



Onyiego v Wire Products Limited (Employment and Labour Relations Cause 69 of 2018) [2024] KEELRC 1896 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1896 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 69 OF 2018**

MN NDUMA, J

JULY 18, 2024

BETWEEN

EVANS GICHANA ONYIEGO CLAIMANT

AND

WIRE PRODUCTS LIMITED RESPONDENT

JUDGMENT

1. By a statement of claim filed on 24/1/2018 the claimant seeks an order against the respondent in the said terms:-
 - i. 1 month’s salary in lieu of notice = 636 x 26.....Kshs. 16,536.00
 - ii. Leave allowance 21/26 x 16,536 x 4 years).....Kshs. 53,424.00
 - iii. Public holidays 10 days x 4 years 636 x 2.....Kshs. 50,880.00
 - iv. House allowance (15%of 16,536 x 51 months).....Kshs. 126,500.40
 - v. 12 months’ salary compensation (12 x 16,536)....Kshs. 198,432.00

Total AmountKshs. 445,772.40
2. The claim is premised on the evidence adduced by the claimant, CW1 who adopted a witness statement dated 25/1/2018 as his evidence in chief and produced exhibits ‘1’ to ‘3’ attached to the statement of claim.
3. CW1 stated that he was employed by the respondent on 17/5/2013 and worked continuously until 23/01/2017 when his employment was terminated.
4. That around November 2016, the claimant was injured at his work place and was given a sick off to resume duty in March 2017.



5. That the claimant resumed work on 6/3/2017 and continued working as usual until 23rd September 2017 when the respondent's manager orally terminated his employment without any reason at all.
6. That the claimant was not given any notice of termination nor was he given a notice to show cause why his services should not be terminated. That the claimant was not invited to any disciplinary hearing. That the claimant violated the provisions of the Employment Act in that respect. Furthermore, the respondent did not pay the claimant his terminal benefits set out in the judgment nor was the claimant given a certificate of service to enable him look for alternative employment.
7. That the claimant was aggrieved by the unlawful and unfair termination and wrote a demand letter to the respondent through his advocate. That the respondent did not heed the demand hence the suit.
8. Under cross-examination, the claimant said his salary was Kshs. 16,536/= per month and was not paid house allowance. That he was not given any annual leave and also did not get any off days and worked during public holidays without additional pay. That NSSF and NHIF were paid by the employer. The claimant denied that he had absconded duty as alleged by the respondent or at all. The claimant said he signed attendance register which was kept by the respondent.
9. The claimant said he worked as a machine operator and was cutting metal pieces. The claimant said he was hit on the back by a flying piece of metal and was treated at Dandora Hospital and had a medical report to that effect which was not before court. The claimant said he was not paid when he was on sick leave. That on the day of termination a supervisor told him at 6 a.m. in the morning to wait at the gate. That he waited until 8 a.m. and the Human Resource Officer came and told him to go home. That after one week, the claimant went back to find out his fate but was told to go back home until he was called back. That after three weeks when he went to check on the progress, he was told to hand over company property including safety shoes. That they promised to call him back but never did. The claimant said the claim was for termination but not work injury.

Defence

10. RW1, Aston Ronde, the Production Manager testified for the respondent. He adopted a witness statement dated 25/7/2018 as his evidence in chief.
11. RW1 said that the claimant was employed by the respondent on 3/4/2014 as per the attendance register. That he worked in the cutting section. That the claimant was a daily paid worker. That the claimant stopped working on 23/9/2017. That no one told him not to come to work. He simply stopped coming and later served the respondent with a letter of demand.
12. That the claimant did not work during public holidays since the factory did not operate during public holidays. That the claimant was a unionisable employee and was a member of the union.
13. That the claimant is not entitled to house allowance since he was paid gross pay and was paid according to the minimum wage and CBA. That the claim has no merit and it be dismissed.
14. Under cross-examination, RW1 said he joined the respondent in 2014. That he was not involved in employing the claimant. That claimant had no letter of appointment. That claimant was a casual employee. That claimant reported to him. That he worked from 8:00 a.m. to 4:30 p.m., six days a week. That Sunday was an off day and Saturday was half day. RW1 said the claimant was not paid for Sundays. That he signed attendance register. RW1 could not recall how much the claimant was paid. RW1 denied that the claimant was employed on 17/5/2013. RW1 said that the claimant served for 3 years and just left work but employment was not terminated.



15. RW1 said claimant was not given annual leave. That NSSF and NHIF was paid to him. RW1 said the claimant did not collect certificate of service. RW1 said he did not have the claimant's records before court but had perused the same. That the attendance register was also not before court.

Determination

16. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:
- a. Whether the claimant's employment was unlawfully terminated or he absconded work?
 - b. Whether the claimant is entitled to the reliefs sought.
17. The claimant was employed on 17/5/2013 by the respondent and worked continuously until 23/01/2017 when he separated from the respondent. The claimant states that his employment was unlawfully terminated by the respondent whereas the respondent states that he absconded work and was not terminated from employment.
18. The claimant may have been employed as a daily paid worker without any written contract, but by dint of his continuous employment for a prolonged period, doing same work, he became a permanent and protected employee in terms of section 37 of the *Employment Act, 2007*, which provides:-
- “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.
 - (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.
19. It is common cause that for the entire period the claimant worked for the respondent, the respondent did not offer him a written contract and did not grant him annual leave because the respondent mistakenly treated him as a daily paid casual employee.
20. The respondent stated that the claimant was on NSSF and NHIF paid for by the respondent and that he was paid minimum wage and gross pay that included house allowance.
21. The respondent stated that the claimant did not work during public holidays since the factory did not operate during public holidays. The respondent stated that the claimant worked from 8:30 a.m. to 4:30 p.m., 6 days a week and did half day of Saturdays and was given off day on Sundays. The respondent said



that the claimant was not paid for days he did not work including Sundays. The respondent therefore denied the claims for payment of house allowance and public holidays as claimed.

22. The court finds that the claimant has proved on a balance of probability that he is entitled to payment in lieu of leave days not taken for a period of four years as claimed in the sum of Kshs. 53,424/=.
23. The claimant testified that he worked during public holidays and it was up to the respondent to rebut that evidence on preponderance of evidence. The respondent stated that it kept a work register where the claimant checked in and out whenever he attended work. The respondent however did not produce the register to effectively rebut the evidence adduced by the claimant.
24. Section 74 of the *Employment Act*, 2007 provides

“74 records to be kept by employer

1. An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars;
 - (a) of a policy statement under section 6(2) where applicable;
 - (b) specified in section 10(3);
 - (c) specified in section 13;
 - (d) specified in sections 21 and 22;
 - (e) of an employee’s weekly rest days specified in section 27
 - (f) of an employee’s annual leave entitlement, days taken and days due specified in section 28
 - (i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are consolidated particulars of the house allowance paid to the employee.

Under section 9 of the Act, it is provided:

- (7) if in any legal proceeding, an employer fails to produce a written contract or the written particulars prescribed in sub-section (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

The terms supposed to be kept in written record under section 9(1) include:-

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- (a) any terms and conditions relating to any of the following
 1. Entitlement to annual leave, including public holidays and holiday pay.”

25. In the present case, the claimant adduced evidence that he was not granted leave days which was conceded by RW1, that he worked during public holidays but was not paid extra pay, which was denied by the respondent without adducing any support records to rebut that credible evidence by CW1. The claimant also said that his salary did not include 15% house allowance and the respondent denied that fact without adducing any supporting written record. The claimant was not a casual and ought to have been paid for public holidays not worked and during off days given including Sundays. The respondent did not pay the claimant for Sundays, holidays and off days because the claimant was wrongfully regarded as a daily paid casual.



26. The court finds that the respondent failed to sufficiently rebut the evidence adduced by the claimant on all the three items and finds that the claimant proved that he was owed Kshs. 50,880/= in respect of unpaid public holidays and Kshs. 126,500.40 in respect of unpaid house allowance calculated at 15% of his basic wage which was Kshs. 16,536/= per month. The court already found that the claimant was entitled to Kshs. 53,424/= in lieu of leave days not taken.
27. On the issue whether the employment of the claimant was terminated or that he absconded work, the court finds the testimony by the claimant credible and consistent with the conduct of treating him as a casual employee that he was simply told to go away by a supervisor of the respondent without notice, notice to show cause or a disciplinary hearing.
28. The court does not believe the narrative by RW1 who in any event appeared not to have the full grasp of what actually happened on 23rd September 2017 when the employment of the claimant was verbally terminated by a supervisor of the respondent.
29. The court finds that the respondent violated sections 36, 41, 43 and 45 of the *Employment Act*, 2007 by terminating the employment of the claimant unlawfully and unfairly being without notice, notice to show cause, hearing and did not provide reasons for the termination.
30. The court finds that the claimant is entitled to one month salary in lieu of notice in the sum of Kshs. 16,536/= as claimed. Furthermore, the claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the Act. In this respect, the claimant did not contribute to the termination; he was not compensated for the unlawful termination nor was he paid any terminal benefits upon termination. The claimant was not given a certificate of service in terms of the law to facilitate getting alternative employment. The claimant had served the respondent for a period of four years being treated unlawfully as a casual and so was denied basic benefits due to him. The claimant suffered loss and damage.
31. In terms of the decision in **Kenfreight EA Limited and Benson K Nguti (2019) e KLR** where the Supreme Court held that;

‘Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee’s employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m)’
32. And taking into account the above considerations, the court awards the claimant the equivalent of four (4) months’ salary in compensation for the unlawful and unfair termination in the sum of Ksh. 66,144/=.
33. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:
 - a. Kshs. 16,536/= in lieu of one month notice
 - b. Kshs. 53,426/= in lieu of leave days not taken.
 - c. Kshs. 50,880/= for unpaid work during public holidays
 - d. Kshs. 126,300.40 for unpaid house allowance.
 - e. Kshs. 66,144/= being compensation for unlawful termination



Total award Kshs. 313,484.40

- f. Interest at court rates from date of judgment till payment in full.
- g. Costs of the suit
- h. Provision of certificate of service in 30 days of this judgment

DATED AT NAIROBI THIS 18TH DAY OF JULY, 2024

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Wekesa for claimant

Mr. Isinta for respondent

Mr. Kemboi Court Assistant

