



Mwau & 9 others v Excel Chemicals Limited (Employment and Labour Relations Cause 104 of 2023) [2026] KEELRC 142 (KLR) (28 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 142 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 104 OF 2023**

**DKN MARETE, J
JANUARY 28, 2026**

BETWEEN

**EMA MUKENE MWAU 1ST CLAIMANT
JUDITH MBITHE MWALI 2ND CLAIMANT
JULITA WAENI MBOVU 3RD CLAIMANT
ALEXANDER MUTISO MUINDE 4TH CLAIMANT
KASYOKA MUTUA 5TH CLAIMANT
CECILIA NDUNGE NYERERE 6TH CLAIMANT
CATHERINE NDUKU NTHEU 7TH CLAIMANT
WAYUA WAMBUA MUASYA 8TH CLAIMANT
DAVID SILA MUTISYA 9TH CLAIMANT
CONSOLATA SYOMBUA 10TH CLAIMANT**

AND

EXCEL CHEMICALS LIMITED RESPONDENT

JUDGMENT

1. This matter came in by way of a Memorandum of Claim dated 13th February, 2023. The issue in disputes is thereon cited as;

Unfair and unlawful dismissal of Claimants’ employment and failure to pay terminal benefits and accrued dues due to the claimants.



2. The Respondent in a Response to Statement of Claim dated 27th March, 2023 denies the claim and prays that it be dismissed with costs.
3. The Claimants' case is that at all material times to this cause, they were employees of the Respondent and worked as packaging personnel at a daily wage of Kshs.600.00.
4. Though termed as causals, they fell within the ambit of section 37 of the Employment Act, 2007. They were never issued with an employment contract despite their long service. The employer deducted unpaid their statutory deductions of NSSF and NHIF as per section 20 of the Employment Act, 2007 aforesaid.
5. The claimant's further case is that despite zealous, unwavering and dedicated service at work, they were treated to unfavourable working conditions in breach of the express position of the Employment Act, 2007 and Article 41 of the Constitution of Kenya, 2010. They endured mental anguish and torture as a result of working in a toxic environment where they were overworked and reported for periods between 7 am and 5pm with only a short 30 minutes break. They were never awarded leave, or at all.
6. Other issues raised by the Claimants in complains against the Respondent come out thus;
 - i. Their attempts to join a trade union were thwarted by threats of sacking and so did their complaints to immediate supervisor for improvement of their working conditions.
 - ii. They were never paid any house allowance.
 - iii. They served dedicatedly but were unceremoniously and arbitrarily turned away from the Respondent's gate on diverse dates of July, 2022 in breach of sections 41, 43, 44 and 45 of Employment Act, 2007.
 - iv. They were verbally informed that they have been summarily dismissed and should not report any more as they had been replaced with new employees.
 - v. This dismissal was devoid of procedure, untimely, unlawful and unjustified and now claim the dues under the Employment Act, 2007 and the Regulations of Wages thereof.
7. They pray as follows;
 - a. A declaration that they were employees of the Respondent.
 - b. A declaration that the Claimants termination from employment was unlawful, unprocedural and unfair.
 - c. A declaration that Terminal dues be paid to each of the claimants as per section 49 and 50 of the Employment Act, 2007 totalling;
 - i. Ema Mukene Mwau.....kshs.292,200/-
 - Ii. Judith Mbithe Mwalikshs.784,200/=
 - Iiii. Julita Waeni Mbovu.....kshs.784,800/=
 - Iv. Alexandar Mutiso Muinde.....kshs.159,000/=
 - V. Kasyoka Mutua.....kshs.158,400/=
 - Vi. Cecila Ndunge Nyerere.....kshs.378,600/=
 - Vii. Catherine Nduku Ntheu.....kshs.249,000/=



- Viii. Wayua Wambua Muasya.....kshs.338,400/=
- Ix. David Sila Mutisya.....kshs.291,000/=
- X. Consolata Syombua Mutuku.....Kshs.249,000/=

- d. Certificate of service as per section 51 of the *Employment Act*.
- e. Costs of the suit and interest from the date of filing suit till payment in full.

The Respondent's case is a denial of the claim.

- 8. It is their case that the Claimants were casual employees whose services were engaged on a need basis as and when required. Their consolidated wages were paid in accordance with the Minimum Wage Regulations. The Respondent further avers that it was only the 9th claimant who had not taken his wages for sometimes and this amount was paid on 9th February, 2022.
- 9. The Respondent's case further comes out as follows;
 - i. The tasks entrusted to the claimants' ended on each day with no spillover to the following day.
 - ii. The Claimant came to work on their own volition and were not obligated to seek work on the following day after engagement.
 - iii. NSSF and NHIF deductions are mandatory for all employees, casual or permanent.
 - iv. The wages paid to the Claimants' were in line with the consolidated wage regime and the Labour Institution Act, 2007 and the Regulation of Wages (General Amendment) order therefore ousting the issue of house allowance.
 - v. Denying a casual employee work does not amount to termination of employment.
 - vi. There was no obligation on the part of the Respondent to engage the Claimant on a daily basis and they were free to seek work elsewhere.
 - vii. The Respondent denies termination of the claimant's employment but agrees that their contract of employment was terminated by operation of the law at the close of each day.
 - viii. The Respondent again poses that it remitted NSSF and NHIF for all persons in its employment.
- 9. In finality the Respondent avers that casual employee are not entitled to notice pay and that by dint of remittance of NSSF, they are not entitled to severance pay. They also do not meet the criterion for issue of a certificate of service.
- 10. The issues for determination therefore are;
 - 1. Whether the claimants were permanent employees of the Respondent.
 - 2. Whether there was a termination of the employment of the claimants by the Respondent.
 - 3. Whether the termination of the employment of the claimants by the Respondent, if at all, was wrongful, unfair and unlawful.
 - 4. Whether the Claimants are entitled to the relief sought.
 - 5. Who bears the costs of this cause?



10. The 1st issue for determination is whether the claimants were permanent employees of the Respondent. To this extend the Claimants in their written submissions dated 24th January, 2025 submit to the provisions of section 37 (1) and (2) of the Employment Act, 2007 that relates to the conversion of casual employment to term contracts in the event of elongated stint of service for the employee. It is their submission that the Claimants worked for the Respondent for a long period of time. Due to the nature of work, they had to report to work for continuous periods of time that was way beyond six months. It is in this spirit that the Respondent deducted and remitted NSSF and NHIF which ordinarily happens to employees under contract as per section 20 of the Employment Act, 2007. The Claimant further seeks to rely on the authority of *Bernard Mutuku Kimolo v East African Growers Limited*, [2018] eKLR to this extent.
11. The Respondent contents this by insisting that the Claimants' were casual employees. They rely in the authority of *Rashid Odhiambo Ologogh & 245 others -vs- Haco Industries Limited* [2007] eKLR where it was observed that employees on fresh contract on a daily basis and eligible for payment on a daily basis remained casual employees even when this was accumulated weekly for those who worked for more that one day.
12. The Respondent further seeks to rely on the authority of *Josphat Njuguna -vs- High Rise Self Group* [2014] eKLR where the court pronounced itself on the provisions of section 37 as follows;

“...The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates.’
13. The Respondent further submits that the claimants were casual employees engaged on new terms on a daily basis, hired on a need basis on a first come first taken position as it is evidenced by the records on the Respondent Casual Employees payment register tendered in evidence. This demonstrates unevenness in the manner of work and pay and therefore lacked continuity. Moreover, the claimants have not demonstrated any evidence of continuous engagement amounting to not less than one month. They therefore have failed in their duty of establishing a case of permanent employment.
14. I agree with the Respondent. It is not the longevity of the employment that determines a conversion of casual employment into permanent. It is the essential nature of engagement. In our circumstances the respondent has ably demonstrated the nature of the claimant employment through documents filed in this court. The Casual Employees Payment register brings out a case of an inconsistent and not continuous working and pay period for the claimants. Payments were made on a daily basis for the claimant employees. A case of conversion from casual to permanent employment would therefore not arise in the circumstances. This is because the legal criteria for such a conclusion is not met. I therefore find that the claimants were and remained casual employees of the Respondent.
15. The 2nd issue for determination is whether there was a termination of the employment of the claimants by the Respondent. The Respondent has demonstrated in evidence that the claimant were casual labourers who sought work and were hired on a daily and need basis. They were under no obligation to seek work the following day after engagement and in any event, this was not assured even in the event of such interest. A case of termination of employment does not therefore arise in the circumstances and I find as such.



16. The claimants have further failed to demonstrate a case of unfair termination of employment as required of section 47(5) of the *Employment Act*, 2007 which provides as follows;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of providing that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”.

This amplifies the findings of no termination of employment.

17. On a finding of no termination of employment the other issues for termination fall by the way side. They are not suited for any determination

18. I am therefore inclined to dismiss the claim with orders that each party bears their cost of the same.

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF JANUARY 2026.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Mburukwa instructed by Kiptunge Collins & Company Advocates for the claimants.

Miss Muli holding brief for Mr. Kipgalat instructed by Munene Wambugu & Kiplagat Advocates for the Respondent.

