



**Omolo v Kenya School of Monetary Studies (Cause 1261 of 2016)
[2023] KEELRC 2500 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2500 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1261 OF 2016
NZIOKI WA MAKAU, J
OCTOBER 3, 2023**

BETWEEN

KENEDY OMONDI OMOLO CLAIMANT

AND

KENYA SCHOOL OF MONETARY STUDIES RESPONDENT

JUDGMENT

1. In his Memorandum of Claim dated 30th March 2016, the Claimant instituted this suit against the Respondent claiming damages and payment of terminal dues following termination of his employment. He prayed for judgment against the Respondent for:
 - a. Basic Salary – Kshs. 17,475.20 per month for the month of January 2016.
 - b. Three (3) months' salary in lieu of notice.
 - c. 12 months' salary being general damages.
 - d. Costs of this suit.
 - e. Aggravated damages.
 - f. Interest on the foregoing paragraphs (a) to (e) above at court's rates.
 - g. Issue the Claimant with a Certificate of service.
 - h. Costs and interests of the suit on the award until payment in full.
 - i. Such other or further relief as this Honourable Court may deem fit to grant.
2. The Claimant averred that the Respondent employed him as a casual labourer and that he worked for the institution for more than three years on an implied contract. That however in a malicious effort and disregard of Kenyan labour laws, the Respondent summoned him and contemptuously instructed him



not to report to work in January 2016. Further, he was to commence the clearance process within three hours of the aforementioned instructions notwithstanding the lack of termination notice. He asserted that at the time of termination of his employment, he was earning a net salary of Kshs. 17,475.20 per month.

3. It was the Claimant's averment that his unlawful termination was marred by favouritism and nepotism in the Respondent institution because the termination was meant to create space for relatives or friends that had been handpicked by the management. In addition, the pay for the said new employees as soon as they reported to work stood at Kshs. 26,000/-, which was double what the Respondent used to pay him. He further averred that since the termination of his employment, the Respondent refused, failed or otherwise neglected to pay him his terminal dues together with interest thereon as sought hereinabove.
4. The Respondent's reply in its Statement of Response dated 21st July 2016 was that it indeed employed the Claimant as a casual labourer but not as pleaded by him. It denied the authenticity of the documents referred to in the Memorandum of Claim i.e. the Staff Card, averring that it neither issues any documents on payment nor does it issue staff cards to employees engaged on a casual basis. According to the Respondent, the annexed staff card never originated from the institution and the Claimant was thus to prove its authenticity. In essence, the Respondent denied the Memorandum of Claim in its entirety including the allegations of unlawful termination. Its contention was that the Claimant was therefore not entitled to payment of any terminal dues nor payment in lieu of notice.
5. It was the Respondent's averment that being a casual labourer, the Claimant was engaged and his employment determined at the end of each day. That there was no automatic renewal of the same and it was under no obligation to offer employment for the following day. Further, it recruited the casual labourers on a day-to-day basis depending on availability of work and that it was on this basis that the Claimant and many other casual labourers were requested not to report to work when there was no longer work to be done. On the claim that some employees were paid more than the Claimant, it averred that the rates of payment of casuals is determined by the number of days worked and the level of skills.
6. It further averred that the Claimant had not exhausted the administrative remedies available to him before seeking legal redress from this court and further, neither had a demand nor notice of intention to sue been issued to the Respondent. It asserted that the Claimant's suit is misconceived, incompetent, bad in law and discloses no reasonable cause of action and prayed that his Claim be dismissed with costs.
7. The Respondent also filed a Witness Statement made by Mr. Gabriel Maina Nyaega who asserted that the Respondent engaged the Claimant as a hand helper on casual terms on an "as needed basis" and to serve in various capacities on diverse dates from 2011 and that the Claimant worked intermittently subject to availability of work. He stated that the Claimant last worked with the Respondent on or about 15th December 2015 and then left upon completion of the project he was undertaking as a casual worker.
8. In evidence, the Claimant testified that he worked for the Respondent between 2011 to 2015 and slightly in 2016 and that he worked for three years in total. He asserted that his performance was good and that he had no disciplinary issues. Under cross-examination, the Claimant stated that they would sign a memo after six months as a renewal and that a contract was made through that memo. He further testified that the amounts of payment were different as there were three modes of payment at the Respondent i.e. cash transactions, mobile transactions through the Tangaza App and the bank transactions. In reference to the staff card produced in court, the Claimant stated that the same was introduced in the midst of his contract.



9. The Respondent's witness, Mr. Gabriel Maina Nyaega (RW1), relied on his witness statement as his evidence in chief. He testified that the Claimant was paid on weekly basis and that the Respondent did not pay daily purely on administrative basis and that the Claimant was last paid in December. He confirmed that the Claimant used the Staff Card for identification to allow him access the school and as he moved around and further confirmed that the Respondent did not issue payslips as produced by the Claimant. RW1 stated under cross-examination that the Claimant worked from 2011 to 2015 on an off and on basis (for periods of 3 days or 10 days) as and when required to and that he was not on contract since he did not work continuously. Upon being referred to the last document of the Respondent's Bundle Exh 10, RW1 confirmed that the Claimant had worked for a total cumulative 15 days whereas in the Bundle Exh 1 no work was done thus no material. That marked the close of oral testimony and parties were to file written submissions.

Claimant's Submissions

10. The Claimant submitted that in the case of *British Leyland UK Ltd v Swift* (1981) IRLR 91, Lord Denning described the test of reasonableness in relation to termination of employment in the following words:
- “The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him; the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”
11. It was the Claimant's submission that from the foregoing, it was clear that the Respondent acted dismissed him unfairly and that no reasonable employer would have dismissed him since he did his work as expected and the employer was therefore supposed to increase his salary. That however in this case, the employer decided to dismiss him to pave way for recruitment of friends and relatives. He further relied on the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR in which the Court elaborated on unfair termination of employment under the lens of sections 41 and 45 of the *Employment Act*. The Claimant submitted that the Respondent contravened section 42(1) of *Employment Act*, which provides that an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understands, the reason for which the employer is considering termination and that the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
12. The Claimant further referred to section 35 of the *Employment Act* which provides for termination notice, with section 35(1) providing 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 –
- a. where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;



- b. where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or
 - 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.
13. The Claimant argued that a casual employment may be converted to a term contract under section 37 of the [Employment Act](#) if the work has been continuous for a month and cited the case of [Humphrey Omondi v Vishnu Builders Ltd](#) [2013] eKLR for this proposition; or the work performed by the casual labourer cannot reasonably be expected to be completed within a period of three months. That where a person engages in casual labour continuously for a month, the labourer is considered an employee with a term contract, whose wages are deemed to be paid monthly, as per section 35(1)(c) of the [Act](#). It was the Claimant's submission that once a casual labourer is converted to a term employee as aforementioned, a written notice of 28 days ought to be given to the employer upon termination of the employment. That section 37 of the [Act](#) further provides for the rights of a casual labourer whose contract of service has been converted to a term employment by stating that if the person works for two or more months continuously, from the date of employment as a casual employee, that person shall be entitled to terms and conditions of service that he or she would have been entitled to under the Act had he not initially been employed as a casual employee. That this means he was entitled to a notice of termination of at least 28 days along with a reasonable explanation for the reasons for termination. In addition, the Respondent was barred by section 45 of the Act from terminating his contract without 28 days prior notice in writing as affirmed in the case of [Kesi Mohamed Salim v Kwale International Sugar Co. Ltd](#) [2017] eKLR.
14. The Claimant submitted that terminating his employment to pave way for the management to employ their relatives and friends violated the principles outlined in Article 232(1)(a) of the [Constitution](#) of Kenya, which provides for high standards of professional ethics, values and principles of Public Service. Further, that the Respondent violated Article 41(2)(a) of the [Constitution](#) on the right to fair remuneration since it underpaid him during his tenure whereas the new employees recruited to replace him were given a salary double than what he used to earn. That in so doing, it also contravened his constitutional right to equality and freedom from discrimination under Article 27 when it discriminated against him by terminating his employment unfairly. That the Respondent violated Article 28 of the [Constitution](#) on the right of every person to inherent dignity and respect and protection of that dignity. He relied on the case of [William Musembi v Moi Education Centre](#) [2014] eKLR in which the Court stated that the purpose of recognizing and protecting human rights and fundamental freedom is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. The Claimant submitted that he was entitled to payment of his due salary in lieu of notice by virtue of section 36 of the [Employment Act](#) and that this Court should grant the orders sought in the Memorandum of Claim as prayed.

Respondent's Submissions

15. The Respondent submitted that it had demonstrated in evidence that the Claimant was employed as a casual employee on need be basis meaning his casual employment never converted to term employment. It cited the case of [Idd Salim Mwadele & 19 others v Kwale International Sugar Company Limited](#) [2017] eKLR where the Court of Appeal held that before the burden of proof of the termination could shift to the respondent, the appellants were first to prove the conversion of their casual employment. It was the Respondent's submission that the Claimant herein had failed



to substantiate his claims that he had continuously worked for the Respondent for over one month to enable him rely on section 37 of the *Employment Act*. That since the Claimant only produced documents that the Respondent disowned having not emanated from it, the burden of proof did not therefore shift to the Respondent. It further cited the case of *Josphat Njuguna v High Rise Self Group* [2014] eKLR where the Court observed that it is a misinterpretation of section 37(1) of the *Employment Act* to hurriedly deem a casual employee who has not been paid at the end of the day as there could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day.

16. On the allegations of discrimination, the Respondent relied on the decision of the Court of Appeal in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR that for a claim on discrimination to be sustained, it must be shown that notwithstanding that the employees were under the same terms of employment, they were treated differently on grounds such as race, health status, ethnic or social origin, belief or culture as set out under Article 27(4) of the *Constitution*. That however in the instant case, the Claimant did not substantiate those claims and it is trite law that he who alleges must prove. That the Respondent on the other hand was able to produce a Memo dated 30th December 2015 particularizing the casual employees between 1st to 20th December 2015 and indicating there was no discrimination as all the casual employees thereat were paid equally per day for the days worked. Without prejudice to the foregoing, the Respondent submitted that the claim for three months' salary in lieu of notice is not tenable as the Claimant had testified that he was paid on a monthly basis and would thus only be entitled to one month's pay in lieu of notice. For damages and salary for January 2016, it submitted that the Claimant did not lead evidence why he should be entitled for the maximum compensation as he had only worked for the Respondent for less than a year on casual basis and neither did he prove that he worked in January 2016. The Respondent submitted that the Claimant had in fact admitted in the claim that his services were terminated in December 2015. On aggravated damages, the Respondent submitted that the Claimant had not proved his allegation of having been discriminated against during the period he worked for it and which claim must therefore fail.
17. The Claimant was engaged on an aggregate period that converted his contract from one that was casual to a term contract in terms of section 37 of the *Employment Act*. He was dismissed in January 2016 by being told not to report to work. He had been issued with a staff card which shifted his position somewhat as visitors and those who were temporarily in the Respondent's premises would have been given a pass which could be surrendered at the close of the day. The Claimant thus proved he was an employee of the Respondent deserving of some modicum of natural justice in the termination of his services as outlined in section 41 of the *Employment Act*. As such, the Claimant is entitled to recover some of the remedies he has sought before the Court. The Claimant is entitled to:-
 - a. One month's notice – Kshs. 17,475.20
 - b. 3 month's salary as compensation for the unlawful termination – Kshs. 54,425.60
 - c. Costs of the suit
 - d. Interest on the sums in a) and b) above at court rates from the date of judgment till payment in full.
 - e. Certificate of service in terms of section 51 of the *Employment Act*.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2023

NZIOKI WA MAKAU



JUDGE

