



**Kenya Union of Commercial, Food and Allied Workers v Akshar Hardware Limited
(Cause E009 of 2023) [2024] KEELRC 13529 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13529 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E009 OF 2023
MA ONYANGO, J
DECEMBER 19, 2024**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**
AND
AKSHAR HARDWARE LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent the employees in the commercial sectors as more specifically set out in the membership clause of its Constitution.
2. The Respondent is described in the Memorandum of Claim as a company registered under the laws of Kenya operating a hardware shop in Eldoret along Iten Road within Uasin Gishu County.
3. The Claimant filed the instant suit on behalf of Jelagat Ronoh, the Grievant, whom the Claimant states was a member of the Claimant union paying union dues and subscriptions directly to the union.
4. It is the Claimant’s case that the Grievant was employed by the Respondent on 4th May, 2019 as a general worker on paid a daily wage of Kshs. 300. At the time of termination her salary was Kshs. 11,700 per month.
5. It is the Claimant’s case that on 19th April, 2022 the Grievant was instructed to take annual leave for one month. On 25th May, 2022 when the Grievant reported back for duty she was asked to go back home and wait until she was called.
6. It is the Claimant’s case that the Grievant was called on 31st May, 2022 at around 11 o’clock to resume duty on 1st June 2022. That when she reported on the said date she was informed that business was slow and she would be called back to work when business improves.



7. It is the Claimant's case that the Grievant reported her predicament to the Claimant union who tried to engage the Respondent on the matter without success thereby compelling the Claimant to report a dispute to the Cabinet Secretary, Ministry of Labour and Social Protection.
8. The Cabinet Secretary accepted the dispute and appointed Mr. Timothy Kipruto as Conciliator. The Conciliator invited parties to several meetings on 25th October, 3rd November and 10th November but the Respondent did not attend. The Conciliator thereafter issued a certificate of unresolved dispute dated 22nd November, 2022, paving way for the filing of the instant suit.
9. In the Statement of Claim dated 21st January, 2023 the Claimant seeks the following orders:
 - a. That the grievant be reinstated without loss of benefits. If reinstatement is untenable, the Claimant seeks the following prayers:

Notice in lieu 16,129.00 3 years leave 14,400 x 21 x 3 33,871 30

3 years salary underpayment 100,658.00

Saturday overtime for 3 years 63,360.00

3 years severance 14,025 x 15 x 3 21,038.00 30

Unpaid salary for the month of

April & May 2022 20,700.00

12 months compensation 193,548.00

Total 452,004.00
 - b. Certificate of service.
 - c. Cost of the suit to the Claimant.
 - d. Any other order the honourable Court deems fit to address the cause of justice
10. The Respondent filed a Response to the Statement of Claim dated 27th October, 2023 in which it states that it employed the Grievant as a casual employee to make tea for workers at 10 am occasionally for which the grievant was paid daily.
11. The Respondent denies that it sent the Grievant on leave arguing that as a casual employee the Grievant was not entitled to annual leave. It avers that the Grievant was told to wait at home as there was no work at the time. That when she was called back she declined. The Respondent denied ever dismissing the Claimant.
12. At the hearing of the suit the Grievant testified as CW1 and stated that she was employed on 4th May, 2019 as a general worker. She was paid Kshs. 2,700 weekly in cash. She signed in a book for the payment. She was not issued with a letter of appointment or contract.
13. The Grievant testified that on 19th April, 2022 she arrived at work in the morning as usual and met the supervisor who told her to take leave for one month. That when the leave was over she reported back to work after being called by the wife of the owner. However, the Supervisor told her that work was down and she should go back home and wait until she was called back. She was not paid while on leave.
14. Under cross examination the Grievant agreed with the Respondent's counsel that she was employed as a casual employee. She denied that she was making tea for other workers and clarified that she was doing



- cleanliness and after finishing she went to sell in the shop. Responding to a question, the Grievant stated that she did not carry steel as that was done by male workers.
15. The Grievant stated that she was later assigned the duty of a cook when the cook left. The Grievant denied that she was ever paid by Mpesa. She worked from Monday to Saturday.
 16. The Grievant testified that on 19th April she was sent on one month annual leave by the Supervisor which was to end on 19th May, 2022. She reported back on 26th May, 2022. That the director's wife told her to report on 1st June, 2022. When she reported she was told work was low but someone else was recruited after she left.
 17. The Respondent called Paul Kipleting' Mutai, an accountant who testified as RW1. He stated that he worked as an accountant for the Respondent from 2020.
 18. RW1 testified that the Grievant's work was casual, that she made and served tea for the workers and did not do any other work. That upon completing her work she cleaned the utensils then left. She reported to work at 8 am and left before midday.
 19. RW1 stated that the Respondent's employees worked for 6 days a week from Monday to Saturday.
 20. RW1 testified that the Grievant was not sent on annual leave. That she requested for one days' permission to take her child to hospital and never reported back. That after some time she reported back but the Respondent was experiencing financial constraints and had stopped serving tea to workers. That she was told to go away and wait until she was called when things improved. That she was called after about 2 weeks but declined to go back to work.
 21. Under cross examination RW1 stated that the Grievant worked for 3 years but remained a casual considering the number of hours she worked. He stated that he had not filed any evidence to show what time the Grievant reported for work and the time she left.
 22. He stated that the Grievant was paid in cash and through Mpesa whenever payment was made when she was not present.
 23. RW1 testified that the Grievant asked for permission to take her sick child for treatment but did not sign any document.

The Claimant's submissions

24. The Claimant submitted on two issues whether the Grievant was unfairly/unlawfully terminated from employment and on remedies.
25. On the first issue the Claimant relied on section 41 of the *Employment Act* and the case of Walter Ogal Anuro v Teachers Service Commission where the court stated that for a termination of employment to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
26. The Claimant submitted that during cross examination the Grievant stated that she was told by the Managing Director that business was slow and she would be called back when business improved. That this was not the proper way to declare an employee redundant as set out in the *Employment Act*.
27. The Claimant further submitted that the Respondent cannot enforce a right that was done/enforced through falsehood, misrepresentation or illegality, relying on the decision of the Court of Appeal in Kenya Airways Limited v Satwant Singh Flora [2013] eKLR.



28. On remedies the Claimant submitted that the Grievant's employment was terminated without notice as provided for in section 35(1)(a) and (b). That there was further no pay in lieu of notice as required under section 36 of the Act.
29. Relying on the decision in *Stephen Karisa Jefwa v Elsek & Elsek (K) Ltd* [2014] eKLR the Claimant submitted that under sections 10(3) and (7) and section 74 of the Act the Respondent was under obligation to produce records to prove the averment that the Grievant worked for 4 hours a day. That the Grievant was entitled to pay in lieu of notice, 3 years leave, underpayments, severance pay and compensation.

The Respondent's submission

30. The Respondent filed submissions in which it identified the issues for determination to be
 - a. Whether the Grievant was a casual employee of the Respondent.
 - b. Whether the Grievant's termination was unlawful/unfair and whether she is entitled to the prayers sought.
 - c. Who pays the costs.
31. On the first issue it was submitted that the Grievant testified that she was working for the Respondent as a general worker and was paid Kshs. 300 per day and Kshs. 11,700 at the time of termination of her reemployment. That she did not produce any documents in support of her allegations.
32. Regarding the conversion of the Grievant's terms from casual to permanent as per section 37 of the Act it was submitted for the Respondent that the Claimant did not adduce evidence to prove that the Grievant worked for the Respondent on continuous basis for an aggregate period of more than one month. That from the Statement of Claim the Claimant did not invite the court to make such conversion. That parties are bound by their pleadings as was held in the case of *Angeline Masuli Mutua v Vegpro (K) Ltd* [2020] eKLR
33. On the second issue it was submitted for the Respondent that the Grievant did not produce any evidence to support her allegation that she was sent on a one month annual leave from 19th April, 2022 and was sent home when she reported back. That the Grievant further did not adduce any evidence that she was called on 31st May by the wife of the Managing Director and told to resume work on 1st June, 2022 when again she was sent home until business improves as she alleged.
34. It was the submission for the Respondent that RW1 testified that the Grievant asked for leave to take her child to hospital and did not report to work for 3 days. That she was then sent home but when called back to work she declined.
35. It was submitted that from the evidence on record it is the Grievant who deserted work without any reason for 3 days.
36. It was the Respondent's submission that the termination of the Grievant's employment was lawful because she was not entitled to one month's notice at the time of termination as she was a casual labourer and her contract ended at the end of each day as per section 35(1)(a) of the Act.
37. It was further submitted that the termination of the Grievant's employment was fair and valid under section 45(2)(a) and (b) and section 44(4)(a) of the Act having absented herself from work and for declining to report back when called by the wife of the Respondent's Managing Director.



38. On costs the Respondent submitted that section 27 of the [Civil Procedure Act](#) provides that costs follow the event and that the successful party should be awarded costs.

Analysis and Determination

39. Having considered the pleadings and evidence on record as well as the submissions by the parties, the court finds that the issues falling for determination herein are:
- i. Whether the Grievant was a casual employee;
 - ii. Whether the termination of the Grievant's employment was unfair/unlawful;
 - iii. Whether the Claimant is entitled to the orders sought in the Statement of Claim.

Whether the Grievant was a casual employee

40. Both the Claimant and the Respondent are in agreement that the Grievant worked for the Respondent from 4th May, 2019 to 19th April, 2022. It is further not disputed that the Grievant was paid Kshs. 2,700 every week as is evident from the evidence of the Grievant and the documents filed by the Respondent.
41. A casual employee is defined in section 2 of the [Employment Act](#) 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"
42. Having been paid weekly and having worked for more than 3 years, the Grievant was definitely not a casual employee.
43. It was the Respondent's case that the Grievant worked for only 4 hours a day. That the Grievant did not provide any evidence to prove that she worked the whole day and not 4 hours as per Respondent.
44. Section 10 and section 74 of the [Employment Act](#) provide that an employer should keep employment records of all employees. Section 10(6) and (7) specifically provide that:
- (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
 - (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.
45. It was thus the responsibility of the Respondent to adduce evidence that the Grievant worked only 4 hours per day and not a full day as she alleged. Having not produced such evidence, the court holds that the Grievant worked for the whole day for 6 days a week.
46. Section 37 of the Act further provides as follows:
37. Conversion of causal 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.

47. Based on the provisions of section 37, the Grievant who had worked for more than 3 years was not a casual employee as her terms of service had converted to regular employment.

Whether the termination of the Grievant's employment was unfair/unlawful;

48. Having found that the Claimant was not a casual, the Respondent's arguments that the Grievant was a casual and not entitled to certain benefits including termination notice are not supported by the evidence on record.

49. Further, the Respondent's arguments that the Grievant absconded duty is not sustainable. In the case of *Mistry Naran Mulji and Company v Chengo* (Employment and Labour Relations Appeal E042 of 2023) [2024] KEELRC 2049 (KLR) (31 July 2024) (Judgment) an employer alleging desertion or absconding of duty by an employee must always demonstrate what action it took when the employee failed to turn up at the place appointed for performance of his duties. It can never be the employer's word against the employee's word when it comes to allegations of absconding and/or deserting duty. Action must be demonstrated by the employer. Where action is not demonstrated, and termination by the employer is alleged, the employer will, more often than not, be found to have terminated the employee's employment.

50. Further, in the case of *Joseph Nzioka v Smart Coatings Limited*[2017] eKLR, the Court stated as follows:-

“Dismissal on account of absconding duty must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”



51. Again, in the case of Boniface Francis Mwangi v BOM Iyengo Secondary School [2019] eKLR, the Court states as follows: -

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

52. The foregoing points to the keeping of employment records. The Respondent ought to have documented the desertion of duty, if any, by sending a notice to show cause to the Grievant or even dismissing her from service by letter stating that the reason for dismissal was failing to report back to work. All the evidence of the Respondent, apart from the evidence of payment, was without support by documented employment records.

53. In the absence of records to rebut the averments of the Grievant, the court holds that the Respondent did not prove that the Grievant absconded duty. The court thus holds that on a balance of probabilities, the Claimant has proved that the Respondent terminated the employment of the Grievant unfairly.

Remedies

54. Pay in lieu of notice

On remedies, the Grievant is entitled to pay in lieu of notice. The salary of the Grievant according to the statutory minimum wages (General Order) applicable at the time of the termination of the Grievant's employment was Kshs. 12,522.70 plus 15% house allowance being Kshs. 1,878.50 for a general worker. I award this award pay in lieu of notice of Kshs. 14,401.10.

55. 3 years leave

Section 28 of the [Employment Act](#) provide for annual leave of 21 days. I award the Grievant the same at Kshs. 30,343.46

56. 3 years' salary overpayment

The Grievant was paid Kshs. 11,700 instead of Kshs. 12,522.70 a difference of Kshs. 822.70 per month for 36 months which amounts to Kshs. 29,617.20 which I award her.

57. Saturday Overtime

This was not proved or explained and is rejected.

58. Severance Pay

The Grievant was not declared redundant. Her employment was unfairly terminated. I thus reject the prayer for severance pay.

59. Compensation

Having found that the Grievant's employment was unfairly terminated, and taking into account the circumstances under which the employment was terminated, her length of service, the manner in which the Respondent handled the whole situation and all the relevant factors under section 49(4) of the Act I award the Grievant 4 months' salary as compensation in the sum of (14401.10 x 4) Kshs. 57,604.40

60. Costs



The Respondent shall pay Claimant's costs which I assess at Kshs.50,000 to cover reimbursements and reasonable expenses associated with the suit in view of the fact that the Claimant was represented by an official of the union and cannot tax its costs under the Advocates Remuneration Order.

61. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY OF THIS 19TH DAY OF DECEMBER , 2024

MAUREEN ONYANGO

JUDGE

