



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ondari v Prime Steel Mills Limited (Cause 247 of 2017)  
[2022] KEELRC 41 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 41 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 247 OF 2017  
SC RUTTO, J  
APRIL 28, 2022**

**BETWEEN**

**JARED OKINDO ONDARI ..... CLAIMANT**

**AND**

**PRIME STEEL MILLS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he worked for the respondent as a casual labourer from the year 2006 until August 29, 2016 when he avers that his services were unlawfully and unfairly terminated. He further avers that his casual contract of employment was converted to a term contract pursuant to section 37 (1) (a) of the *Employment Act*. The claimant has sought against the respondent an award in the sum of Kshs 1,820,984.00 being severance pay, notice pay, unpaid overtime, accrued leave days not taken and compensatory damages.
2. The respondent disputed the claim and averred that it only engaged the claimant as a casual employee and that at no point did he work continuously for an aggregate period of one month hence his employment did not qualify for conversion in accordance with section 37(1) (a) of the *Employment Act*. Consequently, the respondent asked the court to dismiss the claim with costs.
3. The matter proceeded for hearing on October 25, 2021 and each side presented oral evidence.

**Claimant's Case**

4. The claimant testified in support of his case and sought to rely on his witness statement together with his bundle of documents, which he produced as exhibits before court. He asked the court to adopt the same as part of his evidence in chief.
5. The claimant told court that he was employed on contract as a scrap charger and by the time of his termination, his daily wage had risen from Kshs 140/= to Kshs 509/=.



6. He told court that he worked continuously for a period of ten years hence his casual employment was converted to a term contract under section 37 (1) (a) of the *Employment Act*. That on 29<sup>th</sup> August, 2016, he was terminated by his supervisor on grounds that there was no work for him and several of his other colleagues.
7. He further stated that he worked from 7 am to 7 pm for 7 days a week inclusive of public holidays but was never compensated accordingly. That further, he never proceeded on leave. The claimant further averred that he was never issued with a list of disciplinary issues by the respondent. In concluding his testimony, he asked the court to allow his claim as prayed.

### **Respondent's Case**

8. The respondent called one witness, Mr. Geoffrey Oduor, who testified as RW1. He identified himself as a supervisor at the respondent company.
9. He also adopted his witness statement as well as the bundle of documents filed on behalf of the respondent and which he asked the court to admit as part of his evidence in chief.
10. RW1 averred that the claimant was not consistent when reporting to work and that he did not work for an aggregate period of one month. He told court that the claimant just stopped working and when he tried to reach him, he could not get hold of him. He further stated that the claimant was paid for all the hours worked including overtime. He asked the court to dismiss the claim with costs as the claimant was not entitled to any of the reliefs sought.

### **Submissions**

11. It was submitted on behalf of the claimant that he was an employee of the respondent from sometimes in 2006 to August 29, 2016. That his casual employment was therefore converted to a term contract. He placed reliance on the case of *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited* [2013] eKLR.
12. The claimant further submitted that his termination was unfair and unlawful as the respondent did not prove the reasons for his termination. On this issue, he cited the case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR.

### **Analysis and Determination**

13. I have considered the issues arising from the pleadings, the evidence on record as well as the submissions and to my mind, the court is being called to resolve the following questions: -
  - a. Whether the claimant's employment was converted from casual basis to a term contract?
  - b. If the answer to (a) is in the affirmative, was the claimant was unfairly and unlawfully terminated?
  - c. Is the claimant entitled to the reliefs sought?

### **Whether the claimant's employment was converted from casual basis to a term contract?**

14. It was the claimant's case that his employment was converted from casual to permanent basis by virtue of section 37(1) (a) of the *Employment Act*. The respondent disagrees and asserts that the claimant did not work continuously for an aggregate period of more than one month.



15. A casual employee is defined under Section 2 of the *Employment Act*, to mean “a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”
16. In support of his case, the claimant produced his casual labour cards, during the time he worked for the respondent. On its part, the respondent produced the claimant’s clock in records for the period between 1<sup>st</sup> July to July 31, 2016. It is apparent that the clock in records indicate that during the said month, the claimant did not report for duty for 4 days that is, July 2, 2016, July 24, 2016, July 25, 2016 and July 27, 2016.
17. It is also evident from the casual labour cards that the claimant worked intermittently as it shows that he was present during some days in a specific week while he was absent during certain days of the week. In particular, the casual labour cards presented shows that the claimant worked during the following dates;
  - a) from February 22, 2008 to February 24, 2008 while he was absent throughout that week;
  - b) on May 9, 2008 but absent for the rest of that week;
  - c) on November 6, 2009 but was not present for the rest of that week; and
  - d) on March 2, 2012 but was absent for the entire week.
18. From the foregoing, it is apparent that the claimant did not work for the respondent continuously for a period of one complete work or a month for that fact. Indeed, the casual labour cards shows that he worked for the respondent intermittently. This lends credence to the respondent’s assertions that the claimant did not work consistently for an aggregate period of one month. This position is also confirmed by the claimant’s clock in records for the month of July, 2016.
19. If indeed the claimant worked continuously for the respondent for an aggregate period of ten years, then he would have produced his casual labour cards to that effect. In fact, he only needed to produce casual labour cards that demonstrate that he worked for the respondent for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than onemonth.
20. It is worth noting that the casual labour cards produced by the claimant worked to the detriment of his case. They were not helpful to him at all. If anything, the same only serve to confirm that he worked occasionally for the respondent.
21. In view of the foregoing, I am inclined to agree with the respondent that the claimant did not work consistently for an aggregate period of one month. As such I find that his employment was not converted from casual basis to a term contract.
22. In light of the foregoing, the 2<sup>nd</sup> issue cannot be logically determined given the nature of the employment between the parties as the same was one terminable within the ambit of Section 35 (1) (a) of the *Employment Act*.
23. Having found that the claimant was engaged on a casual basis by the respondent, I find that he is not entitled to any of the reliefs sought.

#### **Order**

24. In the final analysis I dismiss the instant claim in its entirety.
25. Each party shall bear its own costs.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28 TH DAY OF APRIL, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Abobo

For the Respondent Mr. Mutoro

Court Assistant Barille Sora

**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**

