



**Mwale v M/S Soon & Seen Construction Limited (Cause 514 of 2017)  
[2023] KEELRC 3362 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3362 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 514 OF 2017  
J RIKA, J  
DECEMBER 15, 2023**

**BETWEEN**

**HUNDERSON KHATIGALA MWALE ..... CLAIMANT**

**AND**

**M/S SOON & SEEN CONSTRUCTION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim dated 15<sup>th</sup> March 2017.
2. He states that he was employed by the Respondent as a Painter at Respondent's construction sites within Nairobi, on 27<sup>th</sup> January 2014. He was initially paid a daily rate of Kshs. 750, which was later enhanced to Kshs. 850.
3. His terms and conditions of service were subject to the *Regulation of Wages [ Building and Construction Industry] Order, 2004*, and the *Employment Act 2007*.
4. He states that the Respondent terminated his contract on or about 23<sup>rd</sup> December 2016, unfairly and unlawfully.
5. He prays for: -
  - a. 1-month salary in lieu of notice at Kshs. 25,500.
  - b. Annual leave for 2 years, 11 months at Kshs. 65,237.
  - c. 12 months' salary in compensation for unfair termination at Kshs. 310,250.
  - d. Severance pay at Kshs. 27,200.
  - e. Rest days at Kshs. 119,000.
  - f. Public holidays at Kshs. 24,650.



- g. Tool allowance at Kshs. 3,675.  
Total... Kshs. 575,512.
  - h. Costs.
  - i. Interest.
  - j. Any other suitable order.
6. The Respondent filed its Statement of Response dated 30<sup>th</sup> October 2019. Its position is that the Claimant was a Casual Employee, on a daily wage rate, as conceded in the Statement of Claim. He was assigned painting work, on need basis. Once the painting was finished, there was nothing more for him to do. He was paid a daily wage rate, on weekly basis. He is not entitled to the remedies claimed.
  7. The Claimant, and the Respondent's Supervisor Rajesh Khimani, both gave evidence for the respective Parties on 14<sup>th</sup> July 2023 closing the hearing. The Claim was last mentioned before the Court on 26<sup>th</sup> September 2023, when the Parties confirmed filing and exchange of their Submissions.
  8. The Claimant relied on his Witness Statement and Documents exhibited as 1-5. He was not given reason for termination, and was paid nothing. He never went on annual leave. Cross-examined, he told the Court that he was employed on 27<sup>th</sup> January 2014. There was no letter of employment. He was paid a daily rate of Kshs. 750, later improved to Kshs. 850. It was paid weekly. He was assigned to a site at Kitusuru in Nairobi. He could be taken to other sites, but this was his principal place of work.
  9. He confirmed that he signed the payment vouchers exhibited by the Respondent. He confirmed that, "I was a Casual Worker..." He told the Court that he was paid daily. He told the Court further, "I agree I worked on need-basis, going by projects... I agree I was paid in full on all assignments... it is true I was never issued a letter, converting me as a permanent Employee..."
  10. The Claimant stated further on cross-examination, that he did not have documents to support his prayers. He worked at a big construction site. The number of Painters varied, depending on the amount of work. He reported his dispute to the Ministry of Labour, but did not know what the outcome was. He confirmed that he signed all payment vouchers on record, and that the Respondent exhibited a cheque, drawn in his favour by the Respondent, for the sum of Kshs. 40,800. He did not collect the cheque. He emphasized that he did not receive this amount on redirection.
  11. Rajesh Khimani relied on his Witness Statement and 2 Documents filed by the Respondent [1-2], in his evidence-in-chief. He knew the Claimant as a Casual Worker, who carried out painting work at the Respondent's construction sites. He did not work in continuity. He was paid a daily rate, on a weekly basis.
  12. Khimani confirmed that the Claimant was a Casual Worker, on cross-examination. The Respondent paid him leave pay as shown at page 134 of its bundle of documents. He was offered Kshs. 40,800 in benefits. He did not collect the cheque. Redirected, Khimani told the Court that the Claimant was on casual employment, and not entitled to statutory benefits. The Respondent computed and offered him terminal benefits, although he was in casual employment.
  13. The issues are whether, the Claimant was in regular or casual employment of the Respondent; whether his contract was terminated unfairly, unlawfully or at all by the Respondent; and whether he merits the remedies pleaded.



## The Court Finds:

14. The first issue was answered in detail by the Claimant, on cross-examination. He told the Court that: -I was a Casual Worker.I confirm this.I was paid a daily rate.I agree, I worked on need-basis, going by projects.I agree I was paid in full on all assignments.It is true I was never issued a letter converting me as a permanent Employee.
15. On redirection, the Claimant did not disown, or in any way qualify, his evidence above. His evidence on redirection was confined to two sentences: I was not paid the amount. I was not issued a written contract. He did not try to recant, modify, explain, or in any way cast doubt on the veracity of his evidence on cross-examination. He remained steadfast, in his self-destruct mode.
16. It is therefore not possible, that the Court will declare that the Claimant was a regular Employee of the Respondent, when he himself states boldly, that he was a Casual Employee. The Court agrees with the Claimant and with the Respondent, that the Claimant was employed as a Casual Employee, assigned to Respondent's construction sites to do painting work. His assignment depended on the availability of painting work. It was not an assignment, that the Claimant performed in continuity. He told the Court that the number of Painters at the site, at any given time varied, depending on the amount of work available.
17. The first issue is settled through the Claimant's own evidence. He was in casual employment, not in regular employment.
18. The second issue is similarly resolved through the evidence of the Claimant. As he was a Casual Employee, mutuality of obligations rose and set with sun. He was at liberty at the end of the day, to move to another construction site, un-associated with the Respondent. He was not bound to report to work the following day. The Respondent would have no obligation, to call on him to account for absconding. There was nothing binding the Parties, after 24 hours. The Claimant would be assigned painting work, on need basis. This is his evidence.
19. It would follow that termination was not at the instance of the Respondent. The Claimant left at the close of the day, as he was entitled to, with no obligation to return.
20. The payments offered to him by the Respondent during and after he left, did not alter his evidence, on the nature of his employment. He ought to have taken what was offered by the Respondent with both hands, and moved on. In the view of the Court, and taking into consideration that the Claimant expressly conceded he was on casual engagement, there was no contractual or statutory obligation on the part of the Respondent, to pay to the Claimant any benefits beyond the daily wage. He told the Court unequivocally that, " I was paid in full, on all assignments."
21. The Claimant has not established that his contract was unfairly and unlawfully terminated by the Respondent, as required under Section 47 [5] of the *Employment Act*.
22. The third issue on remedies, is similarly answered through the evidence of the Claimant, disaffirming the prayers. Notice, annual leave, compensation for unfair termination, severance pay, rest days, and public holiday pay, are benefits based on the presumption that there is a regular contract of employment. The Claimant told the Court he was on casual engagement, and was paid all his dues in accordance with his daily assignments. An Employee on casual engagement does not ask for notice of termination of employment at the close of the day, and is not bound to issue one to his Employer. He is not entitled to other statutory benefits claimed. He walked out of these assignments at his pace and convenience, and is not entitled to the remedies claimed.



23. 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 15<sup>TH</sup> DAY OF DECEMBER 2023.**

**JAMES RIKA**

**JUDGE**

