



Kenya Building Construction Timber & Furniture Industries Employees Union v Dhruv Construction Ltd (Cause 280 of 2017) [2023] KEELRC 223 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 223 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 280 OF 2017
AK NZEI, J
JANUARY 26, 2023**

BETWEEN
**KENYA BUILDING CONSTRUCTION TIMBER & FURNITURE INDUSTRIES
EMPLOYEES UNION CLAIMANT**
AND
DHRUV CONSTRUCTION LTD RESPONDENT

JUDGMENT

1. *Vide* an undated Memorandum of Claim filed in Court on April 18, 2017, the Claimant sued the Respondent and pleaded as follows:-
 - a. That the grievant, Masumbuko Karisa Ziroh, was employed by the Respondent as a Manson on May 3, 2013, earning ksh. 700 per day, and worked diligently until May 27, 2014 when his employment was terminated by the Respondent without any explanation.
 - b. That the Claimant reported a dispute between the parties herein to the Minister, but the Respondent did not attend conciliation meetings convened by the appointed conciliator, leading to issuance of the appropriate certificate by the conciliator and subsequent filing of the claim herein.
2. The Claimant set out the grievant's claim for terminal dues as follows:-
 - a. One month salary in lieu of notice
(700x26 days).....ksh 18,200
 - b. One year unpaid leave (700X26 days).....ksh. 18,200
 - c. Service pay for one year (700x15 days).....ksh. 10,500
 - d. Unpaid wages (700x24 days).....ksh. 16,800



Total ksh. 63,700

3. The Claimant further sought a declaration that the grievants' dismissal was unfair, compensation for unfair loss of employment, (termination of employment) and costs of the suit.
4. The Respondent filed response to the Memorandum of claim on November 24, 2020, evenly dated, and:-
 - a. admitted having employed the grievant as pleaded by the Claimant, but maintained that the grievant was a casual.
 - b. pleaded that the grievant was paid on daily basis for work done, and not on monthly basis, and that there was no need to give notice to a casual.
 - c. that the grievant's termination was lawful, and that the reliefs sought by the Claimant were not deserved.
5. At the trial, the grievant (CW-1) referred to his witness statement dated February 27, 2016 and filed together with the claim documents, which he adopted as his testimony, and further testified that he was employed by the Respondent as a mason on May 3, 2013 and worked continuously for a whole year, upto May 27, 2014. The grievant further testified that he was earning ksh. 700 per day, and was being paid weekly, and in cash, for which he was signing, and that he was not issued with any contract.
6. The grievant further testified that on May 27, 2014, he went to work as usual but his employer (the Respondent) told him and others that their employment had been terminated, and brought in other people who started working as they watched. That the grievant was not given any notice, and was not paid any terminal dues.
7. It was the grievant's further testimony that he reported the matter to his Union (the Claimant), and that the matter went for conciliation but the Respondent did not attend conciliation sessions.
8. The grievant produced in evidence copies of the five documents listed on the Claimant's list of documents dated April 12, 2017. The listed documents are the Building and Construction Industry Order Legal Notice No. 2 of 2012 and No. 94 of 2004, a copy of a letter reporting the dispute, conciliation correspondences and the conciliator's certificate.
9. The Respondent called one witness, Naran Jadvia Pindoria (RW-1), who adopted his witness statement dated November 24, 2020 as his testimony. RW-1 further testified that the grievant was employed by the Respondent as a Mason, and worked as such for one year. That the grievant's work ended on May 27, 2014.
10. Cross-examined, the Respondent's witness testified that the grievant worked for one year, and that the Respondent did not have any employment records to show the days on which the grievant worked and those on which he did not work, and that the grievant was being paid weekly. RW-1 further testified that the Respondent did not attend conciliation meetings.
11. Upon considering the pleadings filed and the evidence presented by both parties, issues that present for determination, in my view, are:-
 - a. whether the grievant was a casual employee as at May 27, 2014 when his employment was terminated by the Respondent.
 - b. whether termination of the grievant's employment was unfair.
 - c. whether the reliefs sought are deserved.



12. On the first issue, it was a common ground that the grievant was employed by the Respondent on May 3, 2013 and that his employment was terminated on May 27, 2014. The Respondent, however, maintained that the grievant remained a casual during the whole period of employment.

13. Section 37(1) (a)& (b) of the *Employment Act* provides:-

- “(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 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.”

14. Section 35(1) (c) of the *Employment Act* provides:-

“where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”

15. The grievant testified that he worked for the Respondent continuously for one year. The Respondent (RW-1) admitted that the grievant worked for one year, but maintained that there were days on which the grievant did not work. The Respondent did not, however, produce any evidence or employment records to show that the grievant did not work continuously. Further, the Respondent did not adduce any evidence to demonstrate that the Respondent did not work for a number of days amounting in aggregate to the equivalent of three months or more.

16. The import of the foregoing is that the grievant may have started off as a casual employee, but his contract of employment was subsequently converted to a term contract whereby wages were payable monthly, and one that was terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

17. Indeed, section 37(3) of the *Employment Act* provides that:-

- “(3) an employee whose contract of service has been converted in accordance with sub section (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.”

18. The Claimant cited the case of *Chemilil Sugar Company v Ebrahim Ochieng Otwon & 2 Others* [2015] eKLR where the Court of Appeal stated as follows:-

“one of the grounds on the basis of which the appellant has attacked that finding is that the Respondents were casual employees who were not entitled to house allowance. The undisputed facts were that the Respondents worked for the appellant in various capacities for periods ranging between one year and fifteen years. Even if the Respondents may have



commenced employment with the appellant as casual employees, their terms were converted to term contracts by operation of law under Section 37 of the Employment Act which provides that..."

19. I find and hold that the grievant was not a casual employee as at May 27, 2014 when his employment was terminated by the Respondent.
20. On the second issue, the Respondent did not demonstrate that he complied with either Section 35(1) (c) or section 41 of the *Employment Act*. The Claimant pleaded, and the grievant testified that his employment was terminated without any reason or explanation for such termination by the Respondent, and that no termination notice was issued by the Respondent. It was not demonstrated by the Respondent that the grievant was paid his terminal dues or that the grievant was given an opportunity to be heard before termination of his employment, for whatever reason.
21. Termination of the grievant's employment by the Respondent was, in view of the foregoing circumstances, unfair. I so hold and declare.
22. On the 3rd issue, and having made a finding that termination of the grievant's employment was unfair, I award the grievant the equivalent of five months salary being compensation for unfair termination of employment. According to the Claimant's pleadings, the grievant was earning ksh. 18,200 per month, a fact not denied by the Respondent. The equivalent of five months' salary is therefore $18,200 \times 5 = 91,000$.
23. The claim for one month salary in lieu of notice is allowed at ksh. 18,200 as prayed by the Claimant. The claim for ksh. 18,200 being unpaid leave for the year served by the grievant is allowed. The Respondent, who was the custodian of the grievant's leave records pursuant to Section 74(f) of the *Employment Act*, did not adduce any evidence to demonstrate that the grievant took any leave during the undisputed one year period of service.
24. The claim for ksh. 10,500 being the grievant's service pay for the served years is allowed as prayed. Section 35(5) of the *Employment Act* is called in aid. The Respondent did not demonstrate that the grievant was a member of NSSF or any other pension scheme or service pay scheme established under a collective agreement.
25. The claim for unpaid wages (700x24 days) is allowed as prayed. The Respondent admitted that the grievant's employment was terminated on May 27, 2014, but did not demonstrate that the grievant's wage for the days worked during the month of May 2014 was paid.
26. Ultimately, and having considered submissions filed on behalf of both parties, judgment is hereby entered for the Claimant against the Respondent for:-
 - a. Compensation for unfair termination of employment.....ksh. 91,000
 - b. One month in lieu of notice.....ksh. 18,200
 - c. Unpaid leaveksh. 18,200
 - d. Service pay.....ksh. 10,500
 - e. Wages/salary for days worked in May 2014.....ksh. 16,800Total . 154,700
27. The Claimant is awarded costs of the suit and interest at Court rates.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JANUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

N/A for Claimant

N/A Respondent

