



**Barasa v Mini Bakers Limited (Cause 1444 of 2016)
[2023] KEELRC 2895 (KLR) (14 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2895 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1444 OF 2016
NZIOKI WA MAKAU, J
NOVEMBER 14, 2023**

BETWEEN

DAVID MASINDE BARASA CLAIMANT

AND

MINI BAKERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent claiming wrongful and unfair termination of his services and failure to pay him terminal benefits. The Claimant averred that on or about 1992, the Respondent employed him as a Dough Maker on a monthly salary of Kshs. 20,352/- but it did not give him an appointment letter. That he served the Respondent company with diligence until 7th March 2016 when it terminated his services and failed to pay his terminal dues i.e. notice pay, service pay for 25 years, leave for 23 years, house allowance at 15% on the basic salary, and 12 months' wages as compensation for unfair termination. He averred that his claim against the Respondent was for Kshs. 1,762,543/- plus costs and interest of this suit and he also prayed for a certificate of service.
2. It was the Claimant's case that he could not have been a casual employee at the Respondent company and that having served it for 25 years, the period must be presumed to be on permanent basis. That during the time he was in the employ of the Respondent, it did not give him leave and he was not paid house allowance for the entire period. That he should be paid service pay because he neither belonged to any registered pension or provident fund scheme under the Retirement Benefits Acts nor was he a member of NSSF. He contended that the Respondent did not observe dictates of procedural fairness under the *Employment Act* and that the verbal dismissal was therefore unprocedural and unfair.
3. In the Response on a without prejudice basis, the Respondent averred in its Memorandum of Response that the Claimant was indeed its employee but denied that it employed him on terms as alleged in his Claim. According to the Respondent, it employed the Claimant as a casual worker and if at all he was engaged for work by the Respondent, it was on casual employment terms regulated



by a Collective Bargaining Agreement (CBA) signed between the Union and the Respondent's Management. That the undated and unsigned letter produced by the Claimant indicating he was allegedly certified as its employee and bearing the name of S.P. Kumar – the Production Manager and a stamp of 1992, was fraudulent and meant to mislead this Court. It was the Respondent's averment that the Claimant was severally advised to convert from casual to permanent employee in line with clause 26 of the CBA and provide information and sign documents to facilitate such conversion, but he declined. That in bad faith, the Claimant instead deserted his duties and filed the suit herein against the Respondent. That the Claimant had thus by his actions declined employment as offered and was thus estopped from claiming wrongful and unfair termination.

4. The Respondent also denied that it failed to pay the Claimant his terminal dues as alleged. It averred that the Claimant was not entitled to notice pay and compensation as his employment was neither terminated nor dismissed but that he absconded duty. That the Claimant was therefore in breach of statutory and contractual obligations. Further, that the Claimant was not entitled to leave and house allowances and as the same was included in his wages pursuant to the negotiated and agreed terms under the CBA, which governed his terms of service. That he was finally not entitled to service pay as he was contributing towards NSSF.
5. The Claimant's rejoinder in his Reply was that the Response largely contained admission to the issues of the Claim. He denied having produced an alleged fraudulent letter with an official stamp in 1992 as averred by the Respondent. According to the Claimant, the Respondent was unfair in its dealings with him as it wanted him to sign a new contract effectively making him lose the previous years he had served at the company. He averred that he was dismissed without being given any reasons and an opportunity to be heard and asserted that Labour laws are supreme to the CBAs. He prayed for the Response to be struck out with costs and judgment entered for the Claimant as prayed in the Claim.

Evidence

6. The Claimant testified that the CBA, which was to commence on 1st May 2014 to 30th April 2017, did not address the plight of casuals prior. That he did not get the dues for the years he had worked for the Respondent and denied having run from work. That when the Respondent wanted to engage him in 2016, he asserted that he had worked for it from 1992 and when he asked for severance pay for the said period, he was dismissed. He testified that he used to be paid daily as a casual. The Claimant confirmed under cross-examination that he was a member of the Union and that union dues used to be deducted but asserted that he never got the CBA. In reference to clause 26(d) (ii) of the CBA, the Claimant confirmed that the same showed computation of daily pay and that notice pay, leave pay and service pay were included in daily pay. That as per page 17 of the CBA, a Dough Maker or Roller's basic salary was Kshs. 15,502/- with house allowance of Kshs. 4,651/- and that the sum of totalled about Kshs. 20,000/-. The Claimant reiterated in re-examination that he was paid per day, never got house allowance and the CBA was never read to them.
7. The Respondent's witness Mr. Jack Otieno (RW1) testified that when he joined the Respondent in 2007, he found the Claimant working in the company as a casual employee. He stated that the Claimant did not work continuously for the Respondent as he was engaged on a need basis and because the market had ups and down. He explained that the bakery would be on operation for three days in one week and then on one day in the following week. Under cross-examination, RW1 admitted that they had neither produced a CBA prior to the 2014 one nor payment vouchers from before 2014. He testified that they wanted to convert the Claimant's terms to a permanent employee in 2016 when he started working regularly as his duties suited the conversion. He asserted that Casuals were not paid house allowance. In re-examination, he confirmed that the 2014 CBA covered the period the Claimant



stopped working at the company and that a disciplinary hearing was held for him for absconding his duties.

Claimant's Submissions

8. The Claimant submitted that having proved by way of documentation that he was employed in 1992 with no contrary evidence tendered to controvert that assertion and RW1 having confirmed not knowing anything else about employment at the Respondent prior to 2007, this Court should find that the Claimant was employed from 1992. He further submitted that his employment automatically converted into a contract of service as stipulated under section 37(1) of the [Employment Act](#) as follows:

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- (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.

9. It was the Claimant's submission that it was not possible that he was a casual employee for all those years. That since he had proved his case on a balance of probability, he should be considered and declared to have been a permanent employee of the Respondent. He cited the case of [Humphrey Owino Omondi v Vishnu Builders Limited](#) [2016] eKLR in which the Court discussed the provisions under section 37(1) of the [Employment Act](#). He further submitted that having proved he was a permanent employee, it follows that he deserved treatment of a permanent employee and should as such have been taken through the redundancy process under section 40 of the [Employment Act](#). The Claimant noted that the Respondent only chose to produce what was in its favour from 2014 after the CBA was signed. That the Respondent's failure to produce payment vouchers or records from commencement of his employment can only infer that the said documents were against it. Further, that the vouchers from 2014 to 2016 were not consistent in terms of duration whereas he had attended work on a daily basis. He also noted that the vouchers as produced confirmed continuity of work for a whole week without interruption.

10. On his claim for service pay, the Claimant submitted that under the 2014 CBA, the days worked per year was agreed at 17 and since there was no CBA before 2014, it was only fair that 17 days be adopted. Moreover, the CBA had indicated at clause 38 that the Respondent was to pay service backwards up to and including 31st July 2003 but was silent for the years before 2003. It was his submission that since the Respondent did not state why it did not retrospect for the years worked and he was seeking service benefit from September 1992 to March 2016, the same should be awarded from 1992. As regards annual leave, the Claimant submitted that the Respondent neither responded to his assertion that he was not allowed to go for leave or paid in lieu of leave, nor gave any contrary proposition. That the 2014 CBA confirmed that every employee was entitled to annual leave at a rate of 30 days from 1st January to 31st December of every year. He submitted that since termination of his employment was illegal, he was entitled to leave pay for 23 years that were complete but had not been paid for. The Claimant reiterated his averments on the house allowance claim and submitted that considering his submissions on his employment having converted to permanent employment, he was consequently entitled to 12 months' salary as compensation for unfair termination. It was the Claimant's submission



that the Respondent having not served him with a notice or pay in lieu of the notice, he ought to be paid notice since the termination of his employment was unprocedural. Lastly, he prayed for costs and interest from 1992 until payment in full.

11. The Respondent did not file submissions. The Claimant had from all accounts been a dough maker for the Respondent. He was engaged from 1992 and even if his initial services were intermittent, breadmaking was carried out until his termination in 2016. Under the law, an employee such as the Claimant was entitled to service pay upon termination after a lengthy period of service where no NSSF is paid for the employee. The Claimant will be entitled to service pay but only at the rate of 15 days for each successfully completed year of service. He worked for 23 years and that is what would be applied to the formula. In the Claimant's claim it was his assertion that he was entitled to house allowance. The sum paid to the Claimant was a rate inclusive of house allowance and he cannot claim the same. He did not avail records to show underpayment for the 23 years he claims house allowance for. The Claimant sought interest on the sums claimed from 1992 till payment in full. Upon commencement of his service to the Respondent, he could not possibly have anticipated that he would not be paid and in any event, the sums were never due in 1992. The only claim for interest would be applicable to what is found due and at the discretion of the court, interest at court rates is payable from the date of judgment till payment in full and not from the filing of the suit or date of termination. The Claimant was entitled to be given notice and thus will recover one month's salary as notice. The Claimant will also have costs of the suit. He however is not entitled to 12 month's salary compensation but instead will recover 3 month's salary as compensation for the unfair termination. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 234,048/- as service pay
- b. One month's salary as compensation – Kshs. 20,352/-
- c. 3 month's salary as compensation – Kshs. 61,056/-
- d. Costs of the suit.
- e. Interest at court rates on the sums in (a), (b) and (c) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

