



**Makau v Dinesh Construction Limited (Cause 886 of 2017)  
[2023] KEELRC 1307 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1307 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 886 OF 2017  
NZIOKI WA MAKAU, J  
MAY 9, 2023**

**BETWEEN**

**AUGUSTUS KYALO MAKAU ..... CLAIMANT**

**AND**

**DINESH CONSTRUCTION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent vide a Statement of Claim dated May 2, 2017. According to the Claimant, the issues in dispute are the unprocedural, illegal and unconstitutional dismissal from the Respondent Company and the Respondent's refusal to pay terminal benefits due to him. The Claimant avers that the Respondent employed him as a Carpenter from May 11, 2015 until May 28, 2016 and that he was paid Kshs 16,800/- per month. He averred that he was not issued with a contract of employment at the time of employment but was instructed to submit his National Identity Card from which the Respondent recorded his details. He further avers that at the time of employment, he was instructed that he would be working from 8:00am to 5:00pm, Monday to Friday and from 8:00am to 12:00pm on Saturdays. That every Saturday he and other employees were paid Kshs 4,200/- and would then sign upon receiving the pay and that he also used to sign the Respondent's register every morning upon reporting to work and evening upon exiting the Respondent's company. That however, he used to work from 7:30am to 5:00pm, Monday to Friday and from 7:30am to 2:00pm on Saturdays without being paid overtime.
2. It is the Claimant's averment that on January 7, 2016, he was injured while at work and got admitted at Kenyatta National Hospital for three (3) days and that he was given a two-week sick-off and returned to work on February 13, 2016. That despite working diligently over and above what was required of him, the secretary informed him on May 28, 2016 that his services had been terminated but he was not issued with notice, a termination letter or given reasons for the termination of his services. He states that the summary dismissal was unlawful and unconstitutional. The Claimant further avers that on or about June 6, 2016, he reported the dispute to the Labour Office at Industrial Area, Nairobi upon which a



letter was addressed to the Respondent. That vide another letter dated June 29, 2016, the Respondent was invited to attend a meeting on July 20, 2016 at the said Labour Office but no one attended the meeting. Further, that the Respondent did not respond to letters issued to it dated January 25, 2017 and February 10, 2017.

3. The Claimant's claim against the Respondent is for one-month salary in lieu of notice, service, unpaid leave, unpaid overtime and 12 months' salary compensation for unlawful termination. The Claimant thus prays that this Honourable Court do award: a declaration that the termination was unfair; an order directing the Respondent to pay the Claimant the sum of Kshs 96,297.60 as particularised in paragraph 24 of the Claim; an order for the payment of Kshs 201,600/- to the Claimant being compensation for unfair termination of employment; an order directing the Respondent to issue the Claimant with a Certificate of Service; costs of this suit with interest thereon at court rates; and any other relief as the Court would deem just and expedient.
4. In response, the Respondent filed a Statement of Defence dated June 21, 2017 denying that the Claimant was an employee of the Respondent company. It avers that the Claimant only offered his services as a carpenter at a construction site and was paid daily wages which were computed and paid off at the end of the week. That it therefore did not have any power to terminate the services of the Claimant and that the alleged notice or reasons for alleged termination are irrelevant and inadmissible in the circumstances. According to the Respondent, the Claimant left on his own will and volition after offering his professional services at the construction site and it thus did not terminate his services. Furthermore, that the Claimant's claim for compensation for unlawful termination and terminal dues are therefore unfounded. It maintains that there is also no basis for overtime and leave and prays that the Claimant's suit against it be struck out and/or dismissed with costs.
5. The Respondent also filed a witness statement made on June 24, 2022 by its Accounts Manager, Ms. Krishna Kerai. Ms. Kerai asserts that she was aware that the Claimant worked for the Respondent as a casual labourer being paid a daily wage rate of Kshs 700/- that was computed and paid off to him at the end of the week. She believes that this suit against the Respondent is malicious, scandalous, frivolous and an abuse of the court process as the Claimant was not an employee of the Respondent.
6. In evidence, the Claimant relied on the Claimant's Bundle as evidence. He testified that the company paid for his hospitalization at Kenyatta National Hospital when he got injured on January 7, 2016. He stated that he seeks service having worked for the Respondent for one (1) year and is also seeking overtime and leave pay because he worked an extra one hour with no pay. He denied being a Casual or that he is the one who decided to leave and stated that when the Respondent employed him it did not say that he was to be a Casual. He further testified that the DOSH form shows he was an employee of the Respondent. On cross-examination, the Claimant confirmed that his pay was calculated per day and stated that the Respondent did not pay him NHIF, NSSF and for overtime. However, upon being shown page 5 of the Respondent's Bundle, he confirmed the OT indicated thereat against his name was overtime of Kshs 4,315/-. That page 3 of the Respondent's Bundle also showed D/W as 5 days with a pay of Kshs 3,500 which he signed for. He confirmed that he was paid when he was injured.
7. The Respondent's witness, Ms. Krishna Kerai (RW1), adopted the Respondent's Bundle of documents as evidence. She testified that the Respondent was in the building and construction industry and that her work at the company was mostly in regard to payments. That work at the site was on need to need basis and that there are times they do not have carpenters on site or in the workshop. She further testified that they had some permanent employees but the Claimant was not one of them as he came for work when he was needed and that they pay NHIF and NSSF for the permanent employees. According to RW1, the Claimant worked for almost eleven (11) months from July 2015 to May 2016, was paid Kshs 700/- per day and Kshs 115/- was the extra per day as overtime. Referring



to the Respondent's Bundle, she confirmed that the wages sheet showed that the workers would sign upon receiving their money and that the hours of overtime is what led to the payment. RW1 stated during cross-examination that names of those who were paid NHIF and NSSF are as shown on page 5 of the Respondent's Bundle which register also had the names of the casuals. She asserted that there were days when the Claimant did not come to work and he would therefore not be paid for that day and that the register would indicate the number of days he had shown up that week. She admitted they did not have a letter showing that the Claimant started working for the Respondent in July 2015 and also, that they neither produced in court a register of casual employees nor a record of overtime paid. That there was however proof that overtime was paid for February. RW1 denied that the Respondent received any letters from the Labour Office or wrote to the said office and confirmed that they did not write to the Claimant when he stopped going to work. That they therefore had nothing to show that the Claimant absconded. In re-examination, RW1 stated that the register was at different sites and that they did not have a combined one. That the DOSH form was only signed when the Claimant got injured because it had to be sent to the insurer for processing and also confirmed that the Claimant used to work for the Respondent.

### Claimant's Submissions

8. The Claimant submits that section 2 of the *Employment Act* defines "casual employee" to mean
- "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."

That contrary to the testimony by RW1, a perusal of the Respondent's payment sheet at pages 1, 4 and 5 shows that some of the permanent employees' NSSF had been paid while others only NHIF was paid. Furthermore, none of the employees in the pay sheet had their NSSF and NHIF fully paid for the disclosed period running between January 3, 2016 to February 27, 2016. That the Respondent only produced records for the said two (2) months while concealing records for the other ten (10) months when he was in employment. That if indeed he had not been in the Respondent's employ in May 2015, the payment sheet records would have clearly shown that position. That RW1 also admitted that she did not have a register for casual employees or a register for permanent employees to prove that the Claimant was indeed a Casual employee as alleged. The Claimant further submits that the DOSH form he produced in Court was filled by Rahab the Secretary who had indicated the Claimant as having been employed by Respondent, his designation as a carpenter and his salary as Kshs 16,800/-. That the Respondent also admitted that the Claimant had worked continuously for over 6 months and his pay computed per week meaning he was therefore not engaged to work on a day to day basis. It is the Claimant's submission that the Court holds that he was not a casual employee having worked from 1May 1, 2015 until May 28, 2016.

9. Secondly, the Claimant submits that section 45(4)(b) of the *Employment Act* provides that termination of the employment shall be unfair where in all the circumstance of the case, the employer did not act in accordance with justice and equity. He cites the case of *Abigail Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR in which the Court noted as follows:

" 17. However, it is the duty of every employer upon a claim being lodged with the court to attend and file all the work records to enable to court address the same on its merits. Section 10(6) and (7) of the *Employment Act*, 2007 requires that;

- (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.



- (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
18. An employer should keep all work records for a period of 5 years even where employment has eased as such records may become necessary and important particularly in proceedings such as these. Also, where legal proceedings are initiated by an employee, the law places the duty to produce the work records upon the employer.
19. Where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not found necessary; the submission of work records is a legal requirement.”
10. The Claimant submits that whereas the Respondent alleged that he abandoned his work and had not been terminated from his employment, RW1 admitted that there was neither a letter of absenteeism from the Respondent addressed to the Claimant nor any record or notification from the Respondent that the Claimant had abandoned his duties. That the duty to prove or disprove any allegation made by an employee is placed on the employer as the custodian of the employment records and documents. That had he abandoned his employment, the same would have been documented in the Respondent's records. He thus submits that termination of his employment was substantively and procedurally unfair as the Respondent did not give him the reasons for terminating his employment and an opportunity to be heard, which is in violation of the provisions of the *Employment Act, 2007*.
11. Thirdly, the Claimant submits that he is entitled to notice pay as under section 36 of the *Employment Act*. For service pay, he cites the case of Nairobi ELRC No 7725 of 2016, *Martin Ireri Ndwiga v Olerai Management Company* in which the Court stated as follows:
- “Service pay is due to an employee who has not enjoyed the benefit of statutory deduction and thus covered under Section 35(5) and (6) of the *Employment Act, 2007*. The Claimant has no written contract, no written statement of payment is submitted and in essence the respondent does not make any effort to demonstrate that as the employer they complied with statutory requirement and regulation to deduct and remit the applicable statutory dues to Kenya Revenue authority, to the Kenya National Social Security Fund and to the National Hospital Insurance Fund as required by law. Failure to abide to mandatory provision of the law in this regard, the Claimant is entitled to his Claim for service pay.”
12. As regards pending and untaken leave, the Claimant submits that since he was not given annual leave and which was not disputed by the Respondent, he is entitled to one year pending and untaken leave. That in the case of *Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd (supra)*, the Court noted that without any work records, section 28 of the *Employment Act, 2007* provides for not less than 21 working days leave with full pay after every twelve consecutive months of service, computed as payment in lieu of taking annual leave. He further submits that the Respondent did not dispute that he worked for extra hours after it changed the timings and which thus entitled him to the unpaid overtime. The Claimant submits that having established a case for unfair and unlawful termination of employment, he is entitled to damages. That in the *Abigael* case (*supra*), the Court awarded the Claimant 12 months' salary for unlawful termination which he urges this Court to similarly award



him for unfair, unlawful and unprocedural termination of his employment. Lastly, that he is entitled to costs having issued the Respondent with a demand letter it did not respond to.

### **Respondent's Submissions**

13. The Respondent submits that as a casual labourer, the Claimant did not have a formal contract of employment with the Respondent but was instead engaged on a day to day basis depending on the availability of work. That the Claimant confirmed during cross-examination that his wages were computed on a daily basis and paid to him at the end of the week and further, that the work he did was to make doors and furniture, which work would ideally come at the tail end of a construction period and would not be available at the beginning. That this means his work was not guaranteed and his engagement depended on the availability of work in the construction workshop that was further pegged on the need for timberwork. Furthermore, that the Claimant did not continuously work for the Respondent for a period of more than one month at a time. That from the foregoing, the Claimant was evidently a casual labourer and not a permanent employee.
14. It is the Respondent's submission that casual or piece rate employment is permissible in law and allows an employer, to allocate a casual labourer with work as and when there is available work to be done. That Rika J reiterated the same in the case of *Garama Karisa Masba v Krystalline Salt Limited* [2016] eKLR. It submits that at no point whatsoever was the Claimant's engagement as a casual labourer converted to a permanent employment by dint of section 37 of the *Employment Act* because he never continuously worked for a period of days aggregating to one month.
15. Further, that the Claimant has failed to adduce any evidence in court to further his allegation of being employed by the Respondent on permanent and pensionable basis or that his casual employment was converted to a term employment. That the DOSH form he refers to is a standard form the Respondent was required to fill to ensure his compensation for the injury he got at work. The Respondent relies on the decisions of the Court of Appeal in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR and *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another* [2018] eKLR where the court held that the burden of proving employment lies solely with the claimant. It is on the basis of the forgoing submissions by the Respondent that it prays that this Court finds that the Claimant was a casual labourer and not the Respondent's permanent employee.
16. The Respondent submits that it did not therefore unfairly terminate the services of the Claimant as he was not an employee of the Respondent but only a casual labourer. That in the case of *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, the Court stated that under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee and the said burden is discharged once he establishes a prima facie case that the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act. It submits that the Claimant confirmed during cross examination that no other person witnesses his conversation with the Secretary who informed him of his termination and further, that since on or about May 2016 he did not return to work. That the Claimant did not in fact produce any written document to show that he was terminated and the said Rahab Githua did not have the authority to terminate his employment, which fact the Claimant was and is aware of. It is the Respondent's prayer that the Claimant having failed to discharge his burden of proof on the Respondent's alleged unfair termination, this Honourable Court should dismiss this claim.
17. The Respondent further submits that the Claimant is not entitled to any of the prayers sought in his Statement of Claim solely because he was a casual labourer at the Company. That the Claimant particularly confirmed in his testimony that he was paid a daily wage that was computed and paid off to him at the end of the week and that he would sign the weekly wage form once he was paid. That the



DOSH form produced in Court shows that the Claimant had worked for 7 months and adding to the Claimant's claim of having worked until 28<sup>th</sup> May 2016, this totals to a period of 9 months. That the Claimant confirmed in his testimony that during the week 3<sup>rd</sup> to 9<sup>th</sup> January 2016, he was compensated for working overtime and therefore if this Court were to grant him overtime, the same would amount to double compensation.

18. The Claimant asserts he was employed by the Respondent as a carpenter and availed as part of his evidence the DOSH form filed when he was injured at work. The Respondent admits being his employer but states he was merely a casual. It availed records indicating payment of NSSF and NHIF dues for some employees for the months. Whereas the Claimant asserts he worked overtime, he did not avail evidence of the same. In fact, the evidence adduced by the Respondent showed that the Claimant was paid for overtime when it was due. It follows therefore that the claim for overtime must fail. The Claimant worked for the Respondent for 11 months. This was even confirmed by the Respondent's witness. The Employment Act per section 37 provides that

- (1)
  - (a) where a casual employee 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 the Act. (underline provided)

19. The Claimant's contract thus converted in terms of section 37 to a term contract. The Claimant therefore was entitled to one month's notice prior to termination, he was entitled to the benefits of a term employee including leave, housing and the like. For the 11 months he worked for the Respondent, he earned Kshs 16,800/- a month. This was well within the statutory minimum. He earned pay that was inclusive of house allowance in terms of the regulation and wages order and as such cannot mount a separate claim for house allowance.



20. The Court having found the payments to the Claimant were above board, the only issue that remains is on the termination. The Respondent's secretary Rahab Githua dismissed the Claimant without cause and without affording the Claimant an opportunity for a hearing in terms of section 41 of the Employment Act as well as the dictates of natural justice. The Claimant and Respondent's witness confirmed that there was no effort to call him back to work to show cause once he was absent from the work place. His contract which had converted in terms of section 37 of the Employment Act required for issuance of one month's notice prior to termination. This was not done and the Claimant would be entitled to this. The Claimant is also entitled to compensation for the unlawful termination which is set at 2 months as he had only served the Respondent for 11 months and his manner of termination was not so egregious as to allow for the maximum compensation. He will also have costs which are capped at Kshs 20,000/-.
21. In the final analysis I enter judgment for the claimant against the respondent for:-
- a. One month's salary as notice – Kshs 16,800/-
  - b. Two month's salary as compensation Kshs 33,600/-
  - c. Costs of Kshs 20,000/-
  - d. Interest on sums in a) and b) above at court rates from date of judgment till payment in full.
  - e. Certificate of service.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

