



**Mbiti v Europackaging Limited (Appeal E012 of 2023)
[2024] KEELRC 1150 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E012 OF 2023**

**SC RUTTO, J
APRIL 19, 2024**

BETWEEN

MARGARET MUTHONI MBITI APPELLANT

AND

EUROPACKAGING LIMITED RESPONDENT

*(Being an appeal against the entire Judgment and decree of the
Chief Magistrate's Court at Ruiru delivered on 25th January
2023 by Hon. Joseph Were (SPM) in MCELRC No. E057 of 2021)*

JUDGMENT

1. The Appellant instituted a suit at the Chief Magistrate's Court at Ruiru being ELRC Cause No. E057 of 2021, through which she averred that she was employed by the Respondent in 2014 to sort out consumer items at the Respondent's former business premises at Mombasa Road. It was her case that she was paid daily wages amounting to Kshs. 653/= per day through Mpesa and the Respondent made her NHIF and NSSF remittances.
2. According to the Appellant, she discharged her duties under the employment contract without fail and with utmost diligence and faithfulness. It was the Appellant's case that on or about 15th July 2021, the Respondent while relocating its business premises from Mombasa Road to Ruiru, terminated her employment without prior notice and justifiable reason and further prevented her from entering its premises. In her view, the Respondent's actions amounted to unfair and unlawful termination.
3. Against this background, the Appellant prayed for maximum compensation for wrongful/unfair termination, notice pay, general damages for wrongful/unfair termination, as well as interest and costs of the suit. She further sought to be issued with a Certificate of Service.
4. The Respondent opposed the Claim through its Statement of Response dated 16th March 2022, in which it averred that the Appellant was a casual labourer who would from time to time be handpicked



by the Respondent whenever she availed herself at the company's gate and whenever there was work available that she would undertake. According to the Respondent, the Appellant whenever recruited for short periods, would not be consistent, reliable or available at all times. It was the Respondent's case that the Appellant being a casual employee recruited on a need to need basis, was not an employee capable of being dismissed. That when relocating to Ruiru in 2021, it did not have any production work and consequently did not require any casual labourers.

5. Terming the Claim misplaced and misconceived, the Respondent asked the Court to dismiss the same with costs.
6. At the trial Court, both parties called oral evidence and after close of the hearing, they filed written submissions. Subsequently, the trial Court evaluated and analyzed the evidence on record, and in the end, dismissed the Appellant's Claim. In so holding, the learned Magistrate held that he was persuaded that the Appellant was not on permanent employment but was a casual employee. The learned Magistrate further found that the Appellant's assertion of unlawful termination was unsustainable and that there was no employment to terminate after 15th July 2021 when the Respondent closed down the Nairobi office and relocated to Ruiru.

The Appeal

7. The Appellant was aggrieved by the foregoing determination hence the instant Appeal through which she raises the following ten grounds: -
 1. The Learned Magistrate erred in law and fact by delivering a Judgment which was inconsistent with the law, pleadings and framed issues for consideration reaching an erroneous conclusion in law and occasioning a serious miscarriage of justice to the Appellant.
 2. The Learned Trial Magistrate erred in law and fact by raising the standard of proof from that of a balance or probabilities to beyond reasonable doubt, by erroneously finding that the Applicant had not proved her claim to the required standard.
 3. The Learned Magistrate erred in law and fact in failing to take into consideration crucial evidence in favour of the Appellant.
 4. The Learned Magistrate erred in both and fact and further misdirected himself by failing to appreciate the fact that Respondent deducted and remitted the Appellant's statutory dues, as the Appellant's employer and thus the Appellant could not have been self-employed.
 5. The Learned Magistrate erred in law and in fact by misinterpreting the law and the evidence on record failing to appreciate the fact that the casual laborers are paid at the end of each day and that the Applicant was never paid everyday but was being paid in arrears.
 6. The Learned Magistrate erred in law and in fact by misinterpreting the law and the evidence on record by holding that the Applicant made no effort to follow up on the Respondent when the Applicant actually caused her advocates on record to prepare and serve a demand letter upon the Respondent which demand letter went unanswered.
 7. The Learned Magistrate erred in law and in fact by misinterpreting the law and the evidence on record by failing to appreciate the fact that the Respondent admitted to having engaged the Appellant since the year 2010.
 8. The Learned Magistrate erred in law and in fact by misinterpreting the law and the evidence on record by consequently failing to appreciate the fact that the Applicant's casual employment



had been converted to regular terms contract and therefore was protected by law against wrongful or unfair termination.

9. The Learned Magistrate erred in law and fact in failing to enter judgment for the Applicant and award her the reliefs sought in her Statement of Claim and as per section 49 of the Employment Act, 2007.
 10. The Learned Magistrate erred in law and fact in issuing a blanket and/or consolidated judgment under MCELRC No. E056 of 2021 to apply to MCELRC No. 059 of 2021, the subject of this Appeal, despite the fact that the matters had never been consolidated, and thereby occasioning a serious miscarriage of justice upon the Appellant.
8. To this end, the Appellant seeks the following orders from this Court:
- a. The Appeal herein be allowed.
 - b. The Judgment and Decree made on 25th January 2023 in MCELRC No. 056 of 2021 entering Judgment against the Appellant by dismissing the lower court suit be vacated and/or set aside.
 - c. The said Judgment be submitted with a declaration that the Appellant was unfairly terminated from her employment.
 - d. The Court be pleased to grant the Appellant her prayers in her statement of Claim dated 12th November 2021 and or as per section 49 of the *Employment Act*, 2007.
 - e. Cost of this Appeal.

Submissions

9. Following the Court's directions issued on 16th November 2023, the Appeal was canvassed by way of written submissions. The Appellant submitted that she was occasioned an injustice when the learned Magistrate issued a blanket and/or consolidated judgment under MCELRC No. E056 of 2021 to apply to her trial case MCELRC No. E057 of 2021. She further submitted that no application was ever made by Counsel to consolidate her matter with any other matter before the trial Court.
10. According to the Appellant, the facts in her case were different from any other cases over which the consolidated judgment was issued. She argued that by issuing the consolidated judgment, the learned Magistrate erred in fact and law by delivering a judgment that was inconsistent with the law and did not specifically address all issues with regards to the facts in her case. In support of this argument, the Appellant placed reliance on the case of *Law Society of Kenya v Center for Human Rights & Democracy & 12 others* (2014) eKLR.
11. In the same vein, the Appellant submitted that consolidation of the judgment could only have occurred upon consolidation of the matters.
12. The Appellant further submitted that she had made out a case of conversion of casual employment to a regular term contract and thus protected by the law. In support of her submissions, she cited the case of *Esther Njeri Maina v Kenyatta University* (2020) eKLR.
13. It was her further submission that the learned Magistrate did not appreciate various and distinct facts in her case from the other cases. The Appellant posited that the Respondent employed her in 2014 as a casual labourer but never paid her wages daily as required under the law.



14. She further submitted that the Respondent did not find it proper to issue her with a notice of termination of employment or communication as to a disciplinary hearing or of moving to a new location.
15. The Respondent did not file submissions as the same were missing from the court's physical record and were not traceable on the online portal. This was despite being granted 14 more days on 29th February 2024, to comply.

Analysis and determination

16. Being a first appeal, I am mindful of my role as a first appellate court, as guided by the determination of the Court of Appeal in *J. S. M. v E. N. B.* [2015] eKLR, thus: -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”

17. Consequently, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion but noting that I did not see or hear the witnesses as they testified.
18. Having considered the record before me, I find the issues falling for determination as being: -
 - a. Whether the trial Court erred in issuing a blanket judgment under CMELRC No. 056 of 2021 to apply to the Appellant's case.
 - b. What were the terms of the Appellant's employment with the Respondent?
 - c. Depending on the answer in (b), was the Appellant unfairly and unlawfully terminated from employment?
 - d. Whether the remedies sought by the Appellant lie in law.

Whether the trial Court erred in issuing a blanket judgment under CMELRC No. E056 of 2021 to apply to the Appellant's case.

19. It is evident from the record that the trial Court issued one judgment under CMELRC No. 056 of 2021 and applied the same to three other cases, including the Appellant's. In this regard, the trial Magistrate rendered himself thus:

“I do not therefore find that the Claimant in this case and the related cases mentioned hereinabove being Ruiru SPM ELRC Nos. E057, E058 and E059 all of 2021 have not proved their claims to the required standard. I do therefore proceed to dismiss the said claims.”

20. Reviewing the record, it is discernible that the Appellant's case at the trial Court was distinct from the Claims raised in CMELRC Nos. 056 of 2021, E058 of 2021 and E059 of 2021. I say so because the Claimants did not rely on the same evidentiary material. In as much as their cases appeared similar in



nature, there was need for the trial Court to analyze the evidentiary material submitted by each of the Claimants independently and arrive at a determination based on the evidence produced in each case.

21. In this case, the trial Court made a blanket determination based on the sole evidence of the Claimant in CMELRC No. E056 of 2021 and failed to consider the evidentiary material produced in the other cases. This was notwithstanding the fact that each of the Claimants at the trial Court had testified individually and produced evidence independently.
22. Therefore, in the interest of justice, it was crucial for the trial Magistrate to assess the evidence presented by each Claimant independently as opposed to relying on the evidence presented by the Claimant in CMELRC No. E056 of 2021.
23. To that extent, the learned trial Magistrate erred in law and fact in issuing a blanket judgment under CMELRC No. E056 of 2021 to apply to the Appellant's case without taking into account her evidence during the trial.

Nature of the employment relationship?

24. It was the Appellant's case at the trial Court that she worked for the Respondent from 2014 upto 15th July 2021 when she was unfairly and unlawfully terminated from employment. The Respondent disagreed with this position and contended that the Appellant was a casual labourer who would from time to time be handpicked whenever she presented herself at the company's gate and when there was work available that she would undertake. The Respondent further asserted that the Appellant's engagement was for short periods and was not consistent and reliable.
25. A casual employee is defined under Section 2 of the *Employment Act*, to mean "a person 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."
26. Succinctly put, a casual employee is engaged daily but no longer than 24 hours at a time. The nature of such a contract of employment is that wages are paid daily and the termination can be by either at the close of any day without notice.
27. In this case, the Appellant exhibited a copy of her Mpesa statement at the trial Court in support of her case. Upon perusal, it is apparent that the Appellant was paid Kshs 8,300.00 on 16th July 2021 while on 26th June 2021, she was paid Kshs 3,265.00. Further, on 19th June 2021, she was paid Kshs 2,760.00.
28. It is worth pointing out that the Appellant stated that she was paid in Mpesa from the onset of the COVID-19 global pandemic hence I take it that the Mpesa statement reflects all the payments she received from the Respondent in the form of salary.
29. According to the Appellant, she was entitled to a salary of Kshs 653/= per day. From the record, the Appellant testified during the trial that she worked every day from Monday to Saturday and in some days on Sundays when called upon to do so.
30. What this means is that if the Appellant was to work for the entire month excluding Sundays, she was to earn an aggregate sum of Kshs 15,672.00 as monthly salary.
31. Therefore, taking into account the sum of money received by the Appellant as salary, it is clear that there is no particular month in which she was paid salary for all days of the month hence translating to Kshs 15,672.00.



32. What I can deduce from the foregoing is that the Claimant worked for the Respondent intermittently hence the intermittent payments. This is more so noting that the Appellant did not indicate, let alone suggest that her salary was not paid in full in any particular month.
33. From the foregoing, I am led to conclude that the Appellant did not work for the Respondent continuously for a period of one complete month. As such, the Appellant's employment was not converted from casual to term contract within the meaning of Section 37(1) of the *Employment Act*.
34. Consequently, the Court returns that the Appellant was a casual employee whose contract was terminable at the end of each day.
35. As I pen off, I find it imperative to mention that the Appellant's reliance on her NHIF and NSSF statements to prove that her employment was converted from casual to term contract had no bearing on this case seeing that her Mpesa statement was the instructive document confirming the frequency in which her salary was paid and the amounts so paid. In this regard, the NHIF and the NSSF statement could not discount the fact that the Appellant's salary was paid intermittently therefore indicating that she worked intermittently for the Respondent.
36. Having found that the Appellant was a casual employee and noting that such employment is terminable at the end of each day, it is not logical to determine whether she was unfairly or unlawfully terminated from employment.
37. In the same breadth, the Court finds that the Appellant is not entitled to any of the reliefs sought.

Orders

38. Ultimately, I find no reason to cause me to overturn the decision by the learned Trial Magistrate. Accordingly, the instant Appeal fails and is dismissed with an order that each party bears their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant Mr. Haggai

For the Respondent No Appearance

Court Assistant Kemboi

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the



duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

