



Workers & another v Frankmart Supermarket Limited & another (Cause 18 of 2021) [2023] KEELRC 28 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 28 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 18 OF 2021
JW KELI, J
JANUARY 19, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS 1ST CLAIMANT**

FOOD AND ALLIED WORKERS 2ND CLAIMANT

AND

FRANKMART SUPERMARKET LIMITED 1ST RESPONDENT

FRANKMART SUPERMARKET LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant was a trade union registered as such within the laws of Kenya to carry out trade union activities for workers in commercial, food and allied sector. The claimant brought the instant suit dated May 18, 2022 on behalf of the grievant, Clayton Jumba, seeking the following reliefs:-
 - a. Refusal by the respondent to pay the grievant his lawful benefits is wrongful.
 - b. The act of discrimination meted on the grievant is unlawful
 - c. The respondent be ordered to pay the grievant his terminal benefits as follows:-
 - One month notice *in lieu* of notice 18,319.50
 - 2 days worked in May, 2022 18,319.50/26x2 1,409.19
 - 16 days of public holidays worked and not paid for 18,319.50/26x16x2 22,547.07
 - 40 days of rest days worked and not paid for 18,319.50/26x40x1.5 42,275.76
 - Leave arrears not taken – 2 years 26/26x18.319.50x2 36.369.00
 - 5 extra hours worked on daily basis 120 daysx1.5x



18,319.50/26 126,827.30

Underpayments:-

- i. Jan.2019 -Dec 2019 18,319.50-15,300
- ii. Jan,2020-May,2020 =3,019.50x12 = 36,234.00
18,319.50-15,300=
3,019.50x5 = 15,097.50
Total 299,349.32

- d. Costs of the suit to the claimant.
 - e. Certificate of service.
 - f. Any other relief this court may find fit to grant.
2. Together with the claim, in addition the claimant filed verifying affidavit of Boniface Kakuvi, witness statement of Clayton Jumba dated May 18, 2022, list of witnesses, List of documents dated 18 May 2022 together with bundle of documents.
 3. The respondent entered appearance through the Law Firm of Kamunya & Associates Advocates on the July 25, 2022 and on August 15, 2022 filed respondent's statement of defence dated August 11, 2022, replying affidavit of Hedwig Namasaka sworn on the August 11, 2022, list of witnesses dated August 11, 2022, list of documents dated August 11, 2022, witness statement of Julius Omari dated August 11, 2022 and the respondent's bundle of documents.
 4. The matter was first referred to conciliation before the Ministry of Labour Officer which was frustrated as the conciliator did not invite parties for the process as per the affidavit of Lilian Manene sworn on the May 18, 2022 and filed in court on the June 9, 2022.

The Hearing

5. The claimant's case was heard on the September 21, 2022 with the grievant Clayton Jumba as the witness of fact on oath who adopted his witness statement as his evidence in chief and produced filed documents as his evidence. The witness was cross- examined by Mr Kamunye Counsel for the respondents.
6. The respondent's case was heard on the October 12, 2022 with one witness of fact Julius Omari on oath who adopted his written statement as a his evidence in chief and produced the respondent's filed documents as the respondent's evidence. The witness was cross - examined by Mr Tako, a representative of the claimant.
7. After close of defense case, the parties took directions for filing of written submissions. The claimant's written submissions drawn by Boniface Kakuvi are dated October 25, 2022 and received in court on the October 27, 2022.
8. The respondent's written submissions drawn Kamunya & Associates Advocates are dated November 9, 2022 and filed in court on the November 11, 2022.

Claimant's Case in summary

9. The claimant's case was limited to one grievant, Clayton Jumba, who testified in court as witness of fact. The claimant stated that Jumba was their member. That he was employed on the January 18,



2019 as a baker at starting salary of Kenya Shillings 15,300/-. That he was underpaid as per general wages order, that on the December 16, 2019 his contract was renewed, that on the April 30, 2022 he was issued with a letter sending him on 15 days unpaid leave, that on the May 16, 2020 he resumed duty, that on May 18, 2020 he was issued with another letter to proceed on unpaid leave stating “until the situation improves”, that on the May 26, 2020 the grievant issued letter of one month notice terminating his services, that one of its members received payment on July 17, 2020 and no notification to the grievant. That Jumba was not paid terminal dues and further claimed he was underpaid.

Defence Case

10. The respondent in statement of defence denied it was the company sued its legally recognized name being Frankmatt supermarket limited and not Frankmart Supermarket limited as pleaded in the claim. That they were not notified of the claim before filing including the conciliation attempts, that the grievant applied for employment on the February 15, 2018 therefore cannot claim to have been working for the respondent before the stated date, that the grievant was never issued with renewal of contract, that the grievant was a casual, that he stole from the employer, that the grievant stole the register and contract forms, that the grievant requested for leave to apply for medical certificate as was required for all food handlers, that the leave was extended as the grievant did not produce medical certificates as at May 18, 2020 and when he was issued with another letter the grievant informed the employer he was no longer interested in working for the respondent.
11. On the issue of discrimination the respondent’s position was that the grievant was not part of the settlement reached between Mr Thomas Makau and itself.
12. The court gave directions on filing of written submissions after the hearing. The claimant’s written submissions drawn by Boniface Kakuvi, General Secretary, were dated October 25, 2022 and received in court on the October 27, 2022.
13. The respondent’s written submissions drawn by Kamunya & Associates Advocates were dated November 9, 2022 and received in court on the November 11, 2022.

Determination

Issues for Determination

14. The parties did not identify issues for determination nor did they cite any authorities in their submissions.
15. The court having heard the parties and read the filed pleadings was of the considered opinion that the issues placed by the parties before it for determination of their dispute were as follows:-
 1. Whether the proper respondent was sued
 2. Whether the grievant Clayton Jumba was engaged on casual basis
 3. Whether the grievant terminated his services,
 4. Whether the grievant was discriminated against by the respondent
 5. Whether the claimant was underpaid
 6. Whether the claimant is entitled to reliefs sought



Whether the proper respondent was sued

16. The respondent in their statement of defence stated they were Frankmatt Supermarket Limited and not Frankmart Supermarket Limited. The respondent did not deny having had employed the grievant in the period in question. There was evidence that indeed the respondent's name was Frankmatt and not Frankmart. The documents relied on by the claimant including those addressed to the claimant and produced by the respondent referred to Frankmatt Supermarket Limited. The court then finds that this is a typing error that is curable under article 159(3)(d) of the Constitution and proceeds to accordingly to determine the case against Frankmatt Supermarket Limited as the respondent having defended the case.

Whether the grievant Clayton Jumba was engaged on casual basis

17. The claimant pleaded that the grievant was employed on the January 18, 2019 in position of baker at starting salary of KES 15,300/-. The employment contract was not produced. The claimant alleged that the contract was renewed on December 16, 2019 and annexed a renewal letter (exhibit 3). The respondent denied ever issuing the renewal letter having not issued an employment letter.
18. During evidence in chief the grievant told the court he was employed on the February 15, 2019. At cross examination the grievant told the court he relied on his application letter which was not produced in court. The grievant told the court his evidence of employment was work identity card. The same was not produced in court. The grievant did not have letter of application for renewal in December 2019. The grievant did not have evidence of the salary paid. The grievant admitted that the said renewal letter of December 2019 did not bear his acceptance signature, the grievant had no evidence that the letter of termination (exhibit6) was delivered to the respondent. On re-exam the grievant told the court he was paid salary through the bank. That he gave the termination to customer care.
19. The respondent's RW1 Julius Omari was the operations manager and former human resources manager of the respondent. RW1 adopted his witness statement which had stated that the grievant *vide* letter dated February 15, 2019 applied for position of cook attendant and attended interview on the February 18, 2019. That he interviewed the grievant and since he did not have any special qualifications he was employed on casual basis and engaged when jobs were available.
20. During cross examination RW1 told the court that he knew the grievant as a former casual worker, that he was paid weekly, that the money alleged to have been lost was deducted end of the week, that he had no evidence the grievant was casual employee paid weekly, that they had not reported the theft of the register as they discovered later and they relied on the renewal contract as evidence that the grievant stole the register together with the signed blank contract forms.

Decision

21. The court makes the following findings on the issue:-
- i. The grievant applied for employment as cook attendant, was interviewed and employed by the respondent without issuance of employment letter on the February 15, 2019.
 - ii. That the grievant was treated as a permanent employee. The court refers to the respondent's exhibits letter dated May 18, 2019 (document number 4) on unpaid leave and letter dated April 17, 2019 being first warning (document 5) stating he was subject of disciplinary action and would be deducted KES 900 from April salary and this was the 1st warning, the grievant was issued with letter to proceed on unpaid leave on April 30, 2020 for fifteen days to resume on



May 16, 2020. On the May 18, 2020 having resumed duty for 2 days the respondent again issued the grievant with letter to proceed on indefinite unpaid leave.

- iii. The court further finds on a balance of probabilities, that the claimant having been engaged on February 15, 2019, the alleged renewal of contract on 16th December for one year referring to previous offer was not valid. The court finds on balance of probabilities the position by the respondent that this document was stolen as probably true. The said document is thus inadmissible as evidence of renewal of contract of employment.
22. The foregoing court findings demonstrate that the grievant was a contractual employee and not casual. The difference between an employee and a casual is as defined under the [Employment Act](#) to wit:- “employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“casual employee” means 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;
23. The court finds that the position taken by the respondent that the grievant was a casual employee not tenable having worked continuously, being treated like a contractual employee and paid salary as per evidence before court. The court then finds that in absence of contract the grievant’s employment converted to contractual employment as provided for under section 37 of the [Employment Act](#) to wit:-

“37. Conversion of casual 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.”
24. Applying the provisions of section 37 of the [Employment Act](#) outlined above the court finds that the grievant was entitled to all statutory benefits of employees under the Employment Act. The court finds that the act of treating the grievant as a non-permanent employee while being subjected to disciplinary processes and unpaid leave was tantamount to unfair labour practices and thus denying him terminal benefits and other benefits enjoyed by permanent employees like medical cover and pension. The court upholds a similar decision by the Court of Appeal Civil Appeal No 261 OF 2020 [Kenyatta University And esther Njeri Maina](#) Nairobi Civil Appeal NO 261 of 2017(Judgment delivered on November 4, 2022) where the court observed in part:- ‘By being retained to what in essence was casual employment,



we are further in agreement with the learned judge's summation that the respondent's constitutional rights were infringed. She was treated as a non-permanent employee and this is tantamount to unfair labour practices and thus denying her all the rights of a permanent employee.”

In the upshot the court finds that the engagement of the grievant was contractual employment applying the provisions of section 37 of the [Employment Act](#).

Whether the grievant terminated his services.,

25. The claimant produced a letter dated May 26, 2020 titled termination letter and addressed to the respondent. The said letter referred to the issue of unpaid leave which the respondent admitted to under paragraphs 12 and 13 of the witness statement of Julius Omari. RW1 stated that the grievant had informed them he had secured another employment. The grievant stated he left the termination letter at customer care. On balance of probabilities the court determines the grievant resigned due to the indefinite unpaid leave. The other position would be of equal result of unpaid indefinite leave amounting to constructive dismissal. The court opted to pick the position of the claimant. The court determines that the grievant terminated his services with the respondent.

Whether the grievant was discriminated against by the respondent

26. The claimant alleged that the respondent choose to pay one Thomas Makau and left out the grievant's claim. The respondent admitted that Thomas Makau was one of their employees but stated that the grievant was not part of the settlement between them and the said Thomas.

The claimant did not provide evidence of the alleged discrimination. The burden of prove laid with the claimant to prove the alleged discrimination. The claim of discrimination is dismissed.

Whether the claimant was underpaid

27. The grievant led evidence on oath that he was paid monthly salary of KES 15,300/-. The burden then shifted to the employer under section 47(5) of the [Employment Act](#) to provide evidence of the alleged weekly payments. The evidence of the claimant was not controverted and on balance of probabilities that court finds that the grievant was paid KES 15,300/- per month. The court found that the grievant was a cook attendant engaged in the bakery. The claimant claimed that the grievant was underpaid and relied on the [2018 General Wages Order](#). The grievant was employed at Mumias branch where he applied for a job which would fall under 'other areas' category. The minimum monthly salary under the said [Order](#) for bakery worker was KES 11,602.90. The court determines that the claimant was not underpaid.

Whether the claimant is entitled to reliefs sought

Notice pay.

28. The claimant having resigned is not entitled to notice pay.

Order for Declaration of Discrimination

29. This claim was not proved and is dismissed.

Claim for 2 days worked in May.

30. The court finds that the grievant was on unpaid leave for month of May 2020 save for 2 days worked. The claimant ought to have been treated as permanent employee. The court grants order of payment



of full salary for the month of May 2020 as the resignation was effective June 2020. The grievant is awarded May 2020 salary at KES 15,300/-

Claim for 16 Days Of Public Holidays Worked And Not Paid For

31. The claim was pleaded and not rebutted specifically by the respondent. The respondent alleged the grievant was a casual worker. The court found that the nature of the grievant's employment converted to permanent employment under section 37 of the Employment Act. The employer has a statutory duty to keep employee records under section 74 of the Employment Act. The court finds on balance of probabilities the claimant discharged his burden under section 47(5) of the Employment Act. The court allows and grants the claim as follows: 15,300/26X16 x2 total award of KES 18, 830/-. 40 days of rest days worked and not paid for and claim for 5 extra hours worked on daily basis
32. The court examined the claim filed for conciliation and did not find these particular claims. The conciliation process is a statutory process. The court finds that though no document was produced by employer on the record of days worked, the claims are an afterthought. The two claims are dismissed.

Leave Arrears Not Taken For 2 Years.

33. The grievant is only entitled to leave for year 2019 having been on unpaid leave in the year 2020 which the court already awarded salary for one month. The claimant is awarded KES 15,300/- as leave arrears for year 2019.
34. The court having found that the grievant was an employee under the Employment Act, the statutory right to service pay applies and the same is granted for 15 days worked in 2019 under section 35(5) of the Employment Act to wit:- "(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed". Award of service pay at 15 days for one year for total sum of KES 15,300.
35. On costs, the court considered the filing of suit was premature. The claimant ought to have put more effort to have the parties attend the conciliation process. The court orders each party to bear own costs.

Conclusion and Disposition

36. The court enters judgment for the claimant against the respondent (Frankmatt Supermarket Limited) for payment of terminal dues to the grievant as follows:-
 - a. Award of May 2020 salary at KES 15,300
 - b. Award for claim for 16 days of public holidays worked and not paid for at KES 18, 830/-
 - c. Award leave in arrears for year 2019 for the sum of KES 15,300/-
 - d. Award of service pay at 15 days for complete year worked for total sum of KES 15,300.
 - e. Interest awarded at court rates from date of judgment until payment in full.
 - f. Certificate of service to issue to the grievant under section 51 of the Employment Act
37. Each party to bear own costs
38. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 19TH DAY OF JANUARY, 2023.



J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant:- Tako

respondent: Ms Kamunya

