



Bichanga & 4 others v County Government of Nakuru & another (Cause 206 of 2018) [2024] KEELRC 2015 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2015 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 206 OF 2018
DN NDERITU, J
JULY 25, 2024**

BETWEEN

**NORAH KWAMBOKA BICHANGA 1ST CLAIMANT
JANE NYAMBUTU IGOGO 2ND CLAIMANT
SALOME WAMBUI MUNGAI 3RD CLAIMANT
JACKLINE KAWIRA NJABAN 4TH CLAIMANT
JOYCE WANJIKU NJOROGE 5TH CLAIMANT**

AND

**COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT
NAKURU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT**

JUDGMENT

I. Introduction

1. Through Oumo & Co. Advocates the claimants commenced this cause by way of a memorandum of claim dated 20th June, 2018 filed in court on even date. Subsequently, the claimants filed an amended memorandum of claim dated 13th December, 2019 adding the 2nd respondent into the cause. As expected, the amended memorandum is accompanied with a verifying affidavit sworn by the 5th claimant on even date for and on behalf of all the claimants.
2. Alongside the original memorandum of claim, the claimants filed an authority to make affidavits signed by the 1st, 2nd, 3rd and 4th claimants authorizing the 5th claimant to swear affidavits, tender evidence, and prosecute the cause on their behalf. The original memorandum of claim was accompanied with a verifying affidavit, a witness statement by the 5th claimant on her own behalf and on behalf of all the



- other claimants, a list of documents, and a bundle of copies of the listed documents that were relied upon and produced as exhibits during the trial.
3. Before the hearing commenced the court granted to the claimant leave to file a further list of documents and a bundle of copies of the listed documents which were filed on 26th July, 2022.
 4. In the amended memorandum of claim, the claimants are seeking the following reliefs-
 - a. A declaration that the claimants are permanent employees after having worked for the respondents continuously for more than 5 years.
 - b. An order for re-instatement of the claimants without loss of benefits.
 - c. In the alternative, a declaration that the termination is wrongful and the claimants are entitled to:
 - i. Payment in lieu of notice.
 - ii. Terminal dues under section 49 of the *Employment Act* as will be computed for each of the claimant.
 - d. That the respondents do pay the costs of this suit.
 5. The respondents entered appearance through Mirugi Kariuki & Co. Advocates on 26th July, 2018. The respondents filed a response to the claim on 3rd September, 2018 seeking that the entire cause be dismissed with costs for want of merits. The respondents maintained this response even after the claimants filed an amended memorandum of claim as alluded to above.
 6. The respondents filed a witness statement by Benjamin Njoroge but this witness was later on substituted with Sammy Ngigi Kimani (RW1)
 7. This cause came up for hearing on 20th July, 2022 when the 5th claimant (CW1), with the authority from the other claimants, testified and closed the claimants' case. The defence was heard on 28th March, 2023 when RW1, the 1st respondent's environment officer, testified and the respondents' case was closed.
 8. Counsel for both parties summed up the case for their respective clients by way of written submissions. Both counsel, Mr Ouma for the claimant and Mr. Kahiga for the respondents, filed written submissions on 21st June, 2023.

II. The Claimants' Case

9. The claimants' case is expressed through the amended memorandum of claim, oral and documentary evidence adduced through CW1, and the written submissions by their counsel.
10. In the amended memorandum of claim, the claimants pleaded that they were all employees of the 1st respondent as duly recruited by the 2nd respondent working in Naivasha and Rongai sub-counties of the Nakuru County. It is stated that they have all worked continuously in various departments for more than five years.
11. It is pleaded that the 1st respondent issued a general notice dated 21st June, 2017 to disengage all the casual employees as from 30th June, 2017. Despite the issuance of the general notice to disengage, it is alleged that the claimants continued working with inconsistent and irregular payment from the respondents. Further, it is pleaded that the claimants were not issued with employment letters detailing the terms and conditions of their employment.



12. The claimants aver that having worked for more than five years they should be legally deemed permanent employees and due process should be followed in terminating their services if at all. It is pleaded that the respondents did not pay the 1st to the 4th claimants' salaries for two months and for four months for the 5th claimant.
13. In her testimony in court on her own behalf and on behalf of the other claimants, CW1 reiterated the contents of the foregoing pleadings and adopted her witness statement dated 20th June, 2018 as her evidence-in-chief. She produced copies of the listed documents as exhibits 1 to 4. She stated that all the claimants are listed in exhibit 1 as casual employees of the respondents.
14. She testified that all the claimants report to work each day and they clock in and out as per records in custody of the respondent. She emphasized that the claimants are not ghost workers but employees of the respondent who have been working and receiving salaries as alluded to above. She stated that the claimants have worked for so long without confirmation hence suffering from low pay and lack of allowances as compared to employees who are permanent and pensionable.
15. In cross-examination CW1 stated that she has been in employment of the respondents since 2003 when she was engaged by the now defunct Nakuru County Council. She stated that the claimants have time without number requested the respondents to engage them on permanent basis to no avail rendering this cause necessary. She stated that she is a copy-typist but the other claimants work in the department of environment as cleaners and sweepers.
16. She stated that the claimants have not been terminated but there has been attempts to terminate them such as the notice issued on 21st June, 2017, alluded to above, which purported to terminate their employment by 30th June, 2017. However, she stated that the notice did not take effect and the claimants have continued to work for the respondents.

III. The Respondents' Case

17. The respondents' case is contained in the response to the memorandum of claim, the statement of RW1 and his testimony in court, and the written submissions by counsel.
18. In the response to the claim, the respondents admitted that the claimants were engaged as casual workers and stated that a general notice dated 21st June, 2017 was issued to disengage all casual workers which allegedly served as sufficient notice as required by the law. It is pleaded that the court cannot rewrite a contract for or impose one upon the parties.
19. In his testimony in court RW1 reiterated the contents of his written statement dated 27th March, 2023, adopting the statement of Benjamin Njoroge earlier on filed, as his evidence-in-chief. He testified that the claimants are no longer working with the respondents as their casual engagement ended as per the notice of 21st June, 2017 that took effect from 30th June, 2017. He stated that the claimants were casuals or on short-term contracts of three months at a time and that the respondents stopped hiring such casuals in 2017.
20. In cross-examination RW1 stated that the claimants were initially employees of the defunct Nakuru County Council. He stated that the 5th claimant had a last short-term contract for three months in 2015 but there are no records of employment in regard to the other claimants. He stated that he was surprised that the 5th claimant and the others were allegedly still working for the respondents yet they availed no evidence of such engagement in court. However, he admitted that the list of casuals filed and produced by the claimants in court is from the county administrator and that the respondents had not filed or produced another list in court. He stated that all the casuals were discharged on 30th June,



2017 as alluded to above. He insisted that the respondents no longer hire casuals as a matter of policy since 2017 due to lack of funds.

21. It is the basis on the foregoing evidence and circumstances that the respondents pray that the claimants' cause be dismissed with costs.

IV. Submissions By Counsel

22. On the one hand, the claimant's counsel identified the following issues for determination- Whether the claimants were employed by the respondent; Whether the claimants have proved their case on a balance of probability; and, What are the remedies available to each of them?
23. On the first issue, it is submitted that based on the evidence adduced there should be no dispute that the claimants were initially engaged as casuals but they have continued to work on monthly salaries. It is submitted that the respondents as the custodians of records ought to have produced documents to disapprove the case as stated by the claimants.
24. Further, it is submitted that having worked for over 10 years each the court ought to pronounce them as permanent and pensionable employees based on the provisions of Section 37 of the [Employment Act](#) (the Act). The court is urged to apply the reasoning in *Daniel Inyangu Ndungani V Mary Khagali Lumula* (2013) eKLR and find that the claimants are and should for all intents and purposes be deemed to be permanent and pensionable employees of the respondent. The court is also urged to find persuasion in the decision in *Read Mixed Concrete (South Africa) LTD V Minister of Pension and National Assurance* (1968) 2 QB 497.
25. It is submitted that by conduct of the parties what started as a casual engagement evolved into permanent and pensionable engagement of the claimants by the respondents and the court is urged to pronounce the same as such.
26. On remedies available and awardable to the claimants counsel submitted that the court should either order that the claimants be engaged on the terms and benefits similar to what other employees of the same cadre and service are currently enjoying and that the same be backdated to 10 years, or, in the alternative, the court orders compensation to the claimants considering the period of service, age of each of the claimants, and their likelihood of securing alternative employment. The court is further urged to order the respondents to issue each of the claimants with a certificate of service.
27. The court is urged to allow the cause with costs.
28. On the other hand, counsel for the respondents raised two issues for determination by the court – Whether this cause has merits; and, Who should bear the costs of the suit?
29. On the first issue, it is submitted that the 1st to the 4th respondents did not prove an employment relationship between them and the respondents. Further, it is submitted that in the list of casuals availed and produced in court by the claimants the name of the 4th respondent is missing and as such there is no basis whatsoever for the 4th claimant to be deemed to have been an employee of the respondents whatsoever. Moreover, it is submitted that the said list is not evidence of continuous employment of the claimants as alleged. It is submitted that the names of the claimants were only stored in the database of the respondents to be on-call to be engaged on-need basis.
30. It is submitted that the case by the claimant does not meet the criteria in Section 37 of the Act for the court to deem Section 35 of the Act to apply. The court is urged to apply the reasoning in *Allied Wharfage Limited V Ganja Mavumba Nyawa* (2020) eKLR and Section 107 of the [Evidence Act](#) and make the conclusion that the claimants failed to prove their case so as to deserve any of the reliefs sought.



31. Further, the court is urged to be persuaded by *Isuzu East Africa Limited V Joseph Likoe Nyangweso (2020) eKLR* wherein the court affirmed that an employee bears the burden of proving employment so as to attract any remedies by the court. Further, the court is urged to follow the reasoning in *Pius Kimaiyo Langat V Co-operative Bank of Kenya Ltd (2017) eKLR* and *South Nyanza Sugar Co. Ltd V Leonard O. Arero (2020) eKLR* and desist from rewriting the contract between the parties without proof of coercion, fraud, or undue influence pleaded and proved.
32. As for the 5th claimant, it is submitted that her letter of engagement confirms that she was to work for three months only from January, 2015. This was long before the notice of 21st June, 2017 was issued.
33. The court is urged to dismiss the cause with costs to the respondents.

V. Issues For Determination

34. The court has carefully, obligatorily, and dutifully gone through the pleadings filed, the oral and documentary evidence tendered, and the written submissions by counsel for both parties. The court identifies the following issues for determination-
 - a. Are the claimants employees of the respondents?
 - b. If (a) is in the affirmative, what is the nature of that employment relationship?
 - c. Depending on the outcome of (a) & (b) above, are the claimants entitled to the reliefs sought?
 - d. Who should bear the costs of the cause?

VI. Employment

35. This is an unfortunate cause that ought not to have come to court in the first place. In my opinion the issues raised are human resources management oriented that the respondents ought to have resolved at the workplace. It is a cause that demonstrates the dire need of a paradigm shift in the manner that the county governments manage their human resources. It is a cause that demonstrates the confusion, the mismanagement, frustrations, and chaos that reign in most of the devolved units especially in the area of human resources management.
36. The evidence on record is that the claimants worked as casuals with the 1st respondent as recruited by the 2nd respondent each for a period of more than five years as of 30th June, 2017. Except for the 5th claimant who is a copy-typist, the others were engaged in the environment department of the 1st respondent as sweepers and or cleaners.
37. In support of the foregoing, the claimants filed in court a list of casual workers engaged by the 1st respondent presumably as of 21st June, 2017 when the notice alluded to above was issued. The word “presumably” as used here is deliberate as the filed list is neither dated nor signed. However, in the list, which was not disputed by the respondents, and in fact RW1 conceded to the same as factual, each of the claimants, except the 4th, are described as follows – the 1st claimant is indicated to have been engaged in 2002 as a sweeper attached to Naivasha Town; the 2nd claimant was engaged as a sweeper in 2006 attached to Naivasha Town; the 3rd claimant was engaged as a sweeper in 2007 attached to Mai Mahiu Township; and the 5th claimant is indicated as attached to the engineer’s office with no specified location of work.
38. However, no evidence was availed in regard to the 4th claimant as to when she was engaged and what services she was offering and her station of duty.



39. From the foregoing, one can safely conclude that except for the 4th claimant, for lack of evidence, the claimants were originally engaged by the defunct County Council of Nakuru or the Municipal Council of Naivasha, as the case may be, and subsequently absorbed by the respondents upon promulgation of the new Constitution of Kenya in 2010 which created the new devolved units including the 1st respondent.
40. The evidence on record as availed by the claimants through the 5th claimant, CW1, indicates that for the entire lengthy period of their engagement the claimants worked as casuals. This is the sad story that the court was alluding to in the first paragraph of this part of the judgment. The evidence through CW1 is that whenever they applied for permanent positions, whenever vacancies were advertised by the 2nd respondent, they were denied those jobs and “outsiders” were employed on permanent and pensionable terms.
41. It is the claimants’ case that each claimant was paid a monthly salary at the end of each month. However, no evidence of payment of such salary was availed in court.
42. Under Sections 10 & 73 of the Act it is the duty and obligation of an employer to keep records of employment and to avail the same whenever so required or when necessary for scrutiny and inspection either by a labour officer or the court. The respondents opted not to avail or produce any documents or at all notwithstanding their admission that the claimants have served as their employees for the periods alluded to above. The court can only presume that the respondents opted not to avail the said records because if produced in court the same would have been against the respondents’ position in some regard.
43. The evidence by the claimants is that vide a notice dated 21st June, 2017 the 1st respondent purported to disengage the services of all casual workers with effect from 30th June, 2017. Further, the claimants allege that they were not disengaged on 30th June, 2017 but they have allegedly continued to serve each allegedly receiving a salary at the end of the month.
44. However, no evidence was availed by the claimants of payment of such salaries. The evidence by RW1 is that salaries are paid into the bank accounts of all employees. In that case the claimants ought to have availed bank evidence or other evidence to confirm that indeed they receive such salaries. How else can the court confirm that indeed they are still in employment which is denied by the respondents? Evidence of payment of salaries is a record that the claimant should readily have in their possession. It is not one of those issues that the court may call upon the respondents to disapprove as it has not been proved in the first place.
45. The 5th claimant, CW1, in her testimony in court produced as exhibit a letter of recommendation issued to her by the 1st respondent on 4th February, 2016. She also produced a letter dated 5th January, 2015 in which the 1st respondent engaged her as a copy-typist for a period of three months with effect from the date of that letter. It is important to note that all the above occurred before the 1st respondent issued the notice dated 21st June, 2017 that took effect on 30th June, 2017.
46. RW1 was categorical in his evidence that after the notice alluded to above took effect on 30th June, 2017 none of the claimants continued to offer any services to the respondents may it be on casual terms or otherwise. According to the respondents this explains why no records are available of the alleged engagement of the claimants after the above date. It is the respondents’ case that if the claimants are still in employment of the respondents, casually or otherwise, they are ghost workers who should be held to account for earning a pay without offering any services.



47. Where does all the above lead to? The claimants allege that they have been employees of the 1st respondent, as recruited by the 2nd respondent, having been inherited from the defunct County Council of Nakuru, or the Municipal Council of Naivasha, as the case may be, from the dates alluded to above to present date. It is elementary law of evidence that he who alleges must prove. While the respondents admit that the claimants, except for the 4th, were casual employees of the 1st respondent until 30th June, 2017, the respondents' position is that their services were terminated as from that date. It was therefore incumbent upon the claimants to establish, demonstrate, and prove that their casual services were retained after 30th June, 2017.
48. The claimants ought to have demonstrated such employment by way of letters of appointment or engagement, any correspondences confirming such engagement, and most importantly, payment of the alleged monthly salaries. How are the alleged monthly salaries paid? If paid to the bank, where are the bank statements confirming the same?
49. I have combed through the pleadings, the oral and documentary evidence adduced, and the entire court file and I have not come across any evidence confirming that the claimants continued to work for the respondents after 30th June, 2017.
50. In answer to issues (a) and (b) for determination, therefore, the court finds and holds that the claimants, except for the 4th, were casual workers of the 1st respondent having been inherited from the defunct County Council of Nakuru and the Municipal Council of Naivasha, as the case may be, until 30th June, 2017 when they were discontinued vide a notice dated 21st June, 2017.
51. In essence, by the time the claimants filed this cause in court on 20th June, 2018 none of them was an employee of the respondents. As painful as it sounds, the court cannot rewrite or redefine the terms of engagement of parties to a contract of employment. Parties are bound by all the terms of such contract and the court may only intervene in case of an illegality. The court's role is to interpret the terms and the intentions of the parties.
52. Section 2 of the Act defines a casual employee as -
- “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”. Section 37(1) of the Act provides that -
- (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
53. From the above provisions, a casual employee is a person who is engaged for a period within twenty-four hours and paid at the end of the day. However, the law provides for conversion of casual employment to term contract of employment after a casual employee has worked for more than three



consecutive months. Based on the evidence availed in court, the claimants did not demonstrate and prove that they were in continuous employment of the respondents for a period of thirty consecutive days or more for the period that they allege to have served.

54. According to RW1 the claimants were engaged on-call and on-need basis. As stated elsewhere in this judgment, by the time the claimants filed this cause in court the evidence confirms that they had already been terminated as per the notice alluded to above. In other words, the casual employment relationship between the claimants and the respondents had terminated for about one year (from 30th June, 2017) to the date of filing of the cause (20th June, 2018).
55. It is on the backdrop of the foregoing that the claimants plead with this court to grant them the reliefs as discussed below in answer to issue (c).
56. It is not in dispute that the 1st, 2nd, 3rd, and 5th claimants herein were respondents' casual employees who worked at Naivasha and Rongai sub-counties within Nakuru County in various capacities as sweepers except for the 5th claimant who was engaged as a copy-typist. The 4th claimant's name does not appear in any of the documents availed before this court. The respondents' counsel's argument is that the 1st, 2nd, 3rd, and 5th claimants were only engaged dependent on availability of work.
57. In a letter dated 21st June, 2017 the 1st respondents through its chief officer of public service management disengaged the casual employees as the respondents lacked budgetary approval. The said letter reads as follows -

Ref: NCG/PSM/3/19/VOL.II (27) Date: 21st June, 2017

All Sub-County Administrators

NAKURU COUNTY

RE: DISENGAGEMENT OF CASUALS

This is a follow-up of my letter Ref: NCG/PSM/3/19 VOL. II (17) of 2nd September, 2016 concerning the above subject matter.

Budget for FY 2017/2018 has not been approved so far and we are not sure whether the budget meant for casual wages will be approved.

In order to avoid debts in form of casual wages, I am directing you to disengage any casual labourer working under you with effect from 30th June, 2017.

Please be warned that any engagement of casual without authority is illegal and may result in you being surcharged.

K. SIGEI

Chief Officer

Public Service Management & Administration

Copy to

County Secretary and Head of Public Service Secretary, County Public Service Board
CO-Finance

NAKURU COUNTY



58. As stated elsewhere in this judgment, it is the above letter that ended the employment relationship between the claimants and the respondents as there is no evidence of any other or further engagement after 30th June, 2017.
59. The claimants failed to prove that they are currently working for the respondents and what their salaries are and at what intervals such salaries are paid. The court, as noted above, finds and holds that there is currently no subsisting or existing employment between the claimants and the respondents in whatever form or howsoever.

VII. Reliefs

60. Prayer (a) is for a declaration that the claimants are permanent employees of the respondents having served continuously for over five years. As the court has found and held in the foregoing paragraphs, the employment relationship between the claimants and the respondents ended on 30th June, 2017. There is no subsisting employment relationship between any of the claimants and the respondents, as none has been proved. The court has no business revisiting an already concluded relationship and reviving it for litigation. There is no evidence that the claimants were unlawfully terminated as at the time of the notice they were casuals who were only entitled to be informed that the employment had come to end at the end of any given day.
61. As pleaded in the alternative, even if the court was to find that the notice issued amounted to unlawful termination or dismissal, which is however not the case, the claimants did not prove payment of salaries as alleged and the court would have no basis upon which to award compensation under Section 49 of the Act.
62. The only pay disclosed is that of the 5th claimant in the sum of Kshs19,229/= as per the letter dated 5th January, 2015. However, the said pay applied to a period of three months running from January, 2019. That contract expired long before the notice issued on 21st June, 2017 which terminated all casuals, claimants included, by 30th June, 2017.
63. Probably, the respondents ought to have been empathetic with the claimants and considered them for absorption into their permanent workforce as at the time of issuing the said notice. Though not proved, the claimants allege that other persons were employed on permanent terms while the claimants served as casuals without due consideration. The allegation by the claimants that they are still working for the respondents was not proved and the same was vehemently denied by RW1.
64. In the entire circumstances and evidence as alluded to in the foregoing paragraphs, as empathetic and sympathetic as the court may be towards the claimants, I am unable to legally grant the orders sought for the reasons enlisted in the cumulative reasoning in this judgment and this cause is hereby dismissed in its entirety.

VIII. Costs

65. In due consideration of the circumstances of this cause, each party shall meet own costs.

IX. Orders

66. For all the reasons above, this cause is dismissed in its entirety and each party ordered to meet own costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 25TH DAY OF JULY, 2024.

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DAVID NDERITU
JUDGE

