



**Mutio v Agricultural Development Corporation (Cause 63 of 2017)
[2024] KEELRC 2235 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 63 OF 2017
DN NDERITU, J
SEPTEMBER 18, 2024**

BETWEEN

NZUVE KINYASIA MUTIO CLAIMANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION RESPONDENT

JUDGMENT

I. Introduction

1. In a statement of claim dated 14th February, 2017 filed through Konosi & Company Advocates the claimant prays for-
 - a. A declaration that the claimant was a regular employee of the respondent.
 - b. Kshs6,278.80/= being one-month salary in lieu of notice.
 - c. Kshs28,813.20/= being salary underpayment.
 - d. Kshs316,184.10/= being pay for overtime worked
 - e. Kshs23,798.25/= being pay for annual leave earned but not taken from 2011 to the time of dismissal.
 - f. Kshs5,118.56/= being pro rata leave earned.
 - g. Kshs143,916.20/= being pay for rest days worked.
 - h. Kshs26,387.60/= being pay for public holidays worked.
 - i. Kshs11,965.50/= being gratuity.



- j. Kshs75,345.60/= being compensation for wrongful dismissal at the rate of 12 months gross salary in terms of section 49 (1) (c) of the Employment Act laws of Kenya
 - k. Certificate of service
 - l. Cost of this suit and interest.
2. Alongside the statement of claim were filed a verifying affidavit, a statement by the claimant, and a list of documents and a bundle of copies of the listed documents, all in support of the claim.
 3. The claimant further filed a witness statement by Alfred K. Tonui (CW2) on 1st February, 2022.
 4. The respondent entered appearance through A. Adema Advocate on 12th April, 2017. The respondent later filed a notice of change of advocates on 1st July, 2021 appointing Rodgers Karumpu Advocate to act for it and filed a response to the statement of claim. In the response to the claim filed on 22nd October, 2021 the respondent prays that the claimant's cause be dismissed with costs for want of merits.
 5. On 1st February, 2022 the claimant filed a reply to the response to the statement of claim dismissing the response and reiterating that judgment be entered against the respondent as prayed in the statement of claim.
 6. The respondent filed a further list of documents dated 18th August, 2022 with a bundle of copies of the listed documents.
 7. This cause came up for hearing on 1st February, 2023 when the claimant (CW1) and CW2 testified and the claimant's case was closed. The defence was heard on the same day with RW1 testifying and the respondent's case was closed as well.
 8. Counsel for both parties addressed the court by way of written submissions. Miss Ekesa for the claimant filed her submissions on 3rd May, 2023 while Miss Koskey for the respondent filed on 5th July, 2023.

II. The Claimant's Case

9. The claimant's case is expressed in the statement of claim, the oral and documentary evidence adduced through CW1 and CW2, and the written submissions by his counsel.
10. In the statement of claim the claimant avers that he was engaged by the respondent in August, 2016 as a night watchman at an agreed wage of Kshs160/= per day. It is pleaded that on 25th April, 2014 the respondent reviewed the terms of engagement and the claimant became a month to month employee at a monthly salary of Kshs5,605/=. It is pleaded that the claimant worked continuously until 30th April, 2016 when he was retired upon attaining the agreed mandatory retirement age.
11. It is pleaded that on or about 1st May, 2016, the respondent re-engaged the claimant as a night watchman on casual terms at a daily wage of Kshs228/=. It is pleaded further that on 10th December, 2016 the claimant was terminated by the respondent without justifiable reason(s). The claimant avers that he worked from 6pm to 6 am during his permanent employment as well as when on casual terms yet the respondent did not compensate him for overtime worked.
12. The claimant avers that he did not take annual leave, off-days, and public holidays and no compensation was made by the respondent. It is pleaded that the respondent failed to remit the statutory deductions for the claimant's benefit and his dependents.



13. The claimant avers that his termination was unlawful and unfair as the respondent failed to give valid reasons and failed to follow the procedure as set out in Section 41(2) of the *Employment Act*.
14. In his reply to the response to the claim the claimant dismissed the response to the claim and reiterated the contents of the statement of claim urging that judgment be entered as prayed.
15. In his testimony in court the claimant reiterated the contents of the foregoing pleadings and his filed written statement dated 14th February, 2017 as his evidence-in-chief. He produced and adopted copies of his listed documents as exhibits 1 to 5.
16. He testified that the respondent had initially employed him in the year 2011 as a security guard until 30th April, 2016 when he retired. He stated that he only took leave in 2015 and yet he worked from 6 pm and 6 am each day including public holidays.
17. He stated that he was tied up and could not take off-days or leave as the respondent did not have replacement personnel and hence he worked on public holidays as well and each and every day of the week. He stated that upon retirement in 2016 Mr. Abonyo, the security supervisor at the time, told him to report back to work to which request he obliged in May 2016.
18. He stated that he was re-engaged as a security guard without being issued with a letter of employment by the respondent. He stated that he earned Kshs228/= per day and that he did not sign the muster-roll as the same was allegedly not availed to him.
19. In cross-examination, he stated that he was underpaid in his initial employment with the respondent but admitted that he did not raise the issue with the employer at any point. He also stated that he was by then not aware of the minimum wage and confirmed that he was initially permanent and pensionable. He stated that he was denied leave from 2011 to 2016 notwithstanding that he verbally requested for the same. He, however, stated that he did take 21 days leave in 2015.
20. He stated that Mr. Abonyo re-engaged him without documentation in the subsequent engagement. He stated that he used to receive his wages and even signed the payroll. He claimed that he requested for an appointment letter for his re-engagement but none was issued to him. He stated that he was aware that the respondent paid for NSSF and other statutory deductions.
21. In re-examination he maintained that he did not take off-days or leave.
22. CW2 adopted his filed witness statement dated 15th December, 2021 as his evidence-in-chief. He testified that he worked with the claimant from August, 2016 when the latter re-joined the respondent. He stated that he worked with the claimant until both were terminated on 10th December, 2016. He stated that the manager terminated the claimant verbally but he could not remember the name of the manager.
23. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim.

III. THE RESPONDENT'S CASE

24. The respondent's case is contained in the statement of response to the statement of claim, the oral and documentary evidence adduced by RW1, and the written submissions by counsel.
25. In the response to the statement of claim, the respondent avers that it confirmed and engaged the claimant on permanent and pensionable terms with effect from 1st April, 2014 at a monthly salary of



Kshs5,606/= as per the letter dated 25th April, 2014 which was availed and produced as an exhibit by the claimant during the hearing.

26. It is pleaded that the claimant worked until 30th April, 2016 when he retired upon attaining the agreed mandatory age of retirement and a notice of retirement dated 28th October, 2015 was issued accordingly. The respondent avers that the claimant utilized all his leave days during the period of employment.
27. It is contended that the minimum consolidated wages in the agricultural industry are based on occupation and skills and that the applicable wage scales as at the material time were those in the Regulation of Wages (Agricultural Industry) (Amendment) Order of 30th July, 2013. It is pleaded that the claimant was paid above the provided minimum consolidated wage as per the above order that was in force through to 2014.
28. It is pleaded that as of 1st May, 2015 the government reviewed the monthly minimum consolidated wage to Kshs6,278.80 vide [Legal Notice No. 116 of 2015](#) and the respondent consequently reviewed the claimant's wages upwards. The respondent avers that being an agricultural institution it would engage, disengage, and re-engage employees on seasonal basis for a period not exceeding 21 days, typically during harvesting seasons or on need basis.
29. The respondent states that the claimant was re-engaged as a casual after retirement. It is pleaded that the claimant did not work for more than 48hrs in a week and that he was not underpaid.
30. The respondent further avers that upon retirement the claimant was paid all his terminal dues and that there are no other dues payable to the claimant.
31. In her testimony in court RW1, the respondent's human resources manager, reiterated the contents of her written statement which she adopted as her evidence-in-chief. She produced documents in the list dated 11th August, 2021 as exhibits 1 to 6. She testified that the claimant was a permanent employee from 2011 to 2016 and that he retired in May, 2016.
32. She stated that the claimant was paid all his terminal dues including leave and overtime. She stated that the claimant worked from 6 pm to 6 am but after 2016 the claimant was not an employee of the respondent. She stated that the claimant was not re-engaged thereafter.
33. In cross-examination, she admitted that the claimant was re-engaged after his retirement. She stated that the farm manager was responsible for calculating overtime worked but did not avail the muster roll for 2011 to 2016 together with the leave records or the staff regulations.
34. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs.

IV. Submissions by Counsel

35. On the one hand, the claimant's counsel submitted on four issues for determination- Whether the claimant was gainfully employed by the respondent; Whether the claimant's employment was unfairly and unlawfully terminated; Whether the claimant should be awarded the reliefs sought; and, Who should bear the costs of the cause.
36. On the first issue, it is submitted that the claimant was employed as a watchman in the year 2011 and worked for the respondent until his retirement in April, 2016. The claimant was re-engaged on 1st May 2016 in the same position. Counsel cited Section 10(7) of the Act arguing that the respondent did not



avail any documentation in court to show that the claimant was one of the respondent's employees between January 2011 to April 2016 and also from 1st May, 2016 to 10th December, 2016.

37. It is submitted that the respondent admitted that the claimant was re-engaged on temporary basis for the harvesting season at his request. After the harvesting season ended, the claimant wanted to continue working and was assigned to a different unit. However, it is submitted that the claimant's name was not, either by design or error, entered in the muster roll.
38. Counsel cited Section 37 of the Act on conversion of casual employment to term employment. Counsel also cited *Sila Mutwiri V Haggai Multi-Cargo Handling Service Limited* [2013] eKLR and *Kesi Mohammed Salim V Kwale International Sugar Co. Ltd* [2017] eKLR in support of the circumstances under which a court may interpret and convert casual employment into permanent employment. Counsel submitted that where an employee serves an employer for more than three months the casual contract automatically converts to a month to month contract. The court is urged to find and hold that the claimant was a permanent and pensionable employee of the respondent before and even during the re-engagement after retirement.
39. On the second issue, it is submitted that the law governing termination is set out in Sections 41, 43 and 45 of the Act. It is submitted that the respondent failed to adhere to those provisions in terminating the claimant. It is submitted that the claimant was not subjected to due process hence rendering the termination unfair and unlawful.
40. On the third issue, it is submitted that the claimant is entitled to the reliefs sought in the statement of claim.
41. On the fourth issue, the court is urged to allow the claim as prayed and award the costs to the claimant.
42. On the other hand, counsel for the respondent identified four issues for determination - Whether the claimant was gainfully employed by the respondent; Whether the claimant's employment was illegally terminated; whether the claimant should be awarded the reliefs sought; and, Who should bear the costs of this claim.
43. On the first issue, it is submitted that the claimant was not re-engaged as the terms of service ended in April, 2016 and the muster-roll produced by the respondent during the trial did not contain the claimant's name.
44. On the second issue, counsel relied on *Josephine M. Ndungu & Others V Plan International Inc* (2019) eKLR citing Section 47(5) of the Act in regard to the responsibility of an employee to prove unfair termination. It is submitted that under Section 45 of the Act an employee must establish a prima facie case of unfair and unlawful termination or dismissal. It is only then that an employer shall be required to provide evidence establishing the validity of the termination in terms of Sections 43 & 45 of the Act. Counsel cited *Muthaiga Country Club V Kudheih Workers* [2017] eKLR in demonstrating the interplay between Sections 43 & 47 of the Act.
45. Counsel cited Section 43 of the Act explaining that it establishes the lawful reasons upon which an employer may terminate an employee which should have reasonable basis and be genuine. Counsel relied on *Kenya Revenue Authority V Reuwel Waitthaka Gitahi & 2 others* [2019] eKLR whereby the Court of Appeal stated that the standard of proof is on a balance of probability, not beyond reasonable doubt, and all that an employer is required to prove is that it "genuinely believed to exist" the reasons relied upon causing it to terminate the employee. It is submitted that the claimant was not terminated unfairly but rather he was retired in accordance with the law and the agreed terms and conditions of employment.



46. On the third issue, the claimant was not a member of a union or subject to a collective bargaining agreement during his years of service.
47. On the fourth issue, the court is urged to dismiss the cause with costs as the claimant failed to prove his case on a balance of probabilities.

V. Issues for Determination

48. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel, the court identifies the following issues for determination -
 - a. Whether the claimant was unfairly and unlawfully terminated or retired.
 - b. Whether the claimant was re-engaged by the respondent after his retirement and on what terms.
 - c. If (b) above is in the affirmative, whether the claimant's employment was illegally terminated after he was re-engaged.
 - d. Whether the claimant is entitled to the reliefs sought.
 - e. Costs.

VI. Employment

49. It is not disputed that the claimant was engaged by the respondent as a security guard from the year 2011 until his retirement on 30th April, 2016. The evidence on record is that the respondent issued the claimant with a letter dated 28th October, 2015 stating that his retirement was to take effect from 30th April, 2016.
50. The respondent is a public corporation which runs and operates on public funds. It cannot be plausible or possible that the claimant was re-engaged as alleged without any records. The muster-roll availed in evidence by the respondent does not contain the name of the claimant and the court finds no basis whatsoever for the allegation by the claimant that he was re-engaged as alleged. While RW1 reluctantly admitted that the claimant was re-engaged as alleged, she did not avail any records or evidence on the terms and conditions upon which the claimant was re-engaged.
51. The court finds and holds that there is no basis whatsoever upon which any award may be made to the claimant founded on the alleged re-engagement that was not proved. Such an award would be an expense on the taxpayer for an alleged employment relationship that is not supported by records as it should. If the alleged supervisor Mr Obonyo decided to engage the claimant based on their friendship, then the claimant should have joined him in the cause as a respondent for the court to establish and determine on what basis the alleged employment was founded.

VII. Termination

52. The claimant was retired upon attaining the mandatory age of retirement as per the undisputed letter availed and produced in court dated 28th October, 2015. He was not terminated or dismissed as alleged.
53. As held above, the alleged re-engagement was not proved and as such the court finds and holds that the claimant was at no point of his service with the respondent terminated or dismissed.



VIII. Reliefs

54. Any reliefs awardable to the claimant, if at all, may only be in respect of the employment relationship that terminated upon his retirement on 30th April, 2016.
55. Prayer (a) is for a declaration that the claimant was a regular employee of the respondent. I have checked from the Act and other applicable law on the meaning of this term – “regular employee” – but found no answer. While this may be a term finding some casual use to imply month to month employment, the court shall resist the temptation of adopting the same as it has no place in the law. This prayer is hence moot.
56. Prayer (b) is for one month’s pay in lieu of notice. As noted above, the claimant was retired upon attaining the mandatory retirement age then applicable and agreed by and between the parties. Certainly, the claimant needed no notice of his attaining retirement age as he was aware of his age from year to year as he approached retirement. No evidence has been availed that it was a term of the contract of service that the claimant was to be notified of his age to signal his retirement.
57. Prayer (c) is for underpayments in the sum of Kshs28,813.20. The claimant’s counsel has cited the applicable Legal Notices in support of this claim and no response has been offered or cited by counsel for the respondent disputing the validity and sanctity of the same. In the circumstances the same is allowed as far as the same relates to the period prior and up to the retirement.
58. Prayer (d) is for overtime pay in the sum of Kshs316,184.10. The evidence on record is that the claimant worked from 6pm to 6am which clocks at 12 hours as opposed to the standard eight hours a day. This evidence was admitted by the respondent through RW1. No evidence was availed by the respondent to convince the court that this claim should not be allowed. The contract of service, for example, was not availed for the court to ascertain the contents thereof in regard to this aspect of hours of work. In the circumstances, the prayer is allowed.
59. Prayer (e) is for annual leave earned but not taken in the sum of Kshs23,798.25. During the hearing both parties were in consensus that the claimant only took his annual leave in 2015 and again in 2016 as he exited service on retirement. Once the leave pay for the two years is deducted from the amount claimed above the balance left is Kshs18,214.35. This is the amount that is awarded to the claimant under this head.
60. For the reasons stated above, that the claimant took leave in 2016 as he waited for retirement, prayer (e) for pro-rata leave for 2016 is denied.
61. Prayer (f) is for rest days worked and not paid in the sum of Kshs143,916.20 and prayer (g) is for public holidays worked and not paid for in the sum of Kshs26,387.60. The claimant is specific on the number of days worked on both claims. In the circumstances, it was incumbent upon the respondent to avail records to dislodge the claim by the claimant on the days worked by, for example, availing the muster-roll. The respondent failed to dislodge that claim and hence the above sums are awarded to the claimant as prayed.
62. Prayer (h) is for gratuity in the sum of Kshs11,965.50. For the umpteenth time the court reckons that gratuity is not a right to an employee. For the court to award this prayer the claimant ought to have demonstrated that he was either entitled to the same arising from a term in the contract or that the respondent had agreed or undertaken to pay the same upon the claimant meeting a certain criterion that he has met. The claimant failed to prove either of the above and hence the request is denied and dismissed.



63. Prayer (i) is for compensation in the sum of Kshs75,345.60. However, the court has found and held elsewhere in this judgment that the claimant was not terminated but rather he was lawfully retired upon attainment of the mandatory age of retirement. Further, the court found and held that the allegation that he was re-engaged by the respondent failed for lack of evidence. For all the foregoing reasons this request is denied and dismissed.
64. Prayer (k) is for a certificate of service which is allowed in accordance with Section 51 of the Act.

IX. Costs

65. The claimant is awarded costs of the cause.

X. Disposal

66. In the disposal of the cause the court issues the following orders:
- a. A declaration be and is hereby issued that the claimant was not unfairly or unlawfully terminated but he was rather lawfully retired upon attaining the agreed age of retirement.
 - b. The claimant is awarded a total of Kshs 533,515.45 as follows:
 - i. Salary underpayments ... Kshs28,813.20
 - ii. Overtime pay Kshs316,184.10
 - iii. Annual leave pay earned ... Kshs18,214.35
 - iv. Pay for rest days worked..... Kshs143,916.20
 - v. Pay for public holidays worked Kshs26,387.60Total Kshs533,515.45
The award is subject to statutory deductions.
 - c. The respondent shall issue and deliver a certificate of service to the claimant within 30 days of this judgment
 - d. Costs of the cause to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 18TH DAY OF SEPTEMBER, 2024.

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DAVID NDERITU
JUDGE

