



**Nakhayo v Vegpro Kenya Limited (Employment and Labour Relations Cause
1783 of 2017) [2023] KEELRC 784 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 784 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1783 OF 2017**

**K OCHARO, J
MARCH 23, 2023**

BETWEEN

JOSEPHINE NAKHAYO CLAIMANT

AND

VEGPRO KENYA LIMITED RESPONDENT

JUDGMENT

1. Through a memorandum of claim dated August 30, 2017, the claimant sued the respondent seeking the following reliefs:
 - a. A declaration that the dismissal of the claimant from employment was unlawful and unfair and the claimant is entitled to payment of his terminal dues and compensatory damages.
 - b. An order for the respondent to pay the claimant her terminal dues and compensatory damages totalling to Kshs 204,050.
 - c. Costs of this suit plus interest thereon.
2. Upon being served with summons to enter appearance, the respondent did enter appearance and file a statement of defence dated May 14, 2018. In the statement of defence, the claimant's claim and entitlement to the reliefs sought were denied.
3. At the hearing, the parties adopted the contents of the witness statements that they had filed herein as their evidence in chief and the documents as their documentary evidence.

The claimant's claim

4. It was the claimant's case that she first came into the employment of the respondent in February 2006, as a grader. That with time in the course of her employment she rose to the rank of scaler. She honestly



- and diligently worked for the respondent for a cumulative period of 10 years and 5 months up to June 8, 2006.
5. On or about the April 13, 2016, she was on duty and tasked with distribution of punnets for packing broccoli to the Trimmers and weighing the same.
 6. She asserted that since she wanted to step out for a break, she requested her colleague Mrs Lucy Wachira to hold fort for her, a thing she wilfully did.
 7. When she resumed work after the break, she continued with her assigned duties. In the course, it was discovered that a mini blade that had been assigned to one of the employees, Ms Pamela Inyanchi by the Sharp Controller, blade No 191 was missing, efforts to trace the same did not bear any fruits.
 8. The loss was reported to the respondent's quality controller Mr Ndolo who asked the claimant, Ms Inyanchi & two of their colleagues to remain behind and continue searching for the blade. As the punnets that had been packed that night were being passed through a metal detector, the blade was found in one of them.
 9. The claimant contended that a week later a meeting was called where she was in attendance. The agenda of the meeting was to address the matter of blades being found in exported packed punnets. In the meeting it was resolved that from that day henceforth, if a blade were to go missing and subsequently found in a packed Punnet, a sanction of dismissal would be meted on the scaler, sharp controller and Trimmer, as a consequence. Thereafter no incident of the like was reported.
 10. On or about the June 8, 2016, she was summoned by the respondent's Human Resource manager, alongside her colleagues Ms Lucy Wachira and Eunice Macharia. Eunice Macharia was pardoned, while her and the others were dismissed on account of the incident relating to blade No 190. The dismissal was summary.
 11. The claimant asserted that the dismissal was unfair, it subjected her to an abrupt loss of income and ability to meet her continuing obligations.
 12. The claimant contended that she first joined the workforce of the respondent as a casual but as at the time of the termination she was in the employment as a permanent employee. She reported to work daily. In a week she had two off days.
 13. The respondent's contention that she was a casual worker, who could only work for the respondent as and when there was work is absolutely untrue.
 14. Before the dismissal she was not given a chance to explain herself on the incident regarding blade No 190.
 15. Cross examined by counsel for the respondent, the claimant stated that she was not employed under any written contract. Consequently, she did not have any document from which her job description would be ascertained.
 16. The claimant testified that she was earning Kshs 530 per a day, therefore Kshs 10,600 a month. She refuted the respondent's contention that she used to work two days a week.
 17. She further testified that she was dismissed following the blade incident. She is the one who reported the loss. After the blade was found, she and the others were warned against a repeat of a similar incident.
 18. She further testified that her dismissal was verbally communicated by Mr Manaze Otieno, the Human Resource manager. After the dismissal, her union stepped in and issued a letter to the respondent.



19. Her salary was paid at the end of every month. She reiterated that her dismissal from employment was unfair, for she was made to bear culpability in a matter where she ought not have.
20. In her evidence in re-examination, the claimant stated that she worked continuously for the respondent for over a period of 10 years.

The respondent's case

21. The respondent presented Mr John Mutanyi its Human Resource Manager to testify in this matter on its behalf.
22. The witness stated that the respondent deals in grading fresh mixed vegetables, packing them into punnets or bags in required weights before they are sealed and sold to its, local markets or exported to international markets.
23. The witness contended that the respondent hires casual employees whenever there is work demand from time to time. The respondent had a specific procedure of hiring the casual employees. After a customer places his or her order, the respondent's management team could then decide on the number of staff required for the work. Once the number is determined, an announcement is made at the pack house, urging those interested in the causal work to report. The casuals then are picked at the gate. Once picked the supervisors would allocate them tasks.
24. The witness stated that on or about April 13, 2016, a knife No 0190 was issued to Pamela Inyanji who on that day was working on Tenderstem Broccoli. She was scheduled to work from 11.00 pm to 1.30 am [April 14, 2016]. When she was breaking out, she handed over the knife to Lucy Wachira [co-worker]. Lucy handed over all the 16 knives for the table to the claimant who was the scaler for the day.
25. The witness stated that on returning from the break at 02.00 am, Pamela went to collect her knife No 0190 from Josphine only to find the knife missing. Search was done, but the same wouldn't be traced. Consequently, the matter was reported to the Senior QC on site who ordered an immediate search in the pack house. Eventually the knife was discovered while all the punnets were being screened through a metal detection machine.
26. The witness contended that it was concluded that the knife got lost from the scaler's desk. The 16 knives had been properly handed over to the scaler who was the head of the table.
27. In his evidence under cross examination, the witness testified that the claimant was a casual worker. She could be engaged by the respondent only whenever there was work. She never worked continuously as alleged by her.
28. The employees were supposed to sign in whenever they reported for work. However, the respondent did not avail the register before the court. The respondent did not tender any document from which the date when the claimant started working can be ascertained.
29. The witness asserted that the respondent did not terminate the claimant's employment. She was let go and told that she would be called whenever there would be work for her. Letting go, was as a result of the knife incident. The incident could have costed the respondent immensely.
30. The witness contended that as the claimant was a casual, the respondent could not take her through a disciplinary process as though she was a permanent employee.
31. The claimant was guilty of the accusation. She was the last person with the knife.



32. In his evidence in re-examination, the witness stated that since the claimant was a casual, her employment was terminated at the end of that day.

The claimant's submissions

33. The claimant's counsel identified four issues for determination, thus;
- a. What was the nature of employment relationship between the parties?
 - b. Was the claimant guilty of any misconduct warranting dismissal from employment?
 - c. Was fair procedure applied before disengaging the claimant from employment.
 - d. Is the claimant entitled to the prayers sought?
34. It was submitted that the claimant was not a casual worker as alleged by the respondent. she was engaged longer than 24 hours at a time. She worked continuously for many days without a break. She served for more than three years, and by dint of the provisions of section 9 [1] of the [Employment Act, 2007](#) the respondent was required to reduce her contract into writing.
35. The respondent did not tender any evidence to rebut the claimant's assertion that she was not a casual employee. In the circumstances of this matter, the law placed a duty upon the respondent to prove that the claimant was a casual worker. Section 10 [7] of the [Employment Act](#) provides that if in any legal proceedings the employer fails to produce a written contract or the written particulars prescribed in subsection [1] the burden of proving or disapproving an alleged term of employment shall be on the employer. The respondent did not produce any attendance records or muster roll in respect of the claimant.
36. It was further submitted that the claimant having worked for a period in aggregate of more than one month and having performed work which would not reasonably be expected to be completed within a period or a number of working days amounting in aggregate to the equivalent of three months or more, by operation of the law, section 37 of the Act, her employment became one terminable by a 28 days' notice under section 35 [1] [c], therefore the nature of the relationship changed, to a term contract. To support these submissions, reliance was placed on the decision by the Court of Appeal in [Chemelil Sugar Company vs Ebhrabim Ochieng Otuon & 2 others \[2015\] eKLR](#).
37. Further reliance was placed on the holding in [Susan Misoke vs Vegpro Kenya Limited \[2020\] eKLR](#), thus;
- ' In the absence of any evidence to the contrary that the claimant worked for the respondent since 2003 to 2015 she ceased to be a casual employee after doing the same job over and over again beyond 3 months and so she cannot be considered a casual worker. I therefore return the verdict that the claimant was not a casual worker but a permanent employee.'
38. As to whether there was procedural fairness in the dismissal of the claimant from employment, counsel submitted that the claimant's contract having converted into a term contract by operation of the law, became protected by the law relating to unfair dismissal. The allegations that were raised against the claimant concerning the knife were unsubstantiated.
39. Contrary to the provisions of section 41 of the [Employment Act](#), the claimant was not notified that the respondent was intending to dismiss her, and upon which grounds. Further, the claimant was not given an opportunity to defend herself against the accusations that were being levelled against her.



40. The evidence of the respondent's witness as was presented through his witness statement and oral testimony in court, clearly shows that the respondent did not have a valid reason to dismiss the claimant from employment. Therefore, the respondent did not discharge its legal burden under sections 43 & 45 of the Act. Consequently, the dismissal was unfair pursuant to the provisions of section 45. To buttress this point, the judicial decision in *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*, was cited.
41. On the reliefs sought, it was argued that having proved that she was not a casual worker and that her dismissal from employment was unfair, the claimant is entitled to the reliefs sought.

The respondent's submissions

42. The respondent's counsel distilled three issues for determination in this matter:
- a. Whether the claimant was engaged as a casual employee.
 - b. Was fair procedure applied before disengaging the claimant from employment?
 - c. Whether the claimant is entitled to the prayers sought.
43. Keenly considering the definition accorded for the term employee, one gets an unmistakable impression that it was the intention of Parliament not to have a casual worker considered as an employee. A casual worker can only be deemed an employee if only his or her such status is converted under the provisions of section 37 of the Act. Absence of the conversation, the rights and protections under the Act, are not available to him or her, substantively.
44. The claimant was not engaged for a period longer than a day and was only called upon when and as need arose, therefore she was a casual worker. To support this point, reliance was placed on the holding in *Francis Runji Karingi & 5 others v Chira Hebei Water Conservancy Engineering Bureau [2014] eKLR*, that:
- ' The critical distinction between an ordinary employee and a casual employee, therefore is that a casual employee is paid at the end of the day and is not engaged for more than 24 hours at a time.'
45. The respondent's counsel further submitted that there is no documentary evidence provided to demonstrate that she was an employee of the respondent. There is no evidence that the claimant before filing this suit wrote to the respondent requesting it to convert her status as a casual to a contractual employee. In her pleadings she has not sought for the conversation.
46. Courts of law lack jurisdiction to grant prayers not sought in the parties' pleadings. This court cannot convert the status of the claimant from a casual to a term contract employee. To buttress the argument that a court cannot grant a relief not sought. Counsel sought fortification in the case of *Abdul Shakoor Sheik v Abdul Majid sheikh and 2 others LLR No 2219 [CAK]*, thus:
- ' Order 7 of Rule 6 of the Civil procedure Rules states that every plaint shall state specifically the relief which the Plaintiff claims, either simply or in the alternative and it shall not be necessary to ask for costs, interest or general rule, therefore a Plaintiff is not entitled to the reliefs which he has not specified in his statement of claim. Pleadings play a very pivotal role in litigation. The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to



adjudicate between them. It thus serves the two-fold purpose of informing each party what is the case of the opposite party which he will have to meet before, and at the same time inform the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine.

The Judge committed a serious breach of a fundamental rule of pleading when he granted a relief based on the meeting of May 27, 1992.'

47. Pursuant to the provisions of section 109 of the *Evidence Act*, duty lay upon the claimant to prove that her work was within the scope of section [1] [a] [b] and [2]. She failed to discharge the duty by providing sufficient evidence that she was not a casual worker.
48. As to whether or not there was procedural fairness in the termination of the claimant's employment, counsel submitted that, the claimant was a casual worker, therefore the provisions of section 41, 43 and 45 of the *Employment Act* did not apply to her case. Under section 35 of the Act, her employment would be terminated without notice.
49. On the reliefs sought it was submitted that the claim for unfair termination does not arise in the circumstances of this matter. The claimant is not entitled to damages or any of the reliefs sought.

Analysis and Determination

50. From the parties' pleadings evidence and submission, the following issues present themselves for determination:
 - a. What was the nature of the claimant's employment?
 - b. Was the termination procedurally and substantively fair?
 - c. Is the claimant entitled to the reliefs sought or any of them?

What was the nature of the claimant's employment?

51. There is one common factor in the positions taken by the combatants herein as regards the claimant's service to the respondent. That she did render services to the latter. However, the parties have taken uncompromisingly different positions as regards under which arrangement she rendered the services.
52. The claimant contended that she first joined the respondent's workforce in the month of February 2006, worked for the latter continuously for a period of 10 years and 5 months, until June 8, 2016 when she was unfairly dismissed from employment. She testified that she was first a casual worker and thereafter got engaged on permanent terms. To prove her engagement by the respondent, the claimant tendered a number of documents as evidence;
 - a. A certificate of medical examination issued pursuant to the provisions of the *Food, Drugs and Chemical substances Act*, [Cap 254] issued on the December 16, 2008 valid up to June 16, 2019, indicating place of work as 'VERGO Kenya Limited.'
 - b. A certificate of medical examination serial no 4666725 issued on September 5, 2013 valid for six months up to February 5, 2014, indicating the place of work as 'Vegpro Kenya Limited.'
 - c. Certificate of training by the respondent awarded on the June 30, 2014.
 - d. Vegpro Premium Bonus Charts for various dates and weeks in the year 2016.
 - e. Scaler's weekly performance ratings.



- f. Schedule for premium weight shift macro handlers for casuals and permanents for wef 19th and October 21, 2015, respectively.
53. These documents were not challenged in any manner by the respondent. Counsel for the respondent submitted that the claimant, first, did not place any evidence before this court demonstrating that she was an employee of the respondent and second that there is no time that she worked beyond 24 hours. The documents tendered by the claimant disabuse this position taken by the respondent.
54. At the centre of the dispute herein is the exact nature of the employment relationship between the claimant and the respondent. I agree with the submissions by counsel for the claimant that in the circumstances of this matter, including that the respondent did not issue any written contract for the relationship between it and the claimant, the documents produced by her, and that under section 10 [7] of the [Employment Act](#), duty lay on the respondent to disapprove the claimant's claim that she was under a term contract of employment.
55. Besides the general assertion that the respondent made, that the claimant could be engaged only as and when there was work, it did not go further to prove the assertion. Reasonably one would expect the respondent to produce a register to demonstrate that the claimant's evidence and position were untrue, or produce a muster roll. Nothing would have been easier than the production. I have not lost sight of the respondent's witness's evidence that the employees would as a requirement sign a register as they reported to work.
56. The documents produced by the claimant in evidence inter alia indicate that the respondent had permanent and casual employees. The evidence shifted the evidential burden to the respondent to prove that it did not or that the claimant was not one those permanent employees. It did not discharge the evidential burden.
57. In sum, I find that the claimant's employment at the time of separation was under a term contract and therefore terminable by a twenty-eight days' notice or payment of one month's salary in lieu pursuant to the provisions of section 35 of the [Employment Act](#).
58. Having found as I have regarding the nature of the claimant's employment, I disregard the parties' submissions as to whether the claimant was a casual or not and whether if she was, her employment status was converted by operation of the law, section 37 of the [Employment Act](#). With great respect, the submissions are irrelevant therefore.

Was the termination procedurally and substantively fair?

59. It is common place now that the enactment of the [Employment Act](#), 2007, came with expansive protections and rights in favour of employees. The effect of it, it brought diminishment of applicability of the common law principles and particularly those that related to employer- employee relationships. The rights and protection are constitutionally and equity spirited.
60. Worth stating that the enactment brought on board applicability of the tenets of natural justice in employment matters. This got embodied in section 41 of the [Employment Act](#).
61. Imperative to state that having found as I have hereinabove regarding the nature of the employment, the claimant fell under the wings of the statutory protections and rights.
62. Section 41 of the Act provides for the architecture of procedural fairness in Kenya. The provision which is couched in mandatory terms, requires of an employer intending to terminate an employee's employment, to notify the employee of the intention and the grounds upon which the action is contemplated, further to allow the employee an adequate opportunity to make a representation



on the grounds. In allowing the opportunity, he or she must also allow the employee the right of accompaniment. Lastly the employer should consider the representations made by the employee and or the person accompanying him before making any decision.

63. The claimant contended that this mandatory procedure was absent in her dismissal. The respondent's witness testified that the claimant was not availed the process under the provision of the law because she was a casual worker. This confirmed the claimant's assertion that the procedure was absent. On this count I cannot hesitate to conclude that the claimant's dismissal from employment was procedurally unfair.
64. Section 43 of the [Employment Act](#), which speaks to substantive fairness in disputes regarding employees' termination, places duty upon the employer to prove the reason[s] for the termination, and section 45 [2] makes it imperative and mandatory on the employer to go beyond stating the reason, and prove that the reason was valid and fair.
65. In this matter, the respondent asserted that the reason for the dismissal of the claimant from employment was because a knife which was supposed to be in her possession disappeared and was found in one of the punnets that were ready for the market. Considering the counter evidence that was given by the claimant, it was necessary that the respondent demonstrate with clarity that indeed the knife was in the possession of the claimant at the time it disappeared. With respect, the respondent's witness's evidence on this aspect was casual not sufficient enough to help the respondent discharge the legal burden under section 45 [2] of the Act.
66. By reason of the premises, I hold that the dismissal was substantively unjustified.

Of the reliefs

67. The claimant claimed for a compensatory award under section 49 [1] [c] of the [Employment Act](#). She claimed for the maximum compensation contemplated thereunder, twelve [12] months' gross salary. The power bestowed upon the court by the provision is discretionary. It is exercised depending on the circumstances unique to each case, however regard should be given to the factors provided for under the section.

I have carefully considered the manner in which the dismissal was effected, the want in procedural and substantive fairness, and the length of time the claimant was in the employment of the respondent and conclude that she is entitled to the relief and to the extent of 7 [seven] months gross salary. Therefore Kshs 10,600 x 7 = Kshs 74,200.

68. Having found that the claimant's employment was one terminable by a twenty-eight days' notice and that the same was not issued, I award the claimant one month's salary in lieu of notice, Kshs 10,600.

The claimant claimed for service pay of Kshs 66,250. The respondent asserted that she was not entitled to the same as she was a casual worker. The court has disagreed with this position taken by the respondent. she was not a casual worker. In absence of any other evidence justifying why she would not be entitled to service pay under section 35 of the Act, I award the same as sought, Kshs 66,250.

In the upshot, I enter Judgment in favour of the claimant for:

- a. Compensation pursuant to the provisions of section 49 [1] [c] of the [Employment Act](#), seven [7] months' gross salary, Kshs 74,200.
- b. One month's salary in lieu of notice, Kshs 10,600.
- c. Service pay Kshs 66,250.



- d. Costs of this suit.
- e. Interest on the awarded sum at court rates, from the date of this Judgment till full payment.

READ, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2023.

Ocharo Kebira

Judge

Mr. Namada for the Claimant.

Ms. Oduor for the respondent.

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.

Ocharo Kebira

Judge

