



**Asale v Lubao Jaggery Factory Limited (Employment and Labour Relations Cause 213 of 2017) [2023] KEELRC 1548 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1548 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 213 OF 2017  
MA ONYANGO, J  
JUNE 21, 2023**

**BETWEEN**

**LUCAS NGACHE ASALE ..... CLAIMANT**

**AND**

**LUBAO JAGGERY FACTORY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By a Statement of Claim dated July 28, 2017 and filed in court on July 31, 2017, the Claimant sought the following reliefs against the Respondent:-
  - i. A declaration that the termination process as carried out by the Respondent is unlawful and that during his employment with Respondent, he was not remunerated as required by law.
  - ii. Payment of his terminal benefits as per the labour laws or as the court may compute, or as per this claim.
  - iii. General damages for the psychological pain the claimant has suffered, due to the wrongful termination of his employment.
  - iv. An order that the Respondent do reinstate the Claimant and in default, the Claimant to be paid extra damages in as the court may deem fit.
  - v. Costs and interests
  - vi. Any other relief that the court may deem fit to grant.
2. It is the Claimant's case that at all times material to this cause, he was employed by the Respondent. He avers he was employed in February 2014 as a supervisor.
3. According to the Claimant, on May 25, 2017, the Respondent abruptly terminated his employment without any warning/notice and/or explanation as required by law.



4. He maintained that the termination was unlawful, unprocedural and wrongful as no notice was given before the termination. He further avers that during the period he worked for the Respondent he did not go on annual leave and was not paid in lieu thereof. He further avers that upon termination he was not paid severance pay.
5. The Respondent filed a Response to the Claimant's Statement of Claim on August 31, 2017 in which it denied in toto all the averments in the Statement of Claim.

### **The Evidence**

6. When the matter came up for hearing on February 13, 2023, the Respondent's representative did not appear in court and the court upon being satisfied that there was proper service on the Respondent's counsel proceeded to hear the Claimant's evidence in the absence of the Respondent.
7. The Claimant testified as CW1 and adopted his witness statement recorded on July 8, 2017. CW1 stated that on May 25, 2017, he was working at the Respondent's premises as a supervisor when his employment was abruptly terminated on grounds that there was no more work in the Respondent's jaggery. It was his evidence that he was not issued with a termination letter. He was further not issued with any show cause letter. He also contended that he was not paid his terminal dues.
8. After the close of the Claimant's case, the court directed the parties to file written submissions. The claimant's submissions were filed on March 27, 2023. No submissions were filed for the Respondent.

### **Determination**

9. I have considered the pleadings before me, the evidence of the parties as well as the submissions on record. The issues for my determination are;
  - i. Whether there was an employer employee relationship between the Claimant and the Respondent herein.
  - ii. Whether the Claimant was a casual employee
  - iii. Whether the Claimant was unfairly and unlawfully terminated from employment
  - iv. What reliefs are available to the Claimant
10. The Claimant adduced evidence that he was employed by the Respondent as a supervisor. He produced annexures 2,3 and 4 being Appointment letter, daily labour report and wages card which are sufficient proof of the existence of an employment relationship between the Claimant and the Respondent.
11. This evidence is supported by the Respondent's defense where at paragraph 13 it is pleaded that the Claimant was employed on casual basis. Again, in the witness statement of Pius Ongoma the Respondent's General Manager, he states that 'he was a casual worker paid on a daily basis.' I find and hold that the Claimant was an employee of the Respondent.
12. The next issue for consideration is whether the Claimant was a casual employee. The *Employment Act* defines a casual employee under Section 2 as an individual 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.
13. Section 37 of the *Employment Act* further provides:
  - (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.

14. The import of Section 37 of the *Employment Act* is that the court is empowered to convert the contract of service of an employee engaged on a casual basis, to a regular term contract.
15. The Respondent did not deny that the Claimant worked over a period longer than one month or an aggregate of three months. The Respondent had opportunity to adduce evidence of the days worked by the Claimant but failed to do so. Under section 10(&) as read with section 10(3)(a) and (6) of the *Employment Act* it is the duty of the employer to keep employment records and where there is a suit and the employer fails to produce such records, the court will make a presumption against the employer.
16. In the instant case I find that the Respondent has not rebutted the Claimant's averment that he worked continuously for the Respondent. I thus find that the Claimant was not a casual employee as his employment had long converted to a regular contract by operation of the law.
17. The next issue for determination is whether the claimant's employment was terminated unlawfully and unfairly. The Claimant in his testimony stated that on the May 25, 2017, the Respondent terminated his employment without any notice.
18. No evidence was led by the Respondent to prove that the Claimant's employment was terminated for a valid and fair reason and that there was procedural fairness in termination.



19. In the witness statement of Pius Ongomahe state:

' Since he was not a permanent employee of the company, there is no way he could be sacked on May 25, 2017. I wish to state further that the company has not been operating its factory for manufacture of jaggery for a long time because it was closed by the government as a result of its (government's) crackdown on manufacture of jaggery.'

20. The averments in the witness statement may be construed to imply that the employment of the Claimant was terminated on grounds of closure of the jaggery manufacturing section of the Respondent's factory. This would mean that the Claimant was declared redundant.

21. Section 40 of the *Employment Act* sets out the procedure to be followed before an employee can be declared redundant in mandatory terms as follows:

1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
  - a. Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
  - b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  - c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
  - d. Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
  - e. The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
  - f. The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
  - g. The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

22. There is no evidence that the Respondent complied with the above provisions for redundancy making the termination of the Claimant unlawful and unprocedural.

### **Remedies**

23. The Claimant prayed for a declaration that the termination of his employment was unlawful which I hereby do.



24. The Claimant further prayed for 3 months' salary in lieu of notice. He however did not adduce any evidence to prove that his terms of employment provided for 3 months' notice. I award him 1 months' salary in lieu of notice in terms of section 35 of the [Employment Act](#). In the sum of Kshs 7500.
25. The Claimant further prayed for 12 months compensation for unfair termination. Having found the termination unlawful and taking into account the Claimant's length of service and all relevant factors under section 49(4) of the [Employment Act](#) I award the Claimant 6 months' salary as compensation in the sum of Kshs 45,000.
26. The Claimant further prayed for service pay. Section 35(5) as read with section 35(6) of the [Employment Act](#) provides for service pay as follows:
- (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. [Rev 2012] CAP 226 Employment 29 [Issue 1]
  - (6) This section shall not apply where an employee is a member of—
    - a. A registered pension or provident fund scheme under the [Retirement Benefits Act](#);
    - b. A gratuity or service pay scheme established under a collective agreement;
    - c. Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
    - d. The National Social Security Fund.
27. There being no evidence that the Claimant was a member of NSSF or any other pension or gratuity scheme, I award him service pay at the rate of 15 days salary per year in the sum of Kshs 11,250.
28. I further award the Claimant costs of the suit with interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF JUNE, 2023**

**MAUREEN ONYANGO**

**JUDGE**

