



REPUBLIC OF KENYA



**Mukade v Aliwalis (Cause 2137 of 2015) [2023] KEELRC 839 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 839 (KLR)

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

**CAUSE 2137 OF 2015**

**JK GAKERI, J**

**APRIL 13, 2023**

**BETWEEN**

**ANNAH ERIKOSI MUKADE ..... CLAIMANT**

**AND**

**DR. NIRMAL SINGH ALIWALIS ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated the instant suit by a Statement of Claim filed on December 3, 2015 alleging wrongful dismissal and refusal to pay terminal dues.
2. The Claimant alleges that she was engaged by the Respondent as a house help on March 15, 2002 at a monthly salary of Kshs 10,000/= and used to work from 6.00 am to 6.00 pm every day including weekends and public holidays without overtime and her duties included cooking, washing and pressing clothes, among other assignments and was neither housed by the employer nor paid a house allowance.
3. That she worked diligently for 161 months and did not proceed on leave for 13 years and 5 months.
4. That on August 4, 2015, she was granted leave to visit a sick relative in Busia and her employment was terminated when she resumed duty and was neither heard nor paid for the 25 days worked in August 2015.
5. The Claimant prays for;
  - a. A declaration that termination of employment was wrongful and unfair.
  - b. Terminal dues of Kshs 842,358/= comprising;
    - i. One month's salary in lieu of notice.
    - ii. 25 days worked in August 2015.
    - iii. House allowance for 161 months.



- iv. Leave for 13 years.
- v. Prorata leave for 2015.
- vi. Public holidays worked.
- vii. 12 months compensation.
- viii. Overtime worked.
- ix. Severance pay for 13 years.

Total Kshs 842,358.00

- c. Certificate of service.
- d. Costs of the suit.

### **Respondent's case**

- 6. In its statement of response dated May 26, 2016, the Respondent avers that he engaged the Claimant on a casual and/or part-time basis as she was a domestic worker of Messrs Paul Enright & Lucas Pietro Saraceno whose domicile was Perth, Australia where he practices medicine.
- 7. That the Respondent was under no obligation to house the Claimant being a part-time employee and did not remit statutory charges in respect of the Claimant.
- 8. The Respondent further avers that the allegation by the Claimant of not proceeding on leave for 161 months was untenable.
- 9. That the Claimant resigned on August 25, 2015 and recommended one Isabella Shikanga Shilongo as her replacement and no terminal dues were outstanding.
- 10. The Respondent avers that the Claimant was not entitled to the reliefs sought as follows; the Claimant did not work overtime or during public holidays and was neither terminated nor declared redundant.

### **Claimant's evidence**

- 11. The Claimant adopted the witness statement and produced documents filed as exhibits.
- 12. The Respondent did not participate in the proceedings, service of hearing date notwithstanding.

### **Claimant's submissions**

- 13. The Claimant's counsel identified three issues for determination, namely;
  - i. Whether the Claimant was a casual employee.
  - ii. Whether termination of the Claimant's employment was unfair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
- 14. As regards terms of engagement, counsel relied on the Claimant's written statement to urge that the Claimant was not employed as a casual. Reliance was made on the provisions of Section 2 of the [Employment Act, 2007](#) on the definition of a casual employee.



15. On termination of employment, counsel relied on the provisions of Section 41, 43, 44(4) and 45(1) of the *Employment Act* to urge that termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness.
16. The decision in *Anthony Mkala V Malindi Water & Sewerage Co Ltd* was relied upon to urge that the provisions of Section 41 of the *Employment Act* were not complied with.
17. It was further submitted that the Respondent had no reason to terminate the Claimant's employment.
18. On the reliefs sought, counsel submitted that the Claimant was entitled to all the reliefs prayed for.
19. The Respondent did not file submissions.

### **Determination**

20. The issues for determination are;
  - i. Whether the Claimant was a casual employee of the Respondent.
  - ii. Whether termination of the Claimant's employment was unfair.
  - iii. Whether the Claimant was entitled to the reliefs sought.
21. Before delving into the issues identified herein above, it is essential to dispose of the issue of burden of proof in undefended suits or where the Respondent opts not to participate in the trial.
22. In this regard, the sentiments of Maureen Onyango J. in *Humphrey Munyithya Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR are instructive.
23. The learned judge stated as follows;

“In the case of *Monica Karimi Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
24. Similarly, in the words of Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR stated that;

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
25. The court is guided accordingly.
26. Although in this case the Claimant produced nothing to demonstrate that she was an employee of the Respondent, other than a copy of the demand letter dated September 2, 2015, the Respondent admitted that the two had a relationship but averred that the Claimant was a casual employee.



27. As to whether the Claimant was a casual employee or not, the Claimant's uncontroverted evidence is that she was employed on March 15, 2002 and served the Respondent as a house help until August 2015, a duration of 161 months.
28. Although the Respondent averred that he engaged the Claimant as a casual, he adduced no evidence to prove his averment. Relatedly, the Respondent did not aver or attach evidence to show that he paid the Claimant on a daily basis.
29. Section 2 of the *Employment Act*, 2007 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.
30. In the absence of cogent evidence to demonstrate that the Claimant was a casual and/or part-time employee serving as a caretaker/domestic worker, the court has no basis to hold that she was.
31. Relatedly, the Respondent avers that the Claimant left voluntarily through resignation by letter dated August 25, 2015, a copy of which was not availed to the court.
32. Finally, since it is common ground that the Claimant left in August 2015, it was behoved the Respondent to demonstrate the nature of the Claimant's employment.
33. From the evidence on record, the court is satisfied that the Claimant was not a casual employee of the Respondent.
34. As to the nature of the contract, the sentiments of the Court in *Robai Musinzi V Safdar Mohamed* Cause No 267 of 2012 are instructive as follows;  
  
"It is now settled law under the *Employment Act* that a verbal contract is a contract that can confer rights and can be enforced. The provisions of this Act apply to oral and written contracts. Further, that all employers should seek at the earliest opportunity to reduce oral contracts into writing. This would help in spelling out the terms and conditions of engagement between the parties."
35. As regards termination of the Claimant's employment, while the Claimant testified that her employment was terminated after she returned from Busia, the Respondent averred that the Claimant resigned from employment.
36. Section 45(2) of the *Employment Act*, 2007 provides that;
2. A termination of employment by an employer is unfair if the employer fails to prove –
- a. that the reason for the termination is valid;
  - b. that the reason for the termination is a fair reason;
    - i. related to the employee's conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; and
  - c. that the employment was terminated in accordance with fair procedure.
37. Other relevant provisions of the Act on termination of employment include Section 43 which deals with the reason(s) for termination, Section 47(5) on justification of the grounds of termination and Section 41 which addresses the procedural precepts.



38. The foregoing provisions are unambiguous that for a termination of employment to pass muster, it must be backed by a valid and fair reason and must have been effected in accordance with a fair procedure as held by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR.
39. In *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, Ndolo J stated as follows;
- “ . . . For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
40. The court is in agreement with these sentiments.
41. As regards the reason for termination, the Claimant testified that sometime in August 2015, she travelled to Busia to attend to a sick relative and was granted off-duty by the employer and when she reported back, she was informed that her employment had been terminated and the job given to another person.
42. Neither the written statement nor the oral evidence adduced in court indicate the number of off-days the Claimant was given and when she resumed duty.
43. Could it be possible that she overstayed and the Respondent sought for a replacement?
44. In the absence of more cogent evidence, the court is left wondering why an employer would accord an employee off-duty and subsequently hire a replacement.
45. The Claimant did not avail sufficient detail to enable the court make an appropriate assessment of the factual situation, bearing in mind that the Respondent adduced no evidence.
46. Based on the evidence adduced by the Claimant, it is the finding of the court that there was likelihood that the Claimant overstayed in Busia and the Respondent employed another person in her place.
47. As regards the procedure employed by the Respondent, it is evident that the provisions of the *Employment Act*, 2007 germane to procedure were not complied with.
48. The Claimant testified that she was neither given a notice nor opportunity to be heard before termination of employment.
49. From the evidence on record, the court is satisfied that termination of the Claimant’s employment was procedurally unfair.
50. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;
- i. Having found that termination of the Claimant’s employment was unfair for want of procedural propriety, a declaration to that effect is hereby issued.
  - ii. One month’s salary in lieu of notice
51. Failure by the employer to issue the Claimant a termination notice was contrary to the provisions of Section 35 of the *Employment Act*, 2007 and the Claimant is awarded pay in lieu of notice Kshs 10,000/=.
- iii. Salary for 25 days worked in August 2015



52. The Claimant tendered no evidence as to date on which she proceeded to Busia and when she reported back to work. In the absence of dates, it is unclear to the court how the 25 days were computed.

The prayer is declined.

iv. House Allowance for 161 months

53. Housing allowance is one of the statutory rights of an employee under Section 31 of the [Employment Act](#) where the employer does not provide housing and the salary is not consolidated among other exceptions.

54. In this case, the Claimant adduced no evidence that she was not housed by the employer. Other than stating that she commenced work at 6.00 am and could work upto very late at night and her typical duties. She did not indicate where she resided. In the absence of such critical evidence, the basis of the claim for housing allowance is unclear.

The claim is declined.

v. Leave for 13 years

55. The Claimant stated that she did not proceed on leave for 13 years even for a single day and worked on all public holidays.

56. The Claimant adduced no evidence as to why she did not proceed on leave for the entire duration and whether she applied for leave.

In the circumstances, the Claimant is awarded leave for 3 years upto the date of termination.

vi. Public holidays worked

57. The Claimant prays for the public holidays worked for the entire duration of employment. Regrettably, the Claimant has not outlined the specific public holidays for each year nor is the number specified.

58. Needless to gainsay, each year has its own public holidays be they national days, religious or other as gazetted by the relevant Cabinet Secretary.

In the absence of the specific days worked, the claim is declined.

vii. Overtime worked

59. This claim is not supported by the relevant particulars. It is unclear whether the Claimant worked from 6.00 am to late in the night every day for 13 years. Equally, the evidence in court is silent as to when she would retire to bed.

In the absence of the necessary particulars, the claim is declined.

viii. Severance pay for 13 years

60. Service pay is due to an employee where an employer does not remit National Social Security Fund (NSSF) dues to the National Social Security Fund Board as provided by the [National Social Security Fund Act](#). Similarly, the Respondent adduced no evidence that he was deducting and remitting the Claimant's NSSF dues.

61. However, the Claimant is seeking severance pay which is only payable in redundancies in accordance with the provisions of Section 40(1)(g) of the [Employment Act, 2007](#).

In the circumstances, the claim for severance pay is declined.



- ix. 12 months compensation
62. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the compensation in accordance with the provisions of Section 49(1)(c) of the *Employment Act*. The court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent for 13 years and rendered services diligently and honestly and had no recorded disciplinary related concerns.
  - ii. The Claimant adduced no evidence as to what she did when the employer informed her that her employment had been terminated. She did not appeal.
  - iii. The Claimant appear to have contributed to the termination of employment.  
In the circumstances, the court is satisfied that the equivalent of 5 months salary is fair.
- x. Certificate of service
63. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.
64. In conclusion, judgement is entered for the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
  - b. Notice pay.
  - c. Leave pay for 3 years.
  - d. Equivalent of 5 months salary.
  - e. Certificate of service.
  - f. Costs of this suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF APRIL 2023**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**



