



**Luvisia v ADC Suam Orchards Limited (Cause 3 of 2019)
[2023] KEELRC 2129 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2129 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE 3 OF 2019
NJ ABUODHA, J
SEPTEMBER 22, 2023**

BETWEEN

SHAPHAT MWACHI LUVISIA CLAIMANT

AND

ADC SUAM ORCHARDS LIMITED RESPONDENT

JUDGMENT

1. In the Amended Statement of Claim dated 5th January 2021, the Claimant pleaded that the Respondent employed him as a Casual on or about 27th September 2018 and that he earned Kshs. 5,000/= per month.
2. The Claimant averred that his employment was terminated on 28th February 2019 without proper notice, any reasons and any warning letter or show cause memo. That in breach of its statutory obligations, the Respondent failed to accord him a fair hearing before the termination and to pay him his terminal dues at the time of his termination.
3. It was the Claimant's position that the Respondent never remitted NHIF and NSSF. He claimed and prayed for Judgment against the Respondent for unpaid salary, one month's salary in lieu of notice, pro rata leave, underpayment of wages, public holidays, overtime, rest days, and house allowance that the Respondent never paid to him.
4. In its amended statement of Response, the Respondent denied that it employed the Claimant. It pleaded that the Claimant and the Respondent had never been in any form of contract and that the Claimant's assertions were untrue.
5. Further, the Respondent averred that as a seasonal worker he was not entitled to NHIF and NSSF benefits, which were only available to employees on regular and permanent basis. It thus denied the benefits and compensation sought by the Claimant and contended that the amended claim was untenable in law.



6. The Respondent's case was that the Claimant was only entitled to wage arrears for the days he worked for the Claimant if any. It prayed for orders that the Claim be struck out and/or dismissed and for costs of the suit to be borne by the Claimant.

Evidence

7. At the hearing, the Claimant testified that he worked for 5 months from October 2018 until February 2019 when he left and that he never missed any day of work. He stated that he was never issued with a uniform nor trained on how to work. That they used to be told to wait for their salaries because of delayed payments. He further stated that after getting sick, he was asked to stay home until he got well and would be called back to work but he was never called.
8. The Claimant stated in cross-examination that the Respondent never used to give appointment letters and payslips and that everything was recorded in a black book. In addition, that the Respondent made him sign that he would be paid house allowance. He further stated that they used to work from 8.00am to 4.00pm Monday through to Sunday and were never paid based on work done.
9. The Respondent's witness, RW1, produced copies of the Muster Roll as defence exhibit. She testified in cross-examination that there was evidence that the Claimant used to be paid cash and he would sign against the payment. She however confirmed that the Claimant did not collect all his money i.e. for 1st January and from 15th to 31st January 2019. She asserted that the Claimant's engagement with the Respondent was on day to day basis and that they do not issue notices to casuals. That casuals used to work from 8.00am to 5.00pm and were trained on their work by their supervisors. RW1 stated in re-examination that the Claimant worked for 36 days and that casuals were not entitled to any allowances.

Claimant's Submissions

10. The Claimant submitted that his evidence on having sought treatment when he fell ill and the Respondent promising to call him back to work was never rebutted or challenged by the Respondent. That while the Respondent implied that the he was a piece rate worker, it did not demonstrate how the work he did was based on availability, only stating that his work involved pruning and irrigation of citrus fruits.
11. He submitted that the *Employment Act* recognises a contract for an unspecified period of time, for a specified period of time, for a specific task (piece work), and for casual employment. That section 2 of the *Employment Act* defines piece work form of employment to mean "any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance." That 'casual employee' on the other hand is defined as "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."
12. According to the Claimant, the distinction between casual employment and piece work/ rate arrangement is that casual employment entails engagement for a period not longer than 24 hours at a time with payment made at the end of the day, while piece rate entails an emphasis on the amount of work and not the time expended in doing it and an entitlement at least to minimum wage.
13. He further submitted that under section 35 of the Act, a contract of service in which wages are paid on a daily basis is terminable by either party at the close of the day without notice. That in cases where wages are paid periodically at intervals of less than one month, the contract would be terminable by a notice of not less than one month. The third instance is that where wages or salaries are paid periodically at



intervals of or exceeding one month, a notice of 28 days applies. He cited section 18(1) (b) as read with section 35(1) (c) of the Employment Act that provide as follows:

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- (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled—
 - (a) ...
 - (b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier. (Emphasis by Claimant)

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- (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—
 - ...
 - (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

According to the Claimant, a piece rate worker in terms of these provisions would be entitled to a notice of 28 days before termination of service.

14. The Claimant submitted that the Respondent did not rebut his evidence that he worked throughout without any rest days. He urged this Court to find that having worked continuously for days and months, he is entitled to termination with a notice and benefits entitled to an employee. On this issue, the Claimant heavily cited and relied on the analysis of the Court of Appeal in the case of Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR.
15. It was the Claimant's submission that he was paid monthly. That determination of whether an employee is a piece rate worker was laid out in the case of Wilfred K. Onyango v DHL Excel Supply Chain Kenya Limited [2017] eKLR wherein the Court observed that for the piece rate contract where wages were paid every two weeks to be terminated, a notice of two weeks was payable as envisaged under section 18(2)(b) of the Employment Act. He submitted that if this Court finds that he was a piece rate worker, he would thus be entitled to two weeks' notice before termination.
16. He submitted that while the Respondent produced the Muster Roll for the period 30th November 2018 to 15th January 2019, it never produced records for September 2018 and February 2019. That it is the duty of every employer upon the filing of such a claim to produce all work records to enable the court address the same on its merits, as provided under section 10(6) and (7) of the Employment Act.
17. The Claimant submitted that where an employee alleges unfair termination of employment, the evidential burden of proof shifts to the employer to demonstrate the existence of any of the circumstances enumerated under section 45 of the Act. In this regard, the Respondent was expected to prove valid reason for termination, fair in so far as it related to its conduct, capacity or compatibility and prove that the termination was done in accordance with fair procedure.



18. He further submitted that other criteria for wording a termination is provided in sections 41 and 43 of the *Employment Act*. In this regard, he cited the case of *Walter Ogal Onuro v Teachers Service Commission* [2013] eKLR where the Court held that there must be both substantive justification and procedural fairness for a termination of employment to pass the fairness test. He also cited the case of *Donald Odeke v Fidelity Security Limited*, Industrial Cause No. 1998 of 2011 in which the Court held that it does not matter what offence the employee is accused of, if they are not heard, the termination is ipso facto unfair. It was the Claimant's submission that the Respondent never tendered any evidence to show that the correct procedure for termination was followed in his case. That he has shown that there was no notice to show cause, no invitation to disciplinary hearing, no hearing proceedings and no notice of termination.
19. In submitting for the reliefs sought, the Claimant cited Cause No. 203 of 2012 - *Linnet Ndolo v Registered Trustees of the National Council of Churches of Kenya* in which the Court having found that the claimant was unfairly terminated, held that she was entitled to payment of compensatory damages as under section 49(1) (c) of the *Employment Act*. Further based on the provisions of section 49(4), the said Court awarded the claimant maximum compensation at 12 months' salary. Similarly, the Claimant in this case prayed for maximum compensation for unfair termination for reasons he had given hereinabove.
20. In his submissions, the Claimant now sought a total of Kshs. 72,083.03 being unpaid salary, underpayment of wages, rest days and overtime all for 4 months and also public holidays as calculated thereat. He also sought an order directing the Respondent to issue him with a certificate of service for having served it for over 11 years. He lastly submitted that since costs follow any event, the costs and interest of this suit should be borne by the Respondent. The Court did seem to find submissions by the Respondent in the Court file, if electronically filed it might have been that the physical copy was never availed the Court as per the administrative advisory.
21. The Court has reviewed and considered the pleadings, evidence and submissions by Counsel in the matter and is of the view that the only issue for determination is whether the claimant as a casual worker was entitled to notice of termination of employment. The respondent has taken the view that the claimant being a casual was not entitled to notice of termination of service. The respondent produced a Muster Roll where it sought to demonstrate that the claimant and his colleagues were paid on a daily basis and signed or thumb-printed against the payment. Section 2 of the *Employment Act* defines a casual employee thus:

“casual employee” means 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.”

The claimant stated, and it was confirmed by the respondent that he worked for the respondent for 5 months. Section 37 of the *Employment Act* provides as follows concerning continuous service by a casual worker:

- “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.
22. Section 35(1)(c) requires that a contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—
 - (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.
23. The respondent admitted during the trial that the claimant was never issued with a termination notice on the basis that he was a casual worker. This was a misapprehension on the part of the respondent hence the claimant would be entitled to one month's salary in lieu of which the Court hereby awards him.
24. Section 45 of the Employment Act prohibits an unfair termination of employment and a termination will be considered unfair if the employer fails to prove that the reason for the termination was valid and that the reason for the termination was a fair reason and that the employment was terminated in accordance with fair procedure. That is to say the Court will consider the reason for which an employee has been terminated and make its own assessment whether a reasonable employer put in similar circumstances would consider termination as the most proportionate disciplinary measure to mete out and further whether the employee was heard before the termination was done. In this particular case the respondent did not furnish any evidence of the reason for the termination and further they have admitted to dismissing the claimant because they wrongly thought as a casual, he was not entitled to notice of termination of employment. To this extent, the Court finds and holds that the termination was unfair. The claimant was a general worker with no special skills and had only worked for five months hence and award of two months salary would adequately compensate him for unfair termination.
25. The claimant put forward a claim for pro rata leave and overtime, however concerning leave, he had only worked for 5 months hence had not qualified for leave. Regarding overtime, the claimant neither pleaded nor lead any evidence concerning the time he reported to work and left and the nature of work he performed that required him to work overtime. As has been observed by this court before, it is not enough for an employee to merely allege that they worked overtime and they are believed. Some background about the nature of work being performed that required working overtime and for what period ought to be laid in support of the claim.



26. In conclusion the Court hereby awards the claimant as follows:

- i. One month's salary in lieu of notice Kshs. 5,000
- ii. Salary/wages for 1st January, 2019 and 15th to 31st January, 2019 admitted not paid (18 days) Kshs. 3,000
- iii. Two month's salary as compensation for unfair termination Kshs. 10,000/-
- iv. Total award without costs Kshs. 18,000/-
- v. Certificate of service
- vi. Costs of the suit.

27. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023

ABUODHA J.N

JUDGE

Delivered virtually this 22nd day of September, 2023

