



**Kenya Union of Commercial, Food and Allied Workers v Jamii Poa Commercial Agency
(Cause E035 of 2023) [2024] KEELRC 2198 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E035 OF 2023
ON MAKAU, J
SEPTEMBER 12, 2024**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

JAMII POA COMMERCIAL AGENCY RESPONDENT

JUDGMENT

Introduction

1. The claimant is a registered trade union and it brought this suit on behalf of its three members (hereinafter called grievants). The suit seeks the following reliefs:
 - i. The action by the Respondent to close its place of business without notifying the grievants was unlawful.
 - ii. That the action by the Respondent to refuse to pay the grievants after closure of the business due to reduced business goes against the provisions of section 40 of the Employment Act, 2007.
 - iii. The Respondent's action to refuse to honour its agreement drawn and signed on 23rd November, 2022 was wrongful and an exhibition of bad faith.
 - iv. The respondent to pay the grievant their terminal benefits as stated here below:



i. Elijah Kuria		
a. Notice		25,737.10
b. Leave untaken	$26/26 \times 25,737.10 \times 5$	128,685.50
c. Service	$22,000/26 \times 15 \times 5$	63,461.53
d. Public Holidays	$25,737.10/26 \times 60 \times 2$	118,785.60
e. Salary arrears		54,000.00
f. Underpayments:	$25,737.10 \times 12$	64,746.00
i. Jan.2017-Dec.2018		92,844.00
$20,398.55-15,000=5,398 \times$		92,844.00
12		92,844.00
ii. Jan.2018-Dec.2018		44,845.20
$25,737 -18,000=7,737 \times 12$		308,845.20
iii. Feb.2019-Dec.2019=		
$25,737 -18,000=7,737 \times 12$		
iv. Jan.2020-Dec.2021		
$25,737 -18,000=7,737 \times 12$		
v. Jan.2021-Dec.2021		
$25,737.10-22,000=3,737.10$		
$\times 12$		
g. Unlawful redundancy		
Total		1,097,810.13
ii. Peter Macharia		
a. Notice		900.00
b. Leave untaken	$26/26 \times 23,400$	93,600.00
c. Service	$23,400/26 \times 15 \times 4$	54,000.00
d. Public Holidays	$23,400/26 \times 48 \times 2$	86,400.00
e. Unlawful redundancy	$23,400 \times 12$	280,800.00
Total		515,700.00



iii. Nelson Kuria		
a. Notice		21,418.50
b. Leave untaken	$26/26 \times 21,418 \times 2$	42,836.00
c. Service	$21,418.50/26 \times 15 \times 2$	24,713.40
d. Public Holidays	$21,418.50/26 \times 26 \times 2$	42,836.56
e. Salary arrears		1,200.00
f. Unlawful redundancy	$21,418 \times 12$	257,022.00
Total		367,786.46

- v. Cost of the suit to the claimant.
2. The respondent denied liability and averred that the grievants were employed on casual basis and as such the alleged redundancy does not arise. It further averred that the settlement agreement signed during the conciliation before the Labour Officer was not voluntary. Therefore, it prayed for the suit to be dismissed with costs.

Evidence

3. Elijah Kuria Mwangi, 1st grievant testified as CW1. His evidence was that he was employed by the respondent as a Sales Manager from 2nd January 2017 for a monthly salary of Kshs.15,000 but later it was increased up to Kshs.22,000. He was placed in charge of the other 14 employees. He worked for a total of 4 years without any warning until December 2021 when he was told by the Director, Mr.Reuben Kabiro to go home and wait until he was called back. He complied but he was never called back.
4. On his cross examination, he contended that he was employed verbally and that he had known the Director before the engagement. He confirmed that his salary was paid through Mpesa. He contended that in December 2021, the Director told him to inform the other employees to proceed on Christmas holiday and wait until they were called back and he did so. During his 4 years' service, he never went on leave due to pressure of work. He denied that the respondent was wound up and contended that the business was still operational.
5. Mr.Peter Macharia Maina, 2nd grievant testified as CW2. His evidence was that he was employed by the respondent as a Driver from 2017 earning Kshs.500 per day but later it was increased to Kshs.900 per day. His duties included transport of Chain link and charcoal. He worked until October 2021 when he was told to go home and await until he was called back.
6. On cross examination, he contended that he was employed verbally. He was driving a lorry or a smaller vehicle depending on the size of the cargo ordered. He never went for any annual leave and he was working continuously. He was receiving instructions from CW1 and not the Director. He was stopped from attending work on 27th October 2021 and he was never called back. He sees the Director still driving the respondent's vehicles. He is not aware whether the respondent is still operating.



7. The 3rd grievant, Mr. Nelson Njuguna Kamau testified as CW3. His evidence was that he was employed by the respondent on 17th October 2017 as a Sales person. His monthly salary was Kshs.12,000 but it was later increased to Kshs.15,000. He never went for any annual leave until 30th March 2020, when he was told not to report to work the following day due to Covid-19 and instead wait until he was called back. He used to work from 6.00am to 8.00pm and he never went on any annual leave due to pressure of work.
8. During cross examination, he confirmed that he was employed orally by the respondent but he was receiving instructions from CW1.
9. He further confirmed that he left employment before the respondent started charcoal business. He was told to go home by Mr. Reuben Kabiro and wait until he was called back and when he received no call he visited the home of Reuben severally and he told him to wait until he was called back. The last time he visited the home was in December 2021.
10. He confirmed that a settlement agreement was voluntarily signed on 23rd November 2022 at Labour Office. He was present when the agreement was signed and there was no threat to anyone before signing. He contended that Mr. Reuben Kabiro simply admitted liability and signed the agreement.
11. The respondent called two witnesses. Ms. Catherine Wanjiru testified as RW1. She stated that she was employed by the respondent on casual basis depending on availability of work. She confirmed that the grievants were among the fifteen casual employees of the respondent. She worked until 2021 but just like the other employees, she was working intermittently even with intervals of a whole week. The company was closed in 2021 because it was not doing well and its assets were attached.
12. She stated that the employees were told to go home and wait to be called back but they were never called back to work. She confirmed that the employees never used to go for annual leave but they rested when there was no materials.
13. On cross examination, she stated that she was employed as a coordinator to assist CW1. When CW1 delivered cargo, she would take cheques to the bank. She denied being a partner or wife to Reuben Kabiro and maintained that she was an employee on a daily stipend.
14. Reuben Kabiro testified as RW2. He contended that he employed the grievants on casual basis and they are his friends. RW1 was also one of his casual employees and he used to call them to work when he had materials. The business went under in 2020 due to Covid-19 and he explained the challenges to the workers. He then told them that he would call them back after work improved. However, the operations never resumed.
15. He contended that the grievants were not entitled to annual leave because they were not in continuous employment. He further contended that he started charcoal business before employing the grievants and he never employed them in the charcoal business.
16. He admitted that he signed an agreement at the Labour office but stated that he did so under duress. He contended that he was told to sign or else he be taken to the police station.
17. On cross examination, he contended that the grievants were sometimes not attending work for a week or even three weeks when there were no materials. However, he admitted that the Mpesa statement filed showed continuous payment. He further admitted that he never reported to the Labour office that work was going down.
18. He contended that the grievants never told him that they were trade union members and stated that the union officials threatened to take him to the police if he failed to sign the agreement. He admitted



that he had no evidence of the said threat or prove that the company vehicles had been sold after the attachment but contended that the grievants lied when they said that they see him driving the vehicles. He contended that the vehicles were to be returned upon payment of the loans but he lacked money to pay the same.

Submissions

19. It was submitted for the claimant that no evidence has been tendered by the employer to rebut the evidence by CW1 and CW2 that the company made big income during Covid-19 pandemic. Further, the respondent has failed to adduce evidence to prove that RW2 signed settlement agreement under threat during the conciliation process.
20. It was argued that, if in deed RW1 signed the agreement under duress, he should have filed complaint with the police. Consequently, the court was urged to award the reliefs sought because they were laid off unfairly.
21. On the other hand, it was submitted for the respondent that the grievants were orally employed and in the same way they were relieved from work until things improve. However, things never improved and the grievants lodged claim through the claimant's union. It was submitted that the grievants membership to the claimant was suspect.
22. It was further submitted that the grievants were casual employees on need basis and contended that the claimant has not adduced evidence of monthly salaries. It was further submitted that the claimant is not entitled to the reliefs sought and further submitted that the agreement dated 23rd November 2022 was signed under duress and it has rescinded it. Finally, it was submitted that the company has since been wound up after its assets were attached by financier using auctioneers.

Analysis and determination

23. I have considered the pleadings, evidence and submissions. There is no dispute that the grievants were employees of the respondent from diverse dates in 2017 to diverse dates in 2021. The issues for determination are: -
 - a. Whether the grievants were casual employees or employees for indefinite period.
 - b. Whether the grievants' employment was unfairly and unlawfully terminated.
 - c. Whether the claimant is entitled to the reliefs sought.

Casual or regular employment

24. Casual employment refers to a case when an employee is hired for not more than 24 hours and for a daily wage. Notice is not required before termination. Regular employment on the other hand is one where the employee is employed on a monthly salary for an indefinite period terminable by notice of at least 28 days in writing. (See section 35 (1) (c) of the [Employment Act](#)).
25. In the instant case, the claimant had adduced Mpesa statements which show that the grievants were receiving both daily payments and monthly payments. The payments were consistent with persons on continuous service. The payment was made from the Mpesa account of RW2, respondent's director. Even if they were intended to be casual workers, their employment converted to regular employment under section 37 of the [Employment Act](#), 2007 due to their continuous service as casual employees.



Unfair and unlawful termination

26. The respondent confessed that it stopped grievants from work due to operational challenges caused by effects of Covid-19 pandemic. Accordingly, the claimant is right that the separation herein was on account of redundancy but done in violation of the mandatory procedure set out under section 40 of the Employment Act, 2007 which provides that: -

- “(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
 - (f) the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and
 - (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.”

27. The respondent did not rebut the claimant’s case that the termination was done without following fair procedure. Consequently, I find and hold that the failure to adhere to the said statutory procedure rendered the termination of the grievant’s employment unfair and unlawful.

Reliefs

28. The claimant prayed for payment of salary in lieu of notice, accrued leave, service, public holidays, unpaid salary, salary underpayments and compensation for unlawful redundancy. The parties have also brought to the attention of this court that the matter was referred to conciliation under section 62 of



the *Labour Relations Act* and a settlement agreement was signed by the parties on 23rd November 2022 between the parties herein and witnessed by the conciliator at the sub-county Labour office, Thika.

29. Although the respondent contends that RW2 signed the agreement through duress, no evidence of such coercion has been tendered. His conduct after signing the agreement did not align with that of a person who has been coerced into committing himself to pay the money reflected in the said agreement. Consequently, I find that the settlement agreement dated 23rd November 2022 was signed by the parties voluntarily after understanding the nature and the implication of the contents therein to each party.
30. Article 159 (2) (c) of *the Constitution* of Kenya, 2010 obligates this court to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration among others. The parties herein submitted themselves to conciliation process before a conciliator appointed under section 66 of the *Labour Relations Act* and resolved the dispute herein under section 67 vide the agreement dated 23rd November 2022.
31. Section 68 of the Act provides that: -
- “(1) If a trade dispute is settled in conciliation, the terms of the agreement shall be-
- a. Recorded in writing; and
- b. Signed by the parties and the conciliator.”
32. Having considered the agreement dated 23rd November 2022, I am satisfied that it is on all fours with the above provisions and the matter was resolved thereby. Consequently, I will recognise and respect the aforesaid settlement agreement and adopt it as the judgment of this court.

Conclusion

33. I have found that the claimants were regular employees for an indefinite period. I have also found that the parties resolved the dispute through conciliation vide an agreement dated 23rd November, 2022. Consequently, I enter judgment for the claimant in terms of the said agreement as follows: -
- i. Elijah Mwangi Kuria
- Notice.....Kshs.22,000.00
- Compensation.....Kshs.22,000.00
- Salary arrears.....Kshs.54,000.00
- Leave.....Kshs.15,399.00
- Holiday.....Kshs.10,262.00
- Kshs.128,661.00
- ii. Peter Macharia
- Compensation.....Kshs.23,400.00
- Leave.....Kshs.18,900.00
- Holiday.....Kshs.12,600.00
- ..Kshs.54,900.00



iii. Nelson Kamau

Notice.....Kshs.18,000.00
Compensation.....Kshs.18,000.00
Salary arrears.....Kshs.1,200.00
Leave..... Kshs.12,600.00
Holiday.....Kshs.8,400.00
Kshs.58,200.00

iv. The claimant is awarded costs plus interest at court rates from the date of filing the suit. The award of damages is also subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

