



REPUBLIC OF KENYA



KENYA LAW
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**Mulima v National Cement Company Limited (Cause 80 of 2017)
[2025] KEELRC 2611 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2611 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 80 OF 2017
JW KELI, J
SEPTEMBER 26, 2025**

BETWEEN

JACKTONE OTIENO MULIMA CLAIMANT

AND

NATIONAL CEMENT COMPANY LIMITED RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated the 9th December, 2016, the claimant sued the respondent, his former employer, and sought the following Orders:-
 - a. A declaration that the Respondent's dismissal of the Claimant from employment was unlawful, unfair and inhumane;
 - b. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded;
 - c. An Order for the Respondent to pay the Claimant his dues, terminal benefits totaling Kshs. 323,726/=;
 - d. Interest on (c) above from date of judgment until full payment; and
 - e. Costs of the suit plus interest thereon.
2. The claimant in support of the claim filed his verifying affidavit, sworn on 9th December, 2016, with a bundle of documents attached; a list of witnesses of even date; the Claimant's witness statement; and a list of documents all of even date.
3. The Respondent appeared through their advocates K. Mberia & Partners Advocates and filed its Reply to the Memorandum of Claim dated May 25, 2017. In support of its Reply, it submitted its List of Witnesses, all of the same date, and an undated Witness Statement of Stephen Mutuku.



The Respondent also filed its bundle of documents dated March 21, 2018, the Respondent's Supplementary List of Witnesses, and a Witness Statement of Erastus M. Musyoka dated March 16, 2023.

4. The parties further filed its list of agreed trial issues dated 21st January, 2019.

Hearing and evidence

5. The claimant's case was heard on the 20th April 2023 before Justice Ocharo Kebira where the claimant testified on oath and adopted as his evidence in chief, his witness statement dated 9th September 2016 with corrections on time of work to 7 am to 7pm under paragraph 5 and from year 2014 to 27th September 2015 under paragraph 6. The claimant produced one document and marked the other as MF1-I. He was cross-examined by counsel for the Respondent, Mr. Wambua. CW2 was David Omega who produced the discharge summary and court attendance fee receipt of Kshs. 3000 as C-exhibits 2 and 3. He was cross-examined by counsel for the respondent.
6. The respondent's case was heard before me on the 27th May 2025 when the respondent called Erastus Mwanzia Musyoka who was its Human Resources Officer as RW1. He adopted as his evidence in chief his witness statement dated 16th March 2023 and produced the respondent's documents as R-exhibits 1-4. He was cross-examined by counsel for the claimant, Ms. Amemba.

The Claimant's case in summary

7. The Claimant's case is that he was employed by the Respondent as a Count and Belt Accountant from 17th September, 2014 at a monthly salary of Kshs. 18,237/=. The Claimant states that from 17th September, 2014 to 5th December, 2014 he worked from Monday to Sunday whereupon on Sunday he worked till 1.00pm but was never paid overtime. It is further claimed that he was not given leave days and was not provided with housing or house allowance by the Respondent. The Claimant avers that on 25th February, 2015 he resumed his duties after recuperating from injuries at work and his working days changed to Monday- Saturday thereon. The Claimant further states that on 27th September, 2014, when reporting to work on that day, he was denied his punching number and was denied access to the Respondent's premises and was informed by one Isaack Mwangi that the reason for the denial of entry was because of his injuries. Thereafter, he was only allowed to work for the remaining three(3) days of the said month, whereupon he was dismissed.
8. The Claimant's grievance against the Respondent relates to his unlawful termination from employment. He avers that the Respondent's action of denying him entry into the premises in that manner amounted to summary dismissal and was discriminatory, unfair, unlawful and inhumane. Further, the dismissal breached mandatory provisions of the *Employment Act*, principles of natural justice and Constitutional right to fair labour practice. The Claimant claims that the reasons given for the dismissal were discriminatory, no notice or warning was ever issued to the Claimant, no hearing was convened and due process was never followed in the termination.

Respondent's case in brief

9. Conversely, the Respondent admits that the Claimant was its employee but was only paid a sum of Kshs. 484.30/= per day as a casual labourer who only reported to work whenever there was work. The Respondent further states that whenever the Claimant worked overtime, he was usually compensated for it and his monthly salary of Kshs. 18,237/= was inclusive of overtime. The Respondent further negates the assertion that the Claimant was entitled to leave arguing that the Claimant was a casual labourer who only worked when work was available and that at no time was the Claimant in



continuous employment for a period over a year entitling him to leave days. The respondent claims that it did not terminate the Claimant's services as claimed, it however claims that the Claimant deserted his duties and therefore claims that the Claimant is thus not entitled to the reliefs sought.

Determination

Issues for determination

10. The Claimant in its written Submissions dated 1st July, 2025, submitted the following three(3) issues for the Court's determination namely:-
 - a. what was the nature of the employment relationship between the parties herein,
 - b. whether due process was followed prior to dismissing the Claimant from employment; and
 - c. whether the Claimant is entitled to terminal dues.
11. The respondent did not file written submissions.
12. The court, having considered the case before it and the reliefs sought was of the considered opinion that the issues placed before the court for determination in the dispute were as follows-
 - a. What was the nature of employment relationship between the parties?
 - b. Whether the claimant's employment was unfairly terminated?
 - c. Whether the claimant is entitled to relief sought?

What was the nature of employment relationship between the parties?

13. The claimant stated he was a permanent employee of the respondent paid Kshs. 18,237 per month as salary from September 2014 to 27th September 2015. That he worked continuously without a break. Conversely, the respondent contended the claimant was a casual employee paid daily wage of Kshs. 484.30 and that is salary inclusive of overtime always came to a sum of Kshs. 18,237 monthly in accordance with the 2015 minimum wages.
14. During cross-examination the claimant told the court he was employed as a belt attendant. The claimant admitted that his exhibit 1 indicated he was a house keeper. According to C-exhibit 1 the claimant was engaged as house keeper on temporary basis on 17th September 2014. He was injured on 5th December 2014. RW1 relied on the wage schedule to prove the claimant was engaged as a casual worker, stating he was paid on a daily basis. He relied on R-exhibit 1 as proof that the claimant was engaged as a casual. The court examined the said document titled Casual. The document was for the period from 5th May 2015 to 9th May 2015 and from 26th September 2015 to 2nd October 2015. RW1 told the court the claimant was engaged for more than 3 months and this was a special engagement. That there was no work available for a full month. During cross-examination RW1 told the court C-exhibit 1 was strange document to the respondent and that he had only seen it in court.
15. A casual employee is defined under the *Employment Act* as -'casual employee" means 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; ' In the instant case the claimant was engaged for more than 24 hours and even more than three months. His salary was paid end month though the respondent applied daily wage rates. R-exhibit 2 was the salary payment transfer to employee accounts on monthly basis for more than 3 months. The claimant was deducted NSSF.NHIF and PAYE AS per



the evidence by the respondent. The engagement had all characteristics of contractual employment as NSSF is pension, NHIF is medical and then PAYE is a tax statutory deduction.

16. The engagement on a casual basis beyond three months meant that the engagement was converted to contractual employment under section 37 of the *Employment Act*, to wit- ‘37. Conversion of casual employment to term contract

- (1) Notwithstanding any provisions of this Act, where a casual employee—
 - (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.
- (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
- (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.” This position was affirmed in *Chemilil Sugar Company v Ebrahim Ochieng Otuon & 2 others* (2015). Furthermore the court finds that the terms of engagement of the claimant, which included NSSF NHIF and PAYE was a contractual employment having satisfied some of the basic conditions of employment under the *Employment Act* namely, social security (pension) and medical. PAYE is tax payable by employee and by making the deductions the respondent affirmed to the Government that the claimant was their contractual employee. The court ultimately must and hereby pronounces that the claimant was a contractual employee.

Whether the claimant’s employment was unfairly terminated?

17. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- ‘45(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid
- (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (*Walter Ogal Anuro v Teachers Service Commission*[2013]eKLR).



18. The claimant's position was that his work was terminated following an injury and that he was not given a termination notice. RW1 told the court the claimant disappeared from work and there was no need to contact him as he was a casual worker. The court having established that the claimant was a contractual worker finds that he was entitled to rights of contractual employee under the *Employment Act* which include fair termination. The defence of the claimant having absconded was not proved according to section 43 of the *Employment Act* to wit- '43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. Absconding is a case of an employee who fails to report to duty with no intention of return. In this case the employer ought to issue a notice to show cause why the employment should not be terminated, according to section 41 of the *Employment Act*. This is the settled position of law and as stated in *Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR* where the Court stated, an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. (see *Wilson Kibande Abai v Kenya Tents Limited [2019] eKLR* and *Obonyo v Kibos Sugar & Allied Industries [2024] KEELRC 1392 (KLR)*).
19. The court established that in the instant case, the reason given by the respondent of the claimant having abandoned work was not proved(see section 43 of the *Employment Act*). RW1 admitted there was no notice show cause as the claimant was a casual according to the employer, which the court established was not true. The termination is held as unlawful for lack of valid reason, as an injury is not a basis to terminate the services of an employee and further there was no procedural fairness as stated in section 41 of the *Employment Act*. (see *Walter Ogal Anuro v Teachers Service Commission[2013] e KLR*)

Whether the claimant was entitled to relief sought

20. On the relief sought of a declaration that the Respondent's dismissal of the Claimant from employment was unlawful, unfair and inhumane;- On this relief the court held the termination was unlawful and unfair. The court makes a declaration that the termination was unlawful and unfair.
21. On the relief sought of a declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded;- RW1, Erastus Musyoka, in a witness statement, admitted the monthly salary of the claimant was Kshs. 18237 which he stated always included the overtime and was based on daily rate of Kshs. 484.30/- The same amount of monthly salary was pleaded by the claimant. The court proceeds to consider the merit of the claims for terminal dues as below.
22. On Notice pay the same is due under section 35 of the *Employment Act* following the conversion of the employment to contractual terms thus 1 month notice pay awarded for Kshs. 18,237.
23. On Leave - it was undisputed that the claimant was not accorded leave during the period of employment. The claimant told the court he was employed in September 2014 and disengaged in September 2015. RW1, in his witness statement, did not offer alternative facts on the period of service. That means the claimant worked for a year and was thus entitled to annual leave under section 28 of the *Employment Act*. He prayed for one month salary in lieu. Section 28 provides for minimum annual leave of 21 days and the same is granted $Kshs. 18237 \times 21/30 = Kshs. 12,765.90$



24. House allowance.- The court established and it was not disputed the salary paid to the claimant was based on daily rate under the minimum wages which is inclusive of house allowance. The claim for housing allowance fails.
25. Overtime- the claimant salary was based on daily rate and calculated for hours worked(R-exhibit 1). The claim for overtime cannot arise in the circumstances and the same is disallowed.
26. Compensation for unfair termination - the court held the termination of the employment as unlawful and unfair. The court is obliged under section 50 of the Employment Act to award remedies under section 49 of the Employment Act, which include compensation on finding unfair termination. Section 49(4) provides for the factors the court is to apply in determining the payable compensation which is capped at the equivalent of 12 months salary. The claimant worked for a year. He did not contribute to his termination which was done when he got an injury possibly due to decreased capacity /output. Taking the foregoing into account the court awards compensation equivalent of 3 months gross salary. Thus Kshs. 18237 x 3 thus Kshs. 54,711.

Conclusion

27. The claim is allowed. Judgment is entered for the claimant against the respondent as follows-
 - a. a declaration that the claimant was a contractual employee and the termination was unlawful and unfair
 - b. Notice pay in lieu of 1 month's Salary Kshs. 18,237.
 - c. Leave pay in lieu Kshs. 12,765.90.
 - d. Compensation for unfair termination equivalent of 3 months gross salary Kshs. 54,711.
 - e. Interest on (b,c and d) above plus costs at court rate from judgment date.
 - f. Certificates of service to issue according to section 51 of the Employment Act.
28. Stay of 30 days granted.
29. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26th DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

C/A Otieno

Claimant- Ms Amemba h/b Namada

Respondent- Wambua

