



**Mlandi & 9 others v Dimamu Agencies Limited (Cause 855 of 2017)
[2023] KEELRC 10 (KLR) (12 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 10 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 855 OF 2017
AN MWAURE, J
JANUARY 12, 2023**

BETWEEN

SAMMY KITONE MLANDI & 9 OTHERS CLAIMANT

AND

DIMAMU AGENCIES LIMITED RESPONDENT

JUDGMENT

1. The 10 Claimants brought their claim *vide* memorandum of claim dated 11th May 2017. The Respondent filed their response on 28th July 2021.

Claimant's case

2. The Claimants state they are male adults and they were employees of the Respondent from varying dates as hereunder.
 - a. Sammy Kitone Mlandi beginning of April 2012
 - b. Gideon Charo Jamo 25th February 2012
 - c. Paul Anyama 25th February 2012
 - d. Samson Chiroh Sonjeh 2nd March 2011
 - e. Caleb Barasa 14th January 2011
 - f. Rodgers Juma Masika 7th August 2013
 - g. Stephen Kitili Kasuni Beginning of July 2015
 - h. Zakayo Sitati 18th August 2013
 - i. Peter Mwaura Ndambuki Beginning of March 2015



- j. Moses Elijah Kilasi 5th January 2015
3. They claim that the Respondent breached employment and labour requirements for failing to pay for overtime worked, leave was not granted and were not provided with house or house allowance. Further they claim they were never paid gratuity or service pay and no salary was paid for the last 3 days for the 7th Claimant. They claim they all worked diligently and were paid 9,840/- per month except for 4th Claimant whose salary was computed at kshs 9,600/- per month.
 4. The 1st and 4th Claimants aver that sometime in July 2015 they reported to work and they loaded the lorry. They say the lorry was weighed at the weighing bridge and was found to have excess of 2 bags and the Respondent manager Mr Patrick informed them their services were terminated.
 5. The 2nd and 3rd Claimants state that on 13th January 2016 they loaded the lorry and were informed it was in excess and so the Respondent's manager one Opiyo informed them their services were no longer required.
 6. The 7th Claimant aver that he was on duty on 2nd August 2016 and was asked by Mr Opicho the Respondent's supervisor to remove his apparel and that his services were no longer required.
 7. Claimant's 9th and 10th aver that on 2nd August 2016 they were loading materials in a hill and they moved away so as not to inhale dust. They were told by Mr Patrick Karaya to leave the premises.
 8. The Claimants say the actions to dismiss them was unfair and unlawful and so are entitled to the terminal dues tabulated in paragraph 13 of the memorandum of claim plus costs and interest.

Respondent's case

9. The Respondent denies all the claims contained on paragraphs 5, 6, 7, 8, 9, 10, & 11 of the memorandum of claim and further denies they breached the employment and labour relationship requirements as claimed in the memorandum of claim.
10. They claim that the Claimants were employed as casuals on need by need basis in the following periods.
 - i. Sammy Kitone Mlandi 1st Claimant was engaged as loader sometime in July 2012 and July 2015
 - ii. Gideon Charo Jambo 2nd Claimant was engaged as a loader sometime in April 2013 and January, 2016.
 - iii. PAUL Anyama 3rd Claimant was engaged as loader sometime in March 2012 and January, 2016.
 - iv. Samson chiro sonjeh 4th Claimant was engaged as loader sometime in March 2011 and 2015.
 - v. Caleb Barasa 5th Claimant was engaged as loader sometime in 2011 to April 2016.
 - vi. Rodgers Juma Masika 6th Claimant was engaged as loader sometime in August 2013
 - vii. Stephen Kitili kasuni 7th Claimant was engaged as general labourer sometime in July 2015.
 - viii. Zakayo Sitati 8th Claimant was engaged as a general labourer between august, 2013.
 - ix. Peter Mwaura Ndambui 9th Claimant was engaged as a general labourer sometime in April 2015 to July 2016.
 - x. Moses Elijah Kilasi 10th Claimant was engaged as general labourer sometime in 2015.



The Respondent avers that the Claimants were remunerated as per contract and all their dues were settled.

11. They therefore pray the claim against the respondent be dismissed with costs.

Claimant's evidence

12. The Claimants gave their evidence in Court and were represented by Kitonyi Mulandi and he says he was given authority to present documents on behalf of the other Claimants. He says his services with the Respondent were terminated in July 2015 together with Samson Chilo. He collaborates the evidence contained in the memorandum.
13. He says they were simply terminated from employment and was neither given a termination letter nor invited for disciplinary hearing. He therefore prays they be awarded their terminal dues.
14. Claimant witness no 2 is Paul Anyama who says his services were terminated on 15th January 2016 together with Gideon Charo.
15. He says he was told by Simeon Opicho to load the lorry and were told later that those who loaded the lorry should go home. He admits he received warning letters on 5th March 2015 and 21st August 2015 but he says he was forced to accept the second warning letter. He says if he refused to sign the warning letter he would be sacked. The Claimants prays for their dues to be paid.

Respondent's Case

16. The witness who testified on behalf of the Respondent was Simeon Lukulu Opicho. His evidence is that the Claimants were terminated for being absent from work and for loading excess bags. He says that Sammy Kittony left work before he could be heard. He says they used to pay the Claimants daily rates of kshs 410/-.

Claimant's submissions

17. The Claimant's submissions are that they were employees of the Respondent on continuous basis as no master roll extract was produced to show otherwise.
18. As for whether the Claimant's dismissal was justified, the Claimants aver there were no show cause letters to prove the reasons given by the Respondent as to why they terminated the Claimants' employment. The reasons given were loading excess bags and wrong counting of bags and absconding duty.
19. They also claim they were not given opportunity to be heard and so they claim that they are entitled to the compensation prayed as they were wrongfully terminated.

Respondent's submissions

20. The Respondent's submissions are that each Claimant was remunerated for the shift they worked and no one worked for more than a shift in a day.
21. They also aver that Claimants were registered with NSSF and claims for service or gratuity should be directed to NSSF.
22. The Respondent's contention is that the Claimants' conducts disentitles them from any damages and their termination was procedural.
23. They aver that the Claimant's claim should be dismissed with costs.



Decision

24. Flowing from the pleadings and testimony adduced as well as the submission the following issues fall for determination.
- a. Were Claimant's casual or service employees of the Respondent?
 - b. Were they unlawfully terminated?
 - c. Are they entitled to any remedies?
25. The Respondents claim in their pleadings that the Claimants were casual employees employed on need basis. They have presented their details of the dates they were employed but does not indicate when they were terminated or whether their employment was continuous or on daily basis in order to determine if they qualify to be casual or service employees. They have also given their reasons for terminating each of the Claimants.
26. The Court therefore needs to interrogate the employment relationship between the Claimant and the Respondent. Section 2 of the *Employment Act* defines a casual employee to mean 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 24 hours at a time.
27. The Claimants claim on diverse dates some in 2011 and up to July 2015 they worked for the Respondent. Some produced their NSSF statements being
- a. Paul Anyamba 1/8/2014 to 30/11/2014
 - b. Samson Sonjeh 2/5/2014 to 31/3/2015 (3 months contributions)
 - c. Also Barasa Caleb 1/1/2014 to 31/11/2014 but
 - d. Stephen Kasuri produced his NSSF card issued on 6th April 2014 but no statement.
 - e. Also Zakayo Sitali statement is from March 2014 to November 2014
 - f. And also Mwana P. from 1/8/2016 to 31/8/2016.
28. Conversion for casual contract to a term contract is provided in section 37 of the *Employment Act*. Section 37 (a) of *Employment Act* provides as follows:
- 37.
- (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;
29. The employment of the diverse Claimants were as pleaded in the Respondent' response as follows:-
- i. Sammy Kitone Mlandi was employed in July 2012 and July 2015.
 - ii. Gideon Charo Jambo they wrote he was employed in April 2013 and January, 2016.
 - iii. Paul Anyama was employed in March 2012 and January, 2016.
 - iv. Samson Chiro Sonjeh was employed in March 2011 and 2015.
 - v. Caleb Barasa was employed in 2011 to April 2016.



- vi. Rodgers Juma Masika was employed in August 2013
 - vii. Stephen kitili kasuni was employed in July 2015.
 - viii. Zakayo Sitati was employed between august, 2013.
 - ix. Peter Mwaura Ndambui was employed between April 2015 to July 2016.
 - x. Moses Elijah Kilasi was employed in 2015.
30. The Respondents did not given any employment records of the Claimants. The employer has the responsibility to keep his employees records as provided in section 75 of *Employment Act*. It is not lost to the Court that the Respondent in his pleadings is very vague on the period the Claimants worked for them. In the absence of any records or evidence by the Respondent the Court is at a loss to envisage the period the respective Claimants worked for the Respondent. The only choice left to the Court is to accept the evidence of the Claimants and adopt their records as in their memorandum of claim as pertaining to the period they worked for the respondents.
31. The Court finds that the respective Claimants worked for the Respondent continuously for a period longer than one month. As held by the Court in the case of *Francis Ndirangu Wachira vs Betty Wairimu Maina* Cause No 253 of 2017.
32. Once an employee works for more than one month his employment converts by operation of law to regular employment as provided in section 37 of *Employment Act*. Such an employee is thus not a casual employee as he was initially.
33. In the case of *Silas Mutwiri v Hagai Muiti Chargo Handling Services Limited* (2013) eKLR the Court held
- “ this kind of employment where the casual employee is not terminated at the end of the day and continues to work continuously for over a month up to and until over three months, then the law converts the same into a contract term of employment”.
34. In that case section 35 of *Employment Act* comes into the play. The same provides as follows:
- “ 35.
- (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—
 - (a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;
 - (b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or
 - (c) 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.

- (2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.
- (3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.
- (4) Nothing in this section affects the right- (a) of an employee whose services have been terminated to dispute the law terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
- (6) This section shall not apply where an employee is a member of-
 - (a) a registered pension or provident fund scheme under the [Retirement Benefits Act](#);
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund

35. Going by the foregoing it is the Courts' finding that the Claimant's herein were term employees and no longer casuals and therefore subject to section 35(1)(c) and section 45 of the [Employment Act](#).

Was Claimant's termination unfair?

36. The Claimant's all told the Court that on the diverse days of their dismissal they were just told to pack up and leave. They were neither called for a disciplinary hearing nor were they served with a termination letter. They were not given reason for their termination as provided in section 45 of the [Employment Act](#). Section 45 (1) of [Employment Act](#) provide "no employer shall terminate the employment of an employee unfairly. Subsection (2) of section 45 provides that the termination of employment of an employee is unfair if employer fails to provides:- that the reason for termination is valid.

37. The Respondent did not give the Claimants the reasons for their termination. They may have given written warnings to some of the Claimants prior to the termination but did not give the Claimants an opportunity to defend themselves in the presence of a fellow employee or a union floor representative. In fact the Claimants say they were just told to leave without any notice or any warning.

38. In numerous authorities as well it is now mandatory that for an employer to terminate the employment of an employee he must pass the fairness test and the fairness test encompasses substantive as well a procedural fairness. In the case of [Daniel Kiplagat Kipkeibut vs SMEP Deposit taking Microfinance](#)



2016 eKLR the Court held that substantive justification has to do with presenting a valid reason to terminate an employer.

39. The law also looks at the procedure followed before termination as provided in section 41 of the Employment Act. Section 41 provides that:

“an employer shall before the terminating of an employee on the grounds of gross misconduct poor performance or physical incapacity explain to the employee in a language the employee understands the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice during this explanation.”

40. The Court finds the Respondent did not follow the dictates of the law in that they failed to give a valid reason for termination of claimant’s employment and equally failed to follow the requisite procedure and therefore declares the termination of the respective Claimants was both unlawful and procedurally unfair.

Remedies

41. Having found the Claimants were unfairly and unlawfully terminated the Court proceeds to award the following reliefs:-

1. Sammy Mulandi from April 2012 to July 2015 is awarded
 - a. One month salary in lieu of notice Kshs 9,840/-
 - b. Untaken/unpaid leave is not proved and is declined.
 - c. House allowance is also not established finds no records to justify the same and is declined.
 - d. Service pay is awarded as there are no record from NSSF to prove whether same was remitted or not Kshs 19,680/-
 - e. Damages for wrongful dismissal for 4 months equivalent Kshs 39,360/-Total awarded kshs 68,920/-
2. Gideon Charo 25th February 2012 to 13th January 2016
 - a. One month salary in lieu of notice 9840/-
 - b. Untaken/unpaid leave is not proved and is declined.
 - c. House allowance is also not established finds no records to justify the same and is declined.
 - d. Service pay is awarded as there are no record from NSSF to prove whether same was remitted or not Kshs 19,680
 - e. Damages for wrongful dismissal for 4 months equivalent Kshs 39,360/-Total awarded kshs 68,920/-
3. Paul Anyama from February 2012 to January 2016
 - a. One month salary in lieu of notice 9840/-



- b. Leave untaken is a special damages and is yet not proved so is declined.
 - c. Service pay is awarded kshs 25,584/-
 - d. Damages for wrongful dismissal at 4 months 39,360/-
Total awarded Kshs 74,784/-
4. Samson Sonjeh 2nd March 2011 to July 2015
- a. One month salary in lieu of notice Kshs 9,600/-
 - b. Leave untaken is a special damage is yet is not proved so is decline.
 - c. Service pay is awarded Kshs 19,080/-
 - d. Damages for wrongful dismissal equivalent to 5 months 9600x5 Kshs 48,000/-
Total awarded Kshs 76,680/-
5. Caleb Barasa from 14th January 2013 to 2nd April 2016
- a. One month salary in lieu of notice 9,840/-
 - b. Untaken/unpaid leave is not proved and is declined.
 - c. House allowance is also not established finds no records to justify the same and is declined.
 - d. Service pay is awarded as there are no record from NSSF to prove whether same was remitted or not Kshs 19,680/-.
 - e. Damages for wrongful dismissal for 4 months equivalent Kshs 39,360/-
Total awarded Kshs 68,920/-
6. Rodgers Masika 7th August 2013 to 2nd August 2016
- a. One month salary in lieu of notice 9,840/-
 - b. Overtime claimed will be declined as this is a special claim and yet is not proved.
 - c. Untaken leave is also declined for lack of specifics.
 - d. Service pay is grant as there are no records that the same was remitted 15,252/-
 - e. Damages for wrongful termination @ 4 months kshs 39,360/-
Total awarded Kshs 64,452/-
7. Stephen Kasuni
- a. One month salary in lieu of notice kshs 9,840/-
 - b. Untaken leave is not specifically proved and so is declined
 - c. Unpaid salary for 3 days worked Kshs 1,230/-
 - d. Damages for wrongful dismissal from July 2015 to August 2016 is awarded one month kshs 9,840/-
Total awarded is Ksh 20,910/-



8. Zakayo Sitali
- a. one month salary in lieu of notice kshs 9,840/-
 - b. overtime claimed is a specific prayer but is not proved and so is declined.
 - c. Payment of untaken leave is also unproved and so is declined
 - d. Damages for wrongful dismissal @ 4 months kshs 39,360/-
Total awarded Kshs 49,200/-
- 9 Peter Mwaura Ndambuki
- a. One month salary in lieu of notice 9,840/-
 - b. Overtime is declined as is a specific prayer and yet is not proved
 - c. Payment of untaken leave is also unproved and so is declined.
 - d. Damages for wrongful dismissal (claimant worked from March 2015 to August 2016 awarded two months equivalent Kshs 19,680/-
Total awarded is Kshs 29,520/-
10. Moses Kilasi
- a. Awarded one month salary in lieu of notice kshs 9,840/-
 - b. Overtime is declined as is a specific prayer and is not proved
 - c. Payment of untaken leave is not proved yet is a prayer of special damages so is declined.
 - d. Damages for wrongful dismissal where Claimant worked from 5th January 2015 to 2nd August 2016 @ 2 months equivalent 19680
Total awarded is Ksh 29,520/-
42. Costs are awarded to the Claimants and interest at court rates from date of judgement till full payment.
Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 12TH DAY OF JANUARY 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 15th March 2020 and subsequent directions of 21st April 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.

ANNA NGIBUINI MWAURE

JUDGE

