



**Mwadime & 3 others v Polystar Plastiks Limited (Cause E040, E038, E039 & E041 of 2024 (Consolidated)) [2024] KEELRC 2793 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2793 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E040, E038, E039 & E041 OF 2024 (CONSOLIDATED)**

**M MBARŪ, J  
NOVEMBER 14, 2024**

**BETWEEN**

**DANSON MWADIME ..... 1<sup>ST</sup> CLAIMANT  
TITO MALONZA ..... 2<sup>ND</sup> CLAIMANT  
DANIEL MASELA ..... 3<sup>RD</sup> CLAIMANT  
JACOB MWANIKI ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**POLYSTAR PLASTIKS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claims herein are consolidated as they arose from the exact cause of action and relate to the same respondent.
2. The claim for Danson Mwadime, Cause No.40 of 2024, is the lead file and applies to the consolidated claims.
3. The claim is based on the fact that the respondent employed the claimant as a mixer from 14 February 2016. He started as a casual employee on a daily wage of Ksh.300 until 1 June 2016, when he was paid a monthly wage of Ksh.17 000. On 1 June 2019, he was issued with an employment contract with effect from 1 January 2019.
4. The respondent issued the claimant a contract for each successive year. The last contract was from 1 January 2023 at a wage of Ksh.22, 000 per month.
5. The claim is that over the years, the claimant worked overtime for 12 hours, alternating the day and night shifts without compensation.



6. On 16 November 2023, the respondent issued the claimant notice terminating his employment with effect from 16 December 2023. The respondent cited financial constraints as the reason for the termination.

The claimant is claiming the following;

- a. Notice pay under Section 40(1)(b) of the *Employment Act* Ksh. 22,000;
- b. Severance pay for years ksh.88,000;
- c. Unpaid overtime for the last 3 years Ksh.181,016.10;
- d. 12 months compensation ksh.264,600;
- e. Certificate of service;
- f. Costs of the suit.

7. The claimant testified in support of his case that he worked for the respondent for 8 years, but on 16 November 2023, he was issued a redundancy notice. He was not paid his terminal dues because the respondent claimed he had worked for one year instead of 8 years. The Certificate of Service did not reflect the total number of years worked. There was overtime work without compensation. Each shift for day and night was for 12 hours, and the e4 extra hours should be paid.

8. Upon cross-examination, the claimant testified that he started employment with the respondent on 14 February 2016 as a casual labourer on a daily wage of Ksh. 300. In June 2016, the wage was increased, and in January 2019, he was issued with an annual contract until the notice dated 16 November 2023.

The last contract was for January to December 2023.

9. Employment did not terminate at the end of the contract but due to redundancy. He was paid for days worked in December 2023, and several other employees were affected. The matter was reported to the Labour Officer, who directed the respondent to make payments.

10. For the overtime claims, the claimant testified that the respondent kept the records. Every shift was 12 hours. The timesheets he filed were not signed by the respondent. What was filed was based on records submitted to the labour office.

11. In response, the respondent admitted that the claimant was employed on a yearly contract from 1 January 2023 to 31 December 2023. It was agreed-upon in the contract that any overtime hours worked would be consolidated in the claimant's salary, but there was no overtime work.

12. On 31 October 2023, the respondent issued the claimant with a notice terminating employment due to redundancy. The respondent indicated that the claimant would be paid all his terminal dues, including;

- a. Severance pay;
- b. One month's notice pay;
- c. Any accrued leave days.

13. On 16 November 2023, the respondent issued another notice informing the claimant that his employment would be terminated on 16 December 2023 due to redundancy. The claimant received this notice but declined to acknowledge or execute his acceptance.

14. The declaration of redundancy was made following the provisions of Section 40 of the *Employment Act*. The required notices were issued together with a notice to the Labour Office. Severance pay and



- a certificate of service were issued. The salary for days worked was paid in full. The claimant rejected the payments by demanding dues not owing, such as service pay, alleged salary arrears, and overtime payments.
15. The claim for severance pay is due for less than 7 years claimed. The claimant was on a one-year contract. The overtime claimed is without proof. Compensation is not due since the due process was followed, and the suit should be dismissed with costs.
  16. In evidence, the respondent called Ali Asgar Esmailjee, the manager, who testified that the claimant was an employee who started as a casual labourer. The respondent converted the employment into a written contract, the last covering the period 1 January to 31 December 2023.
  17. Esmailjee testified that the claimant and other employees were affected by a redundancy declared and notice issued on 31 October 2023. Another notice was issued on 16 October 2023, taking effect on 16 December 2023. A copy was issued to the labour office. The claimant declined to accept the notices issued.
  18. The respondent offered to pay the claimant terminal dues, but he declined and demanded service pay, overtime, and severance pay for a period outside his employment contract.
  19. Esmailjee testified that in 2019, there was a night shift, but in 2023, there was only the day shift. There was no overtime work. The company would open at 8 a.m. and close at 5 p.m.
  20. The company was affected due to a lack of materials and had to reduce operations.
  21. The parties went to the labour office, which tried to reconcile without success. The claimant and other employees made demands for payments that were not justified.
  22. Both parties filed written submissions at the close of the hearing. The determination analyses and addresses these submissions.

### **Determination**

23. On the pleadings, evidence and written submissions, the issues which emerge for determination are;
  1. What was the period of employment;
  2. Whether there was unfair termination of employment;
  3. Whether the remedies sought should be allowed.
24. On the period of employment, the claimant's case is that he started employment with the respondent on 14 February 2016 as a casual labourer.
25. On 16 November 2023, the respondent issued another notice informing the claimant that his employment would be terminated on 16 December 2023 due to redundancy. The claimant received this notice but declined to acknowledge or execute his acceptance.
26. The declaration of redundancy was made following the provisions of Section 40 of the [Employment Act](#). The required notices were issued together with a notice to the Labour Office. Severance pay and a certificate of service were issued. The salary for days worked was paid in full. The claimant rejected the payments by demanding dues not owing, such as service pay, alleged salary arrears, and overtime payments.
27. The claim for severance pay is due for less than 7 years claimed. The claimant was on a one-year contract.



28. The overtime claimed is without proof. Compensation is not due since the due process was followed, and the suit should be dismissed with costs.
29. In evidence, the respondent called Ali Asgar Esmailjee, the manager, who testified that the claimant was an employee who started as a casual labourer. The respondent converted the employment into a written contract, the last covering the period 1 January to 31 December 2023.
30. Esmailjee testified that the claimant and other employees were affected by a redundancy declared and notice issued on 31 October 2023. Another notice was issued on 16 October 2023, taking effect on 16 December 2023. A copy was issued to the labour office. The claimant declined to accept the notices issued.
31. The respondent offered to pay the claimant terminal dues, but he declined and demanded service pay, overtime, and severance pay for a period outside his employment contract.
32. Esmailjee testified that in 2019 there was a night shift, but in 2023, there was only the day shift. There was no overtime work. The company would open at 8 a.m. and close at 5 p.m. A lack of materials affected the company, and it had to reduce operations.
33. The parties went to the labour office, which tried to reconcile without success. The claim and other employees made unjustified demands for payments.
34. Both parties filed written submissions at the close of the hearing. The determination analyses and addresses these submissions.

### **Determination**

35. From the pleadings, evidence and written submissions, the issues which emerge for determination are;
  1. What was the period of employment;
  2. Whether there was unfair termination of employment;
  3. Whether the remedies sought should be allowed.
36. On the period of employment, the claimant's case is that he started employment with the respondent on 14 February 2016 as a casual labourer.
37. On 1 June 2016, the claimant was given a monthly wage and issued a written contract effective 1 January 2019. His last contract was for 1 January to 31 January 2023, but through a notice dated 16 November 2023, the respondent terminated his employment with effect from 16 December 2023 on account of redundancy.
38. In employment and labour relations, the employer can convert oral or casual employment into written contract terms under Section 10(3) of the *Employment Act*. Such conversion is lawful and legitimate. The Court is bound by the written terms of employment except where the terms or conditions are unlawful or contrary to public policy.
39. In this case, the employment conversion through a written contract dated 1 January to 31 December 2019 is lawful and valid. The claimant served under his term contract to a conclusion. It lapsed on its terms.
40. The following contract commenced on 1 January 2023 and was due to end on 31 December 2023, but the respondent terminated employment on account of redundancy through a notice dated 16 November 2023.



41. The respondent admitted that the claimant was on an annual contract from 1 January 2019, thus regulating his employment under Section 90 of the [Employment Act](#). The claimant's claims are thus regulated under the written contract.
42. However, all contracts ended on its terms save for the last contract commencing on 1 January 2019, which ended prematurely due to redundancy.
43. For any claims arising out of the previous contract, under Section 90 of the [Employment Act](#), the claimant could only go back to 3 years for any employment claim or any alleged continuing injury or damage; his claims could only go back to 12 months from the date of cessation thereof.  
Each claim will thus be addressed on this basis.
44. Redundancy is a lawful ground for termination of employment, as held in the case of Elizabeth Tumaini Adhola v Management Board of St. Mary's School [2015] KEELRC 1547 (KLR). Where the employer is faced with an operational reason leading to termination of employment, such is a justified reason for termination of employment. This position is reiterated by the Court of Appeal in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya, Minister for Transport, and Minister for Labour & Human Resource Development & Attorney General [2014] KECA 404 (KLR).
45. Where there is a redundancy, the employer must adhere to the mandatory conditions under Section 40 of the [Employment Act](#). Together with the labour officer, a notice must be issued to the nonunionized employee.
46. In this case, the claimant denied receipt of notice dated 30 October 2023. He acknowledged receipt of notice dated 16 November 2023 taking effect on 16 December 2023. The notice indicates the reason for the redundancy is financial constraints and a challenging economic situation. The claimant did not contest these reasons save to urge the court that he was not paid his terminal dues.
47. Mr Esmailjee testified that the respondent was forced to close the shifts due to operational challenges and only retained the day shift. Finally, it was forced to close down operations, leading to the declaration of redundancy. Notice was issued to the claimant and the labour office.
48. In *Africa Nazarene University v David Mutevu & 103 others* [2017] KECA 381 (KLR), the Court of Appeal held that employee notice about a redundancy can be oral or written. The employee's admission that they were informed of the circumstances leading to the redundancy was sufficient.
49. Upon notice and offer to pay terminal dues, the respondent complied with the requirements under Section 40 of the [Employment Act](#).
50. As outlined above, the previous contracts before 1 January 2019 were terminated on their terms. They did not relate to redundancy.
51. From 1 January 2016 to December 2023, employment terminated prematurely following the declared redundancy.
52. Notice was issued to the claimant, and he admitted to this fact. He served the notice period to completion, but the respondent offered to pay in lieu of notice for one month. That was a generous offer. The claimant should accept this offer.
53. On the claim for severance pay, for the subject period affected by redundancy, the claimant cannot justify a claim for severance pay after his contract lapsed on their terms before 1 January 2023. Such would negate the principle he seeks to rely on under Section 10(3) of the [Employment Act](#).



54. Equally, severance pay, as regulated under Section 40(1) (g) of the *Employment Act*, is for a payment the employer has made to an employee declared redundant, severance pay at the rate of not less than fifteen days for each completed year of service.
55. Severance pay is due to an employee for every full year worked. Severance pay is not prorated.
56. In this case, the respondent offered the claimant severance pay for a year. He should have taken this offer.
57. On the claim for overtime, the representative's evidence that work was reduced to only a day shift in 2023 was not controverted.
58. The claimant filed a schedule to demonstrate the overtime worked, but this needs to be dated to indicate which year was under reference.
59. Overtime, in its nature, accrues monthly. It is a continuing injury if not paid monthly. Where such injury or damage continues to accrue, under the provisions of Section 90 of the *Employment Act*, the claimant should have addressed it within 12 months from the date of cessation as held in the case of *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR). The court held that outstanding benefits constituted a continuing injury since the parties remained in the employment relation as the benefits accumulated, if any. The court held that;

Usually, a belated service-related claim will be rejected for delay, laches, or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service-related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy regarding the date the continuing wrong commenced if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was continuing, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time-barred fails. On the contrary, the said claims fall within the ambit of continuing wrongs contemplated under section 90.

Thus, guided by the Court of Appeal, this court is bound.

60. In this case, the claim was filed on 10 May 2024. The claimant worked overtime under the contracts before 1 January 2023. The alleged continuing injury or damage should have been addressed within 12 months after the cessation of such injury.
61. As addressed above, the records filed in support of the overtime claims need to be updated and demonstrate that the claims should accrue within the context of Section 90 of the *Employment Act*.
62. On the compensation claim, as the claimant has submitted in the case of *Caroline Wanjiku Karanja v KCB Bank Kenya Limited* [2023] eKLR, the employer has the legal duty to give reasons for and the extent of the intended redundancy. Without demonstrating such a matter, termination of employment is unfair.
63. In this case, the respondent's witness testified that operations had to close due to operational reasons and financial challenges. The Labour Officer addressed this matter, and the respondent filed notice and conciliations.
64. Indeed, the respondent offered to pay terminal dues, including one month's notice and severance pay, which were not due as addressed above.



65. The reasons for and the extent of the intended redundancy were addressed. The court finds that no matter the unfair termination of employment. The respondent is at liberty to pay for notice and severance pay.
66. On the claim that the Certificate of Service issued was not commensurate to the period of service, under Section 51 of the *Employment Act*, the employer should issue the certificate at the end of each phase of employment. Each end of the contract should be with a Certificate of Service.
67. The respondent issued a Certificate of Service reflecting the last phase of employment covered under the contract from 1 January to 16 December 2023. Under Section 51 of the *Employment Act*, each contract that ends should be regularised with a Certificate of Service.
68. The claims on costs are without merit. The respondent has offered to pay for notice and severance, and where this is followed up, each party is to bear its costs.
69. Accordingly, the claim is without merit and is hereby dismissed. Each party bears its costs.

Judgment herein applies in the consolidated suits;

Cause No. E038 Of 2024

Cause No. E039 Of 2024

Cause No. E041 Of 2024

**DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M. MBARŪ**

**JUDGE**

