



**Michira & another v Hariom Hardware (K) Ltd (Cause 18 & 19 of 2018
(Consolidated)) [2024] KEELRC 2745 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2745 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 18 & 19 OF 2018 (CONSOLIDATED)
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

SIMON WANJALA MICHIRA CLAIMANT

AND

HARIOM HARDWARE (K) LTD RESPONDENT

AS CONSOLIDATED WITH

CAUSE 19 OF 2018

BETWEEN

DANIEL BOB KAUNYA CLAIMANT

AND

HARIOM HARDWARE (K) LTD RESPONDENT

JUDGMENT

1. The judgment herein is in respect of two suits that were consolidated. The first suit was filed by Simon Wanjala Muchika (hereafter referred to as 1st Claimant) on 10th January 2018. The second suit is filed by Daniel Bob Kaunya, hereafter referred to as 2nd Claimant).
2. In the Memorandum of Claim dated 15th December, 2017 he avers that he was employed by the Respondent as a general employee in February, 2013. That the Respondent unfairly terminated his employment on 12th October, 2017.
3. It was his case that on 12th October, 2017 he was lawfully performing his duties together with the 2nd Claimant when he was summoned by the Respondent's representative Mr. Manish and handed over to the Respondent's security guards with instructions to take them to Naibery Police Station where



- they were locked up until the following day on 13th October, 2017 when they were released without any charges being preferred against them on the Respondent's instructions.
4. The Claimant stated that upon release he reported back to work on 14th October, but was informed that his employment had been terminated.
 5. The Claimant prayed for the following reliefs:
 - a. Declaration that, the Claimants termination from employment was unlawful, unprocedural and unfair and in the circumstance the claimant is entitled to compensation as prayed for herein above
 - b. The sum of Ksh.641,216/= as set out herein above.
 - c. Costs of this suit and interests on at court rates from time of filing suit until payment in full and
 - d. A certificate of service as per section 51 of the [employment Act](#).
 - e. Any other further and better relief the Honourable Court may deem just and fit to grant.
 6. For the 2nd Claimant it is pleaded in his Memorandum of Claim dated 15th December 2017 and filed on 10th January 2018 that he was employed by the Respondent in August 2016 as a general worker and his employment unfairly terminated together with the 1st Claimant on 12th October, 2017. He prays for the following reliefs:
 - a. Declaration that the claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstance the claimant is entitled to compensation as prayed for herein above.
 - b. The sum of Ksh.322,702/= as set out herein above.
 - c. Cost of this suit and interest on at court rates from time of filing suit until payment in full and
 - d. A certificate of service as per section 51 of the [employment Act](#).
 - e. Any other further and better relief the Honourable Court may deem just and fit to grant.
 7. The Respondent filed a Memorandum of Response separately in each of the two suits. It admitted that the 1st Claimant was its employee while the 2nd Claimant was a casual employee outsourced from his employer Ndasalira Supplies Agency. The Respondent attached to its Bundle of Documents two casual contract employment forms for three months between Daniel Bob Kaunya and Ndasalira Supplies.
 8. The Respondent stated in the Response that on 12th October, 2017 it came to its attention that some stock being cutting disks and some accessories were missing from their place of storage where the Claimants and two other employees who have also sued, the Respondent, had direct and unrestricted access to.
 9. That the Respondent had genuine and reasonable grounds to suspect that the Claimants and their two other colleagues were responsible. That they called the police who booked the Claimants and their other colleagues and commenced investigations.
 10. It was the Respondent's case that the Claimants and the other employees requested for negotiations towards an out of court settlement prior to their arraignment in court. That the Claimants proposed that they be released while the Respondent carried out further investigations including review of CCTV footage which it accepted and requested the police to release the Claimants and their colleagues.



11. The Respondent averred that the Claimants also agreed to be released from employment. That it paid the 1st Claimant his terminal dues of Kshs. 20,000 with an additional Kshs 800,000 as a token of appreciation on 16th October, 2017.
12. For the 2nd Claimant the Respondent avers that the Claimant requested the Respondent to inform Ndasalira Supplies Agency to stop assigning the 2nd Claimant to the Respondent's premises following which it informed the 2nd Claimant's employer who also agreed to settle any outstanding dues in respect of the 2nd Claimant.
13. The Respondent denied all other averments by the Claimants.

Evidence

14. At the hearing of the case the Claimants testified on their own behalf while the Respondent called Esther Kangasi Garo, its store keeper who testified on its behalf.
15. The 1st Claimant reiterated the averments in his claim and witness statement. He stated that he was never Kshs. 800,000 as alleged by the Respondent. he was only paid cash Kshs. 20,000 which he signed for. He further testified that he was paid Kshs. 375 per day but was supposed to be paid Kshs. 525 per day.
16. For the Respondent RW1 Esther Kangasi Garo reiterated the averments in the Memorandum of Reply and her witness statement.
17. Parities thereafter filed and exchanged written submission.

Analysis and Determination

18. I have considered the pleadings, evidence and submissions of the parties. The issues arising for determination are the following:
 - a. Whether the 2nd Respondent was an employee of the Respondent;
 - b. Whether the termination of the employment of the Claimants was fair;
 - c. Whether the Claimants are entitled to the prayers sought.
19. It is the averment of the Respondent that the 2nd Claimant was an employee of Ndasalira Supplies Agency contracted by the Respondent to supply casual labour. In support of this averment the Respondent produced a casual contract employment form between the 2nd Claimant and Ndasalira Supplies Agency dated 3rd July 2017. It further produced a receipt for money received by Ndasalira Supplies Agency from the Respondent which had the name and national identity card number of the 2nd Claimant endorsed on the face thereof and job work schedule forms for casuals with several names including the Claimant's for the period from 17th July 2017 to 30th September, 2017.
20. The 2nd Claimant denied that he was an employee of Ndasalira Supplies Agency and insisted that he was employed by the Respondent. He further stated that he did not sign any contract with the said Ndasalira Supplies Agency.
21. Under cross examination the 2nd Claimant stated that he was paid his wages in cash by the Respondent but never signed any vouchers while all the other employees of the Respondent were paid through vouchers which they signed.



22. From the evidence on record, especially the employment form between the 2nd Claimant and Ndasalira Supplies Agency dated 3rd July 2017 signed by the Claimant, I am satisfied that the Respondent has proved on a balance of probabilities that the 2nd Claimant was not an employee of the Respondent but an employee of Ndasalira Supplies Agency working for the Respondent under a labour supply contract with the said agency. The 2nd Claimant had opportunity to join the said Ndasalira Supplies Agency to this suit upon being served with the Respondent's Memorandum of Response naming it as the employer of the 2nd Claimant but did not do so.
23. The 2nd Claimant's case against the Respondent can therefore not stand and is accordingly dismissed with no orders for costs.
24. On whether the 1st Claimant's employment was terminated unfairly or not, it was the 1st Claimant's case that he was arrested together with his colleagues when the Respondent found out that cutting disks were missing from the store. That they were taken to the police station where that stayed overnight before the Respondent secured their release. That upon reporting back to work they were informed that their employment had been terminated.
25. The evidence of the Respondent on the other hand was that the Claimants requested for their release to pursue an out of court settlement and agreed to be released from their employment while the Respondent carried out investigations and review of CCTV footage.
26. The Respondent did not submit any evidence, not even the name of the person sent by the Claimants to ask for their release or any evidence of resignation by the 1st Claimant. The letter dated 16th October, 2017 at Document 4 of the Respondent's bundle accepting resignation of the 1st Claimant does not refer to any letter of resignation. The letter also does not indicate that it was received by the 1st Claimant who denied any knowledge of the same.
27. The version of the story by the Respondent just does not make sense. It does not explain why all 4 employees of the Respondent would agree to be relieved of their duties for an offence that was yet to be investigated when the employer still reserved the right to press charges against them as is stated in the filed witness statements. It further does not explain how the employees in custody reached out to the Respondent to negotiate for such unfavourable terms for their release on yet unconfirmed charges.
28. There is also no explanation why the employees were not asked by the Respondent to make their request to resign in exchange for their release in writing noting that the Respondent accepted the purported resignations by letter.
29. There is further no explanation why the Respondent would pay employees who were under investigation for theft their terminal dues, including such a generous ex-gratia payment of Kshs. 800,000 to the 1st Claimant as alleged by the Respondent.
30. I do not believe the Respondent's evidence that the Claimants requested to resign in the manner stated by the Respondent. I am more inclined to believe the version of the Claimants that the Respondent on its own volition opted to have the Claimants and their colleagues released from custody and then relieved them of their employment.
31. The manner in which the same was done was in violation of section 41 and 43 of the *Employment Act* and therefore amounted to unfair termination of employment in terms of section 45 of the Act. I thus find the termination of employment of the 1st Claimant by the Respondent to have been unfair.



32. Having found the termination unfair, the 1st Claimant is entitled to terminal dues. The 1st Claimant prayed for one months' salary in lieu of notice which I award him under section 35(1) of the Act as read with section 49(1)(a). I award him Kshs. 17,143.50.
33. The court has made the payment based on a 30-day month as the 1st Claimant was no longer a casual employee by virtue of the provisions of section 37 of the Employment Act which automatically converts casual engagements to regular term contracts upon expiry of 90 days continuous employment or 90 days intermittent employment over a period of one year.
34. The 1st Claimant further prayed for compensation equivalent to 12 months salary. Taking into account the circumstances under which the 1st Claimant's employment was terminated, the length of his service and all relevant factors under section 49(4) of the Act I award him 8 months' salary as compensation for unfair termination of his employment. I award him Kshs. 137,148.
35. The 1st Claimant further prayed for underpayments for 56 months in the sum of Kshs.238,336.
36. The daily rate of Kshs. 571.45 was only payable for the period 1st May 2017 to 12th October, 2017 having been gazette to be effective from 1st May, 2017. This would add up to (571.45-375=196.45 per day) for 5 months 12 days (1st May to 12th October, 2017) Kshs. 31,824.90.
37. For the period 1st May 2015 to 30th April 2017 the rate was Kshs. 484.30 per day translating to an underpayment of Kshs. 109.30 per day for 24 months = Kshs. 78,696.
38. For the period 2013 to 2015 the rate was Kshs. 432.40 per day translating to an underpayment of Kshs. 57.40 per day for 27 months February 2013 to April, 2015 which amounted to Kshs. 46,494.
39. The total underpayments were therefore 46,494+ 78,696+31,824.90 totaling to Kshs. 157,014.90 which I award the 1st Claimant on account of underpayment of wages.
40. The 1st Claimant further prayed for annual leave for 4 years 8 months that he worked for the Respondent. he is entitled to the same at the rate of 21 days per year worked and 1.75 days for each month that is less than a year. He is thus entitled to a total of 98 days. At the rate of Kshs. 571.45 per day I award him Kshs. 56,002.10.
41. The 1st Claimant testified that he was paid separately for rest days and work done on public holidays. This was confirmed by RW1. The prayers for the same are rejected.
42. The 1st Claimant having been a member of NSSF as admitted during the hearing, is not entitled to either service pay of gratuity by virtue of section 35(5) and (6) of the Act read together.
43. In conclusion,
 - i. The claim by the 2nd Claimant Daniel Bob Kaunya against the Respondent is dismissed on grounds that he was not an employee of the Respondent.
 - ii. The Claim by the 1st Claimant against the Respondent succeeds and the 1st Claimant Simon Wanjala Michira is awarded Kshs. 367,308.50 as more specifically particularized above.
 - iii. The Respondent shall pay the 1st Claimants costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

