



**Kilui v Tropical Ice (E.A) Limited (Cause E995 of 2021)
[2024] KEELRC 125 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 125 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E995 OF 2021
JK GAKERI, J
FEBRUARY 5, 2024**

BETWEEN

JOSEPH MUTHAMA KILUI CLAIMANT

AND

TROPICAL ICE (E.A) LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim on 6th December, 2021 alleging unfair termination of employment.
2. The Claimant alleges that he was employed by the Respondent as a driver in 1982 at a consolidated rate of Kshs 300/= per day payable at the end of the Safari which later increased to Kshs 530/= per day and a transport allowance of Kshs 550/= payable with the daily rate.
3. That he worked for 6 days a week, 48 hours, one off-day and did not work during public holidays and was entitled to a payable sick leave of up to 7 days.
4. Termination was one (1) day's notice.
5. It is the Claimant's case that as at termination of employment, his daily rate had risen to Kshs 1,000/= per day.
6. The Claimant avers that on 5th April, 2020, he was diagnosed with stomach problems, was treated at Wema Maternity and Nursing Home on 2nd April, 2020 and referred to Machakos Hospital on 23rd April, 2020.
7. Evidence shows that the Claimant sought and was granted required documentation to travel to Machakos for treatment, via letter dated 25th April, 2020 due to the COVID-19 restrictions on travel.



8. It is the Claimant's case that after he was discharged from hospital and fully recovered, he visited the Respondent's offices at Karen but was turned away at the gate.
9. The Claimant prays for;
 - i. A declaration that his employment converted from casual to permanent.
 - ii. A declaration that termination of employment by the Respondent was wrongful, unfair and unlawful.
 - iii. One (1) month's salary in lieu of notice Kshs 29,169/=.
 - iv. Six months' salary for wrongful termination.
 - v. Salary underpayment for 38 years.
 - vi. Damages for unfair termination.
 - vii. Annual leave for 38 years.
 - viii. House allowance.
 - ix. Sick leave for 38 years
Total Kshs 10,355,163/=
 - x. Costs of the suit.
 - xi. Interest on (iii) to (ix) from date of judgment till payment in full.
 - xii. Any other relief the court may deem fit to grant.

Respondent's case

10. In its response filed on 20th April, 2023, the Respondent admits that the Claimant was its seasonal employee and was paid at the end of each safari or cumulatively at the end of the period worked.
11. It admits that the Claimant's daily rate rose to Kshs 1,050/= by the time the seasonal contract ended.
12. It is the Respondent's case that the contract was seasonal because of the nature of its business.
13. It is the Respondent's case that the Claimant did not work continuously for a period exceeding 6 months and did not work between peak seasons and would take alternative employment.
14. It denies having underpaid the Claimant.
15. According to the Respondent, each engagement was a new contract and claims before 2nd November, 2018 were time barred.
16. That the Claimant was last engaged from 28th January, 2020 to 12th February, 2020 and was paid in full but re-appeared around July 2021 requesting for employment and could not be re-engaged.
17. That the parties parted ways amicably and prays for dismissal of the Claimant's suit with costs.
18. On 4th October, 2023, counsels agreed that the suit be determined by way of documentary evidence and written submissions.
19. The agreement was informed by the fact that the Respondent's witness was out of the country and the Claimant was indisposed and in the village. The Respondent's counsel grudgingly agreed and the



court acquiesced to obviate further delay having adjourned the hearing on 24th April, 2023 for similar reasons.

Claimant's evidence

20. The Claimant availed a letter of renewal of the seasonal/temporary employment dated 15th July, 2002, seasonal employment card, authority to travel to Machakos dated 25th April, 2020 stating that he was sick, Referral letter from Wema Maternity & Nursing Home dated 23rd April, 2020, COVID-19 Screening tools issued by the Machakos Level 5 Hospital dated 12th July and 30th April, 2021 and 3rd July, 2021 payment receipts dated 12th January, 2021 and 3rd July, 2021.
21. Patient records from Machakos Level 5 Hospital show that the Claimant was attended to on 3rd July, 2021, 30th August, 2021, and 5th March, 2021 and 12th July, 2021.
22. A copy of the revised Consultation Referral Form on record has no date.
23. The last document dated 18th May, 2021 is the Claimant's Comprehensive Report Card by which date the Claimant was 70 years old.
24. Finally, the Claimant attached unauthenticated pictures of himself standing next to motor vehicles bearing the Respondent's name. The pictures are neither dated nor illustrated.

Respondent's evidence

25. The Respondent availed a document signed by the Claimant on 4th August, 2001 "To whom it may concern" indicating that the Claimant would hire services on a temporary basis when needed and would be paid net of tax.
26. Documents on record confirm that the Claimant was indeed paid per day per safari undertaken as evidenced by the petty cash voucher.
27. In the courts view, this is a case where cross-examination of the witnesses was critical to canvass the contested issues of salary and termination.
28. However, having chosen to invoke Regulation 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the parties only voice are the documents and submissions on record.

Claimant's submissions

29. On conversion of employment from casual to permanent, counsel cited Section 37 of the [Employment Act, 2007](#) and the decisions in [Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd](#) (2018) eKLR and [Nanyuki Water & Sewerage Co. Ltd v Benson Mwiti Ntiritu & 4 others](#) (2018) eKLR where the court declared that the provisions of Section 37 had been complied with and made the declaration.
30. On unlawful termination, counsel cited the provisions of Section 41 and 45 of the [Employment Act, 2007](#) to urge that the Respondent adduced no prove of notice to show cause before terminating the Claimant's employment.
31. Reliance was also made on the decision in [Alphonse Machanga Mwachanya v Operation 680 Ltd](#) (2013) eKLR to reinforce the submissions.
32. On the reliefs sought, counsel cited the provisions of Sections 41, 35, 36 and 49 of the [Employment Act, 2007](#) to urge that the Claimant was entitled to the reliefs sought.



Respondent's submissions

33. As to whether the claim from 1989 to November 2018 is time barred, counsel submitted that it was by reason of Section 90 of the *Employment Act*, 2007 and cited the decisions in *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* to reinforce the submissions.
34. Counsel urged that due to the nature of the Respondent's work, the Claimant was engaged per safari as held in *Joseph Thiongo Mburu v Avenue Service Station Ltd* (2019) eKLR where the court stated that since the Claimant worked for other companies as well during breaks, he could not be categorized as a casual.
35. Counsel submitted that the parties entered into a new contract every time the Claimant was engaged.
36. As to whether the employment was seasonal or permanent counsel, submitted that it was seasonal as evidenced by the renewal of the Employment Letter and the employment card availed by the Claimant, as the Respondent's business was seasonal.
37. Counsel cited the decision in *Josphat Njuguna v Highrise Self Group* (2014) eKLR to urge that the Claimant misinterpreted Section 37 of the *Employment Act*, 2007 on payment as there were logistical challenges in paying the Claimant per day due to the nature of his work.
38. That the Claimant had not worked for a duration of more than 3 months in a single safari.
39. Counsel cited the decision in *Silas Mutwiri v Haggai Multi-Cargo Handling Services Ltd* (2013) eKLR on the import of Section 37 of the Act and urge that the Claimant was a seasonal employee not permanent.
40. Counsel submitted that it was the Claimant's duty to prove that he was a permanent employee and offered no oral evidence to prove that his employment was continuous as he only had the letter of renewal and employment card and employment depended on availability of work within 6 months.
41. On dismissal, counsel submitted that since the contract was seasonal, it simply expired by effluxion of time as there was no work available and the last safari was undertaken on 12th February, 2020 and the Claimant's employment was not unfairly terminated and he was not entitled to compensation.
42. That the sum of Kshs 10,355,163/= sought was excessive under Section 49 of the *Employment Act*, 2007.
43. According to counsel at a daily rate of Kshs 1,050/=-, the Claimant's gross salary amounted to Kshs 31,500/= and the maximum compensation would be Kshs 378,000/=-.
44. That the law required records for only 5 years not more and the Respondent provided the same from 2015 to 2019.

Determination

45. The issues that commend themselves for determination are;
 - i. What was the nature of the Claimant's employment?
 - ii. Depending on the answer to (i) (above), whether the Claimant's employment converted from casual to permanent.
 - iii. Whether termination of the Claimant's employment was unfair.
 - iv. Whether the Claimant is entitled to the reliefs sought.



46. As regards the nature of the Claimant's engagement, counsels have adopted opposing positions with the Claimant's counsel submitting that the Claimant was a casual employee and his employment indeed converted to permanent.
47. The Respondent's counsel maintained that the employment was seasonal and dependent on availability of work.
48. In his bundle of documents, the Claimant produced a copy of the Letter of Renewal of Employment (Seasonal/Temporary Employee) signed by the Claimant on 15th June, 2002. The letter reveals that the parties had had a previous contract(s) which neither of the parties availed.
49. Although the Claimant averred that he was employed in 1982, he adduced no shred of evidence to establish the date of employment. However, the Respondent admitted the Claimant's allegation thereby confirming that the two had an oral agreement on the terms asserted by the Claimant.
50. For unexplained reason(s), the Respondent availed no evidence of the subsequent relationships between the parties after the 6 months stated in the Renewal letter on record.
51. In the absence of such evidence, and bearing in mind that the relationship continued until the alleged termination or when the Claimant returned to the Respondent's office after recovery, a logical inference is that the parties continued on similar terms but may have considered a written contract unnecessary, perhaps due to familiarity, trust and frequency of dealing with each other.
52. Such an inference would appear to favour the Claimant as it underlines the fact that the Claimant was constantly engaged in safaris, the nature of the Respondent's business notwithstanding.
53. No doubt as held in *Abigail Jepkosgei Yator & another v China Hanan International Co. Ltd* (*supra*), an employer is obligated to keep all employment records for a period of 5 years after termination of employment.
54. Thus, contrary to the Respondent counsel's submissions that the employer is only required to keep records for the past 5 years, Section 10(6) of the *Employment Act*, 2007 is emphatic that the relevant particulars under Section 10(1) must be kept for a period of 5 years after the termination of employment which signifies cessation of relationship between the parties.
55. Since the parties herein had dealings with each other from 1982, the Respondent was obligated to keep the records of their dealings until cessation of their relationship.
56. While copies of the Safari salary pay vouchers availed by the Respondent reveals the amounts paid to the Claimant from June 2015, they do not show when the Claimant did not render services or was unavailable to do so.
57. Relatedly, and contrary to counsels submission that every safari was the employment contract, the Respondent adduced no evidence to prove that it withdrew the Claimant's employment card after every safari or 6 months contract and returned it to him when he entered into a new contract.
58. Although both parties are in agreement that the Claimant was initially employed as a casual at a consolidated daily pay of Kshs 300/= which rose to Kshs 530/= and later to Kshs 1,050/= per day, the Respondent adduced no evidence to demonstrate that the Claimant's employment did not transition to permanent subsequently.
59. The Respondent availed no evidence to demonstrate the seasonal or temporary nature of the Claimant's employment from 15th June, 2002 to the alleged date of termination.



60. Similarly, the Respondent did not adduce evidence, as adverted to elsewhere in this judgement, to prove the nature of its relationship with the Claimant from January 2003.
61. The fact that the Claimant's daily rate was consolidated as ordained by law and was payable after every safari owing to logistical challenges does not diminish the fact that the Respondent deemed the Claimant a casual employee.
62. Closely related to the foregoing, the Respondent adduced no evidence to demonstrate how seasonal its business was and how it retained the Claimant's services since 1982 on seasonal employment contracts.
63. Needless to emphasize, Section 37 of the *Employment Act*, 2007 was intended to prevent employers from retaining employees on casual employment while benefiting from them as permanent employees. It was intended to prevent the abuse of casual employment or exploitation of employees.
64. Under Section 2 of the *Employment Act*, 2007 "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 period for a longer period than twenty four hours at a time."
65. For the foregoing reasons, it is the finding of the court that the Claimant was a casual employee of the Respondent.
66. The foregoing is reinforced by the terms of engagement in the contract dated 15th June, 2002. For instance, termination was one days notice as was payment for services rendered.
67. Equally, the documents availed by the Respondent encompass a very small period of the duration in question and covers a few months.
68. More widely, distributed records would have demonstrated the true state of affairs as opposed to the selective records availed.
69. Having found that the Claimant was engaged as a casual employee, the next issue is whether his employment transitioned from casual employment to contract of service by virtue of Section 37 of the *Employment Act*, 2007 which introduced the threshold a casual employee must surpass for the transition to take place, namely, at least one month of continuous service or the person 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.
70. Based on the evidence on record, the court is persuaded that the parties continued in their relationship after January 2003 and the Claimant rendered services for the duration prescribed by Section 37 of the *Employment Act*, 2007 and his employment transitioned from casual to a contract of service thereby entitling him to the attendant rights such as leave.
71. As to whether termination of Claimant's employment was unfair, counsels have adopted contrasting positions with the Respondent's counsel submitting that the contract simply lapsed by effluxion of time.
72. The Claimant's counsel on the other hand submitted that the termination was unfair for want of procedural propriety. Before delving into the facts, it is essential to recapitulate the provisions of Section 47(5) of the *Employment Act*, 2007 as follows:
"For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment of 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.”

73. This provision is unambiguous that it is the duty of the employee to demonstrate that an unfair termination of employment or wrongful dismissal has taken place.
74. In the instant case, a part from alleging that after being discharged from hospital and duly recovered, he visited the Respondent’s office and was summarily turned way at the gate, the Claimant tendered no credible evidence of the alleged unlawful termination by the Respondent.
75. The Claimant adduced no evidence as to when he visited the Respondent’s office or when he was discharged from hospital or he fully recovered.
76. He did not even state who summarily turned him away from the gate or what he did to ascertain the circumstances affecting his engagement by the Respondent.
77. As adverted to elsewhere in this judgement, documents availed by the Claimant reveal that the Claimant was admitted at Wema Maternity and Nursing Home on 2nd April, 2020 and appear to have been under treatment until 23rd April, 2020, he was referred to Machakos for home care and he sought permission to travel on 24th April, 2020 on accordance with the COVID-19 Protocols.
78. Other documents attached in support of the claim show that the Claimant was attended to at the Machakos Level 5 Hospital in April and July 2021.
79. There is no documentary evidence to show that the Claimant was attended to at the Machakos Level 5 Hospital during the 2nd half of 2020.
80. The documents leave no doubt that the Claimant had not recovered fully as alleged in July 2021 and it is thus unclear as to when the Claimant visited the Respondent’s office after discharge and recovery.
81. The absence of relevant particulars on the circumstances in which the alleged termination of employment took place leaves the Claimant’s case of unlawful termination of employment yearning for relevant particulars.
82. The court is guided by the sentiments of Abuodha J. in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR where the learned judge stated as follows;

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”

83. For the foregoing reasons, it is the finding of the court that Claimant has failed to prove to the fact that his employment was unfairly or wrongfully terminated by Respondent.
84. The claim for unfair or wrongful termination of employment by the Respondent is unsustainable and it is accordingly dismissed for want of proof.

Reliefs

85. Having found as above, the court proceeds as follows:



a. Declaration

86. Having found that the Claimant's employment transitioned from casual to a contract of service, the declaration sought is merited.

b. Declaration

87. Having found that the Claimant has failed to prove his claim for unfair termination of employment on a preponderance of probabilities, the declaration sought is unmerited and is declined.

c. One month's salary in lieu of notice, 6 months salary compensation and damages for unfair termination.

88. Having found as above, the foregoing claims are unsustainable and are accordingly dismissed.

d. Underpayment for 38 years Kshs 6,534,024/=

89. The Claimant adduced no evidence of the alleged underpayment, namely what he was entitled and what he was paid and cited no law to justify the amount claimed, whose particulars were not canvassed.

90. Since the Claimant's remit was to drive tourists to parks in Kenya, his typical vehicle was a tour van or Land Rover which are categorized as medium sized vehicle whose CC is upto 3.0 litre and daily rate from 1st May, 2018 was Kshs 921.90 inclusive of house allowance and since the Claimant's daily rate was Kshs 1,050/= as admitted by the Respondent, the Claimant failed to establish any underpayment. The prayer for underpayment is dismissed.

e. Annual leave for 38 years Kshs 1,108,422/=

91. The Claimant tendered no evidence of his leave entitlement or evidence of the outstanding leave days.

92. The written statement dated 30th November, 2021 makes no reference to the fact that the Claimant did not proceed on leave or had any outstanding leave says.

93. The absence of relevant particulars renders the prayer unsustainable and it is declined.

f. Gratuity benefit for 38 years Kshs 1,108,422/=

94. Gratuity is an amount paid by an employer to an exiting employee gratuitously in appreciation of the services rendered.

95. It is either provided for in the contract of employment or the Collective Bargaining Agreement (CBA).

96. The Claimant furnished none of the above.

The prayer for gratuity is dismissed.

g. House allowance

97. In his statement of claim and witness statement, the Claimant admits that the daily rate was consolidated as provided for by the Regulation of Wages (General)(Amendment) Orders and availed no evidence to demonstrate that the position was departed from during the employment relationship.

98. Under Section 31(2)(a) of the *Employment Act*, 2007, the employer is not required to pay housing allowance where the employee's salary or wage is consolidated.



The prayer is declined.

h. Sick leave for 38 years Kshs 554,211/=

99. The Claimant tendered no evidence of this claim as the written statement on record makes no reference to the claim.
100. In the absence on the relevant particulars, specifically the number of days when they accrued and supportive documentary evidence, the prayer is unsustainable and is declined.
101. In the upshot, other than the declaration that the Claimant's employment transitioned from casual employment to a contract of service by virtue of Section 37 of the Employment Act, 2007, the Claimant's suit against the Respondent lacks merit and it is accordingly dismissed.
102. In light of the circumstances of this case, it is only fair that parties bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF FEBRUARY, 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

