



Tabuche v County Government of Kakamega & 4 others (Employment and Labour Relations Cause 23 of 2021) [2023] KEELRC 685 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 685 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 23 OF 2021**

**JW KELI, J
MARCH 16, 2023**

BETWEEN

PIUS OLOO TABUCHE CLAIMANT

AND

THE COUNTY GOVERNMENT OF KAKAMEGA 1ST RESPONDENT

THE BUKAYA HEALTH CENTRE 2ND RESPONDENT

MR. PHILIP MAKOKHA 3RD RESPONDENT

MS SUSAN OKWISIA 4TH RESPONDENT

MS. ANNE MONGONI 5TH RESPONDENT

JUDGMENT

1. By a memorandum of Claim dated 3rd January 2017 the Claimant sought the following reliefs against the respondents :-
 - a. A declaration that the 5 respondents action of underpaying the claimant herein was illegal, unlawful and wrongful
 - b. An order compelling the 5 respondents to pay the claimant the following:-
 - i. Underpayment Kshs. 348,161.40/-.
 - ii. 15% Housing allowance for 13 years Kshs. 101,803.70/.
 - iii. accrued annual leave for 13 years Kshs 45,681.80/-.Total claim of Kshs. 495,646.90/-

The above Kshs. 495,464.90 be paid with interest as from the date the case was filed in court.



- c) An order directing the 5 Respondents to adjust the claimant's salary from Kshs. 3000/- to those stipulated in the said General Orders.
 - d) An order directing the 5 respondents to issue appointment letter to the claimant stating that the claimant is a permanent employee of Bukaya Health Centre.
 - e) An order compelling the 5 respondents to bear the costs of this suit.
2. The Claimant together with the claim verifying Affidavit of 3rd January 2017 and Claimants bundle of documents and Claimant's witness statement (2-9 Claimant's bundle of documents).
 3. The Claim was opposed. The Respondents filed joint statement of defense dated 8th February 2017 and the respondents' list of documents of even date together with the bundle of documents. The Respondents further filed in court joint witness statement of the 3rd and 5th Respondents dated 8th February 2017 and witness statement of the 4th Respondent of even date.
 4. On the 25th October 2022 when the matter was fixed for hearing, the court being satisfied with service proceeded ex parte with the claimant's case and closed the defence case for non-attendance.
 5. On the 9th November 2022 the respondents filed notice of motion application seeking to arrest delivery of scheduled judgment. The court having heard the application inter partes set aside ex parte proceedings and the matter was heard denovo.

Hearing

The Claimant's case on the 16th January 2022

6. The Claimant, in person, testified on oath in his case as a witness of fact where he adopted and relied on his filed claim and produced documents filed in court. The witness was cross examined by counsel for the respondent Ms. Munihi.
7. Claimant's documents produced as his evidence. Employment contract dated 8th March 2004 Claimant's wage increase 2009 minimum wages order 2010 minimum wages order 2011 minimum wages order 2012 minimum wages order 2013 minimum wages order Claimant's wage increase detail Tabulation of underpayment of wages Tabulation of accrued annual leave NSSF statement for 2016

Defence Case on 16th January 2023

8. The Defence called 2 witnesses of fact Susan Okwisia (also the 4th Respondent) who testified on oath and was cross-examined by Claimant. The witness adopted her witness statement of 8th February 2017 as her evidence in chief and produced documents filed by the Respondents in list of documents dated 8th February 2017 namely:-
 - a. Application for employment dated 28th June 2007
 - b. Application for employment dated 19th February 2015
 - c. Notice dated 18th march 2013
 - d. Letter of appointment dated 1st June 2016
 - e. Letter of appointment dated 3rd October 2016
 - f. Authority to incur expenditure form dated 7th October 2015



- g. Expenditure report 1st quarter
 - h. Casual workers payment schedule date 1st October 2015
 - i. Casual workers payment form dated 7th October 2016
 - j. Casual workers payment form dated 12th January 2017
9. The respondent 2nd witness of fact was Philip Makokha (3rd respondent) who testified on oath, adopted his witness statement dated 8th February 2017 as his evidence in chief and was cross- examined by the claimant.

Written submissions

10. The Claimant's submissions were dated 31st January 2023 and received in court on 6th February 2023. The Respondents' written submissions drawn by Phoebe Munihu Muleshe & Co. Advocates, were dated 10th February 2023 and received in court on 13th February 2023 .

Determination

Issues for determination

11. The Claimant addressed the following issues under his written submissions as follows:-
- a. whether I was a casual or permanent employee
 - b. whether I was underpaid and was entitled to leave and housing allowance
 - c. whether the costs of this suit should be awarded to me.
12. The respondents addressed the merit of the claim in general
13. The court after hearing the case was of the considered opinion that the issue placed before the court for consideration was:-
- a. whether the claimant was a casual or permanent employee
 - b. whether the claimant was underpaid and was entitled to leave and housing allowance
 - c. whether the claimant is entitled to reliefs sought

a. Whether the claimant was a casual or permanent employee.

The Claimant's case

14. The Claimant told the court he was employed in 2004 and worked for Bukaya Health Centre. When he filed the suit he was still working.

On cross examination the claimant stated his contract (exhibit 2) was to end on 18th may 2005. That he applied again. The claimant told the court he kept on applying as contract of service was contractual. That he was employed in 2003. That the county government took over hospitals in 2010. The claimant told the court in 2012 he was working and not paid well. That he worked in security and the farm, that he worked continuously. The Claimant told the court that he was working and told to apply again hence the application dated 28th June 2007. That the letter of 19th February 2015 was the same as that of 28th June 2007. That he had been working at Bukaya Health center when he was asked to write the letter of 28th June 2007 without being explained the purpose of the letter. He sought position of



watchman /groundman where he was already working. In letter of 19th February 2015 he applied for groundman job. The claimant told the court he was not aware of advertisement for the jobs. He denied the job was advertised as per R-EXHIBIT 3. The claimant told the court he had not signed contract with the county government. On R- exhibit 4 the claimant told the court the same was appointment letter dated 3rd October 2016 which he signed and was issued while he was working. That the he did not understand the purpose of the letter. The claimant told the court his salary was paid by the incharge. That before 2011 he was paid from development money and thereafter by county government funds. That from 2012 he was told the county government was to pay , that he asked for increment and was told the county government. That he sued the 3rd and 4th respondent as they were the ones he was working with. That he was paid for time worked, that he was stopped on 20th January 2017 and he handed over. That he had no evidence of salary paid. That when the county took over they took time to pay salaries and later paid KES 32000 to his bank account, that he was stopped on 20th January 2017 at 52 years.

In submissions the claimant submits he worked continuously from 2004 to 2017 and no evidence was produced on the alleged breaks by the respondent. That having worked continuously for 13 years the employment automatically converted into permanent basis employed as provided under section 37 of the Employment Act to wit:- 37. Conversion of casual employment to term contract (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 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. (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 87 of this Act shall apply.”

15. Section 87 of the Employment Act reads:- “Complaint and jurisdiction in cases of dispute between employers and employees” (1) Subject to the provisions of this Act whenever— (a) an employer or employee neglects or refuses to fulfill a contract of service; or (b) any question, difference or dispute arises as to the rights or liabilities of either party; or (c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.”
16. To buttress the foregoing submission the claimant further relied on the case in Susan Misoka v Vegpro Kenya Limited (2020)e KLR paragraphs 41 and 44 where the court stated:- ‘41. On the 1st issue, the Claimant’s case is that she worked for Respondent from 1st December 2003 to 22nd April 2015, a span of 13 years continuously and could therefore not be a casual employee. 44. The Respondent though



indicating that the Claimant worked on and off failed to present to Court the muster roll to show how she worked. It is the duty of the employer to keep employees records and the failure by the Respondent to produce such records is an indication that such documents do not exist or if produced would be prejudicial to their case.”

17. The Claimant further submits that the respondent did not avail any evidence in form of records in proof of their allegations as per the duty of employer under section 74 of the *Employment Act* to keep records of their employees. The claimant prays for the court to vary his terms of employment from casual to permanent pursuant to provisions of section 37(4) of the *Employment Act*.

Defence

18. The Respondents in their statement of defence stated that that the claimant was employed by the 2nd respondent when it was still under the management of Kakamega county council on contract of one year and which contract lapsed and thereafter the claimant could serve on renewed contract which at times could not be given to him therefore his employment on contract basis was not regular and continuous as such he is not entitled to the orders sought.
19. RW1 (4TH Respondent) in her statement adopted as evidence in chief stated that she found the claimant working as a casual when she reported at the Health Centre in 2013. That all along the claimant had been a casual worker on contract basis for 3 months renewable on application. The 3rd and 5th respondent associated themselves with the 4th Respondent. RW1 told the court she found letter of claimant’s appointment dated 28th June 2007 in the record of the health Centre. That letter of 19th February 2015 was brought to her upon advertisement of the position vide notice dated 18th march 2013(R-exhibit 3). That the letter dated 3rd October 2016 appointing the claimant was read to him and he signed. That as per payment schedule the Claimant was not at work in August ,September and October 2015(R-EXHIBIT8). That the Claimant was on break as evidence he was a casual worker. That exhibit 9 was the payroll for August and September 2016 where claimant was paid for 2 months as casual worker, and exhibit 10 was payroll for December 2016 paid in January 2017. RW1 admitted the claimant worked for 20 days in January 2017 and was not paid. On cross -examination the 4th Respondent (RW1) told the court she could not recall whether she found the claimant at the health Centre or that it was him who gave her the keys. That the Claimant was paid for NSSF as per his exhibit 10. That she paid for his NSSF as instructed to pay for casuals as lumpsum.
20. RW2 told the court the claimant was a casual worker at the health center and they got casual workers for 6 months. That they did not pay leave or house allowance and had explained the terms of contract. RW2 told the court he was the Chairman of the health center in 2014. That he found the claimant working at the health center as casual. That when he found the claimant it was decided to advertise his work and they employ him afresh. RW2 told the court that he was not informed how long the claimant had worked. That they paid NSSF 50% and employee 50% and not NHIF. RW2 told the court that when the claimant sued them they decided his service was not cordial.
21. In submissions the Respondents submit that the 1st Respondent came in operation in 2010 and did not take over the liabilities of the National Government. That the 2nd to 5th Respondent have nothing to do with the claimant’s employment. That from 2010 the working relations with the claimant was on contractual basis whose terms were explicit and binding between the claimant and the 1st Respondent. That the contract were not run for specific period and there were no benefits. That renewal was not automatic and there were times when contract was not renewed. That the 4th respondent testified on the funding limitation by the 1st Respondent. The 1st Respondent submit that the Court of Appeal had pronounced themselves on employment contracts in *Nanyuki Water and Sewage Company Limited v*



Bneson Mwiti Ntiritu & 4 others (2018)e KLR where it stated that the ‘an employer and an employee are at liberty according to their needs enter into a contract of service which was defined an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;’

22. That in the authority the court observed that there was no pleading or evidence from the respondents that their contracts provided for provision of housing, water, food and medication and such is the claimant’s case. The contract did not provide what he had prayed.
23. The Respondents submit that the 13 years pleaded by the claimant was farfetched for reasons stated that the contract was not continuous. That the last contract expired and was never renewed or presented for renewal and as such the claimant cannot claim for adjustment of salary. That the claimant was no longer an employee of the 1st respondent.

Decision.

24. The Claimant presented evidence of having been employed on 8th March 2008 (C-Document No. 2) which was a contract but ministry of Health Board of 2nd Respondent for 1 year. That he applied again and this happened all through his employed until he was terminated on 20th January 2017 on filing the instant suit. The claimant verbally told the court he was first employed in 2003 but evidence before court was the letter of first employment dated 8th March 2004.
25. The Respondent’s evidence was that the claimant was a casual worker with contracts which were renewed on application and that sometimes there were breaks. The Respondents and relied on payroll of August to October 2015 where the name of the claimant was missing.
26. RW1 told the court the contracts were for 3 months while RW2 stated they were for 6 months. The court found contradiction on the terms of contract. The Respondent did not produce evidence to controvert the evidence of the claimant that he worked continuously save for the workers payment schedule document of August to October 2015. The court finds that said casual workers payment schedule not sufficient evidence on the employee being at the workplace. The payment schedule is not synonymous with attendance list. The court on balance of probabilities found the position of the claimant to be more likely the truth that he had worked from March 2004 to 20th January 2017 continuously when he was stopped for filing the instant suit.
27. The court finds that the claimant having worked for 13 years could not be treated as a casual employee. Both RW1 and RW2 testified they found the claimant working at the health centre. Such short contracts issued from time to time amount to fair labour practices as held by court of appeal in Civil Appeal No. 261 of 2020 *Kenyatta University v Esther Njeri Maina* where it was stated “By being retained to what in essence was casual employment, we are further in agreement with the learned judge’s summation that the respondent’s constitutional rights were infringed. She was treated as a non-permanent employee and this is tantamount to unfair labour practices and thus denying her all the rights of a permanent employee”. The court finds and determines that the claimant’s employment over the long period of 8th March 2004 to 20th January 2017 was not casual employment , the contract of 2004 was for one year and the claimant continued in service. The court declares the claimant’s terms of employment were no casual but permanent and pensionable based on section 37(4) of the *Employment Act* which states:- “37. Conversion of causal employment to term contract (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 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. (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 87 of this Act shall apply.”

28. In conclusion the court holds that the contracts of service issued various times from March 2004 to January 2017 to the claimant doing a job which could not be finalised in less than a month being groundsman/watchman, assumed permanency and are deemed to be ones where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service in terms of section 37 of the [Employment Act](#).

b. Whether the claimant was underpaid and was entitled to leave and housing allowance.

The claimant’s case

29. The Claimant’s pleaded he was underpaid contrary to gazetted general wages orders and tabulated the underpayment for salary. The claimant further pleaded he was not granted annual leave and housing allowance since 2004.

The claimant submits that the respondent’s evidence being casual payment schedules dated 1.10.2015, 7.10.2016 and 12.1.2017 indicated that he was underpaid for the payment do not tally with the minimum wage scales.

The claimant submits that his employment having automatically converted from casual to permanent he was entitled to leave and house allowance as provided by the law under section 37(2) and (3) to wit: “(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”.

30. The Claimant submits that the respondents admitted to not having paid him leave and house allowance of which he prays to be compensated including lost years during earlier retirement by respondents as pleaded. The claimant to buttress this claim relied on the decision in [Samwel Agwata Ogaro -v- Lavington Security](#) (2017)e KLR where the court awarded as follows:- ‘The Respondent did not deny that the Claimant was paid Kshs. 5000 throughout his employment from 2006 to 2011.



Since all remedies are based on the salary, the court has to first establish what the Claimant's minimum wage should have been over the years. The Minimum wage for a day guard in 2006 was kshs. 5195 while that for a night guard was Kshs. 5796.

In 2009, the minimum wage for a day guard was 6130 while for night guard it was 6839. In 2010 the minimum wage was Kshs. 6743 and Kshs. 7523 respectively for day and night watchman.

Having worked both day and night shifts the Claimant was entitled to be paid the higher wage of night watchman. His final salary should therefore have been Kshs. 7523 excluding 15% house allowance. His gross salary was therefore Kshs. 8651.45.

I award the Claimant Kshs. 8651.45 on account of pay in lieu of notice. He is also entitled to house allowance and underpayments which I will combine by working out underpayments based on the consolidated wage (basic plus house allowance). “

The respondent's case

31. The Respondents' case was that the claimant was provided with a contract whose terms were clear there would be no benefits and the contract was binding on the parties. The respondents relied on the decision of the Court of Appeal in *Nanyuki Water and Sewage Company Limited v Bneson Mwiti Ntiritu & others* (2018)e KLR where it stated that the ‘an employer and an employee are at liberty according to their needs to enter into a contract of service’. That in that decision the court observed that there was no pleading or evidence from the contracts that they provided for provision of housing, water food and medication hence the claimant's prayers are incapable of being granted.

Decision

32. Section 37 (3) of the *Employment Act* reads:-

‘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.’

The court already converted the claimant's employment to permanent and pensionable terms having found he worked continuously employed from 8th March 2004 to 20th January 2017. Applying section 37(3) of the *Employment Act* then the terms of contract excluding statutory benefits on basis of being a casual worker are not relevant. The Claimant pleaded specifically he was not paid housing allowance and did not proceed on leave and this was admitted by the respondent. The respondent relies on Court of Appeal decision in *Nanyuki Water and Sewage Company Limited v Benson Mwiti Ntiritu & others* (2018)e KLR. In that decision the court made various holdings which the court proceeds to highlight:-

1. “The manouvre adopted by the appellant in declining to testify served only to give credence to the respondents' version of events, and we do not blame the trial court for its summary conclusion that the respondents were engaged as casual employees and that they had worked for a period of continuous days equivalent in aggregate to not less than a month and the job they performed could not reasonably be completed in less than three months or more. Consequently, we find and hold, as the trial court did, that the contracts of service of the respondents assumed permanency and were deemed to be ones where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service” in terms of section 37.”
2. “On the basis of the finding made above that the respondents' contracts of service were governed by section 37, it was incumbent on the appellant to comply with section 35 (1)



(c) which provides for the manner of termination of various forms of employment in the following terms:- “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 – ... (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.” Other provisions of the Act relating to termination of employment should also have been complied with. It is common ground that no notice was served pursuant to section 35 above. Indeed, the appellant whose legal duty it was to keep records relating to its employees produced no records relating to termination. The termination was therefore unlawful, and we so find. We also affirm the finding by the trial court that the appellant had engaged in unfair labour practice.”

3. This is the finding that the respondent relied on and the court cites the part of the decision to wit:- “Finally on the third issue; the appropriate remedies. The basis for the complaint laid by the appellant is the declaration by the trial court that ‘the claimants are entitled to provision of an allowance for housing, medical, water and food to be backdated to the dates when the plaintiffs began to work and in accordance with the *Employment Act*, 2007 or such better terms offered by the respondent to its employees at all the material time.’ The challenge to that declaration is made on two planes: firstly, that the claims were in the nature of special damages which the trial court had already declined to grant as they were neither pleaded nor proved; and secondly, because there was no pleading or evidence from the respondents that their contracts provided for provision of housing, water, food and medication. At any rate, the appellant argued, no monetary value could be attached to those items and it was inconceivable how these could be backdated to the respective dates of employment of the respondents. It is indeed correct that the respondents in their statement of claim did not particularize the special damages they were entitled to. They merely prayed for provision for ‘housing, water, food and medical’ without pleading them. Instead, they particularized these, among others, in their final submissions and claimed a sum in excess of Sh.18 million. The claim was however dismissed by the trial court stating: “As submitted for the respondent, the particulars of the special damages were not pleaded and the claimants would not be entitled as per the details in their submissions.” There is no cross appeal on that finding, and that is why the appellant wonders how claims that were dismissed could be granted in the same breath. It was contradictory. We have considered the issue and we think there is merit in the appellant’s complaint. A claim for special damages is one that is ascertainable and quantifiable in monetary terms at the time of institution of the suit. There is a plethora of authorities stating that they must be specifically pleaded and strictly proved. See for example, the case of *Maritim & Another v Anjere* [1990-1994] EA 312. The dismissal of the claim by the trial court for want of compliance with the principles was correct and, in any event, is not challenged by the respondents. That ground of appeal also succeeds.”

33. The court finds that the court of Appeal holding was that the claimant in the trial court had not particularised the special damages of housing, water, food and medication in the pleadings but submitted on them. The court held that the said items had to be pleaded and proved.
34. In the instant case the claimant pleaded under paragraph 1.15 of the claim that he was never granted leave an issue admitted by the respondents and justified on basis that it was not a benefit under the contract of service by parties.



35. In paragraph 1.16 of the claim the claimant pleaded that his salary had no element of housing allowances of 15% an issue admitted by the respondents and justified on basis that it was not a benefit under the contract of service by parties.
36. The court having converted the employment of the claimant to permanent and pensionable he ought to enjoy benefits available to employees which include annual leave and housing allowance.
37. On annual leave the claimant tabulated under his document 9 annual leave for 21 days for every year worked using the minimum wages orders. The court holds that any contract of service purporting to pay an employee below the minimum wages as gazetted by the government is illegal. Consequently the court proceeds to award the claimant annual leave as pleaded the claimant having proved he was not granted the annual leave entire working days. In authority relied on by the respondent the Court of Appeal in Benson Mwiti Case while allowing the appeal made the following orders:- “In the end, these are the final orders and declarations in the appeal: (i) A declaration that Section 37 of the Employment Act, 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees. (ii) A declaration that the respondents' employment was unlawfully terminated. (iii) An order that the respondents and each of them shall be paid one month's salary in lieu of notice. (iv) An order that the respondents and each of them shall be paid salary in lieu of leave not taken. (v) A declaration that the appellants had engaged in unfair labour practices. (vi) An order that the respondents and each of them shall be paid compensation equivalent to three months salary. (vii) Each party shall bear its own costs of this appeal Dated and delivered at Nyeri this 11th day of October, 2018.”
38. The court then declares the claimant shall be paid salary in lieu of leave not taken for the years worked. The claimant pleaded he was employed as a night watchman. The letter of 8th March 2004 did not state the position worked. The letter of 28th June 2007 indicated that the claimant applied for watchman/groundsman. The court finds that the claimant fits in the category of general labourer including cleaner, gardener , day watchman etc under the general wages order.
39. The Claimant pleaded he was underpaid under the general wages order but relied on the scale of night watchman which is higher. The court having found he was a general labourer proceeds to tabulate the annual leave, housing allowance and underpayments:-

Underpayment of salary

40. The court had to establish the applicable minimum wages over the years. The claimant did not provide prove of underpayment by availing the payable minimum wages in the year 2004 and 2005. The claimant produced the minimum wages general orders for 2009 to 2013. The court will thus only consider salary underpayment from 2009 to 2017 applying the produced general orders for General labourer under other areas.

2009 salary 1400 minimum wage 3270 difference 1870 x12=22440

2010 salary 1800 minimum wage 3270 difference 1470x12=17640

2011 salary 2750 minimum wage 4047 difference 1297x12=15564

2012 salary 2750 minimum wage 4577.20 difference 1827.20x12=22442.4

2013 salary 2750 minimum wage 5218 difference 2468 x12=29616

2014 salary 2750 minimum wage 5218 difference 2468x12=29616



2015 salary 3000 minimum wage 5218 difference 2218 x12=26616

2016 salary 3000 minimum wage 5218 difference 2218x12=26616

Total salary under payments 190,550.40/.

Accrued statutory Annual leave

41. Section 28 of the *Employment Act* provides for statutory annual leave as follows:- “Annual leave (1) An employee shall be entitled— (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;”

2004 to 2007 $1300/26 \times 21$ days x4 years =4200

2008 $1400/26 \times 21$ days =1130.7

2009 minimum wage of $3270/26 \times 21$ days =2641.1

2010 minimum wage of $3597/26 \times 21$ days =2905.26

2011 minimum wage of $4047/26 \times 21$ days =3268.7

2012 minimum wage of $4577.20/26 \times 21$ days =3696.96

2013-2016 minimum wage of $5218/26 \times 21$ days x 4 years =16858.15

Total award on accrued annual leave for 13 years awarded for sum of KES 34,700.87/-.

Unpaid housing allowance

42. The statutory housing allowance was introduced in 2007 under the *Employment Act* as follows: “ 31 Housing (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation. (2) This section shall not apply to an employee whose contract of service— (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;”

43. The applicable rate is 15% of salary where the employer has not provided accommodation. There was no dispute that the claimant was not provided with housing.

The same is tabulated as follows:-

2007 $1300 \times 15/100 = 195 \times 12 = 2340$

2008 $1400 \times 15/100 = 210 \times 12 = 2520$

The claimant produced general wages orders for 2009 to 2013 and they apply henceforce

2009 minimum wage of $3270 \times 15/100 \times 12 = 5886$

2010 minimum wage of $3597 \times 15/100 \times 12 = 6474.60$

2011 minimum wage of $4047 \times 15/100 \times 12 = 7333.20$

2012 minimum wage of $4577.20 \times 15/100 \times 12 = 8238.96$

2013-2016 minimum wage of $5218 \times 15/100 \times 12 \times 4$ years =37569.60

Total award on unpaid housing allowance for sum of KES. 65502.36



Unpaid salary

44. RW1 incharge of the health center admitted that the claimant was not paid for 20 days worked in January 2017 and the salary is awarded applying the minimum wages of 2013(last general wage order produced by claimant) $5218 \times 20 / 30 = 3478.67$

c. Whether the claimant is entitled to reliefs sought

45. The claimant succeeded in his claim on underpayment and was awarded above for underpayment of salary, leave and housing and unpaid salary. The claimant prayed for his salary to be adjusted and for the respondents to issue him with appointment letter stating he was a permanent employee. The parties were in agreement that the claimant was terminated from employment upon institution of the suit.
46. The suit was instituted while the Claimant was in employment and there was no evidence of compliance with procedural process under section 41 of the *Employment Act* by the Respondent by purporting to terminate the services of the claimant. The response was that having sued them the claimant services were no longer tenable. Section 41 of the *Employment Act* is mandatory to be complied with. The court then orders for the re- engagement of the claimant on permanent basis to his employment with salary under the current minimum wage General Order and that he be issued with appointment letter within 14 days of this judgment for claimant to work remaining years with full benefits from year of employment in 2004. In the alternative the 1st respondent to pay the claimant his service under section 35 of the *Employment Act* having remitted only 3 months NSSF dues (claimant's exhibit 10) for entire period worked. The Court found the 3 months NSSF deductions too little to count as social security protection for the claimant. The 1st Respondent inherited the claimant as an employee together with the health centre under the transitional clause of the 2010 Constitution. Section 35 of the *Employment Act* provides for service pay where NSSF had not been paid. The applicable rate being 15 days for each year worked applying last salary being minimum wage of $5218 \times 15 / 30 \times 13$ years total award Kes 33,917/- and 12 months salary for unfair termination 5218×12 months total sum of Kes 62616.00/- and notice pay of 1 month salary Kshs 5218/.

Conclusion and disposition

47. The court concludes that the claimant succeeded in his claim against the respondents and enters judgment for the Claimant against the 1st respondent as follows:-
- (a) A declaration that Section 37 of the *Employment Act*, 2007 applies to the employment of the Claimant to the effect that his casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the *Act* applies. The Claimant is entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed or treated as casual employee.
 - (b) A declaration that the Respondents had engaged in unfair labour practices as against the claimant.
 - (c) A declaration that the claimant was underpaid under the general wages orders as produced by the claimant and the following awards on underpayment are granted :-
 - i. Award of under payments of salary Kshs.190,550.40
 - ii. Award on unpaid housing allowance for sum of KES.65,502.36



iii An order that the claimant shall be paid salary in lieu of leave not taken for 13 years.
Award on accrued annual leave for 13 years awarded for sum of KES 34,700.87

Total award on underpayments and leave KES. 290,753.63 payable to the Claimant.

(2) The Claimant to be salary for 20 days worked in January 2017 awarded at Kes. 3478.67/-.

(3) Award.

On the termination of employment

a. A declaration that the Claimant's employment was unlawfully terminated on instituting the suit.

b. An order for re engagement of the Claimant permanent basis and issuance of appointment letter in compliance with current general wages order at his last place of work within 14 days of the judgment.

c. In the alternative to the re- engagement an order that the claimant shall be paid:-

a. One month's salary in lieu of notice of Kes Kshs 5218.

b. Service pay of Kes 33,917

(c) An order of compensation for the unfair termination equivalent of 12 months salary for unfair termination 5218x 12 months total sum of Kes 62,616.00.

(5) The claimant was in person. The court exercises its discretion and assesses as reasonable costs of the suit which it awards to the Claimant for total sum of Kshs. 50,000/= .

(6) Interest awarded at court rates from date of judgment .

48. Right of appeal in 30 days

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT IN BUNGOMA THIS 16TH DAY OF MARCH, 2023.

JEMIMAH KELI,

JUDGE.

In the presence of :-

Court Assistant : LUCY MACHESO

Claimant: In person present

Respondent : Masakhwe holding brief for Munihu

