



REPUBLIC OF KENYA



KENYA LAW
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**Otondi v Menengai Oil Refineries Limited (Cause 175 of 2018)
[2024] KEELRC 296 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 296 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 175 OF 2018
DN NDERITU, J
FEBRUARY 15, 2024**

BETWEEN

SIMON NYANCHOKA OTONDI CLAIMANT

AND

MENENGAI OIL REFINERIES LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 22nd May, 2018, filed in court on 29th May, 2018 through the firm of Munene Chege & Co. Advocates. The said memorandum of claim is accompanied with a verifying affidavit by the claimant, list of witnesses, claimant's statement, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking the following orders:
 - a. A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal
 - b. An order compelling the respondent to settle the outstanding benefits, as particularized at paragraph 24 of the claim
 - c. A certificate of service
 - d. Cost of the suit and interest thereof at court rates
 - e. Any other relief that this court may deem fit to grant.
3. The particulars of the items in prayer (b) above are listed in paragraph 24 of the memorandum of claim as follows -



- a. Underpayments Kshs.111,606/=
 - b. Unpaid salary in lieu of notice Kshs.19,674/=
 - c. Service payKshs.9,837/=
 - d. Public holidays worked..... Kshs.24,280/=
 - e. Accrued overtimeKshs.104,889/=
 - f. Compensation Kshs.236,088/=
 - Total Kshs.506,374/=
4. The respondent entered appearance through the firm of Muli & Co. Advocates on 3rd May, 2019. On 13th October, 2020, by consent of the parties, the respondent was granted leave to file its response to the claim together with list and bundle of documents within 14 days.
 5. In the memorandum of response dated 26th October, 2020, filed in court on 27th October, 2020, the respondent vehemently denies the contents of the memorandum of claim dismissing the claim as bad in law, misconceived, and amounting to abuse of the court process. The memorandum of response is accompanied with the written statement of Peter Kanenje Muchibi (RW1), senior human resources manager, list of documents and a bundle of copies of the listed documents.
 6. The cause came up for hearing on 18th July, 2022 when the claimant (CW1) testified and closed his case. The defence was heard on 23rd March, 2023 when RW1 testified and the respondent closed its case.
 7. Counsel for both parties summed up their respective client’s case by way of written submissions. Counsel for the claimant, Miss Daye, filed her submissions on 25th April, 2023 while counsel for the respondent, Mr. Muli, filed his submissions on 2nd May, 2023.

II. The Claimant’s Case

8. The claimant’s case is expressed in the memorandum of claim, the oral and documentary evidence adduced by the claimant and the written submissions by his counsel; the same is summarized as hereunder.
9. In his memorandum of claim the claimant avers that he worked as a mason for the respondent from November 2015 to 14th June, 2017, when he was allegedly unfairly and unlawfully terminated.
10. The claimant avers that the respondent terminated his employment without paying his terminal dues, including salary in lieu of notice, overtime, and service pay.
11. The claimant avers that he was terminated without any reason or explanation or given a chance to defend himself. Further, he alleges that he requested for a letter of termination from the respondent stating the reasons for his un-procedural termination but none was availed to him.
12. The claimant avers that he was abruptly and without notice dismissed from employment by merely being told “achia hapo” (stop right there) and instructed to leave the premises of the respondent and not come back as his employment had come to an abrupt end.
13. The claimant avers that he was earning a daily wage of Kshs. 460/= at the time of his alleged wrongful termination. He further avers that the termination caused him considerable frustration, mental anguish, pain, economic hardship, loss, and damages.



14. While giving his oral testimony in court, the claimant adopted and relied on his written statement dated 2nd May, 2018 together with his bundle of documents filed on 29th May, 2018, which he produced as exhibits. The claimant reiterated the contents of the memorandum of claim stating that he was dismissed without notice or warning. He stated that the reason for his dismissal is unknown to him to this day.
15. The claimant stated that he did not sign a written contract of employment with the respondent. He was paid a daily wage of Kshs.460/=, which allegedly remained the same during the entire period of his employment. He stated that he worked from 8 am to 7 pm every day, with an irregular overtime pay. He further stated that he worked overtime on a daily basis, six days a week, without any off or leave days.
16. The claimant stated that he was offered Kshs.14,984/= as his final dues, but it was not explained to him what the money was for. He stated that he worked on public holidays without compensation.
17. In cross-examination, the claimant reiterated that he was paid Kshs.460/= per day. However, according to the payment sheet, he was supposed to earn Kshs.485/=, meaning that a difference of Kshs.25/= remained unpaid each day.
18. Based on the foregoing evidence and circumstances, the claimant is seeking that the judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. The Respondent's Case

19. The respondent's case is expressed in the memorandum of response, the oral and documentary evidence through RW1, and the written submissions by its counsel; the same is summarized as hereunder.
20. In the memorandum of response, the respondent avers that it engaged the claimant as a mason-helper on casual basis between 2016 and 2017. The respondent asserts that the claimant's casual contract of service expired on 14th June, 2017.
21. The respondent avers that the claimant reported the dispute to the Nakuru County Labour Office and thereafter a meeting was held there wherein it was agreed that the respondent shall pay to the claimant a sum of Kshs.14,984/= in full settlement of the terminal dues. A cheque was issued in favour of the claimant on 7th July, 2017, and a settlement agreement was signed indicating that the payment was made in full. The respondent alleges that the claimant was duly compensated for working beyond the agreed hours.
22. The respondent avers that it made contributions to the National Social Security Fund (NSSF) for and on behalf of the claimant and therefore he is not entitled to gratuity or service pay as claimed. It is pleaded that as a casual worker the claimant was not entitled to notice or pay in lieu thereof, leave pay, or any other of the reliefs sought for in this cause.
23. In his oral testimony in court RW1 adopted his written statement dated 26th October, 2020 and produced the listed documents as exhibits 1, 2, and 3. He produced attendance sheet as exhibit 1, showing the dates and times during which the claimant was at work, and the payment sheets, exhibit 2, showing the payments made to the claimant. He reiterated that the claimant was a casual worker engaged on day to day basis and only on need basis at a minimum daily wage of Kshs.485/= and that he was paid all his dues in accordance with the law. RW1 testified that the NSSF statement produced by the claimant confirmed that he was neither entitled to service pay nor to gratuity and that the sum



of Kshs.14,984/= as agreed in the labour office and as per the agreement executed, covered all the final dues payable to the claimant.

24. In cross-examination, RW1 reiterated that the claimant was a casual worker who was paid daily. He stated that since the claimant stopped working on his own volition the respondent did not try to locate the claimant as he was not a regular or a permanent employee. He stated that the respondent paid NSSF dues for all workers, including the claimant.
25. RW1 admitted that he did not have the minutes of the meeting held at the labour office or a letter inviting both parties to the said meeting. He stated that the amount of Kshs.14,984/= was paid for prorated leave and no other payments were due to the claimant. He admitted that there was no record or muster roll to confirm what time the claimant reported to work and what time he left. However, he stated that the attendance sheet is generated from a biometric system.
26. It is on the basis of the foregoing that the respondent prays that the claimant's claim is bad in law, misconceived, and amounting to abuse of the court process, praying that the same be struck out or dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV.Submissions By Counsel for The Claimant

27. After analysis of the pleadings and the evidence adduced and presented by the parties, counsel for the claimant identified three issues for determination in the following order – Whether the claimant is entitled to compensation in lieu of notice; Whether the claimant is entitled to a certificate of service; and, whether the claimant's dismissal was unlawful, unjust and discriminative.
28. Counsel argues that the claimant was not a casual employee but a regular one, as he worked for the respondent from November 2015 to June 2017. Counsel referred to section 2 of the [Employment Act](#) (the Act) on the definition of casual employment, and section 37 of the Act on conversion of casual employment to term employment. Additionally, counsel cited Rashid Mazuri Ramadhani & 10 Others v Doshi & Company (Hardware) Limited & another (2018) eKLR, wherein the court held that section 37 of the [Employment Act](#) requires the claimant to establish two things before converting casual employment into a contract of service; firstly, that the employee has been engaged by the employer on a casual basis; and, secondly, that the employee has continuously worked for the same employer for a period of more than one month.
29. Counsel argues that the claimant's employment status legally changed from casual to a normal term contract, entitling him to the benefits outlined in the Act and other statutory provisions as well as the rights and protection under Article 41(2) of [the Constitution](#).
30. It is submitted that the claimant was unfairly dismissed as no notice was issued and that terminal dues and other entitlements, including salary in lieu of notice and overtime payments, were not settled. Counsel invoked sections 45(2) & 41 of the [Employment Act](#) in support of the argument that the dismissal was prima facie wrongful, unfair, and unlawful. Counsel cited Walter Ogal Anuro v Teachers Service Commission (2013) eKLR, Daniel Kipkirui Keter v Securex Agencies (K) Limited (2018) eKLR, and Peter Kamwi v Standard Group Limited (2016) eKLR on the pre-requisite of substantive and procedural fairness before, during, and after dismissal or termination.
31. It is submitted that the claimant is entitled to all the reliefs sought, including damages for unfair termination, underpayments, overtime pay, and pay for public holidays worked. It is urged that the claimant is also entitled to a certificate of service under section 51(2) of the Act.



32. In conclusion, counsel submits that judgment be entered for the claimant as prayed in the memorandum of claim, together with costs and interest. The submission on reliefs shall be considered in a succeeding part of this judgment that is dedicated to that aspect.

V.Submissions by Respondent's Counsel

33. Counsel for the respondent identified two issues for determination - Whether the claimant was employed by the respondent on a daily basis or monthly basis; and, Whether the claimant is entitled to the prayers sought.
34. On the first issue counsel submits that the claimant was hired as a casual labourer on need basis and his salary was payable based on a daily rate but then paid at the end of the month. The court is urged to confirm this from the records availed in court by the respondent.
35. On the issue of whether the claimant is entitled to the reliefs sought, counsel submits that the claimant is not entitled to the same and concludes that the claimant's termination was fair and urges that the claim be dismissed with costs. The submission on the reliefs shall be considered in a succeeding part of this judgment dedicated thereto.

VI.Issues for Determination

36. The court has carefully gone through the pleadings, the oral and documentary evidence tendered from both parties, and the written submissions by counsel for both parties. The following issues commend themselves to this court for determination -
- i. What was the nature of the employment relationship between the claimant and the respondent?
 - ii. Was the dismissal of the claimant by the respondent wrongful, unfair, and unlawful?
 - iii. If (b) above is in the affirmative, is the claimant entitled to the reliefs prayed for?
 - iv. What is the appropriate order on costs?

VII.Analysis And Determination

37. Section 2 of the Act defines a casual employee as -
- “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.”
38. Section 37 of the Act provides as follows –
- “(1) Notwithstanding any provisions of this Act, where a casual employee –
- a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be



deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

- (2)
- (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.
- (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.”

39. The above provisions of the law are applicable to this cause in that the claimant was employed as a mason-helper in November 2015. The evidence presented in court from both sides, including payment and attendant sheets, indicate that the claimant began working for the respondent in 2012 and became a consistent employee from November 2015 to June 2017. As a result of the claimant's continuous employment for the said period, the court finds and holds that his casual employment evolved into regular month to month employment. In fact, the evidence on record is that his wages were cumulatively paid on monthly basis, as opposed to daily. He worked for an aggregate period of more than two years. The law cited above enables this court to interpret employment relationships and contracts and there is no doubt in my mind that in consideration of the period served, the regularity of payment of salaries/wages, and all other appurtenant factors, the relationship between the claimant and the respondent was that of a month to month employee governed and subject to the provisions of the Act and all other applicable laws.
40. In *Nanyuki Water & Sewage Company Limited v Benson Mwititi Ntiritu & 4 Others* [2018] eKLR where it was established that the concerned employees were initially engaged as casual workers but worked for a period of continuous days which were equivalent in aggregate to not less than a month, the trial court found and held that the contract of service for the respondents were permanent and were "deemed to be ones where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service" in terms of section 37 of the Act. The court agrees with the case law cited by counsel for the claimant in *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & Another* [2018] eKLR where the court held that section 37 of the Act requires the claimant to establish two things before a court can interpret a casual engagement to be a contract of service; firstly, that the employee has initially been engaged by the employer on a casual basis; and, secondly, that the employee has continuously worked for the said employer for a period of more than one month.
41. The court is of the view and holds that the claimant's employment converted from casual to regular contract of employment for the foregoing reasons.
42. On issue (b) on whether the dismissal was wrongful, unfair, and unlawful, on the one hand, the pleading and evidence by the claimant is that he reported to work only to be told that his services were no longer required. On the other hand, the respondent's position and evidence is that the claimant just failed to show-up for work and it was presumed that he had quit. The respondent's position is that it was not obligated to look for the claimant as his casual employment ended at the close of each day and only resumed on the day that followed if the claimant showed up.



43. The court is persuaded by the evidence from the claimant that he was told to leave the premises of the respondent and stop working without notice or reason given. This is so because no evidence has been adduced to the effect of misconduct on the part of the claimant, notwithstanding that he had worked for the respondent for over two years; and, there is also no explanation as to why the respondent agreed to pay terminal dues to the claimant once the matter was reported to the labour office. If the claimant just quit and walked away, on what basis then did the respondent concede into paying terminal dues? The only logical or plausible reason as to why the respondent paid the terminal dues is because they conceded to the unlawful dismissal and indeed knew that the claimant was no longer a casual employee but one on a month to month contract of service. It is so held.
44. As noted above, the claimant reported the matter to the Nakuru Labour office where both parties agreed on a settlement and a cheque of Kshs.14,984/= was issued in favour of the claimant allegedly in full and final settlement of his terminal dues. A settlement agreement that was signed in the Labour office was produced as an exhibit.
45. In his testimony the claimant stated that he took the cheque but did not know what the money was about or what it catered for. He stated that it is only later that he allegedly realized that the amount of money he received was not adequate to cover all his terminal dues.
46. Section 45(2) of the Act provides as follows –
- 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 employee’s 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.
47. The burden of proof lies upon the employee to prove unfair termination as provided for under section 47(5) of the Act which states that -
- “ 5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving 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.”
48. In my view, there is nothing novel in the foregoing provisions of the law. The law is simply speaking to the fact that an employee who alleges unlawful dismissal or termination has a legal burden of proving the same, on the one hand. On the other hand, an employer who denies or disputes the unlawful dismissal or termination has the burden to justify the termination. The court has found that there is no basis or evidence that the claimant just walked away from his job and there is no record or evidence of misconduct on his part. It is for the foregoing reason that the court finds and holds that the claimant was wrongfully, unfairly, and unlawfully terminated and the respondent was of the misguided view and opinion that the claimant was a casual and as such there were no legal consequences. When the reality dawned on it, the respondent paid the agreed dues in the labour office as alluded to above.



49. The claimant accepted the cheque in settlement of his final dues after he reported the matter to the labour office and there is an agreement to that effect.
50. This court has a duty and an obligation to interrogate the alleged settlement and confirm if the same indeed was in consonance with the law on compensation for wrongful, unfair, and unlawful dismissal of the claimant. The court is a completely different and independent legal forum that is obliged to do justice to all and sundry. The court cannot close its eyes and ears and assume that since the parties agreed and allegedly settled the matter in the labour office that the deal was good and fair. The alleged compensation in the sum of Kshs.14,984/= was neither itemized nor particularized as to enable this court to assess its appropriateness and adequacy. There is also no evidence on how it was arrived at and what factors and principles were considered and applied.
51. While this court has a legal duty to protect both employers and employees, it is no secret that there is no equality of arms when an employer and an employee engage in terms and conditions of employment or a settlement. The employer is superior in financial muscle, logistical and technical know-how, and in stature and standing. In any event, the claimant was vulnerable and necessitous as at the time of the alleged settlement having lost his job and his only source of income. In the circumstances, it is only fair and just that the court takes into consideration the said amount as a set-off of any award that the court may make, but the court cannot fairly and justly sit back and assume that by agreeing to sign the agreement the claimant waived his right to file a claim in court. The court has to ask – was the alleged settlement fair and just in the circumstances of the matter and did the same consider what was lawfully due and payable in accordance with the law? It is for the foregoing reasons that the court shall revisit the same by way of considering the merits of the reliefs sought as hereunder, but the amount paid as above shall be deducted as a set-off to any award(s) that may be made.

VIII. Reliefs

52. Prayer (a) is for a declaration that the dismissal of the claimant by the respondent was unlawful, unjust, discriminative, and unfair. The court has already found and held that the dismissal was wrongful, unfair, and unlawful, and it is hereby declared as such.
53. The particulars of the items in prayer (b) for settlement of the benefits are set out in paragraph 24 of the memorandum of claim and the same is tackled as follows -
 - i. Item (a) is for underpayments for a period of 19 months from November, 2015 to May, 2017 amounting to Kshs.111,606/= based on Legal Notice (LN) No. 117 of 2015, wherein the minimum daily pay for an ungraded artisan, the category to which the claimant allegedly belonged, is pegged at Kshs.655.80, yet the respondent paid to the claimant only Kshs.460/= per day, leaving a difference of Kshs.195.80 per day. The claimant's case is that he was a mason while the respondent has insisted that the claimant was a mason-helper. Under sections 9 & 10 of the Act it was the legal duty for the respondent to reduce the contract into writing but it admittedly failed to do so. The court shall in the circumstances scrutinize the evidence on record with a view of establishing the exact position that the claimant held. It is illustrative that the claimant did not avail evidence of his qualifications and certification as a mason or artisan. However, the court notes that in the payment sheets wherein the claimant and other employees signed, his designation is clearly stated to be mason-helper. As stated, the claimant duly signed the said lists and that is binding written evidence that cannot be contradicted through the word of the mouth as the claimant attempted to do in his oral testimony in court. From the cited LN 117 of 2015 the claimant can only be classified as ungraded artisan and the monthly wage is stated therein as Kshs.13,646.40 or Kshs.655.80 per day. This is the evidence from



the claimant and the submission by his counsel. This claim is merited and the court awards the claimant the sum claimed of Kshs.111,606/=. The court notes that the attendance sheets availed by the respondent as exhibits are neither signed by the employer nor by the employee and the court can only estimate that the above award is reasonably within the range of the days actually worked.

- ii. Item (b) is for unpaid salary in lieu of notice in the sum of Kshs.19,674/=. However, LN 117 of 2015 confirms that the minimum wage for an ungraded artisan within Nakuru Municipality stood at Kshs.13,646.40. This is the amount that is awarded as the evidence on record is that no notice was issued and no payment was made in lieu thereof.
 - iii. For service pay, item (c), the court will decline to award this as the claimant was a member of NSSF and the respondent remitted monthly subscriptions for the claimant and the other employees. That has not been disputed and as it was held in Maximila Bushuru v Anvi Emporium Limited [2017] eKLR where an employee is a member of NSSF he is not entitled to service pay or gratuity unless such service-pay or gratuity is an agreed term in the contract of service.
 - iv. For public holidays, item (d), the court will award the amount of Kshs.24,280/= as the records of work attendance are neither authenticated nor signed by the employer or the employee and the court is inclined to believe the evidence of the claimant that he worked on the stated public holidays. The respondent abdicated its duty to record and keep employment details as required under sections 10 & 73 of the Act.
 - v. On item (e) for overtime the court will award the amount of Kshs.104,889/= as no authenticated record was availed by the respondent on the hours and dates of overtime worked, yet RW1 admitted that the claimant worked overtime on diverse dates.
 - vi. Item (f) is for compensation for wrongful, unfair, and unlawful dismissal under section 49(1) of the Act. The claimant is seeking for the maximum compensation equivalent to 12 months salary/wages. There are no reasons given either in the pleadings, evidence adduced in court, or the submissions by counsel as to why the claimant is deserving of this maximum award. In consideration of the length of the time that the claimant served, the manner of dismissal, availability of similar positions in the job-market, and the effort made by the respondent to settle the claim at the labour office, it is the opinion and holding of the court that compensation equivalent to six months salary/wages is adequate compensation under this head. The claimant is therefore awarded Kshs.13,646.40 * 6=Kshs.81,876/=.
 - vii. The claim for damages for unfair termination/dismissal has no factual, evidential, or legal basis or foundation and the same is denied and dismissed. No special or other damage has been proved that may call upon the court to award any compensation beyond what is awarded above under section 49(1) of the Act.
54. Prayer (c) is for a certificate of service in accordance with section 51(1) of the Act. There are no reasons or circumstances established that may deny the claimant this statutory right. The respondent shall deliver to the claimant, through his counsel, a certificate of service within 30 days of this judgment.

IX.Costs

55. Costs follow the event and the claimant is awarded the costs of this cause.



X.Orders

56. Judgment be and hereby entered in favour of the claimant against the respondent in the following terms –

- a. A declaration be and is hereby issued that although initially engaged as a casual worker, the employment of the claimant by the respondent converted to month to month contract of service upon expiry of the first month of employment under section 37(1)(a) of the Employment Act.
- b. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
- c. The claimant is awarded the following -
 - i. UnderpaymentsKshs.111,606.00
 - ii. Notice payKshs.13,646.40
 - iii. Public holidays pay.....Kshs.24,280.00
 - iv. Overtime pay.....Kshs.104,889.00
 - v. Compensation for wrongful dismissalKshs.81,876.00
 - Sub-totalKshs.336,297.40
 - Less paid at labour officeKshs.14,984.00
 - Balance payableKshs.321,313.40
- d. The respondent shall issue and deliver to the claimant a certificate of service within 30 days of this judgment.
- e. The claimant is awarded costs of the cause and interest on the amount awarded at court rates till payment in full.
- f. All the other claims are denied and dismissed.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 15TH DAY OF FEBRUARY, 2024.

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DAVID NDERITU
JUDGE

