



**Kenya Union of Commercial Food Allied Worker v Fralet Agencies (Employment and Labour Relations Claim 29 of 2023) [2023] KEELRC 2208 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2208 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 29 OF 2023**

**JW KELI, J  
SEPTEMBER 22, 2023**

**BETWEEN  
KENYA UNION OF COMMERCIAL FOOD ALLIED WORKER ..... CLAIMANT  
AND  
FRALET AGENCIES ..... RESPONDENT**

**JUDGMENT**

1. The claimant brought suit on behalf of the grievant Alex Alusiola Shabaya against the respondent vide memorandum of claim dated August 18, 2022 and filed in court on the August 22, 2022 at Bungoma which file was later transferred to this jurisdiction. The claimant sought the following reliefs against the respondent: -
  - i. That the action taken by the respondent to terminate the services of the grievant without any explained reason is unlawful and unfair.
  - ii. The respondent to reinstate the services of the grievant and treat him in all respects as if the termination never took place and pay him all his accrued arrears.
  - iii. If (ii) above is not tenable the respondent to pay the grievant as follows:-
    - a. notice pay in lieu of notice 16,428.30
    - b. leave arrears for 8 years 131,426.08
    - c. service pay 8 years 2,912.82
    - d. salary arrears for 3 months  
December-February, 2022 49,284.9
    - e. Public holidays 121,316.67



- f. Rest days 394,279.2  
Underpayments from February 2017 to February 2022 by 1428.30.
  - g. Compensation for 12 months 197,139.60  
Total Claim Kshs 999,913.87
  - h. certificate of service
  - i. cost of the suit to the claimant.
2. The claimant on even date in addition filed witness statement by the grievant dated 18<sup>th</sup> August, 2022, verifying affidavit by Boniface Kavuvi, claimant's list of documents all of even date together with the bundle of documents.
  3. The respondent entered appearance vide the law firm of Momanyi Manyoni & Co advocates and filed reponse dated September 26, 2022 to the claim. In addition, the respondent filed a witness statement of Francis Uhuru Lutta dated 8<sup>th</sup> March 2023 received in court on the 10<sup>th</sup> March 2023.

#### **The claimant's case**

4. The claimant's case was heard on the February 21, 2023 with CW1 as Alex Alusiola Shabaya, the grievant, testifying on oath and being cross-examined by counsel for the respondent.

#### **The respondent's case**

5. The respondent's case was heard on May 22, 2023 where its witness Francis Lutta (DW) testified on oath and adopted his witness statement dated March 8, 2023 as his evidence in chief. The witness was cross-examined by the representative of the claimant and the defence case closed.

#### **claimant's case in summary**

6. The claimant union case was as per the grievant's witness statement who testified in court that the grievant was engaged by the respondent in February 2014. That he was engaged verbally in permanent terms while he worked with 4 other employees in the same establishment. That he was multitasking from selling construction materials to pump attendant and selling hardware, that he served from February 2014 to February 2022 with a clean record. That since December 2021 the respondent without explanation stopped paying his monthly wages as was the norm and when he asked in February 2022 he was told to leave the premises. During the 8 years of work he never took annual leave, that the employer deducted and remitted NSSF dues from 2014 to 2017 but stopped in May 2017 without explanation which was unfair. The evidence produced was the claimant's constitution and rules, grievant's membership card and claimant's correspondence with the respondent, trade dispute, conciliator appointment and correspondent, conciliator recommendation and certificate of unresolved dispute, grievant's NSSF statement and general wages order. During cross-examination the grievant (CW) confirmed he had no employment letter and that his national identity card number was 23819723. He had no evidence of the salary payment and stated it was paid monthly and not daily and relied on deduction under NSSF statement (page 33 of the claimant's documents). CW told the court that he got the NSSF statement from NSSF. In re-exam CW stated he was paid in cash end month.



## **respondent's case in summary**

7. The respondent called Francis Lutta (DW) who adopted his witness statement dated March 8, 2023 as his evidence in chief. DW stated that the respondent was not registered in 2008 in the business of construction transport of building materials, hardware materials and operations of a petrol station. The company was in business from 2008 to 2020 when it wound up due to bad business environment arising from covid 19 pandemic. That in the year 2020, they closed the business and all casual employees were laid off due to lack of work. That they had 13 casual workers and the nature of business could not allow permanent employment. That he was not aware of any employee who was in union since he did not get any communication from the union calling for deductions from the employee to the union. That the grievant was a casual employee without any academic qualifications to enable him be employed as a salesman. That the claimant as a casual worker from year 2014 to April 2017 when he stopped working with the company. Having left in April 2017 the claimant cannot ask for arrears for the years 2018-2022 since he was not working with the company. That by year 2019 when the grievant joined the union he was not an employee of the respondent. That he did respond to the union as the grievant was not his employee at the time of the communication in 2022. That he did not stop the claimant as he was a casual worker.
8. During cross examination DW admitted he knew the grievant. That he was a neighbour and casual worker from 2014 to April 2017. He was paid daily wages end of the week and had no document to prove payment. That the casuals were paid by the persons they worked with like drivers. That the business was closed. He had no evidence the grievant left in 2017.

## **Written submissions**

9. The court gave directions for filing of written submissions after the hearing. The parties complied. The claimant's written submissions were drawn by claimant's union General Secretary Boniface M. Kavuvi and were dated June 22, 2023. The respondent's written submissions were drawn by Momanyi, Manyoni & Co. Advocates were dated July 3, 2023.

## **Determination**

### **Issues for determination.**

10. The claimant addressed the following issues in submissions :-
  - a. Whether the disciplinary process was procedurally fair
  - b. Whether the termination was justified
  - c. Remedies
11. The respondent addressed the issue of whether the grievant was a member of the claimant as at April 2017, whether grievant was a casual or permanent employee of the respondent and whether the respondent was in existence as well as the remedies, .
12. The court having considered the dispute, the evidence and the submissions by the parties was of the opinion that the issues placed before it by the parties for determination of the dispute are:-
  - a. Whether the grievant was a member of the claimant
  - b. The nature and period of engagement of the claimant



- c. Whether the termination of the grievant from employment fair.
- d. Whether the claimant is entitled to reliefs sought

**Issue (a). Whether the grievant was a member of the claimant**

13. The grievant told the court that in February 2022 his salary delayed while working and when he asked for payment he was told being in the union he would not be paid. His evidence of employment was the statement from NSSF indicating deductions. The claimant further produced membership card dated June 2019. The claimant led evidence that his employment was terminated in February 2022 when he asked for unpaid salary since December 2021. The claim was filed on the August 22, 2022.
14. The respondent through DW stated that the grievant was engaged as casual employee from 2014 to April 2017 when he left. That he was not in employment when he engaged the union. That the grievant was paid daily and issued with cash to pay NSSF. In the response the respondent stated it was not in operation from 2018 to 2020 when the business was wound up.

**Decision.**

15. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
16. The burden to prove employment was on the claimant which I found was proved by the NSSF statement which was not disputed. The claimant had also a burden to prove membership. The claimant produced a copy of the membership card of which the respondent objected to and demanded for production of the original. The respondent submits there was no evidence of subscription as proof he was a member of the union. The right of representation of a party by the union is granted under section 22 of the Employment and *Labour Relations Act* to wit:- ‘22. Representation before the Court. In any proceedings before the court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee, specially authorised for that purpose.’ Justice Rika In a decision relied on by the claimant of *Kenya Hotels and Allied Workers Union v Diani Sea Resort T/A Carslake Nominee Limited* [2015]e KLR interpreted the representation by the union as follows:- ‘ 6. Legal representation of individual Employees in court and other Dispute Resolution Platforms is an obligation of the Trade Union, imposed by the Trade Union Constitution. It is a right of the Employee, which flows from his individual Membership of a Trade Union, normally guaranteed through the Trade Union Constitution. It is an aspect of the right to associate under *the Constitution* of Kenya.7. section 22 of the *Industrial Court Act* 2011 grants Trade Union Representatives the right to represent their Members in Court.’
17. I do uphold the ruling by Rika J in the Diani Sea Resort(supra) to effect that the right of trade union representation of employees in court flows from the membership. The claimant produced copy of membership card with the claimant. There was a demand letter to the respondent which DW stated he ignored as he had not received communication to make deductions to the union. I do find the membership card was corroborated by the union communication to the respondent and the conciliator and passes on balance of probability as prove of membership with the claimant. In holding so I am persuaded by the decision in *Kenya Union of Commercial v Greenland Butchery* [2022] eKLR to wit:- ‘25. The claimant contended that the Grievant was its member and attached a copy of her



membership card, membership number 20571 to its Claim as proof of her membership. The claimant further contended that the Grievant was a paid up member of the union. It is on this basis that the claimant filed the instant claim against the respondent herein on behalf of its member.

26. In the case of *Kenya Shipping, Clearing and Warehouses Workers Union v Africair Management and Logistics Limited* [2016] eKLR it was held:

“The obligation of the Trade Union to represent its Members in and out of Court, and the right of the Members to representation in work related grievances and disputes, flows from the membership of the Employee to the Trade Union. These are obligations and rights created by membership. Recognition is between the Trade Union and the Employer. Membership creates a relationship between the Trade Union and its Members. The two relationships are not the same thing, and do not have the same legal effect. Trade Unions collect regular membership fees from Employees, and the Employees in return, enjoy the representation and protection of the Trade Union under the Union Constitution and the law. Membership allows the Employees to have the Trade Union’s legal representation in Court, while Recognition allows the Union to collectively bargain with the Employers, for the benefit of Members, and all Unionisable Employees.”

27. I thus find the claimant had locus standi to file this suit on behalf of the Grievant.”

18. I do find that the claimant had locus standi to file the claim on behalf of the grievant.

#### **The nature and period of engagement of the claimant**

19. The grievant was engaged continuously for more than one month as per the NSSF statement and admission by the respondent )DW). DW position that the grievant was a casual could not hold water as the employed converted to contractual employment under section 37 of the *Employment Act* (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.” The court holds that the claimant engagement terms converted to contractual and he was entitled to benefits of employees under the *Employment Act*.

#### **Whether the termination of the grievant from employment fair**

20. The claimant under his written witness statement stated that in February 2022 he asked for payment salary which had delayed and was to leave the premises and never to go back.



21. The respondent's position was that the engagement as a casual ended in April 2017 and there was no notice required as the grievant was casual. That the business was wound up for period 2018 to 2022 and is not functional hence the claim for payment for the period was not justified.

### **Decision.**

22. The legal principle of he who alleges must prove abides herein. The claimant as union having received the defence of the grievant having left in April 2017 and the company having been wound up did not file reply to controvert the defence hence these facts remained uncontroverted. The position of the grievant having left in April 2017 was consistent with last remittance to NSSF of April 2017. Based on evidence before the court. I find it more probable than not the grievant's services ended in April 2017.
23. The grievant was treated as casual by the respondent meaning there was no notice of end of engagement. The court having converted the casual engagement to contractual finds that the claimant was entitled to be treated as a contractual employee. The termination was not proved as the claim was based on termination of February 2022 which was not proved. The evidence before the court being the NSSF statement only indicates end of engagement on April 2017 and the reasons cannot be deduced from the statement. I do find the claim did not meet the threshold of proof of unfair termination under section 47(5) of the *employment act* to wit 5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. In this case what we have is just end of engagement.

### **Whether the claimant is entitled to reliefs sought**

24. The claimant sought notice pay in lieu of notice, leave arrears for 8 years , service pay , salary arrears public holiday and rest days and underpayment as well as compensation for unfair termination and certificate of service.
25. Having found the engagement on casual basis converted under section 37 of the *Employment Act* to contractual employment after one month of continuous service I proceed to consider the reliefs sought on merit.

### **On underpayment**

26. The claimant in his statement stated he was an all-round person multitasking form selling construction material pump attendant and selling hardware. The respondent denied the grievant was a salesman for lack of academic certificate. During cross-examination admitted he was casual. The claimant led no evidence of the qualifications if any of the grievant. The burden lay with the claimant to proof claim of underpayment. I perused the memorandum dated June 30, 2022 to the conciliator the precursor to the filing of the claim. There was no claim for underpayment. I do find the grievant was a general labourer. The minimum salary under the wages order of 2018 for this jurisdiction for general labourer was Kshs 12,522. The claimant stated the grievant was paid Kshs. 15,000. The claim for underpayment is without merit and fails.

### **Claim for leave arrears**

27. The grievant's engagement having converted to contractual the court find he was entitled to payment in lies for annual leave for the period proved as having been in employment relationship with the



respondent that is, February 2014 to April 2017. The court awards statutory annual leave payment in lieu for 3 years thus 21/30x15000x 3 award of Kshs. 31,500/=

### **Claim for Service pay**

28. The claimant produced NSSF statement indicating monthly remittance by respondent from February 2014 to April 2017. The grievant having been a beneficiary of NSSF scheme was not entitled to statutory service pay as stated under section 35 of the *employment act* to wit:“(35) 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. (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.”

The claim for service pay is consequently disallowed.

### **Claim for salary arrears for 3months December 2021 to February 2022**

29. The claim fails the court held that the evidence before it was proof of employment relationship between the grievant and the respondent for period of February 2014 to April 2017.

### **Claim for public holidays and rest days.**

30. The court found that the claim for public holidays was only in the reliefs and not supported by the witness statement. He who alleges must prove. In this case the claimant had burden to lay basis of the claim for at the least in the witness statement which was adopted as evidence in chief. The claims for public holidays and rest days was not pleaded to enable the respondent reply. The claims are disallowed.

### **Compensation and notice pay in lieu.**

31. I found no proof of unfair termination. The court finds one month notice pay in lieu as sufficient compensation taking into account the evidence laid by the claimant before the court and the defence of the grievant having been casual. The court having converted the engagement to contractual the one month statutory notice applies.

### **Conclusion**

32. The court found that the grievant’s employment from February 2014 to April 2017 was that of general labourer and converted to contractual after one month of continuous engagement and enters judgment for the claimant against the respondent as follows:-

- i. Award of Annual leave pay for 21days in lieu for 3 years Kshs, Kshs 31,500/=
- ii. Notice pay in lieu Kshs. 15,000/-
- iii. Total award of Kshs. 46,500 awarded with interest from judgment date until payment in full.
- iv. Assessed costs for the claimant of Kshs. 15,000/-

33. Right of appeal and stay of 30 days granted

34. It is so ordered.



**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22ND  
SEPTEMBER, 2023.**

**JEMIMAH KELI,**

**JUDGE.**

**In The Presence Of:-**

**Court Assistant : Lucy Macheso**

**For claimant : Tacko**

**For respondent:- absent**

