant submitted that respondent testified that she was employed as a casual employee.
10. Further that she stated that her salary was Kshs 195/= per day payable weekly. Her starting salary was 147/= per day and this position was confirmed by the defendant/appellant's witness who produced a staff identity card which indicated that the respondent was employed as a casual employee.
11. The Appellant also submitted that Section 2 of the repealed *Employment Act* Cap 226 defines a casual employee as an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.
12. The Appellant further submit that having regard to the evidence before the trial court and the finding by the court that the plaintiff/respondent was a casual labourer, there was no basis for the trial court to find that the respondent was entitled to one month's salary in lieu of notice.
13. Further, that Section 14(5) (iii) of the *Employment Act* Cap 226 (Repealed) does not apply to the plaintiff/ respondent's case as her salary was calculated on a daily basis and paid weekly. The salary was not paid at intervals of or exceeding one month as provided under the aforementioned section of the *Employment Act*.
14. The Appellant relied on Civil Appeal No 10 of 2009 – *Rashid Odhiambo Allogoh & 245 others v Industries Limited* (2019) eKLR where the court of appeal held that under the repealed *Employment Act* Cap 226 continuous service did not convert a casual worker into a permanent worker as is the case in the new *Employment Act* 2007.
15. The appellant said no evidence was tendered to prove the claim for severance pay. To the contrary, the plaintiff/ respondent on cross examination admitted that the appellant was still carrying on with its mushroom business and had employed people to do the job the respondent was doing.
16. Further, that there was no evidence that the respondent had been declared redundant pursuant to Rule 15 of the Regulation of Wages (General) order. [the Regulation of Wages and conditions of *Employment Act* Cap 229 repealed]
17. The Appellant also said that Section 2 of the repealed *Trade Disputes Act* Cap 234 defined "redundancy" as "the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant."



18. In *Beatrice Nthenya & 20 others v The Co-operative Bank Limited* (2020) eKLR Justice R. E. Ougo held that under the well established principle of law that “he who asserts must prove” it is the duty of the plaintiff to adduce evidence to show that his/her services were superfluous or that their office had been abolished. The learned Judge declined to award the plaintiffs severance pay as they had failed to adduce relevant evidence of having been declared redundant.
19. Further that the respondent herein despite pleading redundancy did not adduce any evidence to show that her services were superfluous or that her office had been abolished. She admitted that other people had been employed to do her job. We therefore submit that the learned magistrate erred in awarding the respondent severance pay for one year.
20. The Appellant submitted that the learned magistrate erred when she made a finding that the respondent was entitled to 21 days leave allowance when it was clear that the respondent was paid Kshs 1,045/- being one week’s pay in lieu of leave every 90 days. As the respondent was duly paid in lieu of leave there was no basis for the trial magistrate to award her 21 days leave allowance for one year.
21. Further that the plaintiff/respondent left work voluntarily, she would only be entitled to salary for the days worked. The appellant however on humanitarian grounds offered to pay the respondent one week’s wages in lieu of notice but the respondent declined.
22. This being the first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion.
23. In the case of *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123, where it was held up as follows;

“An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”
24. The issues for determination in this appeal are as follows;
 - i. Whether the respondent proved her case to the required standard.
 - ii. Whether the trial court erred in awarding the respondent severance pay, leave allowance and salary in lieu of notice.
25. On the issue as to whether the respondent proved her case to the required standard, I find that the respondent did not establish that she was a permanent employee of the Appellant.
26. The respondent did not produce any appointment letter and she did not prove that she was employed on a permanent basis by the appellant from the year 2001.
27. The appellant’s witness produced a staff identity card which indicated that the respondent was employed as a casual employee.
28. The witness said she started working in 2004 and voluntarily left in 2005.
29. The date of issue of the card was 11/03/2004 and the card is indicated that the respondent was a casual worker.



30. There was no evidence that she was declared redundant or that her services were superfluous or that her office had been abolished. The respondent admitted that other people had been employed to do her job.
31. Section 2 of the [Employment Act](#) which defines “redundancy” as;

“ the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.
32. There was evidence that the respondent was duly paid in lieu of leave and I find that there was no basis for the trial magistrate to award her 21 days leave allowance for one year.
33. I find that in the circumstances, the Trial Court erred in awarding the respondent severance pay of Kshs 2,558 and Kshs 4,180 in respect of leave allowance and also Kshs 5,016 being salary in lieu of notice making a total award of Kshs 11,574.
34. It is not clear how the Trial court arrived at the figure of Ksh 11,574 since the respondent did not have an appointment letter to show when she was hired by the appellant or the period she worked for the appellant.
35. The date of issue of the card produced by-the respondent herself was 11/03/2004 and the card is indicated that the respondent was a casual worker.
36. I find that the Trial court decided this case against the weight of the evidence on record.
37. The appeal has merit and the same is allowed with no orders as to costs.
38. The judgment of the Trial court is set aside and substituted with an order dismissing the respondent’s suit with no orders as to costs.
39. The decretal sum deposited in court to be released to the Appellant’s advocate.

THE DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

.....
A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

