



REPUBLIC OF KENYA



Masika & 2 others v Revital Health Care [EPZ] Ltd (Employment and Labour Relations Cause 631 of 2016) [2023] KEELRC 420 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 420 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 631 OF 2016**

AK NZEI, J

FEBRUARY 16, 2023

BETWEEN

MISHI MOSES MASIKA 1ST CLAIMANT

MARY MWAILA 2ND CLAIMANT

JADELINE SHALI MWASHIGADI 3RD CLAIMANT

AND

REVITAL HEALTH CARE [EPZ] LTD RESPONDENT

JUDGMENT

1. The Claimants herein, Mishi Moses Masika, Mary Mwaita and Jadelaine Shali Mwashigadi, sued the Respondent vide a Memorandum of Claim dated June 14, 2016, and pleaded as follows:-
 - a. That the Claimants were employed by the Respondent on diverse dates as casual workers at the Respondent's Mombasa office.
 - b. That in May 2015, the Claimants were terminated from their service without prior notice or payment of their terminal and contractual benefits for their long service to the company.
 - c. That the Respondent acted in breach of Articles 41 and 47(1) of the *Constitution* of Kenya and ILO Convention 158 on termination of employment, 1982; and that failure by the Respondent to proffer factual and genuine reasons for terminating the Claimants' employment violated the mandatory provisions of Sections 41,43 and 45 of the *Employment Act* 2007.
2. The Claimants set out their respective claims as follows:-
 - a. Mishi Moses Masika: employed in the year 2010 -2015 [5 years]
 - i. One month payment in lieu of notice (Kshs 735X26 days) Kshs 19,110



- ii. Leave pay for 5 years (21 days X 5 years X Kshs 735) Kshs 77,175
- iii. Service pay (15 days x 5 years x735) Kshs 55,125
- iv. Compensation for unfair termination (Kshs 19,110x12 months) Kshs 229,320
Total Kshs 380,730
- b. Mary Mwaia: employed in the year 2011-2015 [4 years]
 - i. One month payment in lieu of notice (Kshs 735x26 days) Kshs 19,110
 - ii. Leave pay for 4 years (21 daysx4 years x Kshs 735) Kshs 61,740
 - iii. Years of service (15 days x 4 years x Kshs 735) Kshs 44,100
 - iv. Compensation for unfair termination (Kshs 19,110x12 months) Kshs 229,320
Total Kshs 354,720
- c. Jadeline Shali Mwashigadi: employed in the year 2009 – 2015 (6 years)
 - i. One month payment in lieu of notice (Kshs 735X26 days) Kshs 19,110
 - ii. Leave pay for 6 years (21 days x 6 years x Kshs 735) Kshs 92,610
 - iii. Years of service (15 daysx6 years x Kshs 735) Kshs 66,150
 - iv. Compensation for unfair termination (Kshs 19,110x12 months) Kshs 229,320
Total Kshs 407,190

The Claimants claimed a total sum of Kshs 1,142,190.

3. The Claimants further pleaded that they were illegally and unfairly terminated and that the Respondent had failed to pay them their contractual and terminal benefits contrary to the [Employment Act](#), and had failed to issue them with certificates of service, contrary to Section 51 of the said Act.
4. The Respondent entered appearance on October 18, 2016 and subsequently filed a statement of Reply on November 8, 2016, denying the Claimants' claim. In particular, the Respondent denied terminating the Claimants' services, and pleaded:-
 - a. That the Claimants failed to present themselves for work, and had not presented themselves as at the date of filing the pleadings.
 - b. That the Claimants were paid all their dues for the period they had been engaged by the Respondent.
5. When trial opened, the 1st Claimant adopted her witness statement dated August 24, 2016 as her testimony. She further testified that in May 2015, there was a go slow over unpaid two months' salary, which was subsequently paid. That the 1st Claimant went to the place of work the following day after the go slow, but was locked out and told by the HRM, one Emmanuel, that the Respondent did not require the Claimants. That the Claimants were not given an opportunity to be heard.
6. Cross-examined, the 1st Claimant testified that she was being paid Kshs 735, inclusive of overtime.
7. It is stated in the 1st Claimant's witness statement, which the 1st Claimant adopted on oath as her testimony, that she was being paid a daily salary of Kshs 735, which amount was computed and paid monthly.



8. The 2nd Claimant testified that she was employed by the Respondent in April 2011. She adopted her filed witness statement dated August 24, 2016 as her testimony. Save for the date of employment, the 2nd Claimant's evidence was basically similar to that of the 1st Claimant. She testified that she was being paid at a daily rate of Kshs 735.
9. The 3rd Claimant testified that she was employed by the Respondent in February 2009, and was being paid at the rate of Kshs 735 per day as at 2015. She adopted her filed witness statement dated August 24, 2015 as her testimony. Save for the date of employment, the 3rd Claimant's evidence was basically similar to that of the 1st and 2nd Claimants.
10. The Claimants were duly cross-examined by Counsel for the Respondent, but their evidence was not shaken.
11. The Respondent did not present any witness on November 18, 2021, the date scheduled for hearing of the defence case, though shown to have been served with a hearing notice on September 6, 2021 and an affidavit of service in that regard duly filed in Court. The Respondent's case was thus closed without any evidence being presented on behalf of the Respondent.
12. The evidence adduced by the Claimants was not controverted, and therefore stands unchallenged. It was held as follows in the case of *Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 Others, Nairobi [milimani] Hcc No 1243 Of 2021:-*

' It is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact, in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.'

13. Further, it was stated as follows in the case of *Chrispine Otieno Caleb -vs- Attorney General [2014] eKLR:-*

' Although the defendant has denied liability in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.'

14. Having said that, and having considered the pleadings filed and evidence presented by the Claimants, issues that present for determination, in my view, are as follows:-
 - a. Whether the Claimants were casual employees as at May 2015 when their employment was terminated.
 - b. Whether termination of the Claimant's employment was unfair.
 - c. Whether the Claimants are entitled to the reliefs sought.
15. On the first issue, although the Claimants pleaded that they had initially been employed as casuals, they further pleaded and testified that they remained in employment for five years (1st Claimant), four years (2nd Claimant) and six years (3rd claimant) respectively. Section 37(1) of the *Employment 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 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.'

16. Section 37(3) of the [Employment Act](#) provides as follows:-

' (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.'

17. It is my finding that although the Claimants may have been initially employed as casual employees, their respective contracts of service were, by dint of Section 37 of the [Employment Act](#), converted to term contracts where wages were payable monthly and whereon Section 35(1) (c) of the said Act applied. The Claimants became entitled to such terms and conditions of service as they would have been entitled to under the [Employment Act](#) had they not initially been employed as casual employees.

18. The Court stated as follows in the case of [Francis Ndirangu Wachira -v- Betty Wairimu Maina \[2019\] eKLR](#):-

' Having worked continuously for longer than one month, the Claimant's terms of employment converted by operation of the law to a regular employment as provided in Section 37. He was thus not a casual employee as he was initially. I place reliance on the case of Silas Mutwiri -vs- Haggai Multi-cargo Handling Services Limited (2013) eKLR where Mbaru J, stated that '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 upto and until over three months, then the law converts the same into a contract term employment.' Similarly, in the case of Kesi Mohammed Salim -vs Kwale International Sugar Co Ltd [2013] eKLR Makau J, stated 'the Respondent has admitted that the Claimant worked continuously for about 8 years on casual basis. She produced as exhibit schedule of the days worked by the Claimant in 2015 which show that he worked over 36 weeks continuously which is way more than the minimum days required for casual employee to convert to regular term contract under Section 37(1) and (3) of the Act. Consequently, it is my finding of fact and indeed my declaration that the Claimant's casual employment had converted from casual to term contract under Section 37(1) and (3) of the Act and he was therefore subject to the provision of Sections 35(1) (c) and 45 of the Act.'

19. On the second issue, Section 41 of the [Employment Act](#) sets out an elaborate mandatory procedure that must be adhered to by any employer contemplating termination of an employee's employment on grounds of misconduct, poor performance or physical incapacity. The Respondent is not shown



to have given any reason for terminating the Claimants' employment as contemplated in Sections 41,43(1) & (2) and 45(2) of the Employment Act. The Respondent did not give any evidence in Court, and therefore there was never an attempt by the Respondent to reveal the reasons for terminating the Claimants' employment. Further, the Claimants were not issued with termination notices pursuant to Section 35(1) (c) of the Employment Act.

20. It is my finding that in all the circumstances of the case herein, the Respondent did not act in accordance with justice and equity in terminating the Claimants' employment. The termination was, therefore, unfair pursuant to Section 45(4) (b) of the Employment Act, and I so declare.
21. Consequently, and having considered written submissions filed by Counsel for both parties herein, I make a finding that the Claimants have proved their respective claims on a balance of probability, and are entitled to the reliefs sought. I allow the Claimants' respective claims as set out in paragraphs 2 of this judgment, and hereby enter judgment in favour of the 1st, 2nd and 3rd Claimants against the Respondent as follows:
 - a. 1st Claimant - Kshs 380,730
 - b. 2nd Claimant - Kshs 354,270
 - c. 3rd Claimant - Kshs 407,190Total Kshs 1,142,190
22. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
23. The Respondent shall issue the Claimants with appropriate Certificates of Service pursuant to Section 51 of the Employment Act within thirty days of this judgment.
24. The Claimants are awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH FEBRUARY 2023.

AGNES KITIKU NZEI

JUDGE

ORDER

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:

.....for Claimant

..... for Respondent

