



REPUBLIC OF KENYA



Kabui v Lalani (Cause 1697 of 2017) [2023] KEELRC 777 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 777 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1697 OF 2017
AN MWAURE, J
MARCH 28, 2023**

BETWEEN

GEOFFREY KARIMI KABUI APPLICANT

AND

SAMURA LALANI RESPONDENT

JUDGMENT

1. The claimant filed dated 21st April 2017 whereby he is claiming he was unfairly and wrongfully terminated from his employment.

Claimant's Case

2. The claimant states he was employed by the respondent in 2013 at a salary of Kshs 26,000/- per month. He was employed as an electrician.
3. He says his salary was reviewed to kshs 31,200 per month.
4. He says on 12th December 2016 he was unlawfully terminated. He says he was not given notice and was not paid in lieu of notice.
5. The claimant says he was an excellent employee and as a result of the unlawful termination he suffered damages and prays compensation and punitive and aggravated damages plus costs to be awarded to him.

Respondent's Case

6. The respondent's filed their response dated 2nd May 2018. He says the claimant was working as a casual worker at their construction site and would be paid wage on daily basis. He prays the claimant's case be dismissed with costs.



Claimant's Evidence in Court

7. The claimant in his evidence states he was employed as an electrician by the respondent. He says he worked for the said respondent for three years. He says he was chased away without notice and he admits he has no documents as the respondent did not give him.

Respondent's evidence in n Court

8. The respondent's witness Mr Lelani says claimant was his temporary employee in his site. He says he had about 50 employees at his construction site. He says he used to pay him Kshs 1,200/- per day. He further says he closed the site and informed claimant about it but he did not produce a document in court to show he had closed site.

Claimant's submissions

9. The claimant in his submissions says he worked for the respondent from 2013 – 2016 and he is relying on the case of [Francis Mwema Kamau vs China Railways No. 10 Group Co Ltd](#) 2018 eKLR where court held:

Where the claimant remained in the employment of the respondent from September, 2016 to March, 2017 a period of 6 months in continuous service, the rights and benefits applicable to an employee under the Act, applied to him. Without any challenge to the claims made, the circumstances set out in the claim that there was no notice or reasons given by the respondent as the employer when the claimant was terminated in his employment; such amounted to unfairness in accordance with section 45 of the [Employment Act, 2007](#).

10. He submits that he was unlawfully terminated as he was not given any reason for termination or notice. On this he is depending on the case of [Kosgei Metkei Multi Purpose Company Limited](#) Civil Appeal No 95 of 2017 where court held:

“We adopt that finding in this matter and find that the respondent had no valid reason to terminate the appellant's employment; and that it had no fair reason to terminate in relation to the appellant's conduct, capacity and compatibility, and operational requirements of the respondent. In addition, the respondent did not terminate the appellant's employment in accordance with fair procedure. In all the circumstances of the case, the respondent acted unfairly and the termination was not justified. The learned judge fell into error when he concluded that the respondent's action was fair and just. “

11. The claimant avers that since he was unlawfully terminated he is then entitled to the prayers as per the clam.

Respondent's submissions

12. The respondent submits that the claimant did not produce any document to prove employment relationship such as NSSF or NHIF deductions.
13. The respondent is relying on the case of [Everret Aviation Limited v Kenya Revenue Authority](#) [2013] eKLR where Court held:

“in determining whether a relationship between parties is a contract for service between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration



into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the code of payment is critical.”

14. The respondent further submits that the claimant was working at a construction site and when work ended the employees had to leave.
15. Respondent says there were no outstanding payments as he was paid all his dues as before 1/12/2016.

Determination

16. The court would frame the issues for determination as follows;
 - a. Whether the claimant was a service employee of the respondent or was a casual or
 - b. Is he entitled to the reliefs prayed?
17. The claimant avers he worked for the respondent from 2013-2016 as an electrician and was being paid Kshs 26,000/- per month. He says the salary was then increased to Kshs 31,200/-. The claimant has tendered absolutely no document to show his employee/employer relationship. The respondent is the one who produced petty cash vouchers of money paid to the claimant at different times and of varying amounts. Some just read “casual” and others “electrician”.
18. There is no receipt for salary of Ksh 26,000/- or 31,200/-. It is unfortunate if claimant worked for the respondent for three years and yet he has no document at all to prove their relationship.
19. That then would only lead to the conclusion that he was a casual employee as the respondent claims in his response. A casual employee is defined in section 2 of [Employment Act](#) in definitions as follows:

“A casual employee means a person the terms of whose engagement provide for is payment at the end of each day and who is engaged for a longer period than twenty four hours a time.”
20. The court is aware the employer is expected to keep records of his employees as provided in section 74 of [Employment Act](#). However the employee must lay some base as to his claim of being an employee.
21. In this the court is supported by the case of [Zaraka Adoyo Bondo v TAI Shunjun](#) Cause No 40 of 2014. Where court held:

“The claimant herein has failed to prove the existence of an employment relationship between the grievants and the respondent. In the absence of an employer employee relationship the court is not in a position to consider the issue of termination of employment under the [Employment Act](#).”
22. The jurisdiction of employments and labour relations court as far as labour matters is concerned is limited to an employment relationship as defined in law and the court must always satisfy itself on the account before proceeding any further.
23. Regrettably in this case it is purely the word of the claimant against the respondent. The respondent's witness annexed petty cash voucher to show the intermittent manner he was paying the claimant in confirmation that he was a casual employee.
24. The court found no evidence documentary or otherwise to support the claim that the claimant was employed by the respondent. He was asked why he did not call a witness and he said he could not get



one. Having worked for the respondent for three years he could have got a fellow worker to confirm he worked there. He did not call such witness.

25. The court having found that the claimant did not prove the employment relationship with the respondent the court finds the claim cannot hold and the matter is dismissed.
26. The claimant having been a casual worker the court finds it fair that each party meets their own costs.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF MARCH 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

