



**Mutunga v Steel Structures Limited (Cause 1771 of 2017)
[2024] KEELRC 697 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 697 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1771 OF 2017
K OCHARO, J
MARCH 28, 2024**

BETWEEN

PATRICK MUEMA MUTUNGA CLAIMANT

AND

STEEL STRUCTURES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claim before this court is one for unfair termination. The Claimant seeks a declaration that his dismissal from employment was wrongful, and terminal benefits amounting to KShs.807,956.00. The claim is embodied in the Amended Statement of Claim dated 16th October 2017.
2. The claim was resisted by the Respondent through a memorandum of reply dated 20th December 2017. In the pleading, the Respondent denied the Claimant's claim for wrongful termination, and his entitlement to the reliefs sought.
3. As required by the Rules of Procedure, the Claimant filed a reply to the Respondent's memorandum of reply on the 14th of February 2019.

The Claimant's case

4. The Claimant's case was heard on the 14th June 2022. The Claimant adopted this witness statement dated 16th October 2017, as his evidence in chief, and produced the documents that he filed under a list of documents of the even date as his documentary evidence.
5. It was the Claimant's case that he first came into the employment of the Respondent on the 22nd of June 2011 as a casual labourer in its Dispatch Department at a consolidated salary of KShs.22,904.00.



6. The Claimant asserted that he dutifully and diligently worked for the Respondent up to the 2nd September 2016 when the Respondent summarily dismissed him with immediate effect.
7. He contended that on the material day, he reported to work as usual only to be instructed by Mr. Gitau, the Manager, to get back home and report back to work after 31 days. When he reported back the Manager again sent him off for two weeks. After the two weeks, he reported as instructed but he was not attended to at all. He was constrained to leave the Respondent's premises, as a result. He considered the action by the Respondent a dismissal, without reason.
8. He further contended that throughout the time he was in the service of the Respondent, the Respondent did not allow him to proceed for his earned leave.
9. The Claimant further contended that he was not issued with any termination letter, or accorded an opportunity to be heard before the termination.
10. Cross-examined by Counsel for the Respondent, the Claimant testified that, he was employed by the Respondent in the position of a receiving clerk, and that this was on a casual basis.
11. The Claimant further testified that he was not a member of any union and that he did not approach any labour office to intervene in the matter.
12. Questioned on his claim for leave, the Claimant stated that he on several occasions demanded to be allowed to proceed on leave (this verbally), but on all those occasions he was told off.
13. That though he had claimed for travelling allowance, this is an allowance that had not been paid to him at any time.
14. He denied the Respondent's assertion that he absconded duty.
15. Lastly, he testified under cross-examination that, he was contributing towards NSSF every month.

The Respondent's Case

16. The Respondent presented one witness, Francis Njenga to testify on its behalf. The witness presented himself as the Respondent's Director in charge of Human Resource Administration.
17. As the Claimant did, the witness adopted his witness statement dated 20th September 2017 as his evidence in chief.
18. The witness stated that at all material times, the Claimant was in the Employment of the Respondent on a casual basis as a Receiving clerk in its Dispatch Department.
19. His position entailed receiving and accounting for fabricated items from the workshop before they were dispatched to the Respondent's Clients. Relevant to this matter, the Claimant received fabricated steel works from the workshop but failed to account for them fully.
20. The witness contended that the Claimant absconded duty upon being requested to account for the lost items, and proceeded to file the instant suit.
21. Cross-examined by the Counsel for the Claimant, the witness admitted that the Claimant was the Respondent's employee at all material times. Further, the Claimant was in the employment on a casual basis. He worked for the Respondent for five years on an on-and-off basis. Therefore, he did not work continuously.
22. The witness admitted that the Claimant did not proceed for leave at any time.



23. The witness reiterated that the Claimant absconded duty. He further stated that it was only one item that was in issue. However, he was not able to state what the value of that item was.
24. The witness candidly stated that he could not state that the Claimant stole the item (roofing material), but he could that he failed to identify where he had placed it. The item was not traced eventually.
25. The Claimant was allowed a chance by his supervisor to trace the item, but he did not manage to. He was not served with any warning letter as he was nowhere. He had absconded duty.
26. When the court sought clarification from the witness, the witness stated that Mr. Kitavi who was the Claimant's immediate supervisor was still in the employment of the Respondent.

The Claimant's submissions

27. Counsel for the Claimant submitted that the evidence of the Respondent's witness is of very little evidential value as it is hearsay. He urges this court to conclude that the Claimant's testimony as to the circumstances which led to his dismissal by the Respondent was not controverted. The only person who could have controverted the Claimant's evidence was Mr. Kitavi but he was not called to testify.
28. It was further submitted that a conclusion should be drawn in light of the provisions of section 44(3) of the *Employment Act*, that the Claimant was summarily dismissed from employment. For a summary dismissal to be held fair, the employer must demonstrate that the action or omission of the employee amounted to gross misconduct. The Respondent did not establish this. Consequently, the dismissal was not justified.
29. The Claimant's Counsel further submitted that the Claimant was a casual worker throughout the period he was in the employment of the Respondent. This state of affairs was contrary to the provisions of section 37 of the *Employment Act*. Further, under the section, the nature of the Claimant's employment converted to a term contract. The fact that the Respondent was remitting contributions to his NSSF account is a testament to the conversion. The Respondent was therefore bound to terminate the Claimant's employment following the process provided by law.
30. As the Claimant's employment was converted to a term contract, the Claimant was entitled to annual leave at the rate of 21 working days per annum. He should be compensated for the leave days earned but unutilized in the 5 years.
31. As the Claimant proved that he was wrongfully dismissed, he should be awarded the compensatory relief sought, and in making the award, the court should consider the length of time the Claimant served the Respondent. The five years.
32. The Claimant further submitted that he is entitled to notice pay. To support this claim, reliance was placed on the decision in Alex Muriuki Bundi vs. Kakuzi Ltd Civil Case No. 195 of 2003.

The Respondent's submissions

33. The Respondent's Counsel submitted that in his pleadings the Claimant pleaded that he was a casual employee and that there is evidence by the Respondent that he could be engaged as and when there was work for him to do. He cannot be allowed to characterize his employment relationship with the Respondent in a manner that does not agree with his pleadings.
34. It was further argued that annual leave is always payable as and when it falls due. The Claimant did not place before the court any evidence that he demanded for the leave and that the demand was not acceded to. Consequently, he is not entitled to the relief sought.



35. On the Claimant's claim for service gratuity, it was submitted that the same cannot be availed to him as there was concurrence that he was a member of NSSF.
36. As he absconded duty, thereby causing the termination of the employment relationship, the Claimant cannot be heard to claim compensation for wrongful dismissal.

Analysis and Determination

37. I have carefully considered the pleadings, the evidence and the submissions by the parties, and the following issues emerge for determination;
 - a. What was the nature of the Claimant's employment at the time of separation?
 - b. Was the Claimant unfairly dismissed from employment?
 - c. Is the Claimant entitled to the reliefs sought or any of them?

Of the nature of the Claimant's employment

38. From the material placed before this court, there is no dispute that the Claimant was an employee from 22nd June 2011, to on or about the 2nd September 2016. However, there is contestation as regards the exact nature of the Claimant's employment at the material time. The Claimant pleaded that he first came into the employment of the Respondent as a 'casual permanent employee.' He stated in paragraph 3 of the Amended Memorandum of claim:

“The Claimant was employed by the Respondent on the 22nd of June, 2011 as a Casual Permanent Employee.”

39. The Respondent on the other hand denied the Claimant's characterization of the employment by averring in his memorandum of reply, thus;

“3. The Respondent contends that the Claimant has been engaged by the Respondent as a casual employee and not as described by the Claimant that he was a casual permanent employee.”

40. With the rival positions taken by the parties herein, it becomes imperative for this court to determine the exact character of the undenied employment relationship that was between the two at the material time. Essentially, the character of an employment relationship will always affect the reliefs awardable by the court in disputes as is the instant one.
41. What I got the Claimant telling the court is that though he first came into the employment as a casual, his employment contract converted to a term contract by operation of the law. He worked continuously for the Respondent for more than five years.
42. Resisting the Claimant's assertion, and in support of the Respondent's position, the latter's witness testified that the Claimant did not work continuously. That he could be called to work as and when there was a need for him to be called.
43. The court notes that the Respondent did not in its pleadings state that the Claimant was a worker who could be engaged intermittently over the five years. All that it did was assert that he was employed on a casual basis. Further in his witness statement, (turned evidence in chief) the Respondent's witness did not mention at all that the Claimant was an employee who could be called upon for work as and when there was a need. In my assessment, when the Respondent's pleadings and the witness statement



are considered holistically, the following emerge, first, the character of the employment relationship between the rival parties herein, as that of a term contract of employment. Second, the labelling of the employment as one on a causal basis was in ignorance of the statutory definition of the term casual employee.

44. If indeed, the Claimant was that employee of the Respondent, who worked intermittently as alleged, nothing could have been easier than the Respondent tendering in evidence documents to show the various times when he worked and those when he did not. This it did not avail. There was no iota of evidence, demonstrating that on such and such a date, the Claimant was called back to work.
45. It is easy to conclude, and I hereby conclude that the Respondent's witness's assertion which only came up in his evidence under cross-examination, to the effect that the Claimant never worked continuously was an afterthought.
46. The Respondent's Counsel argued that the Claimant cannot run away from the description he accorded his employment, in his pleadings. He called himself a casual worker. In my view, this is a mis-argument as it does not appreciate the fact that the Claimant went further to assert that there was a conversation of the character of the employment.
47. It matters not how parties label the employment relationship. Where necessary, the court has to step in cut the label, and ascertain the exact character of the relationship.
48. Assuming I am wrong to conclude that considering the material before this court, the subject contract was a term contract of employment at all material times, still I would agree with the Claimant that he worked for the Respondent continuously and that even if this employment was first as a casual employee, it became a term contract of employment after the statutory period contemplated in section 37 of the Employment Act. The section provides:

“ 37. Conversion of causal employment to term contract

- (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) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.



- (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.
- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.”

Whether the Claimant was unfairly dismissed from employment

49. Section 43 of the *Employment Act*, places a legal obligation upon the employer, in a dispute flowing from the termination of an employee’s employment, to prove the reason(s) for the termination. Where the employer fails to prove the reason(s), the termination shall be deemed unfair, pursuant to the provisions of section 45 of the Act.
50. The Act imposes a further legal burden on the employer to prove that the reason(s) for the termination was fair and valid.
51. The Respondent contended that the Claimant absconded duty, thereby causing his employment to terminate. I have carefully considered the Respondent’s memorandum of reply, the witness statement by the Respondent’s witness and his testimony in court, the notable thread in all of them is the silence on the pivotal point, the specific date when the alleged act of absconding occurred. In my view, where the employer fails to give evidence as regards when an alleged desertion occurred, the court cannot be off the mark to conclude that the reason for termination has not been proved and or demonstrated to be valid and fair. A reasonable employer could be expected to give the details to the court.
52. In the upshot, I conclude that the Respondent failed to prove the reasons for the termination and that the reason it presented to the Court was neither valid nor fair.
53. I now turn to consider whether the termination of the Claimant’s employment was procedurally fair. Section 41 of the *Employment Act*, provides for a mandatory procedure that an employer contemplating terminating an employee’s employment must adhere to. The provision charges the employer with the obligation to notify the employee of his or her intention and the grounds prompting the intention. The employer should give the employee an adequate opportunity to prepare and make a representation on the ground(s). Conjoined with this right to be heard, is the employee’s right of accompaniment. The employer should allow him to be accompanied by a colleague or a trade union representative (where he or she is a member of a trade union). Lastly, the employer must consider the representation made by the employer and or the person accompanying him, before deciding on the matter.



54. There is no doubt that this procedure was not adhered to at all. The Respondent contended that it couldn't adhere to the procedure as the Claimant had absconded duty and was nowhere to be seen.
55. It is trite law that where an employee asserts that his or her employee deserted duty attracting the termination of his or her employment, the employer must demonstrate that when it noted the employee's unauthorized absence from work, it made efforts to trace the employee to ascertain why he or she was not reporting to work, and if the employer forms an impression that the absence can be a basis for disciplinary proceedings and sanction, inform him as much. Then the employer shall have a reason to engage the statutory procedure contemplated under section 41 of the *Employment Act*, against the employee as desertion of duty is categorized as gross misconduct under section 44 (4) of the Act.
56. There was not even an iota of evidence to show that the Respondent ever attempted to trace the Claimant for the purposes above-stated if at all the latter did abscond duty.
57. As a result of the foregoing premises, I am persuaded that the Claimant's employment was terminated in the manner he explained to this court, and without adherence to procedural fairness.

Is the Claimant entitled to the reliefs sought?

58. The Claimant sought for payment in lieu of notice. Having found that the Claimant's employment was a term contract of service, it was terminable at the end of each month, with the notice contemplated under section 35 of the *Employment Act*. The notice was not issued. As a result, I hold that the Claimant is entitled to one month's salary in lieu of notice.
59. The Claimant also claimed for "travelling allowance" for five years and three months. What informed this claim was not sufficiently explained to the court. The Claimant did not place before me any evidence to establish his entitlement to the relief, the extent thereof and how the same could be arrived at. This is a claim that was just thrown to the Court. I decline to venture into the realm of speculation, as the Claimant wants me to, and reject the remedy.
60. This court declines to grant the Claimant the relief, service gratuity. The Claimant and the Respondent were in concurrence that National Social Security Fund remittances were duly made by the Respondent on the account of the latter. No doubt, therefore, the Claimant fell under a category of those employees statutorily excluded from the benefit of service pay under section 35 (b) of the *Employment Act*.
61. Under section 28 of the *Employment Act*, annual leave has been made a statutory right for the employee, and a statutory obligation on the employer to ensure that the same is accorded. The Respondent's witness admitted in his evidence under cross-examination that the Claimant did not at any time proceed for his leave. In my view therefore, the Claimant had earned but unutilized leave days for the entire period he was in the employment of the Respondent.
62. In my view, it won't be available to an employer to allege that the employee did not apply for leave. Employee welfare, under which leave enjoyment falls, is a Human Resource function, that heavily counts towards a decent workplace. From the Human Resource Management, and statutory, perspectives, the employer must see to it that the function is discharged in a manner that ensures that those employees entitled to annual leave proceed for leave or where their contracts allow commuting of the leave days, they do so with compensation thereof.



63. The Respondent did not assert or demonstrate that the Claimant was compensated for the earned but unutilized leave days. As the Claimant was an employee under a term contract, he was entitled to the expansive rights and protections accorded under the Employment Act.
64. By reason of the foregoing premises, I hold that the Claimant is entitled to compensation for the leave days earned but not utilized. Therefore, KShs.84,172.20 (22,904.00 x 21/30 x 5.25).
65. The compensatory relief provided for under section 49(1) (c) of the Employment Act, is discretionarily awarded by the court. Whether to grant the same to the fullest extent (12 month's gross salary) provided for under the provision, or part thereof or nothing at all, depends on the circumstances of each case. In the instant matter, I have considered that the termination of the Claimant's employment was without adherence to the known statutory dictates, the fact that the Respondent did not come out candidly as to how and why the Claimant was discharged from employment, the length of time that the Claimant was in the service of the Respondent, and the fact that he did not contribute in any shown manner to the termination, and come to the conclusion that he is entitled to the compensatory relief and to the extent of six (6) months' gross salary. Therefore KShs.137,424.
66. In the upshot, judgment is hereby entered for the Claimant in the following terms:
- a. That the termination of the Claimant's employment was unfair.
 - b. One month's salary in lieu of notice, KShs.22,904.00.
 - c. Compensation for earned but unutilized leave days, KShs.84,172.20.
 - d. Compensation under section 49(1)(c) of the Employment Act, six month's gross pay, KShs.137,424.
 - e. Costs of this suit.
 - f. Interest at court rates on the awarded sums above, from the date of this judgment till full payment.

READ, DELIVERED AND SIGNED THIS 28th DAY OF MARCH, 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Njoroge for Claimant

Anyoka for the Respondent

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

