



Otieno v University of Nairobi (Employment and Labour Relations Appeal E044 of 2022) [2023] KEELRC 2012 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2012 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E044 OF 2022**

**B ONGAYA, J
AUGUST 4, 2023**

BETWEEN

DOROTHY ADHIAMBO OTIENO APPELLANT

AND

THE UNIVERSITY OF NAIROBI RESPONDENT

(Being an appeal from the Judgment of the Honourable Edgar Kagoni, delivered on 16.06.2021 in CMEL No. 1766 of 2019)

JUDGMENT

(Before Hon. Justice Byram Ongaya on Friday 4th August, 2023)

1. The appellant filed a memorandum of appeal on August 30, 2022 through Nyabena Alfred & Company Advocates. The appellant appeals against the trial court’s judgment delivered on June 16, 2021 (by Hon. Edgar Kagoni, the learned trial Magistrate) and upon the grounds that he erred in law and fact as follows:
 - a. that the appellant was a casual employee contrary to the evidence that the appellant had worked for six (6) years and therefore by dint of the provisions of Section 37 of the [Employment Act, 2007](#) had automatically ceased to be a casual employee.
 - b. Failing to award the appellant her salary for January, 2019 and annual leave as prayed in the statement of claim which she had earned.
 - c. Failing to award the appellant house allowance arrears as required by the mandatory provisions of Section 31 of the [Employment Act, 2007](#).
 - d. Failing to award the appellant service gratuity as required by the provisions of section 35 of the [Employment Act, 2007](#) in the absence of evidence of her membership of National Social Security Fund (NSSF) or any other retirement benefit scheme.



- e. Failing to make a finding that the termination of the appellant was unlawful and unfair.
 - f. considering the facts, evidence and submissions made by the appellant.
 - g. Failing to consider and have due regard to the appellant's case and to the facts and evidence presented in support thereof.
 - h. In dismissing the appellant's claim with costs to the Respondent.
2. The appellant prayed for the following orders:
- a. The appeal herein be and is hereby allowed.
 - b. The judgment of the trial court delivered on June 16, 2021 in CMEL No 1766 of 2019 be set aside.
 - c. The Honourable Court be pleased to hear and determine this appeal and award the appellant the terminal dues and compensation as prayed in the appellant's statement of claim filed in the lower court amounting to Kshs 3, 170,957.12/= or such amount as the Honourable Court may deem fit and just.
 - d. The costs of the appeal and the lower court be awarded to the appellant.
 - e. The Honourable Court do issue such orders and relief as it may deem fit and just to grant.
3. Both the appellant and the respondent filed their respective submissions to the appeal, which this court has duly considered. Additionally, the court has considered all the material on record, authorities relied upon by the parties and makes findings as follows.
4. 1st issue is whether the trial Court erred in returning that the appellant was a casual employee. The appellant pleaded in the statement of claim that by oral agreement, the respondent offered her employment as a cleaner on October 10, 2007 to serve as a cleaner at a daily wage of Kshs.250 but computed and paid on monthly basis. Further, her pay was increased over time to Kshs 16, 298.00 per month. On January 2, 2019 the respondent unfairly and unlawfully terminated the appellant's employment without due termination notice or pay in lieu of such notice per section 35 of the [Employment Act](#), 2007. That the termination was without due notice or rules of natural justice. Further her salary for January 2019 was not paid. The respondent pleaded in the statement of response that the appellant was offered work as a casual labourer as cleaner to clean the respondent's premises whenever need arose. Further, being a casual labourer she was not entitled to a termination notice or pay in lieu of a termination notice per section 35(1) (a) of the [Employment Act](#), 2007. In January 2019 the claimant never work for the respondent and no payment for wages was due as claimed. Further, sections 41, 43, 44, and 45 did not apply to casual employees. The Respondent's Witness (RW) testified that the claimant worked for the respondent for 6 years but it was not without breaks. The appellant pleaded that her casual employment be deemed to have converted to one subject to statutory minimum terms and conditions per section 37 of the [Employment Act](#), 2007. The test is if the 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, 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. The trial Court found that the appellant had urged her case based on the first limb because monthly payments, in the view of the trial Court was not envisioned as the evidence of being an employee. As urged for the appellant, the trial Court misdirected itself in that respect because once the appellant exhibited the bank statement



showing that indeed the respondent had been paid on a monthly basis, that by itself was sufficient evidence that she had worked for a period or a number of continuous working days which amounted in the aggregate to the equivalent of not less than one month. The first ground of appeal will succeed and the Court finds that the casual employment had converted to one subject to minimum statutory terms. The exhibited bank statements particularly for 2018 were not consistent monthly payments of salary by the respondent and the Court returns that indeed the employment relationship the parties described as casual did convert per section 37 but sporadically so over the time the appellant was able to show she worked for an aggregate of days not being less than a month for the respondent and as a cleaner.

5. The 2nd issue being on remedies the appellant claimed and prayed for the Court returns as follows:
 - a. The appellant prays for one-month wages in lieu of termination notice Kshs.16, 298.00. However, the 2018 bank statement shows that her last wages of Kshs.16, 298.00 was paid around October 8, 2018. Thereafter the appellant does not exhibit evidence that she ever earned until her termination on January 2, 2019 per her own account. In view of that gap, the Court returns that it appears after October 8, 2018 she never worked and her alleged termination on January 2, 2019 is vacuous free from reasonable explanation. There was a clear gap for unexplained no work and therefore no wage payments in better part of October, whole of November and then whole of December 2018. The claim for notice payment in that respect is found unjustified as is inconsistent with the identified gap and therefore the mischief to be curbed by the conversion envisaged in section 37 of the Act.
 - b. The appellant was terminated on January 2, 2019 and her prayer and claim for January 2019 salary is declined as unjustified.
 - c. Annual leave is claimed at Kshs 16, 298.00 for 11 years of service being from October 10, 2007 to January 2, 2019. The claimant offered no evidence of her consistent service over all those years. The bank statement she exhibited for 2018 has already shown long unexplained gaps in the monthly payments. The claim for pay in lieu of annual leave was a sweeping prayer that is found unjustified in view of the long breaks in service. Similarly the house allowance as claimed for 11 years is found inconsistent with the gaps besides the formulae invoked of 15% of monthly wages not being justified at all.
 - d. Service gratuity and commuter allowance were based on the CBA but as correctly found by the trial Court the appellant failed to show she was a member of the trade union besides the claims being inconsistent with the gaps in the service.
 - e. 12 months gross salary in compensation is not justified at all because of the about 2.5 months of unexplained gap just prior to the alleged termination on January 2, 2019.
 - f. The appellant is entitled to a certificate of service that she worked as a cleaner for the respondent over the 6 years admitted for by RW and temporarily so with sporadic breaks.
6. The grounds in the appeal will fail except as found in this judgment and the trial Court's final orders in the judgment upheld except to the extent otherwise found in this judgment. To balance justice for parties each will bear own costs of the appeal and before the trial Court.
7. In conclusion the appeal is hereby determined with orders:
 - a. The declaration that the appellant's casual service sporadically converted per section 37 of the Act and in which case the remedies claimed and prayed for were unjustified.
 - b. Each party to bear own costs of the suit before the trial Court.



- c. The trial Court's judgment and orders varied to the extent of orders (a) and (b) above.
- d. Each party to bear own costs of the appeal.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 04TH AUGUST, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

