



**Kedenge v Quest Works Technologies Limited (Cause 1143 of 2017)  
[2023] KEELRC 1886 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1886 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1143 OF 2017**

**SC RUTTO, J**

**JULY 31, 2023**

**BETWEEN**

**KENNETH GIDALI KEDENGE ..... CLAIMANT**

**AND**

**QUEST WORKS TECHNOLOGIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit through a Statement of Claim dated 21<sup>st</sup> June, 2017, in which he avers that he worked for the Respondent from June, 2009. He states that he was not issued with a letter of appointment or an employment contract. It is the Claimant's case that he initially started off as an assistant to the aluminum glass fitter and after three years, he was deployed to work as a mason until 15<sup>th</sup> August, 2015 when his services were unlawfully terminated. According to the Claimant, the Respondent unfairly and illegally terminated him from employment without meeting the requirements set out in Section 40 of the *Employment Act*. Consequently, the Claimant seeks several reliefs against the Respondent including a declaration that his termination amounted to a redundancy, severance pay at Kshs 19,200.00 for every complete year worked, leave days not taken from 2010 upto 2015, one month pay in lieu of notice, overtime and public holidays, damages for unlawful termination, Certificate of Service and costs of the suit.
2. The Respondent has opposed the Claim through its Response dated 13<sup>th</sup> September, 2017. The Respondent disputes employing the Claimant from June 2009 and avers that it was incorporated on 3<sup>rd</sup> October, 2012 hence it is not possible that the Claimant worked for the Respondent before it was incorporated. The Respondent further avers that the Claimant was engaged as a labourer as and when jobs arose at its construction sites between 16<sup>th</sup> August, 2014 and 15<sup>th</sup> September, 2015. It further avers that the Claimant was paid a daily wage as and when work became available. The Respondent has further denied the Claimant's assertion that his employment was terminated. It avers that its engineer informed the Claimant and several other labourers of reduction of work at its construction sites on 15<sup>th</sup>



September, 2015. According to the Respondent, the dispute was conclusively settled through a joint conciliation under the direction of the Nairobi County Labour Officer and the Claimant has never indicated that he was dissatisfied with the outcome of the conciliation agreement. For the foregoing reasons, the Respondent has asked the Court to dismiss the Claim with costs.

3. Both sides called oral evidence during the trial which concluded on 9<sup>th</sup> February, 2023.

#### **Claimant's Case**

4. The Claimant testified in support of his case and at the outset, sought to rely on his witness statement together with his bundle of documents, which he produced as exhibits before Court.
5. The Claimant told Court that he worked for the Respondent diligently and faithfully from June, 2009 upto August, 2015. It was the Claimant's evidence that on 15<sup>th</sup> August, 2015, the Respondent's engineer by the name Moses verbally informed him together with other employees that there was no more work for them and that if new work arose, he would call them. Essentially, he was terminated from employment. At the time, he was earning a monthly salary of Kshs 19,200.00 which was paid in two installments via M-pesa. The Respondent failed to give him vouchers or pay slips reflecting his wages.
6. It was the Claimant's further evidence that the Respondent failed to attend the negotiations at the labour office. The Respondent further ignored all communication from the Ministry of Labour Social Security and Services. He further served the Respondent with a demand letter but it has refused and/or failed to make good the claim alleging that it paid hm Kshs 30,000.00 in full settlement of the claim.

#### **Respondent's case**

7. The Respondent called oral evidence through Mr. Dominic Chesire, who testified as RW1. He identified himself as a Director of the Respondent company. Similarly, he adopted his witness statement and documents to constitute his evidence in chief.
8. RW1 testified that the Respondent company which is in the business of construction, came into existence on 3<sup>rd</sup> October, 2012. He admitted knowing the Claimant. According to him, the Claimant was engaged by the Respondent on 16<sup>th</sup> August, 2018 as a general unskilled labourer and was paid a daily wage of Kshs 800.00. He further stated that the Claimant's work was manual and was not continuous. That there were instances when he was not enlisted to work due to non-availability of work at the construction site. He further testified that the nature of the Claimant's work did not entail leave days.
9. It was his evidence that upon exhaustion of work at a major construction site the Respondent was involved in, all labourers were informed that work was finished and that they would be informed if new work arose. That was on 15<sup>th</sup> September, 2015.
10. RW1 further stated in further evidence that the Claimant lodged a complaint with the Nairobi County Labour Office citing termination of employment. The Labour Officer convened a joint conciliation meeting in January, 2016. He represented the Respondent at the meeting. On the intervention of the Labour Officer, Ms. Phyllis Iminza, both parties agreed amicably and in writing that the Respondent would pay the Claimant the sum of Kshs 30,000.00 as full and final settlement of his dues. That subsequently, the Claimant was to withdraw the case lodged with the County Labour Office against the Respondent.
11. In accordance with the agreement, the Respondent paid the Claimant the agreed amount of Kshs 30,000.00 which amount he acknowledged receipt of by signing the payment voucher. He was



therefore surprised when the Claimant served a demand note through his Advocates seeking further remedies he had not sought in his complaint to the labour office.

12. RW1 termed the instant suit unnecessary and asked the Court to dismiss the same with costs.

### **Submissions**

13. It was submitted on behalf of the Claimant that he had proved his case that he worked for the Respondent from June 2009 to 15<sup>th</sup> August 2015 when his services were terminated without notice. It was further submitted that the Respondent's claim that he was a casual employee is not sufficient as the law does not allow one to be a casual worker for such a long period of time. In support of the Claimant's arguments, reliance was placed on the case of *Samuel Agwata Ogaro vs Lavington Security* (2017) eKLR.
14. It was further submitted that the Claimant was not given a chance to be heard and was not given a dismissal letter. As such, everything around his dismissal was unfair and unlawful.
15. On its part, the Respondent submitted that the Claimant failed to prove by way of evidence that he worked on a casual basis continuously for an aggregate period of time of more than one month. That consequently, the Court cannot convert his casual employment to permanent employment.
16. The Respondent further contended that the Claimant only introduced the issue of conversion of his casual employment into a term contract in his submissions.
17. It was the Respondent's further submission that it had proved that the Claimant was at all times a casual employee. That as a casual employee, the Claimant's employment was terminable by either party without notice as per Section 35(1) of the *Employment Act*.

### **Analysis and determination**

18. I have considered the issues arising from the pleadings, the evidence on record as well as the submissions and to my mind, the Court is being called to resolve the following questions: -
  - a. What was the nature of the Claimant's employment?  
Depending on the answer in (a), was the Claimant unfairly and unlawfully terminated?
  - b. Is the Claimant entitled to the reliefs sought?

### **Nature of the Employment Contract**

19. It was the Claimant's case that he worked for the Respondent from June 2009 until 15<sup>th</sup> August, 2015 when his employment was terminated. This position has been disputed by the Respondent who avers that it only engaged the Claimant from 16<sup>th</sup> August, 2014 and that his work was not continuous as there were days when he was not enlisted to work due non-availability of work at its construction site.
20. Disputing the Claimant's assertions that he was employed from June, 2009, the Respondent exhibited a certificate of incorporation which indicates that it was incorporated on 3<sup>rd</sup> October, 2012. This fact alone discounts the Claimant's testimony that he was employed by the Respondent in June, 2009, as it is not logical that he was its employee, three years before its incorporation.
21. With regards to the consistency of the Claimant's employment and the nature of the employment relationship, it is worth pointing out that the Claimant's position from the onset was that he was an employee of the Respondent. He did not define their terms of engagement. Notably, it is the Respondent that pleaded that the Claimant was a casual employee as his work was not continuous.



22. Having pleaded as such and in light of the provisions of Section 10(7) of the *Employment Act*, the Respondent was bound to prove as much. The aforesaid section is couched as follows:
- (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.
23. Back to the instant case, who is a casual employee? The answer to this question lies in Section 2 of the *Employment Act*, which defines a 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”
24. Succinctly put, a casual employee is engaged daily but no longer than 24 hours at a time. From the evidence before Court and specifically, the tabulation of payments made to the Claimant between August, 2014 and September, 2015, it is clear that he was in the service of the Respondent for a period of over 24 hours and his wages were paid bi-monthly and beyond the period permitted for employment of a casual employee within the meaning of Section 2 of the *Employment Act*.
25. Indeed, looking at the Claimant’s payments for the three months preceding his exit from the Respondent’s employment, reveal that he worked for the entire duration. In this regard, in June, 2015, he worked from 1<sup>st</sup> upto 30<sup>th</sup> of that month. In July, 2015, he worked upto the 31<sup>st</sup> day while in August, 2015 he worked from 1<sup>st</sup> upto 31<sup>st</sup>. Notably, the record does not indicate that there was a break in the duration of the employment. This discounts the Respondent’s assertion that the Claimant was a casual employee.
26. This is further bearing in mind that Section 10(7) of the *Employment Act* places the burden on the employer to prove or disprove an alleged term of employment.
27. In the circumstances, I cannot help but find that the Respondent has failed to discharge its evidential burden by proving that the Claimant was a casual employee as alleged.
28. Evidently, the tabulation of payments exhibited by the Respondent prove that the Claimant was anything but a casual employee within the meaning of Section 2 of the *Employment Act*.

#### **Unfair and unlawful termination?**

29. Pursuant to Section 45 of the *Employment Act*, an employee’s termination from employment qualifies as unfair if the employer fails to prove that it was based on a valid and fair reason and that a fair procedure was applied in effecting the termination.
30. In the instant case, the Claimant contended that he was dismissed on 15<sup>th</sup> August, 2015 on grounds that there was no more work for him and his colleagues. This position was confirmed by the Respondent who averred that at the time, it had exhausted work at a major construction site.
31. From the record, it is not in dispute that the Claimant was engaged at a construction site. Therefore, it follows that his engagement was bound to the life of the project. The evidence on record indicate that the Claimant worked from August, 2014 upto September, 2015. In the ordinary scheme of things, the kind of work the Claimant was undertaking at the construction site cannot be deemed to be work that is permanent in nature. Such an engagement is bound to end once a project is completed. In his testimony before Court, RW1 stated that the Respondent being a construction company, gets tender awards and executes them. Therefore, it would be impracticable to presuppose that the Respondent would



always be having ongoing construction projects so as to retain and engage the Claimant permanently. Essentially, his engagement was bound to end at some point.

32. In the circumstances, the Claimant cannot allege to have been declared redundant when he was aware that his engagement was tied to the construction project being undertaken by the Respondent.
33. In light of the foregoing, I am satisfied that the Respondent had a valid and fair reason to disengage the Claimant once it completed the project it was undertaking at the time.
34. With regards to procedural fairness, it is common ground that the Claimant was notified of the cessation of his employment on 15<sup>th</sup> September, 2015. This happened to be the last day he was engaged by the Respondent. Evidently, he was not given notice with regards to his termination from employment. His disengagement was therefore not in consonance with the Employment Act. He ought to have been notified in advance or at least paid one month's salary in lieu of notice.
35. Be that as it may, it is notable that upon his termination and being aggrieved, the Claimant sought redress at the Labour Office. The ensuing engagement between the Claimant and the Respondent culminated in the parties agreeing to settle the matter amicably. In this regard, it was agreed that the Claimant be paid the sum of Kshs 30,000.00 being notice pay, service pay and leave pay. From the record, this was done and notably, the Claimant has not challenged the attendant payment voucher.
36. Therefore, having been paid as much, the claim with regards to the issue of notice was dispensed with and the Claimant was compensated accordingly for having been terminated without notice.
37. In the same breath, the payment of service pay and leave pay fall by the way side as the said claims were settled through the Labour Office.
38. The claim for damages collapse as there has been no finding of unfair termination.
39. With regards to claim for overtime, it is notable that the payments exhibited by the Respondent indicate that the Claimant was being paid overtime. Notably, he did not dispute the said payments. For this reason, the claim for overtime is declined.

#### **Order**

40. In the final analysis the Claim is dismissed in its entirety with an order that each party bears its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

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**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Mr. Itonga

For the Respondent Mr. Banji

Court Assistant Abdimalik Hussein

#### **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 had 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.

**STELLA RUTTO**

**JUDGE**

