REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E606 OF 2024

ENOCK OKOLLA……CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS…… RESPONDENT

JUDGMENT

1. The Claimant avers that in 2003, he was engaged by the Respondent as a casual driver at its Busia Branch. He later secured employment on contract terms on 23rd April 2008 and was subsequently transferred to the Respondent's headquarters in Nairobi. He contends that contradictory correspondence from the Respondent suggests uncertainty as to whether he was a permanent and pensionable employee or serving on a renewable annual contract.

2. It is the Claimant's case that the Respondent provides a weekend allowance to employees who perform active duties over the weekend.

3. He avers that, in his capacity as a driver, he routinely drives senior officials of the Respondent union to various upcountry destinations over weekends for meetings

with delegates or branch visits. He maintains that these are official duties for which employees are entitled to weekend allowance.

4. The Claimant contends that he has not received weekend allowance for 169 weekends and is therefore owed Kshs 2,619,500/= by the Respondent. Accordingly, he seeks an order compelling the Respondent to confirm him on permanent employment terms and to settle the outstanding weekend allowance of Kshs 2,619,500/=. He also prays for costs of the suit together with interest.

5. In response to the Claim, the Respondent states that the Claimant was engaged as a driver on a two-year renewable contract through a letter of offer dated 23rd April 2008. The contract was subsequently renewed effective 1st April 2010, 1st April 2013, 1st April 2014, and 1st April 2015. The Respondent adds that upon the contract's expiry on 1st April 2016, the Claimant sought to be placed on permanent and pensionable terms. However, the Respondent reiterated that his engagement remained contractual and extended his contract from 1st April 2016 to 1st April 2017.

6. The Respondent further states that the Claimant's contract was thereafter renewed effective 1st June 2017, 1st June 2020, 22nd April 2021, and 7th February 2024.

7. The Respondent maintains that the Claimant was engaged on a renewable contract and denies the existence of any conflicting correspondence regarding his terms of employment. The Respondent further asserts that the Claimant was never employed on permanent and pensionable terms.

8. The Respondent further denies any liability for the payment of weekend allowance, asserting that no such allowance exists in its policies, contracts, or remuneration structures. Consequently, the Respondent has urged the Court to dismiss the Claimant's suit with costs.

9. In a rejoinder to the Respondent's Statement of Response, the Claimant filed a Reply dated 16th September 2024, maintaining that the Respondent has previously paid him weekend allowances. He asserts that the weekend allowance is a recognized benefit extended to union officials and employees for work undertaken during weekends and public holidays. He adds that, as an operational overhead, the allowance was at times referred to as weekend imprest.

10. The Claimant contends that the Respondent's Statement of Response amounts to a mere denial and urges the Court to reject it and enter judgment in his favour as sought in the Memorandum of Claim.

11. During the hearing, which proceeded on 3rd March 2025, both parties called oral evidence in support of their respective cases.

Claimant's Case

12. The Claimant testified in support of his case and called **Lawrence Kazungu Mwalungo** as an additional witness. Testifying as CW1, the Claimant sought to adopt his witness statement as his evidence in chief. He further tendered the list and bundle of documents filed on his behalf as exhibits before the Court.

13. The Claimant testified that the Respondent Union has branches across the country, requiring officials to travel extensively, including on weekends and public holidays. He stated that such travel often extends beyond normal working hours, prompting the Union to introduce a weekend allowance in place of overtime payments.

14. He further averred that, since the Union's inception, employees including drivers, have consistently received weekend allowance, which is separate from the allowances reflected on pay slips or appointment letters for some staff.

15. According to the Claimant, the allowance is disbursed through the signing of vouchers and expenditure books and is paid monthly alongside other emoluments.

16. He added that the allowance is calculated per weekend or public holiday worked, at a rate of Kshs 15,500/= per weekend. The Claimant stated that he received this allowance regularly until two interruptions: from around 2019 to 2021, and from June 2022 to date.

17. As a result, he claims that the Respondent owes him arrears for 169 weekends, amounting to a total of Kshs 2,619,500/=.

18. The Claimant further stated that he sent numerous letters to the Union Secretariat requesting payment, all of which were ignored.

19. He contended that other employees and drivers continue to receive these allowances, while his payments have been withheld for reasons unknown to him.

20. The Claimant also stated that there was conflicting correspondence regarding his employment terms; some letters indicate he is on a contractual basis, while others

suggest permanent employment. He noted that his colleagues in similar positions are employed on permanent terms.

21. **Mr. Lawrence Kazungu Mwalungo**, who testified as CW2, equally adopted his witness statement as his evidence in chief.

22. CW2 testified that he has worked for the Respondent Union as a driver since 1st August 2003.

23. He explained that, as a driver, his duties include transporting Union officers for both official and non-official purposes.

24. CW2 further stated that the Claimant is his colleague and that they perform the same duties.

25. He also averred that the Union operates branches nationwide, requiring extensive travel by officials, including during weekends and public holidays.

26. He added that these trips often extend beyond normal working hours, leading the Union to introduce a weekend allowance in lieu of overtime payments.

27. CW2 added that since the Union's inception, employees including drivers, have received a weekend allowance, which is separate from allowances listed in payslips or appointment letters for some staff.

28. He further stated that the allowance is processed through vouchers and expenditure books and is usually paid monthly alongside other emoluments. It is calculated per weekend or public holiday worked, at a rate of Kshs 15,500/= per weekend.

29. CW2 further averred that he is employed on a permanent basis and began working alongside the Claimant around the same time, performing similar roles.

30. According to CW2, it saddens him that the Claimant has not been placed on a permanent employment contract.

Respondent's Case

31. The Respondent presented oral evidence through **Alice Tuei**, who testified as RW1. Ms. Tuei identified herself as a Human Resources Officer of the Respondent Union and similarly, she adopted her witness statement as her evidence in chief. She also produced the documents filed on behalf of the Respondent as exhibits before the Court.

32. RW1 testified that the Claimant was never employed on a permanent and pensionable basis, maintaining that the Respondent has consistently regarded him as a contractual employee.

33. She stated that the Respondent has never issued any correspondence suggesting a departure from the contractual nature of the Claimant's employment.

34. RW1 further explained that the Claimant's remuneration was governed by the terms of the initial offer letter dated 23rd April 2008, which included specific allowances such as house allowance, medical allowance, commuter allowance, and annual leave allowance.

35. She added that on 1st July 2017, the Respondent implemented a comprehensive remuneration package clarifying the allowances to which employees were entitled, including house allowance, medical allowance, annual leave allowance, daily travelling allowance, and other specified benefits.

36. According to RW1, the Claimant's claim for a weekend allowance of Kshs. 2,619,500/= is baseless, as no such allowance exists in the Respondent's policies, contracts, or remuneration packages.

37. She further added that the pay slips produced corroborate this position, showing no evidence of any weekend allowance being paid during the Claimant's employment.

38. RW1 maintained that the Respondent has fully complied with the contractual terms agreed with the Claimant, and that his claims regarding the weekend allowance and purported permanent employment are unfounded and lack both factual and legal basis.

39. RW1 maintained that the Claimant's entitlements are limited to those expressly outlined in the contractual documents and remuneration policies, which do not include any weekend allowance.

Submissions

40. The Claimant submitted that, by operation of Section 37 of the Employment Act, his contract had long converted into permanent employment. He argued that his 16 years of uninterrupted service, evidenced by continuous renewals, regular payment of wages, statutory deductions, and pension enrolment, constitute

conclusive proof of a permanent employment relationship. In support of this position, the Claimant relied on **Michael O. Odongo v. Kenya Electricity Generating Co. Ltd, Kisumu Cause No. 21A of 2013.**

41. The Claimant further submitted that he consistently performed his duties without interruption, reported to the Respondent's offices daily, adhered to duty rosters, and undertook long-term assignments. In his view, this uninterrupted service and acceptance of ongoing obligations demonstrated mutual recognition of a stable and continuous employment relationship.

42. He further argued that the Respondent's repeated issuance of "renewal letters" over many years, while still deducting statutory contributions and paying benefits, could not disguise the fact that the relationship was in substance permanent. To buttress this position, the Claimant cited the cases of **Narry Philemons Onaya-Odeck v. Technical University of Kenya [2017] eKLR and Kenyatta University v. Esther Njeri Maina (Civil Appeal 261 of 2020) [2022] KECA 120.**

43. The Claimant further submitted that the totality of the Respondent's conduct, being continuous service, statutory deductions, pension enrolment, duty assignments, and selective confirmation of other employees, leads inexorably to the conclusion that he was a permanent employee. He added that the

Respondent's actions created both a legitimate expectation of permanence and an estoppel against denying such status.

44. The Claimant further argued that the Respondent's reliance on temporary contracts was merely an artificial device to deny him accrued employment rights.

45. Regarding the weekend allowance, the Claimant submitted that the Respondent's failure to produce the ledger, despite being its custodian, should be construed against it. With respect to this, the Claimant argued that the only reasonable inference is that the ledger, if produced, would have supported his claim that he consistently worked on weekends and was entitled to the allowance.

46. The Claimant stated in further submission that although he served continuously for 16 years, he was denied permanent confirmation while his colleagues were confirmed, which he viewed as discriminatory. He further claimed that reassignment to a lesser role without consultation amounted to an unfair labour practice and, in effect, constructive dismissal.

47. In support of these arguments, the Claimant relied on the cases of **Peter Gakinya & another v. NSSF Board of Trustees (2014) eKLR and Elizabeth Kwamboka Khameba v. BOG Cardinal Otunga High School Mosocho (2014) eKLR.**

48. On the other hand, the Respondent submitted that the Claimant was employed on fixed-term renewable contracts, yet he now seeks an order compelling the Respondent to confirm him as a permanent and pensionable employee, contrary to the express terms of his contract. In the Respondent's view, such a request is untenable. It argued that, grounded on the principle of freedom of contract in labour relations, this Court lacks jurisdiction to compel an employer to convert a fixed-term contract into permanent employment. It was the Respondent's argument that to do so would amount to the Court rewriting the parties' agreement. On this score, reliance was placed on the decision in **Chacha Mwita v. KEMRI, Cause No. 1901 of 2013.**

49. The Respondent further argued that the Claimant willingly signed his original employment letter dated 1st April 2008, as well as all subsequent renewal letters up to his last contract dated 7th February 2024, demonstrating his acceptance of the contractual terms.

50. Referencing the case of **National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd & another (2001) KLR 112,** the Respondent submitted that parties have the freedom to enter into fixed-term employment contracts, and unless such contracts were procured through fraud, concealment, or misrepresentation, the Court cannot intervene to vary or rewrite the terms agreed upon.

51. Regarding the Claimant's claim for weekend allowance, the Respondent argued that it would be improper for the Court to compel payment of allowances that are non-existent, have no legal or contractual basis, and are essentially fictitious.

52. As to the allegation of discrimination, the Respondent submitted that the Claimant had not met the threshold required to sustain such a claim. The Respondent further argued that the burden of proof does not shift in the absence of direct evidence by the Claimant.

53. Still on this issue, the Respondent added that the Claimant and CW2 were hired at different times and fell within different employment categories, making their roles incomparable in value. To support this position, the Respondent relied on the decision in **Erick Barasa Makoha & 2 others v. Neema ya Mungu Investment Co. Ltd (2021) eKLR.**

Analysis and Determination

54. Flowing from the pleadings by both parties, the evidentiary material on record as well as the rival submissions, it is clear that the Court is being called to resolve the following questions: -

   i. **Whether the Claimant's fixed-term contract assumed permanency; and**

   ii. **Whether the Claimant is entitled to the weekend allowance.**

Whether the Claimant's fixed-term contract assumed permanency

55. Before addressing the substantive issues, the Court considers it necessary to deal with the question of constructive dismissal. It is notable that this issue was not pleaded by the Claimant and only emerged in his submissions, where he contended that the Respondent unilaterally altered his terms of employment by reassigning him from driver to security officer without consultation or justification.

56. On this issue, the Court aligns itself with the holding in **Rem Ogodo Ogana v Kenya Sugar Board [2016] eKLR**, in which it was held that a claim for constructive dismissal must be expressly pleaded and that a claimant is required to set out specific particulars which he or she believes compelled him or her to leave employment involuntarily, notwithstanding that the employer had not expressly terminated the employment relationship.

57. In the present case, the Claimant did not plead constructive dismissal in his Memorandum of Claim, nor did he seek reliefs that ordinarily flow from such a

claim. By law, he was required to specifically plead constructive dismissal and set out the particulars thereof, which he failed to do.

58. In any event, the Claimant remains an employee of the Respondent and therefore cannot sustain a claim for constructive dismissal.

59. It is trite that submissions do not constitute evidence. On this issue, I gather support from the decision of the Court of Appeal in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR,** where it was held as follows: -

> "***Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."*** Underlined for emphasis

60. Consequently, the Court finds that, as constructive dismissal was not pleaded, the issue does not arise for determination in this matter.

61. With that being said, I now turn to the issues identified for determination.

62. The Claimant contends that there are conflicting letters regarding the terms of his employment, with some indicating that he was engaged on a contractual basis while others suggest he was a permanent employee. The Respondent disputes this assertion and maintains that the Claimant's engagement has at all material times been on a renewable contractual basis.

63. In support of its position, the Respondent exhibited copies of letters evidencing the renewal of the Claimant's employment at various intervals.

64. On his part, the Claimant supported his assertions by exhibiting a letter dated 12th June 2008 authored by **Teresia Chege** and addressed to the Cooperative Bank, in which it is stated that the Claimant was on permanent employment with effect from April 2008, having been previously engaged on a casual basis.

65. It is noteworthy that as at 12th June 2008, the Claimant was serving under a two-year renewable contract effective 23rd April 2008. Further, there is no subsequent correspondence on record confirming him as a permanent employee.

66. It is therefore evident that the letter dated 12th June 2008 does not accurately reflect the Claimant's terms of service as at that date.

67. What's more, the Claimant's contract was subsequently renewed by a letter dated 26th April 2010 for a two-year period, effective 1st April 2010 to 1st April 2012. This further confirms that the Claimant was engaged on a contractual basis, thereby undermining the assertions in the letter dated 12th June 2008.

68. In his submissions, the Claimant relied on Section 37(1) of the Employment Act, contending that his 16 years of continuous service had converted his contractual employment into a permanent position.

69. Section 37(1) of the Employment Act addresses the conversion of casual employment into a regular contract, applicable where an employee has worked continuously for at least one month or has undertaken work that extends beyond three months in duration.

70. In this case, it is undisputed that the Claimant was initially employed on a casual basis. However, he was later issued with a contract of employment, thereby converting his engagement into a fixed-term contract. Accordingly, at the time of filing this suit, the Claimant's employment was no longer casual but contractual in nature.

71. It is also common ground that the Claimant has been on a fixed-term contract since 2008, which, at the time of filing this suit, amounted to nearly 16 years. The issue for determination, therefore, is whether the successive renewal of the Claimant's fixed-term contract results in its conversion to a permanent contract.

72. Testifying in support of the Claimant's case, CW2 stated that he is employed on permanent and pensionable terms of service.

73. In explaining why the Claimant was retained on a fixed-term contract rather than on permanent terms, RW1 testified that in 2008, the Respondent disposed of its motor vehicles and therefore had no need to employ drivers permanently. She further stated that all drivers are engaged on a contractual basis, not as permanent employees.

74. Notwithstanding RW1's testimony, it remains unclear why the Respondent has continuously renewed the Claimant's contract for 16 consecutive years, particularly given that the Claimant was first engaged in 2008, the same year the Respondent claims to have disposed of its motor vehicles hence did not require drivers on a permanent basis.

75. Accordingly, the Court finds that the Respondent has not furnished sufficient justification or material reasons for continuously engaging the Claimant on successive fixed-term contracts over a period of 16 years.

76. Indeed, it is highly probable that the long-standing, uninterrupted, and consistent practice of renewing the Claimant's fixed-term contract over 16 years led him to reasonably believe that his employment had become permanent.

77. Whereas the Employment Act,2007, does not explicitly provide for the conversion of a fixed-term contract into a permanent contract, where an employer repeatedly renews fixed contracts for work that is continuous and ongoing, as in the present case, it may be inferred that the employment relationship has, in effect, assumed permanent status.

78. In the case of **Kenyatta University v Maina [2022] KECA 1201 (KLR),** the Court of Appeal upheld the trial Court's finding that the constitutional rights of an employee who had been kept on casual terms for nine continuous years had been violated. The Judges further held that treating the employee as non-permanent in those circumstances amounted to an unfair labour practice, as she was denied the rights due to a permanent employee. Ultimately, the Court of Appeal affirmed the trial Court's finding that the employment relationship between the parties in that case was not casual or temporary, but permanent and pensionable.

79. Similarly, having considered the evidence before me, I find that the successive renewals of the Claimant's fixed-term contracts over a period of 16 years effectively conferred permanent status upon his employment.

Whether the Claimant is entitled to the weekend allowance

80. The Claimant has claimed the sum of Kshs 2,619,500/= as payment for weekend allowances. He contends that, since its inception, the Respondent Union has consistently paid employees, including drivers, a weekend allowance in addition to the allowances reflected in their pay slips or stated in their appointment letters.

81. The Claimant states that these payments were made in respect of travel, including excursions that extended beyond normal working hours and days, with the allowance provided in lieu of overtime.

82. The Respondent has denied the Claimant's claim for weekend allowances, asserting that his remuneration is governed by the terms set out in the initial offer letter dated 23rd April 2008, which provided for specific allowances, including house allowance, medical allowance, commuter allowance, and annual leave allowance.

83. The Respondent further stated that on 1st July 2017, it introduced a comprehensive remuneration package, which clarified the allowances to which employees were entitled. This package included provisions for house allowance, medical allowance, annual leave allowance, daily travel allowance, and other specified benefits.

84. In support of its case, the Respondent exhibited a copy of the said Remuneration Package, which details the allowances payable to employees.

85. Notably, the Remuneration Package does not provide for weekend allowance.

86. Furthermore, the Claimant's contract of employment does not include any provision for a weekend allowance.

87. It is noteworthy that, in some months, the Claimant's payslip reflects an item described as 'extraneous allowance' amounting to Kshs 15,000/=. Under cross-examination, the Claimant testified that he continues to receive this allowance, which he stated relates to instances when work is performed beyond normal working hours.

88. On further cross-examination, the Claimant testified that the weekend allowance was intended to cover his accommodation and meals while he was away from Nairobi driving his superiors over the weekend.

89. Notably, the Remuneration Package produced by the Respondent includes a daily traveling allowance, payable to all officers to cover accommodation, subsistence, and incidental expenses. The Claimant did not differentiate this allowance from the weekend allowance he claims, nor did he assert that he was ever denied the daily traveling allowance during his official trips outside Nairobi.

90. It is trite that a party who alleges the existence of a fact bears the burden of proving it. This is discernible from **Sections 107 and 108 of the Evidence Act.** Therefore, the party who alleges must prove. This burden remains with the alleging party until it is discharged or shifted by sufficient evidence supporting the existence of the alleged fact or facts.

91. In this case, the Claimant, having alleged that he was entitled to a weekend allowance, was required to prove this assertion. This was a fundamental aspect of his claim, particularly in light of the Respondent's categorical denial of the existence of such an allowance from the outset.

92. In making the foregoing observations, the Court is mindful of the obligations imposed on an employer under **Sections 10(6) and (7) and Section 74 of the Employment Act** regarding the maintenance of employment records and the burden of proof. However, these obligations arise only where an employer fails to produce a written contract or the written particulars required under Section 10(1).

93. In the present case, the Respondent has produced the Claimant's employment contract, which, as noted, contains no provision for a weekend allowance. Accordingly, the onus was on the Claimant to establish his entitlement to the allowance.

94. All in all, the Court finds that the Claimant has not established to the requisite threshold that he was entitled to weekend allowance.

Orders

95. In the final analysis, the Claimant's claim succeeds only to the extent that the Court finds his employment relationship with the Respondent to be permanent and pensionable, effective from the date of this judgment.

96. The claim for weekend allowance is found to be without merit, and is therefore dismissed.

97. In light of the nature of the employment relationship between the parties, there will be no orders as to costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **11th** day of **December** 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant No appearance

For the Respondent Mr. Ajak Jok

Court Assistant Mohammed

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the

Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE