



**Mutua v Ten Senses Africa Limited (Cause 2004 of 2017)
[2023] KEELRC 3284 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3284 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2004 OF 2017
J RIKA, J
DECEMBER 15, 2023**

BETWEEN

BRIGHT NDUKU MUTUA CLAIMANT

AND

TEN SENSES AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her statement of claim on October 6, 2017.
2. She states that she was employed by the respondent as a general labourer, from July 2010. She was sorting and grading macadamia nuts. She was paid a monthly salary of Kshs. 12,990. She was dismissed by the respondent, in November 2016.
3. She was informed by the Respondent's Production Manager, Charity Kathure, to home as there was no more work. She never took annual leave. N.S.S.F contributions were deducted from her salary, but never remitted. There was no reason given to her, to justify termination. No termination notice was issued.
4. She claims: -
 - a. Declaration that termination was unfair.
 - b. 1-month salary in lieu of notice at Kshs. 12,990.
 - c. Annual leave pay, for 6 years and 5 months served, at Kshs. 64,950.
 - d. House allowance in arrears at Kshs. 150,035.
 - e. Overtime at Kshs. 367,841.
 - f. Service pay at Kshs. 50,011.



- g. 12 months' salary in compensation for unfair termination at Kshs. 155,880.
Total...Kshs. 801,707.
- h. Costs and interest.
5. The respondent filed a statement of response, dated May 19, 2021. The claimant was not in regular employment. She executed various casual agreements with the respondent. The last covered the period 9th June 2016 to August 9, 2016. It was for a period of 3 months. She was paid hourly gross wages at Kshs. 54, payable every 2 weeks through M-pesa. Parties could terminate the agreement, through a notice of 7 days. Disputes arising under the contract would be referred to mediation. The claimant was not employed in 2010.
 6. She was not entitled to annual leave under her contract. Her wages were all-inclusive. She was not unfairly dismissed by the Respondent. Her contract lapsed on or about August 9, 2016. She is not entitled to compensation and notice as pleaded.
 7. The Claimant gave evidence and rested her case on January 25, 2023. Human Resource Officer Meshack Mulwa gave evidence for the respondent on the same date, and on July 6, 2023 when the hearing closed. The Claim was last mentioned before the Court on September 20, 2023, when Parties confirmed filing and exchange of their Closing Submissions.
 8. The Claimant adopted her witness statement and 2 Documents [1-2], in her evidence-in-chief. Cross-examined, she restated that she was employed in 2010. She was not issued a written contract at the inception. She earned Kshs. 12,900 monthly.
 9. She stated that she was a Casual Labourer. She confirmed that she was not entitled to house allowance and to N.S.S.F subscription. She also told the Court that, "I was not entitled to annual leave." She worked overtime. Termination was communicated verbally. Written contracts issued from about the year 2015. She did not exhibit the contracts issued from about the year 2015. She agreed that she was paid after every 2 weeks, in cash, and later through M-shwari.
 10. Redirected, she insisted that she was employed in 2010, by word of mouth. A contract issued in 2016 for 3 months. She worked in continuity from 2010. In 2014 she had a maternity break.
 11. Meshack Mulwa adopted as his evidence-in-chief, his Witness Statement, and the casual contract document dated 9th June 2016. He told the Court that the claimant was engaged on a contract, lasting 3 months. It commenced in June 2016, and ended in August 2016. The Respondent did not summarily dismiss her. The Respondent deals in macadamia nuts. Macadamia nut is seasonal. The Respondent did not have grading and sorting work throughout the year. The Claimant is not entitled to the prayers claimed.
 12. Cross-examined, Mulwa told the Court that there was no other contract, concluded with the Claimant, beyond the contract exhibited by the Respondent. The N.H.I.F statement indicates that the Respondent paid contribution for the Claimant, on September 29, 2016. This was after the Claimant left. It could have been a delayed payment. Her contract expired and was not renewed.
 13. The issues are whether the Claimant was a regular Employee of the Respondent, from the year 2010 to 2016; whether her contract was terminated by the Respondent unfairly; and whether she merits the prayers sought.



The Court Finds:

14. The central issue, whether the claimant was a regular or casual Employee of the respondent, was answered by the claimant herself, on cross-examination.
15. She told the Court that: -I was a Casual Labourer.I was not entitled to N.S.S.F [subscription] and annual leave.I was paid after every 2 weeks.
16. The Court has no reason to delve into exploration of the question whether an Employee was in regular or casual engagement, where the Employee has herself described engagement as casual.
17. The frequency of wage payment conceded by the claimant on cross-examination- after every 2 weeks- tallies with the evidence of the respondent: that the claimant was paid wages on an hourly rate, after every 2 weeks.
18. There is only one contract exhibited before the court. It is dated June 9, 2016. It entered into effect on June 9, 2016. It expired on August 9, 2016. It is signed by both Parties. It assigns the Claimant sorting duties. The gross hourly wage is indicated to be Kshs. 54. It was payable every 2 weeks.
19. The claimant was not able to supply the Court with contracts or other evidence, to show that she was employed in 2010, and worked in continuity. She did not even exhibit the written contracts she stated, were issued from about 2015.
20. The contract dated June 9, 2016, suggests that she was indeed employed on a fixed-term contract of 3 months. Parties characterized the engagement as casual employment incorrectly. Perhaps the claimant was at some point, offered casual work by the Respondent, but this is not shown through the evidence before the Court. The evidence before the court is that the claimant was on a fixed-term contract, for a period of 3 months, which expired on August 9, 2016.
21. The nature of the work availed to the claimant by the respondent- sorting and grading macadamia- would seem to the Court as suggested by the Respondent's Witness, to be seasonal. It is not likely that the product- macadamia- was in season throughout the year, necessitating engagement of fulltime workers.
22. N.H.I.F data showing contributions made in September 2016, does not establish that the claimant worked in continuity from 2010 to 2016. It could be that the Respondent was late by a month, in remitting the claimant's N.H.I.F contribution. N.H.I.F records cannot be a substitute for the written contract executed by the Parties, clearly identifying the terms and conditions of service.
23. Consequently, the Court agrees with the position of the Respondent, that the Claimant was on a fixed term contract which expired. She was not dismissed by the respondent. She was not entitled to notice, compensation, annual leave and service, under her fixed-term contract. She has not established that she worked overtime.

It is Ordered: -

- a. The Claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 15TH DAY OF DECEMBER 2023.

JAMES RIKA



JUDGE

