



**Olindo v Kenya Power and Lighting Company Ltd (Cause
703 of 2018) [2024] KEELRC 746 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 746 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 703 OF 2018
BOM MANANI, J
APRIL 8, 2024**

BETWEEN

CAROLINE KADARA OLINDO CLAIMANT

AND

KENYA POWER AND LIGHTING COMPANY LTD RESPONDENT

JUDGMENT

Background

1. The Claimant has filed the instant cause in her capacity as the legal representative of the estate of one Emmanuel Inyangala Anyangu, deceased. Until his death, the deceased had been working for the Respondent.
2. The Claimant avers that the deceased was employed on permanent and pensionable terms. Therefore, his estate is entitled to be paid gratuity.
3. Further, the Claimant contends that the deceased did not utilize his accrued leave days for the ten (10) years that he served the Respondent. She contends that the deceased was entitled to twenty one (21) days leave every year bringing his total leave days for the period under review to 210. Thus, she prays that the leave days be commuted and paid to the deceased's estate. The Claimant also avers that the deceased's estate is entitled to be paid Ksh. 2,000,000.00 on account of death benefits.
4. The claim is opposed by the Respondent. According to the Respondent, the deceased was not engaged on permanent and pensionable terms. For the duration of his service, he was engaged on fixed term contracts of service.
5. The Respondent denies that the deceased was entitled to the leave days that the Claimant has alluded to. According to it (the Respondent), the deceased's leave entitlement was two and a half days (2.5) for every month that he worked. The Respondent contends that the deceased utilized this days.



6. The Respondent contends that on his death, the deceased's estate was paid Ksh. 200,000.00 to cover his final benefits. As such, there is no amount that is due from it to his estate.

Issues for Determination

7. After evaluating the pleadings and evidence on record, the issues that emerge for resolution are the following:-
 - a. Whether the deceased was engaged by the Respondent on permanent and pensionable terms.
 - b. Whether the deceased had outstanding leave days with the Respondent.
 - c. Whether the deceased's estate is entitled to be paid death benefits of Ksh. 2,000,000.00.
8. The Claimant contends that although the deceased was still serving the Respondent on short term contracts at the time of his demise, the law presumes that the two had a permanent and pensionable employment relation owing to the length of service by the deceased. The Claimant relies on section 37 of the Employment Act to advance the above argument.
9. On the other hand, the Respondent contends that the parties' employment relation was anchored on fixed term contracts of service that covered the entire period of their engagement. The Respondent argues that the Claimant was not engaged as a casual employee. Rather, he served as a fixed term contract employee. Therefore, section 37 of the Employment Act cannot be invoked to hold that the relation between the parties had graduated from short term to indefinite term.
10. Section 37 (1) of the Employment Act provides as follows:-

“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.”
11. Section 37 (3) of the Act provides as follows:-

“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.”
12. Section 37 (4) of the Act provides as follows:-

“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.”



13. Section 2 of the Act defines the term “casual employee” as follows:-

“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 longer period than twenty-four hours at a time.”
14. From the above provisions, it is apparent that a casual employee is an individual whose services are engaged on day to day basis and whose salary is due at the close of the day. Although such individual may be engaged to serve for several consecutive days, he remains a casual employee if the contracts between the parties are anchored on daily engagements.
15. In order to prevent the abuse of this group of employees by employers, section 37 of the [Employment Act](#) was enacted to provide for conversion of their contracts from casual to indefinite term if they (the casual employees) remain engaged by the employer for a period that is in excess of one month or if the work that they have been engaged to perform cannot reasonably be completed within a space of three months or more.
16. However, section 37 of the [Employment Act](#) only applies to casual contracts of service. It has no application to fixed term contracts that do not fall in the definition of casual contracts.
17. The evidence that the Respondent has placed before the court shows that the deceased and Respondent initially engaged on short term contracts of service of between one to six months. There is no suggestion that the deceased was engaged on a day to day basis to provide services to the Respondent in terms of section 2 of the [Employment Act](#). The foregoing removes the deceased’s contracts with the Respondent from casual engagements. They were fixed term contracts whose durations varied from one to six months.
18. Therefore, the Claimant cannot rely on section 37 of the [Employment Act](#) to argue that the deceased’s engagement with the Respondent converted into indefinite term. In effect, the employment relation between the deceased and the Respondent was anchored on a series of standalone fixed term contracts. The relation was not of a permanent and pensionable nature.
19. But even if the deceased’s contract had converted into a long-term contract, his estate would still not have been eligible to receive gratuity pay under section 35 (5) of the [Employment Act](#). This is because there is evidence that the deceased was a contributor to the National Social Security Fund (NSSF), a matter that debarred him or his estate from pursuing a claim for gratuity by virtue of section 35(6) of the Act.
20. Evidence of the deceased’s membership to the NSSF is in the Respondent’s letter to the aforesaid Fund dated 25th June 2015 (page 65 of the Respondent’s trial bundle). The deceased’s pay slip appearing at page 64(b) of the Respondent’s trial bundle also confirms this fact.
21. Section 28 of the [Employment Act](#) entitles an employee who has served continuously for a period of one year to annual leave of twenty one (21) working days. However, it is apparent that the individual tenure of the deceased’s short term contracts did not amount to a year. As such, the Claimant’s contention that the deceased was entitled to annual leave for 21 days every year is not well founded.
22. The record shows that the arrangement between the parties was that the deceased would earn leave of 2.5 days for every month worked. Although the Claimant’s case was that the deceased never took any of his leave days, the Respondent produced a leave application form appearing at page thirty (30) of its trial bundle which shows that the deceased had on some occasion applied for leave. When asked whether she was aware of this fact, she indicated that she was not. She further indicated that in view



of this disclosure, she was no longer in a position to confirm whether the deceased had taken his leave days. Having regard to this evidence, it is evident that the Claimant's claim for 210 unpaid leave days was merely speculative. As such, it is disallowed.

23. The Claimant has further claimed for death benefits of Ksh. 2,000,000.00 but provided no evidence that Respondent had a scheme that anchored this claim. Absent such evidence, the court cannot entertain the claim.

Determination

24. The upshot is that the Claimant has failed to establish her claim against the Respondent.

25. In the premises, the suit is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

