



**Mulatya v Kenjap Company Limited (Cause 1417 of 2017)  
[2023] KEELRC 154 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 154 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1417 OF 2017  
K OCHARO, J  
JANUARY 31, 2023**

**BETWEEN**

**MUTUA MULATYA ..... CLAIMANT**

**AND**

**KENJAP COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant herein through his statement of claim dated July 19, 2017, sued the Respondent seeking for the following reliefs:
  - a) A declaration that Respondent's action dismissing the Claimant from employment was unlawful and unfair.
  - b) The sum of Kshs 224,741 particularized in paragraph 19 of the Claim.
  - c) Certificate of Service.
  - d) Costs of this suit.
  - e) Interest on the amount awarded at court rates.
2. Upon being served with summons to enter appearance, the Respondent entered appearance on the March 2, 2018, and filed a Response to memorandum of claim dated November 8, 2021. In the said response, the Claimant's case was denied, his entitlement to the reliefs sought too.
3. The parties' respective cases were heard on the December 20, 2021. Directions were given for the filing of submissions, they were complied with. Imperative to state that the witness statements and documents that the parties had filled were adopted as evidence in chief of the makers and documentary evidence, respectively.



## **The Claimant's Case**

4. It was the Claimants' case that he came into the employment of the Respondent on or about the February 1, 2016 as a Gardener at a basic salary of Kshs 8000 per a month, exclusive of House allowance. He stated that he was not given a formal employment contract either at the time of employment or in the course of the employment. At no time was he ever given a copy of his pay slip[s] during the currency of the employment.
5. The Claimant stated that on the May 31, 2017, he travelled to his rural home to attend to the needs of his daughter who had joined form 1 in St Mary's Secondary School Miambani. Since 1<sup>st</sup> of May 2017 was a public holiday, Labour Day, he decided not to travel back to work but sought from his supervisor that he be allowed to so report on the May 3, 2017.
6. He further alleged that on the May 3, 2017, he reported back to work at around 7:45 am. His first contact on that day was the Respondent's supervisor, one Kennedy Ambale who handled him in manner suggesting that all was not well. However, he continued working up to end of April 2017, when he was called for his salary. Upon receipt of the salary, he signed the pay slip which was in an envelope under which the salary had been handed over, and retained the same.
7. After receiving the salary and the pay slip, the Respondent's Human Resource Manager, one Ms Christine informed him that his employment had been terminated, then asked him to return the pay slip. The Claimant declined, and upon that, the Manager asked him to serve for one more month in the employment of the Respondent, month which was then to serve as a notice period. He obliged the instructions.
8. On or about the May 29, 2017, one of the supervisors, Mr Kimondo, informed him that the Respondent had decided to terminate his employment, and that his salary was to be remitted on the June 5, 2017. He was paid Kshs. 8000, an amount which the Claimant claimed was his final dues.
9. The Claimant contended that throughout his employment with the Respondent, he worked from 7.30am to 4.30 pm on weekdays and from 7.30am to 1:00 pm, during weekends. At no time did he proceed for annual leave.
10. Cross-examined by Counsel for the Respondent, the Claimant reiterated that he was employed by the Respondent as a Gardener and attached to work at the compound of Sameer Co Limited. He all through worked in that compound.
11. The Claimant testified further that the pay slip was testament that he was an employee of the Respondent. According to the April 2017 pay slip, his gross salary was Kshs 10,000.
12. Mr Kennedy Ambala was his supervisor, He was in charge of allocating the Respondent's employees, daily tasks.
13. In his evidence in re-examination, the Claimant testified that all through up to until the year 2017, he was earning Kshs 8000, but started earning Kshs 10,000 gross salary when the Respondent decided to pay them an additional allowance of Kshs 2000.

## **Respondent's Case**

14. Respondent presented on Kennedy Ambale to testify as its witness in support of its defence to the Claimant's case. The witness stated that he was in the employment of the Respondent as a supervisor. His role entailed sourcing for labourers, assign them daily tasks, and ensure that the tasks were carried out satisfactorily.



15. Among the clients of the Respondent was Sameer Africa, who had outsourced its gardening services. It is pursuant to this that the Respondent employed the Claimant as a Gardener stationed at the Sameer grounds, on the February 8, 2016. His salary was to be paid at the end of every day completed. The extent of the daily payment depended on the tasks that the Claimant managed to complete. However, the Claimant opted to receive payments at the end of every month.
16. The Claimant would be allowed to work and tasks allocated to him on a need basis.
17. The witness stated that after sometime, he started receiving complaints from the Respondent's client, Sameer Africa concerning the Claimant and his involvement in acts of theft and bhang peddling. The witness's several verbal warnings did not attract any change on the Claimant. He continued misconducting himself, he was even caught red handed with stolen items, smoking bhang and peddling the same.
18. The witness stated further that, upon the above stated premises, he got prompted to report the Claimant's acts of gross misconduct to the Respondent's Manager, Mr Mark Kimondo. The Claimant was summoned before the said Manager. Disapproval of his misconduct was expressed to him. He was thereafter asked to go home, write an apology letter to the Respondent and forthwith make amends. The Claimant became visibly angry, declined the opportunity to explain himself, and never reported back to work.

### **The Claimant's Submissions.**

19. The Claimant identified the following issues as the issues that commend themselves for determination in this matter, thus,
  - I. Whether the Claimant was a permanent employee of the Respondent.
  - II. Whether the Claimant's termination from employment was lawful and fair.
  - III. Whether the Claimant is entitled to the remedies sought.
  - IV. Who should bear the Costs of this Suit?
20. The Claimant's Counsel submitted that it is not disputed that the Claimant did work for the Respondent from February 2016, to May, 2017, when his employment was terminated. He so worked on a permanent basis. The Respondent's position, taken that the Claimant was employed as a casual labourer, engaged only when work was available, remained unproved. The provisions of section 9 of the *Employment Act*, the demanded of the Respondent to place before Court documentary evidence, to establish this.
21. Further, by dint of the provisions of section 37 of the *Employment Act*, even if it were to be taken that he was employed as a casual worker, having worked for more than the period set therein, he became a permanent employee. To buttress this submission, reliance was placed on the case of *Christoper Baraza Wasike v Pemco Agencies Limited* [2018] eKLR.
22. On the Respondent's assertion that the Claimant was dismissed because he was engaged in acts of theft and bhang pedaling, Counsel submitted that that can not be a valid reason. The allegations are so serious that the Respondent wouldn't have failed to report the alleged activities to the police if indeed the Claimant was involved in such.
23. It was further submitted that the dismissal of the Claimant was procedurally unfair. The law imposed a duty on the Respondent to demonstrate that it adhered to the stipulations of section 41 of the



- Employment Act. There were no disciplinary proceedings against the Claimant. In its evidence, the Respondent failed to explain why there wasn't.
24. On the reliefs sought, Counsel submitted that pursuant to the provisions of section 31 of the Employment Act, an employee is entitled to House allowance. The Claimant's case that contrary to the stipulations of the law, he was not being paid house allowance, was unchallenged. In fact, it got support in the evidence of the Respondent's witness when he testified that no employee within the Respondent's establishment earns House allowance. The Claimant being a permanent employee by reason of section 37 of the Act, was entitled to the House allowance provided for under section 31. Fortification on this submission was sought in the case of Irungu Githae v Mutheka Farmer's Co-operative Society Limited [2019] eKLR.
25. It was further argued that the evidence by the Claimant that his salary was Kshs 8000 was not rebutted. Considering the Regulation of Wages [General][Amendment] Order 2015, that came into effect on May 1, 2015, the Minimum wage for a Gardener was fixed at Kshs 10,954, exclusive of House allowance. As claimed by the Claimant, he was being underpaid.
26. The Claimant's Counsel submitted that the Claimant is entitled to the compensatory relief contemplated under section 49 of the Employment Act.

### **The Respondent's Submissions**

27. The Respondent identifies the following issues as those that emerge for determination, thus;
- I. Whether the Claimant was an employee of the Respondent,
  - II. Whether the Claimant is entitled to House allowance,
  - III. Whether the claim for underpayment has been established,
  - IV. Whether the Claimant was unfairly dismissed.
28. The Respondent's Counsel submitted that in the Claimant's statement of claim, the Claimant pleaded that he was an employee of the Respondent, but surprisingly in what appears to be a complete departure from the contents thereof, the Claimant has decided to reconstruct his case in submissions by arguing that he was a casual employee whose employment became permanent by operation of the law. Parties are bound by their pleadings. The Claimant cannot be allowed to depart from them. In support of this submissions, reliance was placed on the Malawian case of Malawi Railways Ltd v Nyasulu [1998] MWSC 3.
29. Further reliance was placed on the holding in Republic v Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another, thus:
- “The applicant, the respondent and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”
30. Having not established that he was an employee of the respondent, he cannot claim to be entitled to house allowance.
31. On procedural and substantive fairness of the alleged termination, the respondent's counsel argued that having not proved that there was an employer -employee relationship between him and the respondent, the claimant cannot be heard to assert that he was unfairly terminated, as there cannot be a termination without the relationship.



32. That without prejudice to the foregoing, the respondent's witness was clear that the claimant ran away. He didn't avail himself for the disciplinary hearing. He cannot justifiably cry foul.

### **Analysis and Determination**

33. Considering the pleadings, evidence and submissions by the parties, the following issues emerge for determination:
- (a) Was the Claimant an employee of the Respondent at all material times?
  - (b) How did the Claimant's employment determine?
  - (c) If it was brought to an end by the Respondent, was it substantively and procedurally fair?

### **Was the Claimant an employee of the Respondent at the material time?**

34. As regards whether the Claimant was an employee and or under what form of engagement did the Claimant work for the Respondent, the combatants have taken fiercely uncompromising contrasting positions. The Claimant pleaded and stated in evidence that he was an employee of the Respondent with effect February 2016 till May 29, 2017, when his employment was brought to an end by the latter. The pleadings and the evidence being in the tone that the employment was in nature a permanent one.
35. The Respondent on the other hand as indicated hereinabove took the position that the Claimant was a casual worker who according to the agreement between him and the Respondent was supposed to draw his salary at the end of each day of work upon completion of specific allocated tasks.
36. It is upon these premises that this Court must render itself on the nature of the Claimant's employment with the Respondent at the material time, as the nature shall influence the reliefs awardable to him should it find that he is entitled to. Under the [Employment Act, 2007](#), the statutory benefits available to an employee engaged on a permanent basis are radically different from those to a casual employee.
37. The Claimant placed before this Court a pay slip for the month of April 2017. In my view, the slip was presented before this Court for the purposes, first, to demonstrate existence of the employer-employee relationship between the Respondent and him, second, that he was earning an agreed monthly salary, and lastly that his employment was in nature permanent. The Respondent did not assert that the pay slip was not authentic and or place any evidence before me assailing, and or through cross examination challenge, its authenticity. Consequently, I hesitate not to find that the slip was issued by the Respondent to him, and the purpose for which it was tendered as evidence achieved.
38. Further, the Court has carefully considered the items on the pay slip. They include basic pay. In my view, they are those that leave no doubt that the employment was not casual as alleged by the Respondent.
39. If indeed the Claimant's employment was not as expressed by the Claimant but as expressed by it, one would reasonably expect an employer like the Respondent to place before the Court documents for instance a payroll, daily work register, and a service provision document between Sameer Africa and it, to fortify its position. This it didn't do. In addition, I have carefully considered the response to the statement of Claim, and the witness statement by its witness, there is a disconnect on the description they both accord the nature of the Claimant's employment.
40. By reason of these premises, the Court comes to a conclusion that the Claimant was not "an independent casual employee" as alleged by the Respondent. He was an employee whose salary



was payable as of right at the end of every month not pursuant to the alleged arrangement by the Respondent, but owing to the nature of his employment.

### **How did the Claimant's employment determine?**

41. As between the Claimant and the Respondent there is no common cause as regards whether or not the former's employment was brought to termination by the latter. However, the combatants seem to agree on one crucial fact, that on the date of separation, one Mr Kimondo, the Respondent's Manager was at the center of the happenings of that day. The Claimant contended that on the May 29, 2017, Mr Kimondo orally informed him that the Respondent had decided to terminate his employment effective that day. The Respondent's witness testified that the Manager asked the Claimant to go home, write an apology letter on the infractions that had been alleged against him. The Claimant, went never to report back. Therefore, there was no termination as alleged by the Claimant.
42. The position taken by the Respondent through the evidence of its witness and the submissions filed herein is totally at variance with the averments in its response to the statement of claim. The Respondent pleaded in part;

- " 10. The Respondent further states;
- i. Termination was for a justifiable reason the Claimant having absconded duty and involved in the theft of the Respondent's client's property and peddling drugs.
  - ii. Termination was fair and the Claimant was granted an opportunity to be heard but declined to adhere to internal disciplinary channel.
  - iii. The Claimant has never reported back nor cleared with the relevant departments and thus declined to return the working gears."

43. In its pleadings therefore, the Respondent makes an admission that it terminated the Claimant's employment. To hold otherwise, this Court shall be diminishing the importance and purpose of pleadings in an adversarial system as is ours. As regards the importance and purpose of pleadings, this Court expressed itself in *Aristide Marage Nyangau v Lavington Security Limited* [2021] eKLR, thus;

"From the onset, it is important to state that the whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence of the trial to matters relevant to those issues, and to ensure that the trial proceeds to judgment without either party being taken at a disadvantage by matters not fairly....."

This Court cannot allow the Respondent to change the character of its case by presenting evidence that runs counter to its pleadings. By reason of these premises, it is not difficult for me to find that the Claimant's employment was terminated by the Respondent in the manner put forth in his evidence.

### **Was the termination substantively and procedurally fair?**

44. Having found as I have hereinabove that the Claimant's employment was brought to an end by the Respondent when its Manager verbally terminated the same, I now turn to consider whether the termination was substantively and procedurally fair.
45. Section 43 of the *Employment Act* placed a legal burden on the Respondent to prove the reason(s) for the termination of the Claimant's employment and a failure to so prove could attract the default consequence contemplated under section 45 of the Act, the termination being deemed unfair.



46. At the trial, the Respondent took a position that it did not in any manner terminate the Claimant's employment. Consequently, it did not lead any evidence to establish the reason(s) for the termination.
47. Without prejudice to the foregoing, the Respondent alleged that the Claimant was instructed to go home and write an apology letter concerning an alleged misconduct of theft of its customer's property and peddling bhang in the course of his employment, however, he went never to return to work. In my view, these were bare assertions by the Respondent's witness. The evidence is too silent on when these were committed. There was not a single witness or a piece of evidence, that was presented before this court from the customer's end, to demonstrate that the Claimant was involved in the theft and peddling. The allegation by the Respondent was to the effect that the Claimant was involved in criminal activities of a serious nature, reasonably a person contending as it was, would be expected to tender cogent evidence as opposed to mere assertions. Mere assertions cannot be a means of establishing a fact, or discharging a legal burden.
48. In sum, this Court finds that the Respondent didn't prove the reason[s] for the termination of the Claimant's employment. The legal burden under section 43 of the *Employment Act* was not discharged. Further, that the Respondent did not prove that the termination was on a valid and fair reason[s] as was expected of it by the stipulations of section 45 of the Act. The termination was substantially unfair.
49. Section 41 of the *Employment Act*, a provision of the law which the court has severally held as being mandatory in nature, provides for procedural fairness. It provides for what an employer contemplating terminating an employee's employment, must do and avail.
50. The provision above stated reflects procedural fairness encompassing three components. The first component - notification/information. The employer has to notify the employee of his or her intention to terminate the employment and the grounds stirring the intention. Second, the hearing component, the employer must avail the employee an opportunity to defend himself or herself against the grounds and the right to accompaniment. The consideration component, the employer must consider the representations made by the employee and/or the person accompanying him before deciding to terminate the employee's employment or summarily dismiss him or her. Consideration is imperative for if it is absent the purpose for hearing, and the protection accorded to the employees under the *Employment Act* shall be brought to naught.
51. Blurred by the position it took during the hearing, the Respondent did not in any manner place evidence before me towards establishing the procedure leading to the termination of the Claimant's employment and that the procedure was fair. Establishing this was a statutory burden that it had to discharge, and by reason that there was no evidence placed before me, I find that the burden was not discharged. The Claimant's evidence that he was verbally dismissed without being accorded an opportunity to defend himself was not rebutted therefore. It is imperative to state that in his evidence under cross examination, the Respondent's witness did admit that the Claimant was not accorded a hearing.
52. In the circumstances of this matter, the Respondent failed to prove that the process leading to the termination of the Claimant's employment had the three components hereinabove alluded to or any of them.
53. The termination of the Claimant's employment was procedurally unfair.



## Of the Reliefs

54. The Claimant sought for inter alia a certificate of service. The Respondent did not assert that the same was issued to the Claimant at the time of separation or at all. The Claimant's claim for the same was therefore unchallenged. This Court has on a number of occasions held that an employee's right to a certificate of service under section 51 of the Employment is inviolable. It must be issued to an employee at the end of the relationship between him and his employer. Any employer breaching the right stands a risk to be liable for any damage or loss that might arise from the breach.
55. The Claimant further sought for compensation to an extent of twelve months' gross salary for unfair termination of his employment. Section 49[1][c] bestows upon this Court the power to grant a compensatory award in favour of an employee who has successfully assailed the termination of his or her employment on account of it being unfair. However, it should be noted that the power is exercised at the Court's discretion. An award or denial of the same is dependent on the justice of each case. I have carefully considered the circumstances of this matter; that the termination of the Claimant was without any expressed and proved reason; the manner in which the Respondent presented its case on the reasons for the termination which in the view of this court was very evasive, unclear and uncandid; the fact that the termination was procedurally unfair; and the fact that there is no evidence demonstrating that the Claimant induced the termination in any manner, and conclude that he is entitled to the compensatory relief and to the extent of 8 months' gross salary, Kshs 87,637.70.
56. The Claimant stated that at all material times the Respondent paid him salary that was below the relevant Wage Orders. Pursuant to The [Regulation of Wages \[General\]\[Amendment\] Order 2015](#), he was entitled to a basic salary of Kshs. 10, 954.70. Therefore, by the Respondent paying him a basic pay of Kshs 8000 per month, it was underpaying him by Kshs 2,954.70 monthly for the entire period he worked for it. The Claimant's claim on this should be considered in light of the provisions of section 48 of the [Labour Institutions Act](#), which stipulates;

- “ 1. Notwithstanding anything contained in the Act or any other written law-
- a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement.
  - b) If the contract of an employee to whom the wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for conditions of employment prescribed in wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established in the wages order shall be inserted in the contract in substitution for those terms.

57. In my view, in situations where a particular wages order is applicable, wages order providing for payment of a remuneration that is higher than what an employee to whom it applies is earning, or provides for better terms and conditions than those he or she is enjoying, under a contract of employment, the employer is under a statutory obligation pursuant to the provisions of section 48 of the [Labour Institutions Act](#), to adjust the remuneration, terms and conditions of employment to suite the provisions of the wages order. A relevant wages order cannot be out contracted. The



employer cannot be heard to assert that the remuneration, terms and conditions of the employment were negotiated and agreed upon.

58. The law imposes a consequence of non-adherence to the above stated provision of the law. Section 48[5] bestows a right on the employee to recover any sum which he didn't earn as a result of the under payment, in civil proceedings.
59. This Court is persuaded that; the wages order applied to the Claimant; at all material times he was paid less than what the order stipulated and; he is entitled to the sum claimed under the head "underpayments", Kshs. 47,275.62.
60. Lastly, it was the Claimant's case that the Respondent never paid him House allowance despite the fact that he was entitled to the same under the law. The Respondent's witness in his testimony under cross examination confirmed that it was not in the practice of the Respondent to pay House allowance to its workers. Section 31 places an obligation upon the employer to at all material times at his own expense provide reasonable accommodation for each of his employees, or pay to the employee such sufficient sum, as rent, in addition to his or her wages or salary. There is no doubt that the Respondent didn't discharge its obligation under this provision of the law. The Claimant's right to House allowance was breached. Consequently, I am persuaded that he is entitled to the unpaid House allowance for the period he was in the employment of the Respondent, Kshs 26,291.35.
61. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms:
  - (a) A declaration that the termination of his employment was unfair.
  - (b) Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, Kshs 87,637.70.
  - (c) Unpaid house allowance, Kshs 26,291.25.
  - (d) Salary underpayment, Kshs 47,275.60
  - (e) The respondent is directed to issue the claimant with a certificate of service within 30 days of this judgement.
  - (f) Costs of this suit.
  - (g) Interest on the awarded sums at court rates from the date of this judgement till full payment.

**READ, SIGNED AND DELIVERED ON THIS 31<sup>ST</sup> DAY OF JANUARY, 2023.**

.....  
**OCHARO KEBIRA**

**JUDGE**

**In presence of**

**Ms. Owuour for the Claimant.**

**Mr. Watitu for the 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 March 15, 2020 and subsequent directions of April 21, 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.**

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**OCHARO KEBIRA**

**JUDGE**

