



**Maswili v Sinohydro Corporation (Cause E707 of 2021)
[2025] KEELRC 2415 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2415 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E707 OF 2021**

**K OCHARO, J
JUNE 26, 2025**

BETWEEN

RICHARD MUSEMBI MASWILI CLAIMANT

AND

SINOHYDRO CORPORATION RESPONDENT

JUDGMENT

Introduction

1. By an Amended Statement of Claim dated 20th March 2023, the Claimant sought as against the Respondent: -
 - a. Special damages in the sum of KShs. 11,520.
 - b. General damages for pain and suffering.
 - c. Termination dues under Section 49 of the *Employment Act*, salary for July 2019 and also onemonth's salary in lieu of notice. d) Costs and interest.
2. The Claim was resisted through a response to the Amended Statement of Claim dated 18th May2023. The Claimant's claim was denied in toto.
3. The Claimant's case was heard on 24th October 2023, while the Respondent's case was heard on14th February 2024. After hearing the parties on their respective cases, this Court directed them to file their respective submissions. They obliged.

Claimant's case

4. The Claimant states that at all material times, he was an employee of the Respondent, havingbeen employed in August 2018 without any written contract as a casual labourer at a monthly salary of KShs. 18,000.



5. On 28th July 2019, while in the course of his employment, the supervisor negligently removed the stand holding a compressor machine, causing a metal bar to detach from the machine and land on his feet. As a result, he sustained injuries to his left leg.
6. The incident and the resultant injuries were a result of the Supervisor's negligence.
7. After the incident and recovery from the injuries, the Respondent wrongfully, unlawfully and unfairly dismissed him from employment when he returned to work.
8. The termination was without any reason, not preceded by any notice to him, and an opportunity was not accorded to him to make any representations or defend himself against accusations against him required by law.
9. Cross-examined by the Respondent's Counsel, the Claimant stated that the National Social Security Fund [NSSF] statement of account tendered as evidence confirms the employee-employer relationship with the Respondent. His employment was permanent.
10. He further stated that he was injured on 28 July 2018. After treatment, he was called back to work, but at a time when he had not fully recovered. The supervisor instructed him that whenever the Directors of the Respondent company were present, he should hide, as he didn't want them to notice the Claimant's injury.
11. 1. he asserted that the Supervisor asked him to surrender his P3 form, and when he refused, that is when they dismissed him from his employment.

Respondent's case

12. The Respondent called one witness, Oliver Mudagale, who is responsible for Operations, to testify on its behalf. The witness urged the Court to adopt his witness statement filed and dated 3rd July 2023 as his evidence in chief. He stated that at all material times, the Claimant was not a fulltime employee of the Respondent Company. The Respondent engaged him on a need basis as a casual labourer for specific projects.
13. The Respondent always provided safe working conditions for its workers. It provided them with protective clothing. The injury was a result of the Claimant not using the protective equipment provided.
14. It is impossible that, when removing the stand holding the machine, the machine alone struck the Claimant. If the machine lost stability upon removal of the stand, it is only logical that it would have injured all four people, not just the Claimant. Therefore, the injury to the Claimant resulted from his own negligence.
15. Cross-examined by Counsel for the Claimant, the witness stated that the Claimant worked for the Respondent between 2018 and 2019. The Respondent company used to provide its workers with shoes and gloves. They could be provided at the workplace, and records thereof kept.
16. The witness stated that he didn't witness the occurrence of the accident; as such, he was destitute of the capacity to testify in detail about the accident. 17. Further, he would not tell why the Claimant was dismissed.

Claimant's Submissions

17. The Claimant filed submissions dated 25th April 2024.



18. He submitted that the fact that he was an employee of the Respondent at all material times was not controverted by the Respondent. Having worked for the Respondent between 2018 and 2019, the Claimant's status as a casual labourer was converted by dint of section 37 of the Employment Act to an indefinite form of employment.
19. Sections 43 and 45 of the Employment Act enjoined the Respondent to demonstrate the reasons for the dismissal of the Claimant from employment and that the reasons were fair and valid. The Respondent didn't present any evidence before the Court geared towards establishing this. By dint of Section 45, the dismissal should be deemed unfair and unlawful.
20. It is also clear from the evidence of the Respondent's witness that the dismissal was not in conformity with the dictates of procedural fairness. Without procedural fairness and substantive justification, the dismissal was undoubtedly unfair. Respondent's Submissions
21. The Respondent filed submissions dated 22nd May 2024.
22. The Respondent submitted that the Claimant's employment relationship was on a casual basis, characterised by project-specific engagements on a need basis. The Claimant confirmed this position. In light of the nature of the employment relationship, the Claimant cannot allege wrongful or unfair dismissal.
23. The Claimant failed to prove that he continuously worked for the Respondent. It was his duty to do so. To support this point, reliance was placed on *Kihara v Saikabe Construction Company* [2022] KEELRC 1558 [KLR].
24. Having failed to prove that the dismissal was unfair and or wrongful, the reliefs sought cannot be available to the Claimant.

Issues for Determination

24. I have reviewed the pleadings, oral and documentary evidence, and submissions filed by both parties. The issues for determination are as follows: -
 - a. Was the Claimant an employee of the Respondent, and if so, under what terms?
 - b. Whether the Respondent unfairly terminated the Claimant's employment;
 - c. Whether the Claimant should be awarded the reliefs sought in his statement of claim.
26. This Court observes that the Respondent, in its pleadings [paragraph 6], denied that the Claimant was its employee at all material times, and that at variance with this, its witness, in his statement turned evidence in chief, asserted that the Respondent could engage the Claimant as a casual labourer in specific projects, on a need basis. Furthermore, during cross-examination, the witness stated that the Claimant worked for the Respondent between 2018 and 2019.
27. These, in my view, are three contradictory positions by the Respondent at different points of the proceedings. Statements and evidence that aren't aligned with a party's pleadings materially, and vice versa, seldom help the party to discount the adversary's case.
28. Generally, the Respondent was too vague in their evidence regarding the employment relationship between them and the Claimant. One would expect their claim that the Claimant could be engaged from time to time as a casual labourer to be supported by evidence detailing the projects and periods. However, the Respondent failed to present such evidence to the Court. As a result, the claim remained merely a bald assertion.



29. This Court has not lost sight of the stipulations of section 10[7] of the *Employment Act*, thus;“If in any legal proceedings, an employer fails to produce a written contract or written particulars prescribed in subsection [1], the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
30. Considering the Claimant’s contention that his employment was first as a casual employee, which eventually morphed into an indefinite form of employment, and the fact that the parties had no written contract of employment, the duty lay upon the Respondent to disapprove the Claimant’s assertion. In light of what I have mentioned herein above, I conclude that the Respondent didn’t discharge the legal burden under the Section.
31. In sum, the Respondent did not discount the Claimant’s version that, though he was first employed as a casual worker, the relationship converted to a term employment under section 37 of the *Employment Act*. Upon closer examination, this version finds support in the Respondent’s witness’s evidence under cross-examination.
32. Contrary to what the Respondent’s Counsel submitted, the Claimant, in his evidence, clearly stated that he was a permanent employee of the Respondent.
33. For termination of an employee’s employment or summary dismissal of an employee from their employment to be considered fair, it must be demonstrated that the process leading to the decision to terminate or dismiss conformed with the statutory dictates under section 41 of the *Employment Act*, and that there was substantive justification for the decision. The onus is always on the employer to prove both procedural fairness and substantive justification.
34. In paragraph 9 of their Response to the amended statement of claim, the Respondent claimed that the Claimant deserted duty, thereby ending the employer-employee relationship. Surprisingly, neither their witness’s witness statement [turned evidence in chief] nor his oral testimony mentions this, or any other reason, as the basis for the termination of the Claimant’s employment. As a result, it is easy to conclude that the Respondent failed to discharge its legal burden under section 43 of the *Employment Act*—proving the reason[s] for the termination and, under section 45[2], that the reason[s] were fair and valid.
35. Undoubtedly, the Respondent didn’t present any evidence on the statutory aspect of procedural fairness to rebut the Claimant’s claim that the termination of his employment was without procedural fairness.
37. By reason of the foregoing premises, I find that Respondent terminated the Claimant’s employment, and the termination was both procedurally and substantively unfair.
36. Section 16 of the *Work Injury Benefits Act* deprives this Court of the original jurisdiction to entertain claims flowing from workplace accidents and consequential injuries or deaths. On this note, I will not delve into considering the relief sought by the Claimant based on the alleged accident and resultant injuries.
37. As such, the only outstanding relief for consideration is the compensatory relief under section 49[1][c] of the *Employment Act*. This relief is granted at the court’s discretion, depending on the circumstances of each case. I have carefully considered the circumstances under which the termination of the Claimant’s employment occurred, the fact that he did not contribute to the termination in any proven manner, and the length of his service with the Respondent. I hold that he is entitled to the compensatory relief, amounting to 5 months’ gross salary.
38. In the upshot, Judgment is hereby entered for the Claimant in the following terms;



- a. A declaration that the termination of the Claimant's employment was unfair.
- b. Compensation pursuant to the provisions of Section[49][1][c] of the *Employment Act*, 7 [seven]months' gross salary, KShs. 80,460.
- c. One month's gross salary, 11,520.
- d. Interest at Court rates from the date of this Judgment till full payment.e. Costs of the suit.

READ, DELIVERED AND SIGNED THIS 26th DAY OF June 2025

SIGNED BY: HON. MR. JUSTICE OCHARO KEBIRA

THE JUDICIARY OF KENYA.

NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT

