



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 745 OF 2015**

**CHARLES KITHUKA & 19 OTHERS.....CLAIMANTS**

**VERSUS**

**DPL FESTIVE LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimants aver that they were employees of the respondent having been engaged as such on diverse dates. That although they were paid on a daily basis, they were regular employees. The claimant's main grievance is that their respective engagement with the respondent ceased with effect from 1<sup>st</sup> August, 2013, due to their persistent request to be converted from casual to permanent employees. Subsequently, the claimants have prayed for the following reliefs; notice pay; severance pay; annual leave for all the years of employment; shift allowance; compensatory damages; costs of the suit; and certificate of service.

2. Opposing the claim, the respondent stated that the claimants were engaged as casual labourers hence they did not have contracts detailing their respective dates of employment. That being casual employees, they would avail themselves at their own convenience and would often seek alternative casual work elsewhere for days on end. That in fact, the claimants were never terminated but chose not to attend the respondent's premises on the date they were to be converted from casual labourers to permanent employees.

**Claimants' case**

3. The claimants identified Mr. Charles Kithuka to testify on their behalf. In that regard, when the matter came up for hearing on 23<sup>rd</sup> November, 2021, Mr. Kithuka took the stand and rendered oral evidence in support of all the claimants' respective cases. Mr. Kithuka adopted his witness statement and the bundle of documents filed together with the claim, to constitute part of his evidence in chief. He also produced the said documents as exhibits before court as well as the Authority to Plead, which was executed by all the claimants.

4. Mr. Kithuka told court that all the claimants were engaged by the respondent with effect from 2005 to 2011 and were members of the Bakery and Confectionery, Food Manufacturing and Allied Workers Union (Union). That they were terminated due their persistent request to have their respective employment contracts converted to permanent basis, so as to allow them enjoy better terms and conditions of service under the existing Collective Bargaining Agreement (CBA). That their request for conversion fell on deaf ears. Mr. Kithuka further stated that on 1<sup>st</sup> August, 2013, the claimants reported for their shift at around 8:30 pm, only to be informed by their supervisor, Mr. Kefa, that the shifts had been reduced to two hence were advised to report back the following day. That they reported back to work on 2<sup>nd</sup> August, 2013 as advised, but the respondent's directors, by the names Mr. J.O and Mr. Depesh, told them to go home and report when a new shift would have been introduced. That being aggrieved, they reported the issue to their union and later to the labour office but no resolution was forthcoming, hence the court action. He prayed that the claim be allowed as prayed.

**Respondent's case**

5. The respondent called oral evidence through its Human Resource Manager Ms. Lilian Oyata, who testified as RW1. Ms. Oyata adopted her witness statement and bundle of documents filed on behalf of the respondent, to constitute part of her evidence in chief. She also produced the documents as exhibits before court.

6. Ms. Oyata joined issues with the claimants to the effect that they were all members of the Union. She told court that the claimants were engaged on a casual basis hence were not regular employees of the respondent. That the respondent decided to convert the terms of service of its casual labourers including the claimants, to permanent basis. That this was to take effect from 1<sup>st</sup> July, 2013 but the claimants wrote a complaint to the respondent, requesting that the process of conversion be put on hold as they needed some issues addressed first. That as such, the respondent held a meeting with some of the claimants to address the issues raised. That one of the resolutions from the meeting was to push forward the date of conversion from 1<sup>st</sup> July, 2013 to 1<sup>st</sup> August 2013.

7. That on 1<sup>st</sup> August, 2013, when the conversion was to take effect, the claimants failed to turn up for work hence the respondent informed

the Union as much vide its letter of 5<sup>th</sup> August, 2013. That after two months, the respondent was served with a letter from the Kenya Human Rights Commission (KHRC), which alleged that they had wrongfully terminated the claimants. That the respondent responded to the said letter clarifying the position. Ms. Oyata further denied the claimants' assertion that the respondent started operating 2 shifts on 1<sup>st</sup> August, 2013, adding that its operational requirements demand a 3 shift schedule. She further denied that the claimants worked continuously hence were not regular employees. Ms. Oyata asked the court to dismiss the claim with costs.

### Submissions

8. The claimants submitted that having worked for a period longer than a month, their terms of employment were converted by operation of law, from casual to regular employees as provided for under section 37 of the Employment Act. It cited the case of **Silas Mutwiri vs Haggai Multi Cargo Handling Services Limited (2013) eKLR**, in support of its submissions. That they were unexpectedly terminated from employment without any notice hence the same was unfair and unlawful, contrary to the provisions of section 45 of the Employment Act. The cases of **Francis Ndirangu Wachira vs Betty Wairimu Maina (2019) eKLR**, **Joseph Okelo Odhiambo & another vs Y.J Elmi and 2 others (2012) eKLR** and **John Mwaniki Kihimo vs KAK Enterprises (2013) eKLR** were cited in support of this position.

9. As at the date of writing this Judgment, the respondent was yet to file any submissions, hence the court did not have the benefit of considering the same.

### Analysis and Determination

10. Based on the pleadings, the testimonies rendered before Court and the submissions on record, the following issues arise for determination: -

- i. **What was the nature of the employment relationship between the claimants and the respondent?**
- ii. **Were the claimants terminated?**
- iii. **If the answer to (i) is in the affirmative, were the claimants unlawfully and unfairly terminated?**
- iv. **What reliefs if any, are available to the claimants?**

### Nature of the employment relationship

11. It is not contested that the claimants rendered services to the respondent. The question is on what terms were such services rendered. Whereas the claimants allege that they were rendering their services regularly, the respondent disagrees and states that the claimants were engaged on need by need basis.

12. Section 2 of the Employment Act defines a casual employee to mean *a person whose terms of engagement provide for payment of wages at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.*

13. The claimants have averred that having worked between 2005 and 2013 continuously, their terms of employment converted to permanent basis by virtue of section 37 of the Employment Act. Section 37 (1) of the Act provides as follows;

**(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;**

**(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.**

14. From the record, there is no evidence to prove or disprove the assertion by the claimants, to the effect that they worked continuously for the respondent. Both parties presented daily casual payment vouchers, which I must add, were not helpful at all since they relate to different periods of time and different shifts. There was none that was in respect of a continuous period aggregating to one month. Further, there was no muster roll before court to confirm whether the claimants attended work continuously for more than one month as alleged.

15. In the circumstances, given that the claimants have claimed that they were regular employees of the respondent, it was upon them to prove this fact by virtue of the provisions of **Section 107 of the Evidence Act**. Granted, the claimants may not have had in their possession the attendance records to prove this assertion as such documents are ordinarily in the possession of the employer. Nonetheless, there exists under the law, mechanisms to compel production of documents in the possession of the opposing party. Specifically, pursuant to **Section 69** read together with **section 68 (a) of the Evidence Act**, a party may require production of specific documents that are in the possession of the other party whom the document is sought to be proved. Such production is normally precluded by a Notice to Produce.

16. In the instant case, the claimants were well aware of the respondent's defence to the effect that they were not regular employees and their engagement was a need by need basis. That notwithstanding, they did not compel the respondent to produce the attendance register or muster roll, which they knew would have assisted them prove their case.

17. In the circumstances, and in absence of evidence, the claimants have failed to prove to the requisite standard, that they were regular employees of the respondent.

18. Further, and closely related to the foregoing finding, is the respondent's defence that the claimants refused to show up at work on the date their terms of employment converted from casual to permanent. Indeed, this issue also formed the crux of the claimants' case as they alleged that the reasons for which their employment was terminated was the respondent's refusal to convert their terms of service from casual to permanent.

19. This is an instance where the record speaks for itself. Thus, vide a letter dated 28<sup>th</sup> June, 2013 purportedly authored by the respondent's employees from its enterprise branch, they requested that the process of conversion from casual to permanent be put on hold pending negotiations and resolution of certain issues. I will reproduce the said letter verbatim;

*"The Director,*

*Thro' H/R Manager,*

*D.P.L Festive L.T.D*

*RE: CHANGE OF DESIGNATION FROM CASUAL TO PERMANENT*

*Dear Sir/Madam,*

*Reference is made to our mind that on 1<sup>st</sup> July, 13 requesting to be reassigned from (sic) the position permanent employees. We write to request and advice our management that we are ready to consideration (sic) but unless you show and tell us about the past year we are not ready. Again you told us no different of LUNGA and enter price (sic) remember we work manually how then (sic) the working capacity will be equal? (sic) Again you said a yesterday employee(sic) will be equal to the one who came in the year 2006. To us we are not ready and we are requiting for more negotiation about the employment until next terms and conditions in written: we remain looking forward for your return up.*

*Yours enterprise workers*

*Cc MANAGEMENT*

*CC CHIEF SHOP STEWARD*

*CC ENTER PRICE WORKERS"*

20. Following the above letter from employees of the respondent, a meeting was convened on 1<sup>st</sup> July, 2013 and in attendance, was the respondent's management, union representatives as well as the employees' representatives, namely, Mr. Charles Kithuka (6<sup>th</sup> claimant), Nzioka Mutuku (16<sup>th</sup> claimant), Gregory Mutuku, Bernard Kioko and Kilonzo Maithya.

21. The agenda of the meeting was to resolve the following issues;

- i. that the employees were not ready for the conversion from casual to permanent which was to be effected on 1<sup>st</sup> July, 2013 as they had not saved enough money to sustain them for the month of July, 2013;*
- ii. Less/no production especially on the night shift;*
- iii. they were not willing to report until they were given letters of appointment and cleared dues for previous months; and*
- iv. they wanted to be aware if their department will still remain the same or it will be generalized.*

22. From the record of the minutes, the meeting resolved as follows inter alia;

- i. there will be an extension of one month before conversion from casual so as to allow the employees organize themselves financially;*
- ii. the employees will be issued with their letters of appointment during the first month of conversion;*
- iii. the departments and shifts to remain the same; and*
- iv. from August, 2013, all of the employees serving as casuals will be converted to permanent basis without further delays/excuse.*

23. At the foot of the minutes, are the signatures of all the persons who attended the meeting including the 6<sup>th</sup> and the 16<sup>th</sup> claimants. This confirms their concurrence to the contents of the said minutes. It is also notable that the claimants did not at any given time dispute the

resolution arrived at during the said meeting.

24. Through a letter dated 11<sup>th</sup> July, 2013, the respondent's Human Resource Manager, Ms. Oyata, (RW1) formally communicated the position taken at the meeting to the General Secretary of the Union. She noted in part: -

*“We have already converted all employees in our Lunga lunga branch and we were to convert employees (sic) enterprise branch on 1<sup>st</sup> July, 2013 but unfortunately the same did not take place. On 1<sup>st</sup> July, 2013, employees in enterprise branch failed to report to their duties claiming they were not financially prepared to work one month without pay, some also claimed they want the management to first pay them their final dues before converting them to permanent basis. The management agreed with employees through their union officials that conversion will effect(sic) 1<sup>st</sup> August 2013 without fail and no excuse will be entertained.”*

25. Through a letter dated 5<sup>th</sup> August, 2013, the respondent notified the General Secretary of the Union, that 28 employees did not turn up for duty on 1<sup>st</sup> August, 2013, when the conversion of employment from casual to permanent, was to take place.

26. From the chronology of the foregoing events, it is evident that the respondent was desirous to convert the terms of the claimants from casual to permanent basis. This was to be undertaken through a formal process. However, by their very own conduct, the claimants were not willing to vacate their casual status of employment. It is indeed a paradox, that having refused to have their terms converted to permanent basis on the respondent's motion, the claimants now ask the court to deem their employment as having been converted pursuant to section 37 of the Employment Act.

27. From the record, it would seem that at the time, the claimants were unwilling to have their terms of employment converted from casual to permanent. What changed along the way?

28. As it is, the record discredits the assertions of the claimants to the effect that that they were terminated for persistently demanding to be converted from casual to permanent basis, when they are the ones who rejected the conversion initiated by the respondent.

29. The next issue for determination is whether the claimants were terminated from employment.

#### **Were the claimants terminated?**

30. According to the claimants, they were terminated with effect from 1<sup>st</sup> August, 2013. This assertion has been disputed by the respondent. It is therefore imperative to evaluate the evidence so as to establish which side the truth lies.

31. Section 47(5) places the burden of proving unfair termination on an employee. It provides as follows;

**“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employee”**

32. The claimants have alleged that the termination was verbal hence there is no letter of termination to prove as much. As such, this fact can only be ascertained from the evidence on record.

33. Vide a letter dated 5<sup>th</sup> August, 2013, the respondent informed the General Secretary of the claimants' Union that 28 employees had failed to show up at work hence had deserted duty. Incidentally, this was the date they were to be converted from casual to permanent.

34. As part of their evidence, the claimants produced a demand letter dated 15<sup>th</sup> August, 2013, through which the KHRC informed the respondent in part: -

*“The above named persons CHARLES KITHUKA & MICHAEL OMWEGA representing 19 others (hereinafter our clients) reported to our legal aid desk on 8<sup>th</sup> August, 2013 that they have been in your employment as casual labourers for various years. Due to misunderstandings with regards to terms and conditions of work they resigned.” Underlined for Emphasis*

35. From the letter above, which emanated from the KHRC on behalf and seemingly, upon instructions from the claimants, it is apparent that they left the employment of the respondent by way of resignation hence it was on their own volition. This confirms the respondent's position as contained in its letter dated 5<sup>th</sup> August, 2013, that some of the employees, including the claimants, had failed to show up at work. Essentially, they had left work on their own volition.

36. This further contradicts the claimants' assertion that they were terminated from employment by the respondent.

37. In view of the foregoing, the court returns that the claimants were not terminated as alleged, and instead, left on their own accord.

38. Having found as such, the 3<sup>rd</sup> issue for determination falls by the wayside.

39. In the same breath, the reliefs for notice pay, compensatory damages, annual leave, NSSF and severance pay are declined. As regards, the claim for shift allowance, the same would have been considered but it was not particularized, hence it also falls.

40. In the final analysis I dismiss the instant claim in its entirety.

41. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH 2022.**

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**STELLA RUTTO**

**JUDGE**

**APPEARANCE:**

**MR. KINGANGI FOR THE CLAIMANTS**

**MS. OBONYO FOR THE RESPONDENT**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**STELLA RUTTO**

**JUDGE**