



**Okong'o v Chowparty Pure Vegetable Restaurant (Cause 2186 of 2017)
[2023] KEELRC 2627 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2627 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2186 OF 2017
MN NDUMA, J
OCTOBER 19, 2023**

BETWEEN

SAMWEL OKONG'O CLAIMANT

AND

CHOWPARTY PURE VEGETABLE RESTAURANT RESPONDENT

JUDGMENT

1. The claimant filed suit on 3/11/2017, seeking compensation for unlawful and unfair termination and payment of terminal benefits set out in the Statement of Claim.
2. The respondent filed a response to the Memorandum of Claim in which is pleaded that the claimant was a casual employee who absconded duty and was therefore not dismissed from employment and is not entitled to the reliefs sought.
3. C.W.1, the claimant relied on a witness statement filed on 6/11/2017 in which he states that he was on 11/10/2013 employed by the respondent as a casual labourer with a wage of Kshs.350 per day payable weekly. That the pay was not reviewed. That he reported to work at 10.30 a.m. upto 11 p.m. daily. That he was unlawfully dismissed on 17/7/2017 without payment of terminal dues. That he had served the respondent for a period of 3 years and 8 months without any warning letter. That he suffered loss and damage pursuant to the unlawful and unfair dismissal. The claimant worked as a cleaner and produced a written casual agreement form signed by the claimant. The claimant reported a dispute on 25/7/2017 to the Ministry of Labour and the Ministry calculated terminal benefits payable to the claimant including service pay; underpayment, leave earned and payment in lieu of notice. The claimant relied on Regulation of Wages (General Amendment) Order for 2013, 2015 and 2017 in support of the sought underpayments in respect of a General Labourer at Nairobi. The dispute was not resolved at the labour office hence the suit.



4. Under cross-examination by Advocate Masese, for the respondent, the claimant stated that initially he was a casual but this had changed to continuous, permanent employment until the time of dismissal. That he was paid Kshs.350 per day and Kshs.50 for transport. That he was given food like other employees. That the food was not to be deducted from his wage. That he worked overtime until late and that is why they were paid for transport. Claimant said he was a General Cleaner but not a Gardener. That he was not registered with National Social Security Fund (NSSF) or National Hospital Insurance Fund (NHIF) and so the dues were not deducted.
5. That he worked for 6 days continuously from Monday to Saturday. That if he got an off day, it was deducted from his salary. The claimant denied that he was paid a daily wage of Kshs.622 in the year 2017. The claimant said other employees said to be permanent were paid double salary during holidays which did not apply to him. That he got one day unpaid off per week. That if he worked on a Sunday, he was given one other day off. That he was not granted paid leave or off-days. The claimant said he got two warnings on 10/1/2017 and 25/1/2017. That he had a final warning letter but was not in the wrong. The claimant insisted that he was dismissed from employment and did not abscond as alleged by the respondent. That he was dismissed for delaying to bring food from one hotel to the other.
6. That the delay was from the kitchen where he waited to be given the Order. That the delay was 45 minutes. The Indian Boss sent him home without a hearing upon being suspended for 7 days. That upon return from suspension, he was sent home for good. That he tried to return to work three times but was chased away. That his salary was never increased in 2016 to Kshs.527 per day as alleged. That he was paid cash and signed a voucher
7. R.W.1, Emmanuel Imbai Litumbi, testified that he was a manager of the respondent. That he dealt with staff matters. That he joined the respondent 10 years ago. He relied on a witness statement dated 6/2/2022. R.W.1 said that the claimant was a casual and worked on and off in the years 2013, 2014, 2015, 2016 and 2017. That he had a daily wage but was paid after some time. That initially he was paid Kshs.350 plus Kshs.50 for transport and lunch 100/= making a total of Kshs.500 per day.
8. That the claimant was not entitled to leave, public holidays or overtime as he claims but the company allowed him to be off and would be paid ex-gratia some times.
9. Under cross-examination by Advocate Kandere for the claimant, R.W.1 denied that the claimant was summarily dismissed when he was showed a letter dated 13/7/2017. R.W.1 said that the claimant was to report back. That he was there when the claimant was given the letter. That the letter was a warning for absenting himself from duty. That the respondent was not aware where he was. That the claimant was given a paper to write where he was and was to report back on 15/7/2017. That the claimant did not return. That the company did not call him on phone. That the claimant then reported a dispute at the Ministry of Labour. That the respondent responded to the report but did not have a copy of their response before Court. R.W.1 said that the claimant was not a permanent employee. That he was not paid in lieu of leave. That he reported to work at 10.30 a.m. until 10 p.m. in the night. That they had break at 3 pm to 6 p.m. for 3 hours. That he had no records of this. That they were paid overtime which varied depending on the number of hours worked. That the claimant did not work all days. He worked for 3 ½ years intermittently. That he was given one day off, every week. That the claimant also absented himself without permission. That he was a casual employee. That the suit has no merit, and it be dismissed.

Determination

10. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by C.W.1 and R.W.1. The issues for determination are:-



- (a) Whether the claimant absconded work or his employment was wrongfully terminated by the respondent.
- (b) Whether the claimant has proved that he is entitled to the reliefs sought.
11. It is not in dispute that the claimant worked for the respondent from the year 2013 to the year 2017. There is a dispute as to whether the claimant worked as a casual during that period or his employment had converted to that of a permanent employee.
12. Section 37(1) of the *Employment Act*, 2007 reads:-
- “37(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.
13. It is evident that the nature of work carried out by the claimant whether continuously or intermittently between the years 2013 and 2017 place the claimant within the contemplated monthly employee to whom section 35(1) (c) applied. It follows that the employment of the claimant could only be terminated upon giving him a notice of at least 28 days and the claimant is entitled to the protection under section 35(4) (a) to dispute the lawfulness or fairness of termination accordance with the provisions of the *Employment Act*, 2007.
14. Furthermore, since the claimant/respondent did not pay NSSF for the claimant nor place him under any other social protection scheme, then the claimant is entitled to payment of service pay in terms of section 35(5) as read with 35(6) (d) of the *Act*.
15. From the foregoing and the testimony of R.W.1, it is clear that the respondent wrongly believed and treated the claimant as a temporary casual employee for a period of 3 ½ years. R.W.1 admitted that the claimant worked as a General labourer for the respondent for six (6) days a week and would report at 10.30 a.m. until 10.00 p.m. in the night. This work was continuous for the 3 ½ years the claimant served the respondent. R.W.1 stated that they gave the claimant one day off, weekly and that the claimant was paid overtime as and when he exceeded the normal hours.
16. R.W.1 did not deny that the respondent wrote the letter before Court dated 13/7/2017 to the claimant which letter was a final warning to the claimant. The claimant was warned that any further transgression would result to summary dismissal of the claimant.
17. The claimant did not produce any letter of dismissal and the respondent denied that it had dismissed the claimant from work.



18. Clearly, the letter dated 13/7/2017 had requested the claimant to return to work on 15/7/2017. R.W.1 says that the claimant did not return whereas the claimant states that he returned to work three (3) times but was chased away.
19. The onus of proving that the employment of the claimant was terminated or that the claimant was dismissed from employment lies with the claimant on a balance of probabilities.
20. From the various warning letters given to the claimant, it is apparent that the respondent had the habit of communicating disciplinary matters to the claimant in writing.
21. The Court has deduced from this trend that it is more probable than not that, if the respondent had summarily dismissed the claimant from his employment, they would have issued him with a letter of summary dismissal.
22. Accordingly, the Court is not satisfied that the respondent summarily dismissed the claimant from work. The Court finds that the claimant did not return to work upon receiving the final warning dated 13/7/2017 and reported a dispute to the Ministry of Labour as set out herein before.
23. The claim for unlawful and unfair summary dismissal has no merit and is dismissed.

Terminal Benefits

24. On the terminal benefits sought by the claimant, the Court finds as follows:-

- (a) One month pay in lieu of notice.

The claimant failed to prove that the respondent summarily dismissed him from work and therefore this claim lacks merit and is dismissed.

- (b) Service Pay

The claimant is entitled to payment of service pay in terms of section 35(5) and (6) of the *Employment Act* as claimed in the sum of Kshs.27,900 and the same is awarded accordingly.

- (c) R.W.1 admitted that the claimant did not go on leave for the 3 ½ years he served the respondent and was not paid in lieu of leave days not taken. The Court awards the claimant Kshs.47,894 in lieu of leave days not taken.

- (d) The claim for compensation has no merit and is dismissed.

- (e) The claimant proved that he was not paid double salary for the public holidays worked because he was regarded a casual. The Court awards the claimant Kshs.24,800 for the public holidays worked.

- (f) The claimant was not paid for the one off-day he was given every week because he was regarded to be a casual. The Court awards the claimant Kshs.218, 944 in respect of all the unpaid off days given to him for the 3 years and 8 months' period served.

- (g) The claimant proved that he was at all material times paid a daily wage of Kshs.350. The respondent did not produce any documentary prove to the contrary, going by the minimum wage demonstrated in the General wage notices produced by the claimant for the period 2013; 2015 and 2017; the claimant has proved that he was underpaid as set out in the claim in the sum of Kshs.37,627; 165,672 and 14,444 and 6,220.

Total underpayment – Kshs. 223,963.00



Total Award: Kshs. 543,501.00

25. In the final analysis, judgment is entered in favour of the claimant against the respondent for a sum of Total Kshs. 543,501.00
- (b) Interest at Court rates from date of judgment till payment in full.
 - (c) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 19ST DAY OF OCTOBER, 2023.

Mathews N. Nduma

Judge

Appearances

Mr. Kandere for claimant

Mr. Masese for Respondent

Ekale – Court Assistant

