



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1562 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JENIPHER ACHIENG OUKO & 13 OTHERS.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant filed their amended memorandum of claim dated 20th May, 2019. The original one was dated 4th August, 2017.
2. Respondents put a response dated 31st October, 2017.

CLAIMANTS CASE

3. Jenipher Achieng Ouko being the first Claimant testified on her behalf and on behalf of other 13 Claimants as per their authority dated 4th August, 2017.
4. The Claimants says they worked for the Respondent from 20th July, 2017 when they saw an internal memo dated 4th March, 2017 directed to Deputy Vice Chancellor and was to the effect that they would outsource cleaning services.
5. The Claimant further says they were issued recommendation letters to terminate their services.
6. The Respondents have been treating them as casuals even though they have worked for the Respondent for more than 3 months. They say they have not been going on leave and were not provided with house nor paid house allowance.
They say they did not enjoy medical benefits as per the collective bargaining agreement and were not given uniforms.
They also say they were never given commuter allowance as per their Collective Bargaining Agreement.
7. They say their services were terminated without being given a notice for redundancy and so their termination was unlawful and furthermore they were not paid their terminal dues.
8. The Claimants pray for their terminal dues as particularized in paragraph 16 of the memorandum of claim for the 14 Claimants for unlawful and wrongful termination of their employment.

RESPONDENTS CASE

9. The Respondent denies the Claimants were employed by the Respondents on diverse dates and denies the claim that they have been working for the Respondents continuously from respective dates without proceeding on annual leave.
10. The Respondent states the Claimants were term employees and are paid a consolidated salary and so were not entitled to enjoy other benefits.

11. The Respondent states all claims raised by the Claimants ought to be dismissed.

They pray the Claimants suit be dismissed with costs and interest.

ISSUES FOR DETERMINATION

12. (i) The one issue in this matter is to determine if the Claimants were unlawfully or wrongfully terminated?

(ii) Are they entitled to the reliefs sought.

DECISION

13. The fundamental issues to determine is whether Claimants were unlawfully terminated from their employment.

The 14 Claimants were employed by the University of Nairobi. That fact is not disputed.

The crux of the matter however is whether they were employed as permanent staff or were casuals.

14. Jenipher Achieng Ouko the Claimant witness who testified on her behalf and on behalf of the other 13 Claimants while testifying in court stated she was employed by the University in 1995. In her pleadings as well she said she was employed on 12th April, 1995.

The thirteen Claimants indicated diverse dates when they were employed. There are no letters of appointment or any documents produced to indicate the dates the Claimants were employed.

15. The Respondent witness Mr. Peter Maina Muthee did not indicate the dates the Claimants were employed. In his pleadings the Respondent denied that the Claimants were employed on diverse dates as they aver in their pleadings but did not produce any document to show when they were employed.

16. He also said the Claimants were their employees and were term employees but he produced no proof or even indicative dates of the terms of their contracts.

17. The employer is the one mandated under the Employment Act to write and keep records of his employees.

Section 9 (2) of the Employment Act 2007 provide that an employer who is a party to a written contract shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance to subsection 3.

18. Further Section 10(7) of the Employment Act provide that in any legal proceedings an employer fails to prove a written contract or written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

19. In the present case the Respondent has produced no documents to establish what kind of relationship was there between the Claimants and the Respondent.

20. On the other hand the Claimants are affirmative they worked for the Respondent for diverse dates all over 2 years each.

21. The Respondent even though he claims the Claimants were their employees he did not give specifics as to the dates of the contract and the terms. The court is forced to just depend on oral averments without any documents to prove such fundamental covenants and this is quite unfortunate.

He also says in his pleadings that they did not treat the Claimants as casuals.

22. Yet they terminated their employment as casuals as they did not follow the procedure set out in Section 45 of the employment Act 2007.

23. The Claimants claim they were treated as casuals. But even if they initially started to work as casuals employees Section 37 of Employment Act provide that casual employment convert to service contract where wages are paid monthly and Section 35 (1)(c) of the Employment Act apply thereafter.

The Claimant in her evidence stated they used to be paid monthly but at times would be paid even 3 months in arrears. She says she had applied for a letter of appointment but was not issued with one.

24. Even if the Respondent describe the Claimants as term employees however the Respondent has not produced documents to show the terms of the contract. They were also not on casual terms because casual employment convert to service contract if the period worked amounts in aggregate to one month.

This then can only be found to be service contract and the court is emboldened to find they were service contract employees. They are

entitled therefore to their dues under the Employment Act 2007.

25. Before I proceed let me confirm I considered all the respective pleadings and submissions by the respective parties.

One issue I picked from the Respondent's submission is the one of date of separation from employment by the Claimants.

26. The Respondent in their submissions raise the issue of discrepancy of the date of termination of the Claimants. They aver that in the pleadings the outsourcing of cleaning services was issued on 14th March, 2017. They submit that the Claimants date of termination should have been 14th March, 2017 and not 1st January, 2019.

The Claimant in court during her evidence in chief averred that their termination was on 1st January, 2019.

27. Paragraph 4 of the memorandum of claim that the Respondent are referring is alluding to the issuance of memo of outsourcing services and not the date of termination.

The respective parties do not state the date of termination and is unfortunate there are no documents to establish the dates of appointment and termination of the Claimants.

28. The Respondent witness in his evidence in chief himself admitted the Claimants left employment around 23rd December, 2018.

This confirms what the Claimant had said that they left employment during Christmas holiday.

I therefore do not agree with the Respondent that there is discrepancy on the date the Claimants left employment.

I emphasize that the problem is lack of documentation which the respondent should have produced.

29. Were Claimants unlawfully terminated?

The Claimants say they reported to work on 1st January, 2019 and were told there was no work for them since a company had been contracted instead.

It means the Claimants were not given any notice that their positions were being filled. So there was no more work for them.

The law is sacrosanct that before you declare a person redundant you must inform him in writing at least a month in advance or inform his union if he is a member of the union.

The principles set out in paragraph 40 of the Employment Act are according to the court in the **CASE OF JANE I KHALECHI VS OXFORD UNIVERSITY PRESS EA LIMITED (2013) eKLR** mandatory and are not left to the choice of the employer.

Redundancy according to the above case of **JANE KHALECHI (SUPRA)** affects people's livelihoods and so cannot be treated casually.

30. In my considered judgement and having considered the facts of this case carefully, the evidence adduced as well as the submissions, I am persuaded the Claimants have proved their case that they were service employees of the Respondent on diverse dates and that they were unlawfully and wrongfully terminated from their employment. If the Respondent meant to declare the Claimants redundant they should have followed vigorously the process set out in Section 40 of the Employment Act. The same was totally not followed. So Claimants termination was unlawful and unprocedurally flawed.

I therefore enter judgement in favour on the 14 Claimants against the Respondent.

REMEDIES

I proceed to award the following remedies in favour of the Claimants as follows:-

1. JENIPHER ACHIENG OUKO (23) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=.

(ii) Annual leave, 21 days for each completed year

Kshs.264,331.04.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked is

Kshs
563,468.40.

(iv) Service gratuity at 15 days for each completed year Kshs.163,635.50.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Jenipher Aching is Kshs.1,005,663.94.

Claimant also claims commuter allowances, leave travelling allowances and uniform refund and all are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement

till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

2. HELLEN KIARIE (11) YEARS

(i) One month's salary in lieu of notice

(527x 27 days).....Kshs.14,229/=.

(ii) Annual leave, 21 days for each completed year

Kshs. 126,419.19/=.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked 256,122/=.

(iv) Service gratuity at 15 days for each completed year Kshs.78,259.50/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Hellen Kiarie is Kshs.475,029.69.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

3. MARGARET MUSIMBI (13) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.149,404.50.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.332,958.60.

(iv) Service gratuity at 15 days for each completed year Kshs.92,488.50.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Margaret Musimbi is Kshs.589,080.60.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

4. EDITH K. MULATI (11) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.126,419.19.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked 256,122/=.

(iv) Service gratuity at 15 days for each completed year Kshs.78,259.50/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Edith K. Mulati is Kshs.475,029.69.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

5. FRANCIS OMARE (6) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.68,955.92/=.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.128,061/=.

(iv) Service gratuity at 15 days for each completed year

Kshs.42,687/=.

Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Francis Omare is

Kshs. 253,932.92.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(v) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

6. HELLEN OBILI (6) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.68,955.92/=.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.128,061/=.

(iv) Service gratuity at 15 days for each completed year Kshs.42,687/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Hellen Obili is Kshs.253,932.92.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

7. JULIA WAMBUTI (13) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.149,404.50.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(vii) House allowance for the duration worked Kshs. 332,958.60.

(iii) Service gratuity at 15 days for each completed year Kshs.92,488.50.

(iv) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Julia Wambuti is Kshs.589,080.60.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(v) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

8. NANCY GACAMBI (12) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.137,911.85/=.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.281,734.20.

(iv) Service gratuity at 15 days for each completed year Kshs.85,373/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Nancy Gacambi is Kshs.519,248.05

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

9. SUSAN WANJIRA (4) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.45,970.62.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.76,836.60.

(iv) Service gratuity at 15 days for each completed year Kshs.28,458/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Susan Wanjira is Kshs.165,494.22

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

10. TITUS MUSYOKI (4) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.45,970.62.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.76,836.60.

(iv) Service gratuity at 15 days for each completed year Kshs.28,458/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Titus Musyoki is Kshs.165,495.22

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

11. EUNICE NJERI (4) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.45,970.62.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.76,836.60.

(iv) Service gratuity at 15 days for each completed year Kshs.28,458/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Eunice Njeri is Kshs.165,494.22.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

12. OPIYO ONYANGO (10) YEARS

(i) One month's salary in lieu of notice

(527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.114,926.54.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.230,509.80.

(iv) Service gratuity at 15 days for each completed year Kshs.71,145/=.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Opiyo Onyango is Kshs.430,810.34.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

13. ZEDDY CHEBET (3) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.34,477.96.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(iii) House allowance for the duration worked Kshs.51,224.40.

(iv) Service gratuity at 15 days for each completed year Kshs.21,343.50.

(v) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Zeddy Chebet is Kshs.121,274.86

They claimed commuter allowances, leave travelling allowances and uniform refund which are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(vi) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

14. BETTY KHALEKHA (4) YEARS

(i) One month's salary in lieu of notice (527 x 27 days).....Kshs.14,229/=

(ii) Annual leave, 21 days for each completed year

Kshs.45,970.62.

Respondent claimed they used to go on leave but no evidence was tendered so I award leave days.

(vii) House allowance for the duration worked Kshs. 76,836.60.

(iii) Service gratuity at 15 days for each completed year Kshs.28,458/=.

(iv) Having awarded severance pay I am hesitant to award general damages. I am convinced the Claimant is well compensated. I decline this prayer.

Total awarded to Betty Khalekha is Kshs.165,494.22.

They claimed commuter allowances, leave travelling allowances and uniform refund are special damages and are not proved. The Claimants allude to provisions of Collective Bargaining Agreement but there is no proof that they were members. All are declined.

(v) Interest at court rates from the date of Judgement till final payments.

Costs are also awarded to the Claimant. Also to be issued certificate of service within 30 days.

Orders accordingly.

Delivered, dated and signed in Nairobi this 23rd day of February 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE