



Musyimi v Landmark Holdings Limited (Employment and Labour Relations Cause E566 of 2020) [2025] KEELRC 1033 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1033 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E566 OF 2020**

**JW KELI, J
MARCH 28, 2025**

BETWEEN

ONEAL MUTUA MUSYIMI CLAIMANT

AND

LANDMARK HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. The Claimant, alleged to have been engaged as a casual labourer in the mechanical section of the Respondent from January 2014 to January 2018. He got injured at work on 23rd September 2017 and was assessed to have 10% permanent incapacity. He alleged to have been discriminated against on grounds of physical disability as he could not work as fast as he used to. He was reassigned duties but the employment was terminated thereafter without notice.
2. The Claimant sought for the following Orders:-
 - (i) A Declaration that the termination of the Claimant's employment by the Respondent was wrongful, unlawful and unfair for being substantively without justification and being procedurally unfair,
 - (ii) A Declaration that the termination of the Claimant's employment and unlawful conduct by the Respondent through its management infringed his constitutional rights to fair labour practices under Article 41 of *the Constitution* of Kenya and right to reasonable working conditions.
 - iii) A Declaration that the Respondent infringed the Claimant's constitutional right to information relating to his terminal/final dues contrary to Article 35 (1) (b) of *the Constitution* of Kenya by failing to provide the said information in response to the Claimant's request.



- iv) A Declaration that the Respondent infringed the Claimant's constitutional right to inherent dignity contrary to Article 28 of the Constitution of Kenya in the manner of terminating the Claimant's employment and communicating the said termination whereby the Respondent sought to humiliate, embarrass and ridicule the Claimant and bring odium to him from other members of staff.
 - v) A Declaration that the Respondent's conduct towards the Claimant and the purported termination of the Claimant from employment failed to adhere to the threshold of fairness as provided for under Section 45 of the Employment Act and was therefore wrongful, unlawful and unfair.
 - vi) The Respondent do pay the Claimant his full salary and benefits during the period of dismissal.
 - vii) In the alternative, and without prejudice to the above and below the Claimant be paid in full all his terminal dues and benefits amounting to Kshs. Kshs.164,424/= as enumerated above.
 - viii) A Declaration that the Claimant is entitled to the payment of damages and compensation for the infringement and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.
 - ix) General Damages and Aggravated Damages on aggravated scale under Articles 28, 30,31, 35 (1) (b) and Article 41 of the Constitution of Kenya for the oppressive, arbitrary and unconstitutional conduct of the Respondent against the Claimant through its management which caused him shock, humiliation, inconvenience, loss of reputation, distress and embarrassment.
 - x) Loss of prospective future earnings due to unlawful and unconstitutional termination of the Claimant's employment in contravention of Article 41 of the Constitution and Article 23 of the Universal Declaration of Human Rights being an infringement of the Claimant's right to protection against unemployment, to right to work and a legitimate expectation to work until retirement without unlawful termination equivalent to current salary for 38 years from Claimant's age of 22 years at the time of the unlawful termination to age of retirement at 60 years, which is Kshs.12,648.00x12x38= Kshs. 5,767,488/-.
 - xi) An Order directing that the Respondent's executive management do issue a written apology to the Claimant for the unfair, wrongful and unlawful manner of terminating his employment.
 - xii) That costs of these proceedings be borne by the Respondent.
3. In support of the claim was a list of witnesses and documents dated 22nd September 2020, and a supplementary list of documents dated 14th December 2020 (the documents were demand letter and treatment notes, and medical report of injury to right hand and Mpesa statement for March 2017 – December 2017).
 4. The Claimant filed his witness statement dated 22nd September 2020.

Response

5. The Respondent entered appearance through the Law firm of Nyaoga & Mugisha and filed a statement of response dated 10th November 2020 and opposed the claim. The Respondent stated that the Claimant was not its employee but a casual labourer who worked on a temporary day to day basis depending on the volume of work available. The Respondent stated that it had never acknowledged the Claimant's injury as alleged.



6. The Respondent denied to have discriminated against the Claimant. The Respondent stated there was a pending suit between the parties in Nairobi Chief Magistrate's Court Civil case No. E5303 of 2020.
7. In support of the response was a list of witnesses dated 10th November 2020, Respondent's witness statement of Stephen Mwangi Kamau dated 10th November 2020. The statement supported the response and stated that the Claimant stopped doing work for the Respondent sometime in January 2018. The Respondent notified the disappearance of the claimant to the sub-county labour officer and attached the letter dated 7th February 2019 under Respondent's list of documents. The letter stated that "one Oneal Mutua was working with us as a helper, has been absent since January 2018. He is assumed to have deserted his duties. This is for record and further advice".
8. The Claimant responded to the Respondent and stated that he was an employee engaged to help in the mechanical sector of the Respondent for more than a year. That Respondent referred him to the Mariakani Cottage Hospital where he would receive treatment, take the invoices to the employer and the employer gave him the money required for treatment. He reiterated that after the injury sustained at the workplace, his supervisor, on numerous occasions, told him that his work was not at par because of his injuries. The Respondent's Human Resources Manager later dismissed him for the same reason. The Claimant stated he was employed as a helper in the mechanical sector and paid KShs.3,162.00 on weekly basis. The Claimant stated that the suit in Nairobi Chief Magistrate Court Civil Case No. 5303 of 2020 was a personal injury claim and not related to the unfair termination of the Claimant's employment.

Hearing

9. The Claimant's case was heard on the 29th October 2024 where the Claimant testified on oath as only witness of his case. He adopted his witness statement dated 22nd September 2020 as his evidence in chief and produced documents under the list dated 22nd September 2020 as C-exh1 – 3 at pages 9 – 44 of Claimant's bundle. He was cross-examined by counsel for the Respondent, Mr. Dache, and re-examined by his counsel, Ms. Kirui.
10. The Respondent's case was heard on even date with Stephen Mwangi Kamau who adopted his witness statement dated 10th November 2020, produced letter dated 7th February 2018 to the Sub-county Labour officer as R-exh 1. He was cross-examined by counsel for the claimant, Ms. Kirui and re-examined by counsel for his counsel.
11. The parties filed written submissions after the hearing.

Determination

Issues for determination

12. The claimant identified the following as issues for determination:-
 - i. Whether the Claimant was a casual labourer or an employee
 - ii. Whether the reason for the dismissal was valid and fair;
 - iii. Whether a fair procedure was followed before the dismissal; and
 - iv. What reliefs, if any, is the Claimant entitled to?
13. The Respondent identified the following issues for determination:
 - a. Whether the Claimant was a Casual labourer or an employee;



- b. Whether the Claimant was unfairly terminated; and
 - c. Whether the Claimant is entitled to the reliefs sought.
14. The court after perusal of the pleadings and hearing the case was of the considered opinion the issues for determination were as follows:-
- a. Whether the claimant was an employee of the respondent.
 - b. Whether, if employee, his services were unfairly terminated.
 - c. Whether the claimant was entitled to reliefs sought.

Whether the claimant was an employee of the respondent

15. The claimant stated that he was employed as a helper in the mechanical section of the respondent and was paid Kshs. 3162 weekly calculated 500 daily as casual and worked 8am to 5 pm with Sunday as rest day. He worked from January 2017 to January 2018, when his employment was terminated. He produced the MPESA statement for period March 2017 to 30th December 2017 to demonstrate payment of salary by the respondent (C-exh 3, pages 13-44 of the bundle of documents).
16. The respondent stated that the claimant was not an employee but casual labourer engaged on temporary day to day basis depending on the volume of work available and suddenly stopped work in January 2018. During cross-examination the claimant confirmed he worked for the respondent from January 2017 to January 2018 as casual labour and paid weekly. That his wages varied as he was paid for days worked only. He was paid Kshs. 500 daily.
17. An employee is defined under the *Employment Act* as "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner; a casual is defined as "casual employee" means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;" The court finds that it was not in dispute that the claimant was engaged for more than 24 hours. From the evidence of the MPESA statements produced by the claimant, he was engaged continuously for more than a month. He stated he was engaged from January 2017 to January 2018. The employer stated he stopped 30th December 2017. During cross-examination RW told the court the claimant worked for the respondent for 1 year. According to section 37(3) of the *Employment Act* the employment of the claimant continuously for 1 years converted to term contract service to wit:-'37 (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.' The decision of the Court of Appeal in the case of *Kenyatta University v Esther Njeri Maina (2022)* eKLR cements the position that an employee will benefit from the provisions of Section 37(1) on conversion from casual to permanent terms once they have shown that they were continuously employed for more than three months at a time. It was the Respondent's own testimony that the Claimant worked with them for about one year and was paid on a weekly basis as evidenced also by the Mpesa statements filed by the claimant. In the circumstances, the claimant was entitled to the provisions and benefits of Section 37(1) of the *Employment Act* (2007). The court declares the claimant was an employee of the Respondent.



Whether the termination was lawful and fair.

18. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:-
- ‘2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.’ To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro V Teachers Service Commission[2013]eKLR).
19. It was not in dispute that there was no procedural hearing. What was in dispute was the validity of the reasons for the termination according to section 43 of the *employment act* which states:-
- ‘43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’ The Respondent relied on the letter to the Sub-County Labour Officer dated 7th February 2018, which stated that the claimant had absconded duty. That he was assumed to have deserted duties.
20. The claimant denied having seen the letter before or having absconded duty and stated that it was the human resources manager of the respondent who told him to stop working. He alluded the termination to the injury he had sustained, leading to his being assigned light duties. He stated that the supervisor had stated his work was not at par. During cross-examination, the claimant stated that he saw the letter to the labour officer in court. The claimant told the court he did not receive any communication. He was employed orally and told to stop work the same way and was only told to return the work ID.
21. RW on cross-examination, told the court they tried to reach the claimant unsuccessfully but he had no call logs. They did not write to the claimant. RW told the court he was not aware of the injury case and that the case before the lower court was dismissed with costs.
22. The court having evaluated the evidence found that there was no proof before the court of the claimant having absconded duty outside the notification to labour officer. RW confirmed that the claimant had worked for 1 years. They paid salary by MPESA hence his contact was known. There was no evidence of notice to the claimant or the call logs. The court found that he claimant case of unfair termination was successful for lack of valid reason and procedural fairness(Walter Ogal Anuro V Teachers Service Commission[2013]e KLR)



Whether the claimant was entitled to reliefs sought.

23. The respondent did not submit on the salary. The court found that since the injury suit was dismissed, the only issue was of unfair termination Compensation.
24. The claimant was not issued with notice of termination. He is awarded notice pay under section 35 of the Employment Act,
25. The claimant was not under NSSF or pension. Service pay is issued under section 35(6) of the Employment Act of 15 days for the year worked.
26. The claimant having been treated as casual was not accorded annual leave under section 28 of the Employment Act. Leave pay for 21 days worked is granted,
27. On compensation for unfair termination under section 49 of the Employment Act, The court awarded equivalent of 6 months, the claimant having worked for 4years, and been treated as a casual unlawfully hence losing on social security of pension .

Conclusion

28. The claim was successful. Judgment is entered for the claimant against the respondent as follows;-
 - a. A declaration that the termination as unlawful and unfair
 - b. Notice pay Kshs. 12,648
 - c. Untaken leave Kshs. 8854
 - d. Service pay Kshs. 6324
 - e. Compensation pay Kshs. 50592
Total award of Kshs 78,418/-
 - f. Cost and interest at court rate from date of judgment.
29. 30 days stay granted.
30. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Claimant Ms Kirui

Respondent Ms. Kale h/b Dache

