



**Kimani v Ngigi (Cause 1129 of 2018) [2024] KEELRC 864 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 864 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1129 OF 2018**

**SC RUTTO, J**

**APRIL 5, 2024**

**BETWEEN**

**CYRUS GICHURI KIMANI ..... CLAIMANT**

**AND**

**MUNGAI WAINAINA KIGATHI NGIGI ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the instant suit vide a Memorandum of Claim dated 22<sup>nd</sup> July 2018, in which he avers that he started working for the Respondent on 23<sup>rd</sup> October 2001 as a gardener pursuant to an oral contract. According to the Claimant, he worked for the Respondent diligently up to 2017 when he was arbitrarily dismissed from work. Consequently, he claims against the Respondent the sum of Kshs 927,500/= being notice pay, compensatory damages for unfair termination, unpaid house allowance, unpaid leave pay and service pay. He further prays for costs of the suit and interest.
2. The Respondent countered the Claim through a Statement of Defence dated 26<sup>th</sup> July 2017, in which he denies having a contractual relationship with the Claimant. In the alternative, the Respondent avers that he would occasionally engage the Claimant as a freelance and casual employee to undertake some gardening assignments from time to time and not as a full-time employee. He further avers that the Claimant's summary dismissal was justified and that due process was adhered to. The Respondent further avers that the Claimant's termination was not unfair and wrongful. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.
3. During the hearing which took place on 7<sup>th</sup> November 2023 and 5<sup>th</sup> December 2023, both sides called oral evidence.

**Claimant's Case**

4. The Claimant testified in support of his case and at the outset, sought to rely on his witness statement together with the list and bundle of documents filed alongside the Memorandum of Claim to constitute his evidence in chief.



5. It was the Claimant's testimony that his duties included general compound maintenance. His workload was overwhelming every day and therefore, he never took annual leave.
6. The Claimant further averred that on 28<sup>th</sup> June 2017 following his father's demise, he requested the Respondent for seven days off to attend to the funeral arrangements and eventual burial. The Respondent accepted his request and he proceeded to bury his father.
7. He returned to his place of work seven days later and was shocked to find that he had been locked out. He reached out to the Respondent with a view to understanding the cause for the drastic and unprecedented action against him. The Respondent alleged that he had deserted duty and would arrange to pay his final dues.
8. On 31<sup>st</sup> July 2017, the Respondent presented him with a cheque of Kshs.21,000/= as his final terminal dues. He declined to receive the cheque as the amount was only a fraction of what was owed to him.
9. He reported the matter to the Kiambu County Labour Office. He was later told by the Labour Office that the Respondent's Lawyers had requested for the matter to be transferred to Nairobi. The Nairobi County Labour Office made final attempts to have the matter settled but to no avail. This prompted him to instruct his Advocates on record to pursue his complaint.

### **Respondent's Case**

10. The Respondent testified in support of his case. Similarly, he adopted his witness statement as well as the Statement of Defence to constitute his evidence in chief.
11. It was the Respondent's testimony that there were no implied or expressed terms of a contract of employment as alleged by the Claimant.
12. He stated without prejudice that at no time did he engage the services of the Claimant for any continuous period of time. That the gardening services were rendered for short intervals as and when the need arose.
13. The Respondent further confirmed that he issued the Claimant with a cheque for the sum of Kshs 21,000/= being sums due and owing to him for services rendered. The cheque was duly received by the Labour Office, Nairobi after the Claimant lodged a complaint upon which the matter was marked as settled.
14. According to the Respondent, the current suit filed by the Claimant is just an attempt to extort money from him to unjustly enrich himself (Claimant).
15. The Respondent further stated that the current suit is a vendetta by the Claimant whom he stopped engaging with and asked to stop coming to his residence when he discovered that he had been stealing money from his wife on several occasions and taking undue advantage of her diminished mental state.
16. In his oral testimony before Court, the Respondent denied giving the Claimant permission to bury his father. According to him, the Claimant stopped going to work and he (Respondent) only heard from him after six days.

### **Submissions**

17. Placing reliance on the provisions of Sections 9(1) (b) and 9(2) of the *Employment Act*, the Court was urged to find that the Claimant was employed on 23<sup>rd</sup> October 2001 as a permanent employee.



18. It was further submitted that the Respondent did not demonstrate to the Court his efforts in reaching out to the Claimant when he did not show up at work. It was further submitted that the Respondent did not do so because he knew why the Claimant was away from work.
19. In further submission, the Claimant stated that his dismissal was unfair in terms of Section 45 of the *Employment Act* in light of the undisputed fact that the Respondent did not whatsoever follow the procedure under Section 41 of the *Employment Act*.
20. On the part of the Respondent, it was submitted that the Claimant has not proved the existence of the facts he is urging this Court to believe in. In the same vein, the Respondent submitted that the Claimant has failed to prove the alleged fact that he was a permanent employee.
21. It was further submitted by the Respondent that the Claimant has failed to prove that he was dismissed from employment and has failed to discharge the burden placed on him under Sections 107 and 108 of the *Evidence Act* as well as Section 47(5) of the *Employment Act*. In support of this argument, the Respondent placed reliance on the case of *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* [2021] eKLR.
22. In closing, the Respondent urged the Court to find that the Claimant is not entitled to any compensation.

### **Analysis and Determination**

23. I have considered the pleadings, the evidentiary material placed before me and the rival submissions and isolated the following issues for the Court's determination:
  - a. Whether the Claimant was engaged on casual terms;
  - b. Whether the Claimant's termination was unfair and unlawful;
  - c. Is the Claimant entitled to the reliefs sought?

### **Nature of employment relationship?**

24. It is the Respondent's case that he engaged the Claimant as a freelance and casual employee to undertake some gardening assignments from time to time and not under any circumstances as a full-time employee. This position was disputed by the Claimant who averred that he served the Respondent on a continuous basis from 2001.
25. Pursuant to Section 10(7) of the *Employment Act*, the burden was on the Respondent as the employer, to prove the fact that the Claimant was a casual employee and was engaged as and when need arose. The said statutory provision is couched as follows: -
  - (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
26. This position was reiterated by the Court of Appeal in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR where it was held that: -

“[15]. In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the *Employment Act* to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for



the appellant from August, 2010 until November, 2013, the appellant was estopped by Section 37 of the *Employment Act* from claiming that she was a casual employee.”

27. Therefore, it was not sufficient for the Respondent to merely assert that the Claimant was a casual employee without producing relevant evidence to back up that position.
28. As such, and particularly noting that he was the party responsible for the maintenance of employment records under Section 74 of the *Employment Act*, the Respondent was under an obligation to prove by way of evidence, that the Claimant was engaged intermittently and not for a continuous period of time.
29. In absence of any evidence to the contrary, I am led to conclude that the Claimant was engaged on a term contract as opposed to a casual basis.
30. That said, was the Claimant’s termination unfair and unlawful?

### **Unfair and unlawful termination?**

31. The determination of this issue turns on the provisions of Sections 41,43 and 45 of the *Employment Act*. In this regard, an employer must prove that there was substantive justification to warrant the termination of an employee’s contract of service and that the termination was undertaken procedurally. Essentially, this is the standard to be applied in determining whether an employee’s termination from employment was fair and lawful.
32. With regards to substantive justification, Section 43(1) of the *Employment Act*, requires an employer to prove the reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further along the Act, Section 45 (2)(1) and (b) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee’s conduct, capacity or compatibility; or based on its operational requirements.
33. Back to the case herein, the Respondent was not quite clear as to the reasons that led to the Claimant’s termination from employment. I say so because, in his witness statement, the Respondent stated that he stopped engaging the Claimant and asked him to stop going to his residence when he discovered that he had been stealing from his wife and taking undue advantage of her diminished mental state.
34. This assertion was in sharp contrast with the Respondent’s oral testimony during the trial as he testified that the Claimant absented himself from his place of work for six days without obtaining permission.
35. On his part, the Claimant stated that he asked for permission from the Respondent to attend his father’s funeral.
36. Revisiting the provisions of Sections 43 (1) and 45 (2) (a) and (b) of the *Employment Act*, the burden was on the Respondent as the employer to prove that the termination of the Claimant’s employment was based on a valid and fair reason related to his conduct, capacity or compatibility.
37. From the record, the Respondent did not present any evidence to prove that he had a valid and fair reason to terminate the Claimant’s employment based on his conduct or absence from work. As such, the Claimant’s termination from employment was substantively unfair within the meaning of Sections 43(1) and 45(2) (a) & (b) of the *Employment Act*.
38. Turning to the question of procedural fairness, Section 45(2) (c) of the *Employment Act*, provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, Section 41(1) of the *Employment Act* requires an employer to accord an employee a hearing prior to termination.



39. In the instant case, the Respondent stated in his witness statement that he asked the Claimant to stop going to his residence. In this regard, he did not indicate let alone suggest that he disengaged the Claimant in line with the requirements stipulated under Section 41 of the *Employment Act*.
40. Admittedly, termination of an employment contract in a domestic setup may not be wholly characterized by the strictures ordinarily existent in a formal context. Be that as it may, the Respondent was required to in as much as practicable, explain to the Claimant the reasons for which he was terminating his employment in a language he understood. In this regard, he would have given the Claimant an opportunity to render his explanation on the allegations against him.
41. There being no evidence let alone, the slightest indication that the Claimant was subjected to a fair process prior to termination, I am led to conclude that no such process was undertaken.
42. In the circumstances, I cannot help but find that the Respondent is at fault for terminating the Claimant's employment without complying with the procedure contemplated under Section 41 of the *Employment Act*.
43. The total sum of my consideration is that the Claimant's termination from employment was both unfair and unlawful in terms of Sections 41, 43 and 45 of the *Employment Act*.

### **Appropriate Reliefs**

44. Having found that the Claimant's termination was unfair and unlawful, he is entitled to compensation under Section 49(1) of the *Employment Act*. As such, the Court awards him compensatory damages equivalent to seven (7) months of his gross salary and one (1) month's salary in lieu of notice. This award takes into account the length of the employment relationship between the parties as well as the circumstances attendant to the Claimant's dismissal from employment.
45. The Claimant is further awarded leave pay as the Respondent did not exhibit his leave records in line with his obligation under Section 74(1) (f) of the *Employment Act*. However, in terms of Section 28(4) of the *Employment Act*, the Claimant's entitlement shall be limited to 18 months preceding his termination from employment.
46. The claim for service pay also succeeds as there is no evidence that the Claimant fell within the exclusions under Section 35(6) of the *Employment Act*. Further despite the Respondent stating that the Claimant started working for him in 2003 as opposed to 2001, he did not tender evidence to this effect noting that it was his duty as the employer to maintain employment records under Section 74 of the *Employment Act*.
47. Regarding the claim for house allowance, the Claimant stated that he was being paid in cash. There was therefore no pay slip exhibited to confirm a breakdown of his salary. This leads me to question how he came to ascertain that he was not being paid house allowance, without a pay slip or contract of employment indicating as much. On this basis, the claim for house allowance collapses.

### **Orders**

48. In the end, I enter Judgment in favour of the Claimant against the Respondent and he is awarded:
  - a. One month's salary in lieu of notice being the sum of Kshs 14,000.00.
  - b. Compensatory damages in the sum of Kshs 98,000.00 which sum is equivalent to 7 months of his gross salary.
  - c. Service pay for 16 years served being the sum of Kshs 112,000.00.



- d. Unpaid leave being the sum of Kshs 14,700.00.
  - e. The total award is Kshs 238,700.00.
  - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
49. The Claimant shall have the costs of the suit.
50. The Claimant shall also be entitled to a Certificate of Service in line with Section 51 of the [Employment Act](#).

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL 2024**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Njuguna

For the Respondent Ms. Macharia instructed by Mr. Mungai

Court Assistant Millicent Kibet

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**

