



Ibrahim v Reliance Hospital Limited (Employment and Labour Relations Cause E816 of 2021) [2023] KEELRC 2539 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2539 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E816 OF 2021
BOM MANANI, J
OCTOBER 19, 2023**

BETWEEN

HALIMA MIHAMED IBRAHIM CLAIMANT

AND

RELIANCE HOSPITAL LIMITED RESPONDENT

JUDGMENT

Introduction

1. The dispute between the parties arises from the closure of the employment relation between them. The Claimant was hired by the Respondent to offer nursing care at the Respondent establishment from 3rd June 2021. However, this relation was terminated on 18th June 2021, a few days after it had begun.
2. On the one hand, the Claimant contends that termination of the relation was irregular. On the other, the Respondent holds the position that the relation was regularly terminated.
3. The parties are also not in agreement about the type of employment relation that they established on 3rd June 2021. Whilst the Claimant's contends that she was hired on an indefinite term contract, it is the Respondent's case that the contract, being of a locum nature, established a casual employment relationship.

Facts of the Case

4. There is no dispute between the parties that the Respondent offered the Claimant some form of employment. According to the Claimant, she applied for a nursing job at the Respondent establishment through her letter of 2nd June 2021. The letter was produced in evidence.
5. The Claimant contends that after she was interviewed by the Respondent's matron, she was allowed to start working around 3rd June 2021. She was however not given specific roles within the hospital.



6. The Claimant argues that she was hired at a monthly salary of Ksh. 75,000.00. This is premised on the fact that the daily shift rate was fixed at Ksh. 2,500.00. This amount was to be paid at the close of the month in arrears. It is the Claimant's position that she was hired on an indefinite term contract.
7. The Claimant avers that after she was absorbed by the Respondent, she expected that the Respondent would issue her with a written contract of service. However, this was not to be. The Claimant avers that despite her efforts to follow up on the written contract, the Respondent did not address the issue.
8. It is the Claimant's case that on 17th June 2021, she was assigned the task of taking care of a pre-term baby. She was to work on night shift.
9. The Claimant avers that whilst she was on duty, an expectant mother was admitted to the hospital's maternity wing the same night. It is the Claimant's case that despite the fact that she had been assigned the task of taking care of the pre-term baby who was in need of constant care, she was asked to attend to the newly admitted expectant mother at the same time.
10. The Claimant asserts that despite the challenge posed by taking care of two delicate patients, she managed to attend to both of them for the entire night. The Claimant further asserts that on the morning of 18th June 2021 and to her astonishment, the Respondent's matron accused her of sleeping on duty. The Claimant avers that the said matron reprimanded her and threatened to take disciplinary action against her.
11. The Claimant asserts that the matron was not willing to listen to her side of the story or review CCTV footage for the night to confirm that the Claimant had indeed been active throughout the night in both the pre-term and maternity units. It is the Claimant's case that the matron asked her to go away pending resolution of her issue.
12. Feeling overwhelmed, the Claimant says that she left the workplace to seek medication for peptic ulcers which was allegedly triggered by the hostile encounter that morning. She indicates that when she tried to resume duty some days down the line, she learned that her services had been terminated.
13. The Claimant asserts that on 24th June 2021, she lodged a complaint about the harsh treatment that she had been exposed to on the morning of 18th June 2021. However, her complaint was allegedly not addressed.
14. It is the Claimant's case that the Respondent had no valid reason to terminate her employment. She further asserts that she was not afforded a hearing before her contract was terminated.
15. On its part, the Respondent asserts that the Claimant was only hired as a casual employee. As such, there was no indefinite employment contract between the two.
16. The Respondent contends that the Claimant procured the employment through misrepresentation of material facts. According to the Respondent, the Claimant lied that she was a registered nurse at the point of seeking employment when she was not. It's the Respondent's contention that the Claimant only procured this registration after her services had been terminated.
17. The Respondent further contends that the Claimant was not diligent whilst at work. The Respondent accuses the Claimant of having been asleep on the material night that she alleges she took care of the pre-term baby and expectant mother. This, the Respondent argues, exposed its patients to grave danger.



Issues of Determination

18. After analyzing the pleadings and evidence on record, the court is of the considered opinion that the following are the issues for determination:-
 - a. Whether the parties were in a casual employment relation.
 - b. Whether the employment was regularly terminated.
 - c. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

19. Regarding the 1st issue, it is clear that the parties have taken diametrically opposing positions on the nature of their employment relation. On her part, the Claimant believes that she was hired on indefinite terms. She relies on the fact that her salary was to be paid at the close of the month rather than on daily basis to assert that her services were of a long term rather than casual nature.
20. On the other hand, the Respondent contends that the employment relation between them was of a casual nature. The Respondent states that the fact that the Claimant was to be paid at the close of the month does not denote permanence of their engagement. She was only engaged on need basis.
21. According to the Claimant's application letter, she asked that the Respondent accommodates her either on locum or permanent basis. However, there is no record to show that the Respondent hired the Claimant's services on indefinite term basis.
22. The Respondent asserts that the Claimant was hired on casual basis. According to the Respondent, this explains why she was not issued with a letter of employment.
23. The Respondent further relies on the Claimant's letter of 24th June 2021 to fortify its contention that the latter was hired as a casual. According to the said letter, the Claimant acknowledged that she was a locum staff. It is the Respondent's contention that locum staff work on temporary terms and are thus considered as casual employees
24. The record shows that the parties had hardly worked together for a period exceeding one month before the Claimant's contract was terminated. This notwithstanding, the Respondent admits that the Claimant's remuneration was to have been paid on monthly rather than daily basis.
25. It is true that the *Employment Act* describes a casual employee as one whose services are engaged for a period that does not exceed twenty four (24) hours and one who is paid at the end of each day. However, the reality is that some employers may opt to pay casuals at intervals that exceed one day.
26. There may be instances when one is paid on weekly or even bi-weekly basis. However, this does not derogate from the fact that such contract remains of a temporary nature.
27. Indeed, the court has pointed out that it is misleading to peg the casual nature of employment exclusively on the fact of daily payment of wages. Such interpretation may fail to account for casual employees whose salaries are paid at intervals that are longer than a day (see *Josphat Njuguna vs High Rise Self Group* [2014] eKLR, *Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR and *Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited* [2015] eKLR). Therefore, the mere fact that the Claimant was to be remunerated at the close of the month does not necessarily imply that she had been engaged on indefinite terms.



28. Importantly, the Claimant acknowledges in her letter of 24th June 2021 that she was serving on locum basis. As indicated in the submissions by the Respondent’s counsel, locum employment is meant to be temporary in nature. This form of employment is consistent with casual employment. This position is further fortified by the observations by Rika J in *Kenya National Union of Nurses v Nairobi County Public Service Board & another* [2022] eKLR when he stated that locum employment is by its very nature temporary so as to allow for ease of mobility of the labour.
29. The Claimant’s own evidence shows that she admits to having been hired on locum basis. Therefore, and having regard to the aforesaid judicial pronouncements, her contract of employment was of a temporary nature. Consequently, her assertion that she was employed on indefinite terms merely because her salary was to have been paid at the close of the month is without merit. It is rejected.
30. The next issue for determination is whether the Claimant’s contract was fairly terminated. According to the Claimant, her services were terminated without the benefit of a hearing or notice and without proper reasons. On the other hand, the Respondent contends that the Claimant was released after it was discovered that she had not been registered as a nurse at the point she was engaged. Further, it is contended that the Claimant had been guilty of negligence as she was found sleeping whilst on duty.
31. In *Josphat Njuguna vs High Rise Self Group* [2014] eKLR, the court observed that once the employer opts to pay a casual employee at intervals that are in excess of one day, the employee gains the protection that section 35 of the *Employment Act* provides. Put differently, such employee becomes entitled to be released only after he has been given notice that is equivalent to the period that he is to serve before he can earn his salary.
32. The Court of Appeal appears to have agreed with the foregoing position in its decision in *Rashid Odhiambo Allogoh & 245 others vs Haco Industries Limited* [2015] eKLR when it observed as follows:-
- “The learned Judge of the Employment and Labour Relations court went ahead to coin the term “a monthly casual worker” as an exception to the casual worker contemplated under section 2 of the *Employment Act*. This casual worker “sui generis” therefore enjoys the protection accorded to regular or permanent employees by section 35(1)(c) of the Act.”
33. The Respondent does not deny that the Claimant was to earn her wages monthly. Therefore, before releasing her from employment, the Respondent was obligated to issue her with notice of not less than twenty-eight (28) days in terms of section 35 of the *Employment Act*. There is no evidence that this was done.
34. It is also important to note that the *Employment Act* predates *the Constitution* of Kenya 2010. Under the *Employment Act*, casual employees (particularly those earning a daily wage) can be released without assigning reasons for their release or taking them through a hearing. The justification for this appears obvious. The contractual relation involving this category of employees comes to a close at the end of the assignment when they are paid their wage at the close of the day.
35. However, the scenario becomes complicated when the case involves casual employees whose term of service exceeds a day. If such employees are to be released before maturation of their anticipated temporary term, should they be given reasons for their release? Are they entitled to be heard in their defense?
36. *The Constitution* 2010 appears to have introduced a paradigm shift by entrenching the need for fair labour practice and fair administrative action whilst making administrative decisions that affect employees including those serving on casual terms. Thus, by virtue of section 7 of the sixth schedule



- to *the Constitution*, the *Employment Act* must be read with the necessary adjustments to fit into the current constitutional dispensation.
37. By virtue of articles 41 and 47 of *the Constitution*, if such employees are to be released before the lapse of the anticipated temporary term, they are entitled to be notified of the reasons that have informed their premature release. It is only by doing so that the employer will give meaning to these provisions of *the Constitution* and the *Fair Administrative Action Act*.
 38. The record shows that although she was to serve on locum basis, the Claimant was to earn salary on monthly basis. This denotes the fact that the parties anticipated that the Claimant was to serve for a period that was to be longer than one month. Therefore, her release on 18th June 2021, coming hardly sixteen (16) days into her contract, was certainly premature. In the premises and having regard to the provisions of articles 41 and 47 of *the Constitution* as read with the *Fair Administrative Action Act* and section 7 of the sixth schedule to *the Constitution*, the Claimant was entitled to be informed of the reason for her release and be afforded a hearing. There is no evidence that this was done.
 39. The Respondent may have had justifiable reason to want to release the Claimant from employment. However, it (the Respondent) was obligated to do so in a manner that accords with the principles of fair labour practice and fair administrative action. This is particularly important in order to give employment contracts a human face. Employees are not to be treated as objects in the employer's production chain. They must be accorded the human dignity that they deserve. It is important for employers to appreciate that their decisions impact on real lives and must be processed fairly and humanely.
 40. Finally, before I pen off, it is important to clarify an issue that appears to remain unclear to the defense team. For some reason, the defense appears to labour under some confusion as to whether casual employment constitutes employment. The defense appears to suggest that this form of engagement does not constitute an employment contract.
 41. The *Employment Act* contemplates various forms of employment contracts. These include: indefinite term contracts of service; fixed term contracts of service; seasonal employment contracts; and casual employment contracts. All these result in an employment relation. Therefore, to suggest that casual employment does not result in an employment relationship is a misnomer.

Determination

42. Having regard to the aforesaid, I find that the parties had an employment relation albeit temporary in nature. Thus, the Claimant is entitled to compensation for unfair termination of her temporary engagement. In the premises and having regard to the temporary nature of the assignment, I award the Claimant compensation that is equivalent to her salary for two months, that is to say, Ksh. 150,000.00.
43. In making this award, I have considered the requirements under section 49 of the *Employment Act*. In particular, I have taken into consideration the fact that the parties had been engaged as employer-employee for a very short duration.
44. I also award the Claimant Ksh. 75,000.00 being payment in lieu of the notice to terminate her contract as required under section 35 as read with section 36 of the *Employment Act*.
45. I award the Claimant interest on the award at court rates from the date of this decision.
46. This award is subject to the applicable statutory deductions.
47. The Claimant is awarded costs of the case.



DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

