



Mwanza & another v Manpower Networks Limited (Cause 1989 of 2017) [2024] KEELRC 43 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 43 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1989 OF 2017
JK GAKERI, J
JANUARY 29, 2024**

BETWEEN

ONESMUS MUTUA MWANZA 1ST CLAIMANT

SAMUEL NDUNGU 2ND CLAIMANT

AND

MANPOWER NETWORKS LIMITED RESPONDENT

JUDGMENT

1. The Claimant's commenced this suit against the Respondent on 5th October, 2017 alleging that they were declared redundant.
2. It is alleged that the 1st Claimant worked continuously from October 1st 2011 and March 2013 for the 2nd Claimant and both were loaders. That their one year contracts were renewed continuously until termination.
3. The Claimants allege that on 23rd August, 2017, they received text messages to visit the company's office to handover the Respondent's property and there would be no work for them and did the same and cleared but their dues were not paid.
4. It is the Claimants' case that the provisions of Section 40 of the *Employment Act*, 2007 were not complied with.
5. The 1st Claimant prays for;
 - i. Severance pay Kshs.50,488.44
 - ii. Termination in lieu of notice Kshs.16,829.48
 - iii. Salary for August 2017 Kshs.16,829.48



- iv. Off-days Kshs.170,883.95
 - v. Compensation for unfair termination Kshs.201,953.76
 - vi. House allowance Kshs.166,611.85
 - Total Kshs.623,596.85
6. The 2nd Claimant prays for;
- i. Severance pay prorated Kshs.36,000/=
 - ii. Termination in lieu of notice Kshs.13,000/=
 - iii. Salary for August 2017 Kshs.13,000/=
 - iv. Off-days Kshs.76,000/=
 - v. Compensation for unfair termination Kshs.186,000/=
 - vi. House allowance Kshs.74,100/=
 - Total Kshs.398,100/=

Respondent's case

- 7. According to the Respondent, the 1st Claimant was employed as a loader on 1st October, 2011 under a one year contract renewable annually and payment was on the tonnage moved at Kshs.8.5 per tonne which increased to Kshs.9.77 in 2017 subject to availability of work and remuneration varied depending on the amount of work.
- 8. That the contract came to an end in August 2017 and the 1st Claimant was duly notified and paid terminal dues.
- 9. It is the Respondent's case that the 2nd Claimant joined on 1st March, 2013 as a loader under a similar contract and the contract came to an end in August 2017 and was paid terminal dues.

Claimants evidence

- 10. CWI, Mr. Samuel Ndungu confirmed that the contracts on record was that of Mr. Onesmus Mutua Mwanzia and not his.
- 11. The witness equally confirmed that he had not provided a copy of his payslip.
- 12. He admitted that the amounts paid to the 1st Claimant varied from month to month.
- 13. Regarding his salary, the witness testified that he had no basis to claim Kshs.13,000/=.
- 14. The witness testified that he could not explain the different payments made.
- 15. That he did not work during off-days and payments were made on a monthly basis.
- 16. On re-examination, the witness testified that although he signed a written contract the Respondent did not avail a copy and was not given a payslip.
- 17. It was his testimony that he would have gone to Safaricom Ltd for the statement but did not bother.



Respondent's evidence

18. Mr. James Tsuma confirmed that he availed the employment contracts of the Claimants.
19. He admitted that an SMS was sent to the Claimants to report to the office to surrender the Respondent's property as the contract had come to an end and there was no work for them.
20. The witness confirmed that the Claimants were being paid piece rate per month and the amount paid varied from month to month and was paid to the group and there was no provision for house allowance.
21. That the salary for August 2017 comprised terminal dues.
22. On re-examination, the witness testified that the Respondent had been contracted by Bamburi Cement Ltd and would only call the Claimants to load cement into the trucks and paid for bags handled and had off-days and renewal of contract was based on availability of work.

Claimant's submissions

23. By 10th December, 2023 when the court retired to prepare this judgement, the Claimants had not filed their submissions.

Respondent's submissions

24. As to whether termination of the Claimant's employment was unfair or unlawful, the Respondent's counsel submitted that Section 2 and 18 of the *Employment Act*, 2007 provided for payment piece-rate workers to urge that the Claimants were piece-rate workers paid for work done as shown by the payslip of record.
25. Reliance was made on the decisions in *Garama Karisa Masha V Krystalline Salt Ltd* (2016) eKLR cited in *Nyevu Sibya Maithya & 14 others V Krystalline Salt Ltd* (2017) eKLR to buttress the submission.
26. Reliance was also made on the sentiments of the Rika J. in *Nyevu Sibya Maithya & 14 others V Krystalline Salt Ltd* (Supra) to submit that the Claimants expected the court to convert their employment to time based contracts at a fixed wage or regular terms.
27. Counsel urged that piece-rate employment ended on completion of the task not the time and the Claimants employment was not unfairly terminated.
28. On entitlement to the reliefs sought, counsel submitted that the Claimant had failed to discharge the burden of proof under Section 107 and 109 of the *Evidence Act* as held in *Rogoli Ole Manadieggi V General Cargo Services* as cited in *Patrick Lumumba Kimuyu V Prime Fuels (K) Ltd*.
29. That the 1st Claimant could not explain how the sum of kshs.13,000/= claimed was arrived at.
30. The 2nd Claimant additionally demonstrated that the 1st Claimant was a piece-rater and could not explain why the salary varied from month to month.
31. That the Claimants failed to prove that they were casual employees to enjoy the reliefs under Section 37 of the *Employment Act*, 2007.



Findings and determination

32. From the evidence availed by the parties, it is evident that Mr. Onesmus Mutua Mwanza joined the Respondent on 1st October, 2011 as a loader initially under a 3 months fixed term contract till 31st December, 2012 which was subsequently renewed severally.
33. Remuneration under the contract was based on collective daily group tonnage moved by members of the shift at Kshs.8.50 per tonne which subsequently rose to Kshs.9.77 per tonne.
34. The last contract run from 1st January, 2017 to 31st August, 2017.
35. Mr. Samuel Ndungu, on the other hand joined on 1st March, 2013 as a loader initially under a one (1) year and 10 months fixed term contract effective 1st March, 2013 to 31st December, 2014 on terms similar to those of Onesmus Mwanza and the last contract commenced and was scheduled to end at the same time as that of Onesmus Mutua Mwanza.
36. Significantly, the Claimants were employees of the Respondent which had been contracted by Bamburi Cement Ltd to transport cement and the contracts provided for a minimum tonnage of the shift.
37. In any loading activities where the Claimants were present, the shift was required to move the tonnage which on computation would be equivalent or above the minimum wage of a general worker but in all circumstances the remuneration would not be below that of general worker, which would explain the different amounts received by Mr. Onesmus Mutua as evidenced by the payslips on record.
38. Strangely, although Mr. Samuel Ndegwa testified on behalf of the Claimants, he did not avail a copy of his payslip to prove his last salary and confirmed that he had no basis for the sum of Kshs.13,000/= claimed.
39. Both Claimants attached copies of National Social Security Fund statements which show that the Respondent was their employer and remitted contributions upto May 2017.
40. Copies of payslip on record also reveal that the Respondent paid income tax and National Health Insurance Fund contributions.
41. The Respondent did not disown or contest the payslips.
42. The totality of the documentary evidence on record is that the Claimants were employed under fixed term contracts independent of the tonnage they would load at Bamburi Cement Co. Ltd, the different amount paid as salary notwithstanding.
43. Evidently, the Claimants last contract was scheduled to end at the end of August 2017.
44. As regards termination of the Claimants' employment, CWI, Mr. Samuel Ndungu testified that he received a message from the Respondent intimating that he should return the Respondent's property and the Site Manager informed him that he had been dismissed.
45. The witness did not avail a copy of the message or explain what he did thereafter.
46. However RWI, Mr. James Tsuma confirmed that the Respondent sent a message to the Claimants telling them the contract had ended as the Respondent had no work for them.
47. It is unclear to the court as to when the phone message was sent.



48. The foregoing notwithstanding, it is clear that the contract was due to end on 31st August, 2017 and the text message was sent on 23rd August, 2017.
49. In the absence of the actual text message, it is difficult to infer whether the Respondent's action amounted to an unfair termination of employment or merely notified the Claimants of the impending lapse of their contracts in 7 days' time and what the terms of exit were.
50. Neither party provided a copy of the message and guided by the mantra that he who alleges must prove as ordained by Sections 107 and 108 of the *Evidence Act* as submitted by the Respondent's counsel, it behooved the Claimants to prove that indeed the message received was a termination notice and the termination was unfair within the meaning of Section 45 of the *Employment Act*, 2007.
51. In the absence of such proof, it is the finding of the court that the Claimants have failed to prove that termination of their employment by the Respondent was unfair.
52. This finding is reinforced by the decision in Registered Trustee of Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho-Kariuki (2017) eKLR, where the Court of Appeal was emphatic that a fixed term contract;
- “ . . . carry no rights, obligations or expectations beyond the date of expiry . . . ”
53. In sum, the only amount due to the Claimants as at 31st August, 2017 was the month's salary based on the tonnage as agreed or the minimum wage of a general worker.
54. The Respondent tendered no evidence to prove that it paid the Claimants salary for August 2017 and any other pending dues, if any.
55. Indeed Mr. James Tsuma testified that the salary for August 2017 was supposed to be terminal dues and he admitted that he had no evidence of payment.
56. On re-examination the witness retorted that he was not working in accounts.
57. On entitlement to the reliefs prayed for, the court proceeds as follows;

i. Severance pay

58. The Claimants adduced no evidence to prove that they were declared redundant.
59. The prayer for severance which is only payable in redundancies is unproven and it is dismissed.

ii. Salary in lieu of notice

60. The Claimants failed to prove that they were entitled to one (1) month's salary in lieu of notice and are thus not entitled to any.
61. Having failed to prove that there was an unfair termination of their employment, the prayer is unmerited and is declined.

iii. Salary for August 2017

62. It is not in contest that the Respondent sent a message to the Claimants on 23rd August, 2017 informing them to return its property which they did.
63. However, the Respondent adduced no evidence to show that it paid them the salary or dues for August 2017. RWI had no proof of payment.



64. The Claimants are awarded salary for August 2017, if the same was not paid.

iv. Off-days

65. This prayer was not proved and is dismissed.

v. Compensation for unlawful termination

66. Having found as above, the prayer for compensation for unlawful or unfair termination is unsustainable and it is dismissed.

vi. House allowance

67. RWI confirmed on cross-examination that the contract of employment made no provision for house allowance simply because the Claimants were piece-rate employees.

68. However, the witness failed to demonstrate how the fixed term contracts given to the Claimants ensured that housing, which is statutory right of every employee was catered for.

69. Clause 7 of the contract would appear to provide the answer in that the minimum wage of a general worker was payable which shows that the Respondent intended to comply with the law.

70. Copies of the payslips on record show that the basic salary was the gross salary.

71. In sum, the Respondent did not pay house allowance to the Claimants or provide housing as ordained by the provisions of Section 31 of the Employment Act, 2007.

72. The Claimants are therefore awarded house allowance for the duration of the last contract effective 1st January, 2017 to 31st August, 2017 at 15% of the basic salary.

73. The basic salary shall be the average of the Claimants salary for the months of June, July and August 2017.

74. In the upshot, judgement is entered in favour of the Claimants against the Respondent in the following terms:

- a. Salary for August 2017, if unpaid.
- b. House allowance at 15% of the basic salary for the duration of the last contract computed as above.
- c. 50% of the costs of this suit.
- d. Interest at court rates from date of judgment till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF JANUARY 2024

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

