



Cholyo v Menengai Oil Refineries Ltd (Employment and Labour Relations Cause 127 of 2018) [2023] KEELRC 450 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 450 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 127 OF 2018
DN NDERITU, J
FEBRUARY 23, 2023**

BETWEEN

PAUL KIPROTICH CHOLYO CLAIMANT

AND

MENENGAI OIL REFINERIES LTD RESPONDENT

JUDGMENT

1. In a Statement of Claim dated 8th May, 2018 filed in court on even date through Munene Chege & Co Advocates the Claimant prays for: -
 - a. A declaration that the Claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal.
 - b. An order compelling the Respondent to settle the outstanding benefits, as particularized at paragraph 24 of the Claim.
 - c. A certificate of service.
 - d. Cost of the suit and interest thereof at court rates.
 - e. Any other relief that this court may deem fit to grant.
2. Together with the statement of claim was filed a statement by the claimant and a bundle of documents in support of the claim.
3. On 3rd May, 2019 the Respondent through Muli & Co Advocates entered appearance and filed a memorandum of response to the claim on 23rd December, 2021. In their memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. Along with the statement in response to the claim the Respondent filed a list with one document attached.



5. This cause came up in court for hearing on 30th May, 2022 when the Claimant (CW1) testified and closed his case.
6. The defence was heard on the same date when Peter Kanede Muchibi (RW1) testified and the Respondent's case was closed.
7. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for both parties filed their respective written submissions on 19th July, 2022.

I. Claimant's Case

8. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summed up as hereunder.
9. The Claimant adopted his filed witness statement on record and stated that he was engaged by the Respondent as a mason in December, 2014 and remained in that employment till 14th June, 2017 when he was wrongfully and unlawfully dismissed.
10. He alleges that the dismissal was wrongful and unlawful as no reason or notice was given, no hearing was conducted, and his terminal dues were not paid.
11. The Claimant states that he started with a daily wage of Kshs 425/- which was raised to Kshs 460/- from July, 2015.
12. He testified that the Respondent failed and or refused to reduce the employment relationship into writing and as such he was treated as a casual worker during the entire period of employment.
13. On the circumstances leading to his dismissal the Claimant alleges that on 14th June, 2017 the factory manager of the Respondent simply walked to where the Claimant was working and told him to leave the premises. He alleges that his access key card to the premises was immediately blocked to ensure that he could not access the premises again.
14. He alleges that no formal communication was ever made to him on the reasons for the dismissal or given a hearing to defend himself.
15. The Claimant testified that he only received a sum of Kshs 23,079/= in terminal dues which he only accepted as payment for overtime.
16. In cross-examination the Claimant said that he was paid on daily basis and that he worked from 6am to 6pm each working day with one hour for lunch. He admitted that the record provided by the Respondent indicated that he did not work on any public holiday.
17. Although the Claimant admitted that he was treated as a casual worker by the Respondent he insisted that his employment was continuous and uninterrupted for the entire period of his engagement.

III. Respondent's Case

18. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, the acting head of the human resources department, and the written submissions by Counsel, as summarized hereunder.
19. The witness produced the attendance register for the period December, 2014 to May, 2017 which indicates that the Claimant did not work in any of the public holidays during that period.



20. He testified that the Claimant was a casual and that as at the time of leaving the employment he was on a daily wage of Kshs 485/-. He stated that as a casual worker the Claimant was not entitled to any notice before dismissal and that he was not entitled to service pay or gratuity. He testified that the Respondent remitted NSSF payments on behalf of the Claimant.
21. The witness stated that the Claimant worked from 8am to 5pm with one-hour lunch break.
22. The witness alleged that the Claimant left on his own volition and, being a casual worker, the Respondent was under no legal obligation to pursue him to come back to work.
23. He denied that the Claimant was a mason and termed him a general worker who was allocated general work including cleaning and assisting masons as a hand-help.
24. The witness testified that the sum Kshs 23,079/- paid to the Claimant was for leave days earned and that no other dues were payable to him. He admitted that the attendance register availed in court was extracted from a biometric system which was not produced in court. He also admitted that he did not have the records of payment of wages to the Claimant and as such he could not confirm or deny that the Claimant had worked overtime or what the Claimant's daily wage was.
25. The submissions by counsel for both sides shall be considered in the following part of this judgment.

IV. Issues for Determination

26. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties and the court identifies the following issues for determination –
 - a. What was the nature of the employment relationship between the Claimant and the Respondent?
 - b. Was the dismissal of the Claimant by the Respondent wrongful and unlawful?
 - c. If (b) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - d. Who meets the costs in this cause?

V. Employment

27. Both parties have taken diametrically opposed directions in regard to the nature of the employment relationship between the Claimant and the Respondent. While the Claimant argues that he worked continuously for the entire period of employment, and hence by operation of the law became a month to month employee, the Respondent has taken the position that the Claimant was always a casual worker who never qualified to become a month to month employee.
28. Further, while the Claimant alleges that he was employed as a mason the Respondent claims that he was employed as a casual general worker who was assigned non-skilled tasks such as cleaning, helping masons and carpenters, and any other available work on need basis and from time to time.
29. However, it is not in dispute that the Claimant was an employee of the Respondent for the period from December, 2014 to May, 2017. It is also not in dispute that the employment relationship between the employer and employee was not reduced into writing.
30. Section 37 of the *Employment Act* (the Act) provides as follows –

- (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 can not reasonably be expected to be completed within a period, or a number of working days amounting in the No 3 of 1997. www.kenyalaw.org The [Employment Act](#), 2007 45 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.
- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and Section 88 of this Act shall apply.

- 31. The necessary implication of the above law is that after working for a period of one month for the same employer an employee of necessity becomes a month to month employee accorded all the rights and privileges appurtenant to such employment. In any event, Section 37 of the Act enables this court to apply the law to a given set of facts and circumstances (evidence) and determine the nature of the employment relationship between an employer and an employee.
- 32. Counsel for the Claimant submits that the definition of a casual employee under the Act confirms that the Claimant was not a casual employee but a month to month employee. The Act defines a casual employee 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.”
- 33. Further, Sections 9, 10, and 73 of the Act place an obligation upon the employer to reduce the terms of employment into writing and keep records of employment. Once the Claimant testified on his terms of employment, it was upon the Respondent to dislodge the same through adduction of evidence to disprove those allegations. The Claimant stated that he was employed as a mason and worked for the period from December, 2014 to June, 2017. He further stated that his last daily pay was Kshs 460/= as opposed to Kshs 485/= as alleged by the Respondent.



34. The Respondent did not avail any documents to illustrate and prove the nature of the employment relationship between it and the Claimant. In the circumstances this court can only logically and legally go along with the testimony of the Claimant.
35. In view of the foregoing this court holds that the Claimant was engaged by the Respondent as a mason for the period between December, 2014 and June, 2017 on a month to month basis, after the first month.

VI. Termination or Dismissal?

36. Counsel for both parties have used and applied the words termination and dismissal interchangeably. This court has observed this confusion and interchange in many causes besides this one and hence it is important that the difference in the application and use of the two terms be generally drawn. Whenever an employment relationship comes to an end it has generally terminated. Therefore, termination is a general term that denotes the coming to an end of an employment relationship. Termination may be effected by either party issuing a notice, by mutual consent, or through effluxion of time. On the other hand, dismissal is coming to an end of an employment relationship wherein the employer gives no notice or issues a shorter notice than that agreed by or between the parties or that period provided for by the law – See Section 44 of the Act on summary dismissal, for example.
37. Going by the foregoing distinction it means that where employment comes to an end through notice as agreed by the parties or as provided for by the law, by mutual consent, lawful and procedural redundancy, the same may be described as termination in that the relationship has come to an end. On the other hand, dismissal occurs where either no notice is given or if given the same is shorter than that agreed by or between the parties or as provided for in the law.
38. However, it is also important to note that termination or dismissal may be fair and lawful or unfair and unlawful based on the tests of substantive and procedural fairness – See Sections 40, 41, 43, 44, 45, and 47 of the Act.
39. The evidence by the Claimant is that while at work on 14th June, 2017 he was approached by the factory manager of the Respondent and ordered to leave the premises of the Respondent and ordered not to report to work henceforth. His access credentials in the key card were immediately withdrawn and hence he could no longer access the place of work. No notice whatsoever was issued to him and he was not given a hearing.
40. On the other hand, the Respondent alleged that the Claimant abruptly and without notice failed to report to work and that since he was a casual worker the Respondent simply let him go as he was not obligated to issue a notice or even explain his decision to stop working.
41. Having held in the preceding part of this judgment that the Claimant was on a month to month contract of service, the Respondent was under obligation to issue him with a one month's notice before dismissing him or one month's salary in lieu thereof. In absence of such notice, it means that the Respondent dismissed the Claimant. The logical question that follows is whether the said dismissal was wrongful, unfair, and unlawful.
42. This Court (ELRC) has held severally that for termination or dismissal to be fair and lawful the same should meet the twin tests of substantive and procedural fairness. The substance is the reason for dismissal or termination while the procedure is the method and mode of execution of the same.
43. Sections 40 (redundancy), 43, 44, 45, 46, and 47 of the Act are clear on what constitutes substantive and procedural fairness in termination or dismissal. Several decisions, among them *Walter Ogal Anuro*



v Teachers Service Commission (2013) eKLR; *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR; and *Mary Chemweno v Kenya Pipeline Company Limited* (2014) eKLR, have also clarified and to a large extent settled this issue.

44. The evidence on record is that the Claimant was not issued with a notice, no hearing was held in whatever form, and no terminal dues were paid to the Claimant upon dismissal, except for the amount of Kshs 23,079/= as stated in an earlier part of this judgment.
45. Flowing from all the foregoing, this court holds that the dismissal of the Claimant was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness. It is so declared.

VI. Reliefs

46. Having held that the Respondent wrongfully and unlawfully dismissed the Claimant and failed to accord him both substantive and procedural fairness this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
47. Prayer (a) is for a declaration that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful. This court has already held so in the foregoing part of this judgment and so I have no difficulties in declaring so, which I hereby do.
48. Prayer (b) is composed of various items and is dissected as follows. The first item is underpayment in the sum of Kshs 164,571/-. The Claimant has particularized how this amount is arrived at and supported the same with Gazette Notices as submitted by his counsel. The Respondent has not disputed the cited notices and no alternative notices have been produced to counter those relied upon by the Claimant. In the circumstances, this court shall allow this claim and award the amount of Kshs 164,571/= as pleaded.
49. The other item is unpaid salary in lieu of notice. Since the Claimant was a month to month employee, and the court has found so above, he was entitled to one month's notice before or upon dismissal or payment in lieu thereof. At the correct applicable rate of Kshs 655.80 per day, the monthly rate comes to Kshs 19,674/= which is hereby awarded as pleaded.
50. The other item is service pay in the sum of Kshs 19,674/-. There is on record evidence to the effect that the Respondent remitted monthly contributions to NSSF for and on behalf of the Claimant. There is no evidence whatsoever that there was an agreement by and between the parties on payment of gratuity or such other ex gratia and hence this claim is denied as the Claimant has not demonstrated that he was entitled to such payment either in his pleadings, evidence adduced, or in the written submissions by his Counsel.
51. The other item is pay for public holidays. The records availed by the Respondent indicate that the Claimant did not work on public holidays. There is no evidence availed by the Claimant to prove that he indeed worked on any public holiday. The claim of Kshs 24,280/= under this head is thus dismissed.
52. The Claimant admitted in cross-examination that he did not work overtime but also admitted that the sum of Kshs 23,079/= that was paid to him upon termination was in regard to overtime worked. In the circumstances the sum of Kshs 104, 889/= claimed in overtime is denied.
53. The other item claimed is compensation for the wrongful, unfair, and unlawful dismissal. Counsel for Claimant has asked for the maximum compensation of twelve months gross wages under Section 49(1)(c) of the Act. This court has considered the factors set out in Section 49(4) of the Act. The Respondent was grossly unfair and brutal in the manner that it dismissed the Claimant denying him both substantive and procedural fairness. No notice was issued and no consideration was put in



context by the Respondent in regard to the future and welfare of the Claimant upon dismissal. The Respondent did not care at all as to what was to happen to the life of the Claimant upon dismissal notwithstanding that the Claimant had served the Respondent for over two years.

54. The Respondent was also not forthright during the trial and decided to take the evidently false narrative that the Claimant had abandoned duty knowing very well that the Claimant had actually been wrongfully dismissed. The Respondent also failed and or refused to pay any terminal dues to the Claimant upon dismissal.
55. Although no evidence was availed as to how long it took the Claimant before obtaining another job this court takes the view that this is an appropriate case for an award of the maximum compensation provided for in the law being twelve months gross salary amounting to Kshs 236,088/= . It is so ordered.
56. For avoidance of doubt the only loss or damage that an employee may be awarded is compensation under Section 49 of the Act unless some special damage is proved.
57. Prayer (c) is for a certificate of service and the Respondent is hereby ordered to issue the Claimant with a certificate of service as provided for under Section 51 of the Act.

IV. Costs

58. The Claimant is awarded costs of this cause.

V. Disposal

59. In final disposal of this cause, this court issues the following orders: -
 - a) That a declaration be and is hereby issued that the Claimant was an employee of the Respondent on a contract of service running from month to month.
 - (b) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful and unlawful.
 - (c) The Claimant is awarded a total of Kshs 420,333/= together with interest thereon from the date of this judgment less statutory deductions. The said sum is made of-
 - i. Under payment..... Kshs 164,571/=
 - ii. One month's gross wage in lieu of notice. .Kshs 19,674/=
 - iii. Compensation for wrongful and unlawful dismissal.....Kshs 236,088/=Total.....Kshs 420,333/=
 - c) All the other claims are denied.
 - d) The Claimant is awarded costs of this cause.
 - e) The Respondent is ordered to issue and deliver a certificate of service to the Claimant within 30 days of this judgment.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 23RD DAY OF FEBRUARY, 2023

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DAVID NDERITU



JUDGE

