



**Kavili v Dimamu Agencies Limited (Employment and Labour Relations Cause 1803 of 2017) [2024] KEELRC 1760 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1760 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1803 OF 2017**

**K OCHARO, J**

**JUNE 28, 2024**

**BETWEEN**

**SHADRACK MUTISO KAVILI ..... CLAIMANT**

**AND**

**DIMAMU AGENCIES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By an Amended Memorandum of Claim dated 10<sup>th</sup> January 2018, the Claimant seeks: -
  - a. A declaration that the Claimant's dismissal from the Respondent's service was unfair and unlawful.
  - b. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totaling Kshs. 225,333/- with interest thereon.
  - c. The Respondent do pay the Claimant costs of this cause plus interest thereon.
2. In response to the Amended Memorandum of Claim the Respondent filed a Response dated 28<sup>th</sup> October 2021, denying; the characterization of the employment relation by the Claimant; his cause of action against it; and his entitlement to the reliefs sought.
3. This matter proceeded for hearing of the Claimant's case on 2<sup>nd</sup> February 2023. The Claimant testified on his own behalf and adopted his Witness Statement dated 10<sup>th</sup> January 2018 as his evidence in chief. He also produced the documents filed under his List of Documents dated 10<sup>th</sup> January 2018 as his documentary evidence. On 26<sup>th</sup> July 2023, the Respondent's case was heard. RW1, Simon Opicho, testified on behalf of the Respondent. He adopted his Witness Statement dated 28<sup>th</sup> October 2021 as his evidence in chief, and produced the documents contained in the Respondent's List of Documents dated 28<sup>th</sup> October 2021 as the Respondent's evidence.



### **Claimant's case**

4. The Claimant avers that he was employed by the Respondent as a Loader in February 2016. He worked up until the 20<sup>th</sup> February 2017 when the Respondent dismissed him from employment. At the time of dismissal, he was earning a monthly salary of Kshs. 10,000/-.
5. On 17<sup>th</sup> February 2017, the Claimant together with his two colleagues were accused of loading three trucks with excess bags of cement with the intention of stealing from the Respondent. Consequently, the Claimant was dismissed from employment. Further, the Claimant together with his colleagues were taken to Athi River police station and charged with a criminal offence. The Respondent did not avail witnesses or evidence in the criminal case, thus the case was later dismissed for want of prosecution. When he was released from custody, he called the Respondent's office but was never allowed to get into the premises. He was informed that he had been dismissed.
6. The Claimant asserts that the dismissal was; unlawful and unfair; contrary to the stipulations of *the Constitution* of Kenya 2010 and the *Employment Act* 2007; fair labour practices and the principles of natural justice, as he had not committed any infraction to warrant a summary dismissal; he was not issued with a show cause letter or warning prior to the decision to dismiss him; the Respondent did not follow due process; and the decision to dismiss was harsh and unjustified.
7. The Claimant contends that he was not paid his terminal benefits following the dismissal. His terminal benefits should have included leave allowance as he never went on annual leave, overtime pay for public holidays as he reported to work during public holidays and was paid the normal rate rather than a double rate, and housing allowance as he was never provided with housing or paid an allowance.
8. It is averred that the Claimant has since the unlawful termination struggled to secure an alternative job so as to provide for his family, but in vain.

### **Respondent's case**

9. It is the Respondent's case it is a Human Resource Consultancy and management firm. It does labour force resourcing, recruitment and training. Specifically, it provides loading labour force on contract on temporary basis on behalf of her client Mombasa Cement Limited.
10. It was further asserted that the Claimant was recruited as a loader on casual temporary basis on the 7<sup>th</sup> day of February 2016. He could be recruited and or offered employment as and when loading jobs were available. His salary was paid daily.
11. The Claimant served as a loader on casual temporary basis for some time, however, incidents of excess loading of cement unto trucks on his part started to emerge. For instance, incidents overloading were noted on 6<sup>th</sup> June 2016, 1<sup>st</sup> July 2016, 16<sup>th</sup> July 2016, and 29<sup>th</sup> December 2016. As a result, he was issued with several warnings but he didn't change, notwithstanding that he had given a written apology and undertaken to.
12. The realizing that he was being investigated for incidents of overloading on diverse dates, the Claimant opted to disappear from work, without informing or issuing any notice to the Respondent's Managers or supervisors. He never reported back to duty. His assertion that he was terminated unfairly isn't true, therefore.
13. As he was a casual employee, he was not entitled to annual leave, housing facility or house allowance. He didn't work on any public holidays as alleged.



14. In his evidence under cross examination, the Respondent's witness admitted that the Claimant worked continuously. His salary was being paid after every two weeks.
15. The witness further testified that the Claimant was subjected to a disciplinary hearing on the 29<sup>th</sup> December 2016. Pressed on this, he testified further that he was not given any formal invitation to the disciplinary hearing. He was just called into the office for the hearing.
16. The Claimant wrote the apology letter on the 30<sup>th</sup> December 2016. The Claimant was not arrested and taken to the police station as he alleges.
17. The witness testified that they tried to get the Claimant on phone but they didn't succeed. Further, their efforts to try and trace him through relatives didn't bear any fruits. However, the Respondent has no documentary evidence to demonstrate the effort.

### **Claimant's Submissions**

18. The Claimant submits that the Respondent's allegation that the Claimant's employment was temporary on the basis isn't convincing for the reason that it has not placed forth any evidence to demonstrate this. Nothing could have been easier than tendering an attendance register to prove this fact. Therefore, this Court should conclude that the Claimant wasn't serving the Respondent under a casual employment.
19. He urges the Court to further take into account that he worked continuously. He was engaged longer periods than 24 hours at a time. He served for more than three continuous months without a break in his service and was paid a monthly salary. By reason of this his employment was one terminable under Section 35 (1) (c) of the Act, by a twenty-eight days' notice.
20. The Claimant submits further that having worked as hereinabove stated, his casual employment converted to a term contract under Section 37 of the Act. The Claimant relies on the case of *Chemelil Sugar Company v Ebrahim Ochieng Otuon & 2 Others* [2015] eKLR to buttress this point.
21. It is further submitted that for a termination of an employee's employment to be fair, substantive justification contemplated under section 43 and 45, and procedural fairness under Section 41 of the *Employment Act* must be demonstrated by the employer where there is controversy on the termination. To support this point reliance is placed on the Court of Appeal decision in *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR.
22. The Respondent's witness's evidence didn't bring out any infraction on the part of the Claimant to justify the dismissal. The apology letter that the Respondent purported to put reliance on, to fortify its position that it had a valid reason to dismiss the Claimant, was not written by him. In any event, the letter does not address overloading of trucks. It was not dated and does not have an addressee.
23. Absconding duty by an employee can be a valid ground for summary dismissal under section 44[4] of the *Employment Act*. However, in the instant matter the Respondent didn't not establish that the Claimant absconded duty. It didn't show this by producing a record showing that the employee did not report; by showing efforts made to reach out to the employee for instance through telephone calls, notices sent to his last known address or even messages; and by sending a notice to the labour officer. Reliance has been placed on the case of *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited* [2020] eKLR to buttress this submission.
24. The Claimant submits further that the procedural cannons set out under Section 41 were not adhered to. He was not notified of the grounds stirring the Respondent's contemplating to dismiss him. He was not given a chance to defend himself against any accusations. Adherence to the procedure set out



in the section is mandatory otherwise the dismissal becomes unfair by dint of the provisions of section 45 of the Act. To support this position, reliance is placed on the case of Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited Cause No. 74 of 2013.

25. The Claimant submits that he is entitled to the remedies sought. He is entitled to notice pay as he was not given notice or paid in lieu thereof prior to termination. He should also be awarded leave pay as he did not take annual leave for the duration of his employment or receive leave pay in line with Section 28 of the *Employment Act* 2007. He states that it was the duty of the employer to ensure that he took annual leave or received leave pay, as stated in the case of Rajab Barasa & 4 Others v Kenya Meat Commission [2016] eKLR. The Respondent did not produce any evidence showing that the Claimant indeed took his leave days or was paid for the untaken leave days.
26. The Claimant further submits that he is entitled to house allowance as throughout his employment with the Respondent, he was not either provided with accommodation or paid a house allowance.
27. The Respondent certainly did not produce any evidence to controvert his aforesaid claim. On public holidays, the Claimant submits that he worked during public holidays without compensation, so he should be awarded public holiday pay. Further, the Respondent did not remit his NSSF contributions as evidenced by the NSSF statement produced by him in Court. Hence, he should be awarded service pay under Section 35 (5) of the Act.
28. Having established that he was unfairly dismissed, he is entitled to the compensatory award contemplated under section 49[1][c] of the *Employment Act*, equivalent to 12 months' salary.

### **Respondent's Submissions**

29. In their brief submissions dated 25<sup>th</sup> October 2023, the Respondent submits that the Claimant absconded work when he realized that he was being investigated for loading excess bags of cement on customer lorries. The Respondent was therefore justified in summarily dismissing him. They rely on the case of *Abraham Kimutai Cheruiyot v The Aga Khan Hospital Kisumu Kericho ELRC Case Number 124 of 2016* to buttress this submission.
30. On the issue of NSSF contributions, the Respondent is emphatic that the Claimant was registered as a member of the National Social Security Fund and the Respondent remitted contributions to the Fund on behalf of the Claimant. He is therefore not entitled to service pay.
31. On the reliefs sought, the Respondent submits that the Claimant is not deserving of reliefs sought as he was not dismissed, but absconded duty.

### **Issues for Determination**

32. I have reviewed the pleadings, oral and documentary evidence, submissions filed by both parties and authorities. The issues for determination are as follows: -
  - a. Whether the Claimant was employed under a casual contract or term contract;
  - b. Whether the Respondent unfairly terminated the Claimant's employment;
  - c. Whether the Claimant should be awarded the terminal dues sought in his Amended Memorandum of Claim dated 10<sup>th</sup> January 2018.



### **Whether the Claimant was employed under a casual contract or term contract**

33. As regards the form of their employment relationship, the parties didn't take a common position. Their positions were diametrically opposite. As indicated above, the Claimant asserted that his employment was a term contract, while the Respondent took the position that the Claimant's employment was on a casual basis.
34. Under Section 2 of the [Employment Act](#) 2007, a "casual employee" is defined 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;
35. The Respondent's witness in his testimony under cross examination admitted that the Claimant worked for the Respondent continuously for over one year. Further, his salary was being paid after every two weeks. The Court notes that testimony was seriously at variance with his witness statement and the Respondent's pleadings. In the circumstances, the Court is not convinced that the Claimant was employed on a casual basis as the Respondent alleged, but under a term contract as asserted by the Respondent.
36. Assuming that I am wrong on the above finding, I will still hold that the Claimant's contract of employment was a term one by dint of the provisions of Section 37 which provides as follows: -
37. Conversion of casual 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.”

37. The Claimant’s evidence, which is not controverted, points to continuous workings days aggregating not less than a month, as envisioned by Section 37 (1) (a) aforesaid. I find support for this position in the case of *Nanyuki Water and Sewerage Company Limited v Benson Mwiti Ntiritu and 4 Others [2018] eKLR Civil Appeal No. 20 of 2017*.

### **Whether the Respondent unfairly terminated the Claimant’s employment**

38. The Respondent asserted that the Claimant absconded duty. Considering the material placed before this Court clearly show that the Respondent didn’t prove that there was desertion. In its pleadings and its witness’s statement the Respondent was firm that having absconded, the Claimant was not available for any disciplinary hearing. Surprisingly in the witness’s evidence under cross examination, he asserted the Claimant was taken through a disciplinary hearing. This in my view, is a radical departure from the position taken inquiry into whether a dismissal from employment was as indicated above, but a fortification of the fact that the Claimant was at the workplace and therefore, he didn’t abscond duty.
39. Having found as I have that the Claimant did not abscond duty as alleged by the Respondent, I now turn to consider whether the dismissal of the Claimant was fair. Section 43 of the *Employment Act* places a duty upon the employer to prove the reason for termination. The position taken by the Respondent was that Claimant absconded duty and therefore in my view that is the reason they fronted for the termination.
40. Hearing above, I have found that the respondent assertion that the Claimant absconded duty as not founded. Therefore, this leads to an easy conclusion that the reason for the dismissal was not proved by the Respondent as required by the Section 43 of the Act.
41. Having not established the reason for the termination then one cannot state safely that the Respondent discharged its statutory duty under Section 45 sub-section 2, proving that the reason was valid and fair.
42. I note that the reason that the Respondent advance for the termination of the Claimant’s employment was that he committed a gross misconduct by overloading of cement into customer’s lorry. I have seen the five (5) warning letters produced by the Respondent as evidence. They are dated 6<sup>th</sup> June 2016, 1<sup>st</sup> July 2016, 16<sup>th</sup> July 2016, 1<sup>st</sup> August 2016, and 29<sup>th</sup> December 2016. They all consistently accuse the Claimant of loading excess bags of cement onto customer trucks. All the letters are signed by the Claimant in acknowledgment of receipt. Regulation 2 of the Respondent’s Rules and Regulations, which are also produced before the Court as evidence, and duly executed by the Claimant in acceptance, prohibits the loading of excess bags and threatens disciplinary action if this rule is flouted. The warning letters issued to the Claimant on the basis of loading excess bags, and termination of employment for this reason, would have therefore been valid and fair if the Respondent had demonstrated the internal processes/investigations that it carried out to reach the conclusion that the Claimant had loaded excess bags on the occasions cited.
43. Indeed, the Honourable Court in the case of *Nicholus Muasya Kyula v Farmchem Ltd [2012] eKLR*, held that:

“The court therefore finds that the termination of the claimant’s employment by the respondent was unfair because the Respondent has failed to prove the reasons for termination as envisaged under Section 43 of the *Employment Act*, 2007...



In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. Typically, the process would entail the following steps:

- (a) A report to the relevant authority that a misconduct has been committed by an employee.
- (b) A preliminary report to gather relevant information on the alleged misconduct...”

- 44. Save for the warning letters produced, the Respondent herein has not presented this Court with evidence of internal investigations that led it to believe that the Claimant was culpable for loading excess bags. In particular, it has not presented weigh bridge readings/records for the trucks involved to prove that there was indeed an excess, and the attendance register for the material dates to show that the Claimant was on duty or responsible for loadings those particular trucks.
- 45. The apology letter produced by the Respondent allegedly proving that the Claimant admitted to the misconduct and apologized for it has little probative value as it does not bear a date, is vague and ambiguous, and does not have an addressee. The signature affixed thereto, at casual glance, also appears to be different from the Claimant’s signature affixed to the other documents produced such as the Employee Permanent Record, the Rules and Regulations and the Warning Letters. In fact, the Claimant disputes the alleged apology letter.
- 46. I therefore reach the conclusion that the Respondent has not discharged their Sections 43 and 45(2) burden of proving that the first reason was valid and fair.
- 47. Section 41 of the *Employment Act* which is couched in mandatory terms provides for a procedure which an employer contemplating dismissing an employee from his or her employment must adhere to. The Employer must inform the employee of the intention to dismiss and the grounds the basis of the intention. Secondly, the employee must be given an adequate opportunity to prepare and defend himself or herself against the grounds. He or she should be allowed to be accompanied by an employee of choice during the representation. Lastly, the Employer must consider the representation made by the Employee and all their accompanying colleague before making a decision. See- Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited Cause No. 74 of 2013.
- 48. I have carefully considered the material placed before me and conclude that the Respondent did not at all adhere to the procedural canons in the process leading up to the dismissal of the Claimant. The Respondent’s witness in his evidence in chief took the position that because of absconding duty the Claimant was not available to be taken through the process. However, in his evidence under cross examination, he did an about turn and asserted that he was taken through a disciplinary process on 29<sup>th</sup> December, 2016.
- 49. There were no minutes of the disciplinary proceedings tendered before the Court to support the allegation that the Claimant was heard on the above stated date. These contradictory positions taken by the Respondent brings it out as a party not very candid. The Claimant’s evidence on the aspect of procedural fairness was not in my view shaken at all. In the upshot, I conclude that the dismissal of the Claimant from employment was procedurally unfair.



### **Whether the Claimant should be awarded the reliefs sought.**

50. I have found herein above that the Claimant's employment was one terminable by a 28 days' notice under Section 35 (1) (c) of the [Employment Act](#) 2007. No doubt, in the circumstances of the dismissal there was no notice issued to the Claimant. The Respondent did not assert and prove that one was issued. As a result, I have no hesitation to grant the Claimant notice pay.
51. I note that the Claimant was entitled to 21 working days' leave per year. The Claimant pleaded and adduced evidence that he was not allowed to take his annual leave for the duration of his employment. Despite being the keeper of employment records under Section 74 of the [Employment Act](#) 2007, the Respondent has failed to rebut the Claimant's evidence as aforesaid, by producing signed leave forms or other employment records showing that he did indeed take leave, or receive payment for his untaken leave days. In the circumstances, I hereby award the Claimant leave pay as claimed.
52. The Claimant states that he did not receive a house allowance for the duration of his employment. Regulation 4 of the Regulation of Wages (General) Order 1982 entitles an employee earning a monthly wage who is not provided with free housing to a housing allowance equivalent to 15% of their basic salary. Section 31 of the [Employment Act](#) bestows upon an employee to write to either a reasonable accommodation or payment of house allowance by the employer. This provision therefore places upon the employer a corresponding duty to provide the accommodation or pay allowance. No evidence has been adduced by the Respondent showing that the Claimant received a housing allowance, or free housing or that his salary was consolidated. Accordingly, I allow the prayer for housing allowance.
53. On the issue of service pay, I note that while the Claimant appears to be a member of NSSF, no remittances have been made on his behalf by the Respondent. This is evidenced by the NSSF Statement produced before the Court by the Claimant. The Respondent has not produced any records to controvert this evidence. Section 35 (5) of the Act entitles him to service pay, usually calculated at 15 days pay for every year worked. For this reason, this claim is allowed.
54. The claim for public holidays fails as the Claimant failed to specify which public holidays he worked. He only lists 11 public holidays in his calculations. This very Court has held in the case of James Orwaru Nyaundi v Kilgoris Classic Sacco Limited [2022] eKLR as follows:-
- “78. The Claim for overtime and public holidays worked compensation has just been thrown to Court. This Court has incessantly urged that this practice must come to a stop. It is not enough for a Claimant to just give figures to court, asserting that he or she is entitled to them, cross her or his fingers hoping that the Respondent does not place before Court documents, and as a consequence of the failure say “behold the claim is proved, the employer has not tendered in evidence any documents.” The Claimant must if she or he has to succeed in the Claim, be specific on the days when he worked overtime, the specific public holidays, when he worked and wasn't paid for.
55. I now turn to the prayer for damages for unfair termination. The Claimant prays for the maximum of 12 months' gross salary as compensation, while the Respondent states that he is not entitled to any compensation. Under Section 49 (1) (c) of the [Employment Act](#) 2007, this Court has discretion to award compensation up to a maximum of 12 months' gross salary. It is imperative to state that the award of the relief depends on the circumstances peculiar to each case.
56. I have carefully considered the manner in which the Claimant was dismissed from employment, the fact that the Respondent completely failed to adhere to the statutory requirements herein above



brought out, the length of period the Claimant was in the service of the Respondent, and the fact that it has not been demonstrated that he contributed to the dismissal, and find that he is entitled to the compensatory award contemplated in the provision and to an extent of three (3) months gross salary. Per his uncontroverted evidence, the Claimant earned a gross salary of Kshs. 10,000/- per month.

57. It is trite law that per Section 51 of the Employment Act 2007, the Claimant should be issued with a Certificate of Service.
58. In the upshot judgement is hereby entered in favour of the Claimant in the following terms: -
- a. A declaration that the Claimant's termination from employment was unfair and unlawful.
  - b. The Claimant shall be paid;
    - i. One month's salary in lieu of notice Kshs. 10,000/-
    - ii. Leave pay for 1 year  
(10,000/30x21x1) Kshs. 7,000/-
    - iii. House Allowance for 1 year  
(15% x 10,000/- x 12) Kshs. 18,000/-
    - iv. Service pay (10,000/30 x 15 x 1) Kshs. 5,000/-
    - v. Compensation for unfair termination  
(3 months x 10,000/-) Kshs. 30,000/-  
Total Kshs. 70, 000/-
  - c. Interest on (b) above at court rates from the date of this judgment until payment in full.
  - d. The Respondent to issue the Claimant with a Certificate of Service within 7 days of this Judgment.
  - e. Costs of this suit.

59. It is so ordered.

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

**OCHARO, KEBIRA.**

**JUDGE**

**In the presence of:**

**Ms. Omamo for Claimant**

**Mr. Kariuki for 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 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 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

