



Maina v Muchai (Cause 2130 of 2017) [2022] KEELRC 12758 (KLR) (4 April 2022) (Judgment)

Neutral citation: [2022] KEELRC 12758 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 2130 OF 2017

M MBARŪ, J

APRIL 4, 2022

BETWEEN

GRACE WAIRIMU MAINA CLAIMANT

AND

CHRISTOPHER KARANJA MUCHAI RESPONDENT

JUDGMENT

1. The claimant is female adult. The respondent is a male adult and trading as Achievers School.
2. On 1st May, 2010 the respondent employed the claimant as an early childhood development teacher at a wage of Ksh.5, 500 per month and which was later increased to Ksh.8, 000 per month in 2014. Employment terms were oral. Work hours were 7AM to 5PM Monday to Friday.
3. The claimant was not provided with housing or a house allowance.
4. On 1st January, 2017 the respondent terminated the claimant's employment without notice or giving any reasons. When schools opened, the claimant found that she had been replaced by another teacher. She was not paid her terminal dues and claims the following;
 - a. Salary arrears Ksh.55,000;
 - b. Notice pay Ksh.8,000;
 - c. Annual leave for 7 years Ksh.45,230;
 - d. Service gratuity for 7 years Ksh.32,307;
 - e. Compensation;
 - f. House allowances for 84 months Ksh.100,800;
 - g. Certificate of service.



- h. Costs.
5. The claimant testified that the respondent was running a school and she was employed as an early childhood development teacher from 1st May, 2010 at a wage of Ksh.5, 500 per month. Such was without a house allowance and no pay slip was issued. She would be paid through Mpesa of in cash and at times a bank deposit working from 7AM to 5PM.
 6. Some months went without pay. Cumulatively she had Ksh.55, 000 in wage arrears. She started asking for the payment of her wage arrears leading to dismissal from employment.
 7. The defence that the claimant had a contract that lapsed is not true since she was never issued with the same.
 8. Upon cross-examination, the claimant testified that on 26th February, 2019 she was paid Ksh.10, 000; On 2nd September, 2015 she was paid Ksh.11, 000; On 7th January, 2017 she was paid Ksh.10, 000.
 9. She had month months of work each term and during the school holidays she was not at work and she was not paid. Employment termination notice was not issued, she only found another teacher in her class and when she went to the office she was not allocated work.
 10. In May to November the respondent had two terms. There was a holiday of 2 months and she was not paid.
 11. In the year 2016 the claimant took maternity leave from 5th March, 2016 and returned after 2 months in May, 2016 and in April, 2016 she was not paid. The respondent only sent Ksh.2, 000. She returned to work in May, 2016 with her child who required constant attention. She required the wage for own upkeep and the child.

Response

12. In response, the respondent's case is that the claimant worked on a term-to-term contract commencing when schools opened and ending on closing date renewable upon agreement at a consolidated wage of Ksh.10, 000 a month by the year 2016. The pay was consolidated as provided under section 31(1) of the [Employment Act](#).

The claimant was not entitled to the benefits claimed.

13. In January, 2017 the claimant did not turn up for work to renew her termly contract and which was within her discretion and the respondent had no choice but to get a replacement.
14. The claimant was on contract and cannot claim leave pay. All schools have a holiday to cover that. The claims made should be dismissed with costs.
15. No work records were filed with the response saves for payment vouchers and Mpesa statement.
16. Christopher Karanja Muchai testified that he is the proprietor of Achievers School and worked with the claimant who was an ECD teacher from May, 2010 to October, 2016. The claimant would be employed when the school was in session and paid Ksh.5, 500 per month and during school holidays the school could not afford to pay the claimant. This was agreed upon that no salary was due during school holidays.



17. When the claimant left in October, 2016 she was being paid Ksh.10, 000 per month. This was through Mpesa, in cash and her Equity Bank Account. The last statements of 19th February, 2019 show the payments to the claimant.
18. The claimed wage arrears are not justified. When schools opened in October, 2016 there was no immediate payment as the school had no money. The term ended in October, 2016 to allow KCPE period of examinations and the claimant was not in the school and therefore could not be paid. This was the practice for all teachers.
19. In January, 2017 the claimant did not report to work. He called her and she never picked her calls. After a week of absence, he replaced her since the school required the service and the claimant refused to attend work.
20. Mr Muchai testified that he only owes the claimant the sum of Ksh.10, 000 for November, 2016 and nothing more. A term had 3 months and her September, 2016 wage was paid at Ksh.10, 000.

Determination

21. The *Employment Act*, 2007 (the Act) has created a fundamental shift with regard to employment and labour relations in Kenya. An employer is granted the prerogative to employ an employee on term contract pursuant to Section 10(3) of the Act, under piece-work contract pursuant to Section 18(1) of the Act and on a contract of service pursuant to Section 9 of the Act. Under Section 8 of the Act, the employer is at liberty to employment an employee on an oral contract subject to the provisions of Section 10 of the Act.
22. Where the employer fails to issue the employee with any form of contract and remains an employee under oral term contract and without compliance to Section 10(2) of the Act, such an employee becomes protected pursuant to the provisions of Section 37 of the Act.
23. Therefore, where an employee is under an oral contract and continues to perform the same duties for the employer continuously and for periods exceeding 3 months, a written contract should be issued.
24. The importance of Section 9(1) (b) of the Act is to protect the employer in the event a claim is lodged with the court. The law requires that;
 - (b) Which provides for the performance of any specified work which could not 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,
Shall be in writing.
26. The employer is further placed under a legal duty to ensure that where there is a written contract of service, the same outlines the particulars of employment and employee gives consent thereof.
27. The gist of Section 9(2) and (3) of the Act is that;
 2. An employer who is a party to a written contract of service 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 with subsection (3).
 3. For the purpose of signifying his consent to a written contract of service an employee may—
 - (a) sign his name thereon; or
 - (b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.



28. With this background, the respondent's case is that the claimant was under term-to-term contracts of employment starting at the beginning of the term and ending at the term end. That the claimant agreed to this kind of employment and all other employees enjoyed a similar treatment.
29. However, no employment contract(s) have been filed. This is contrary to Section 10(7) of the Act which directs in mandatory terms that;
- (7) If in any legal proceedings an employer fails to produce a written contract or the 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.
31. There is no evidence before this court that the claimant was on a written contract and in this regard, having worked for the respondent continuously and without break from May, 2010 to 7th January, 2017 she became protected pursuant to Section 37 of the Act.
32. The claimant became entitled to the right and benefits accruing from the Act for failure to be issued with a written contract of service pursuant to Section 9 and 10 of the Act.
33. On this basis, before termination of employment, the claimant was entitled to notice and reasons thereof. None were given under the respondent's mistaken belief that the claimant was on term-to-term contract of service, which is addressed hereinabove and found did not exist and that her employment was protected pursuant to section 37 of the Act. See *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR that;
- Under section 37 of the *Employment Act*, this court has the power to vary the terms and conditions of service of workers and declare that employees are employed in terms and conditions consistent with the said Act. In this case, the claimants worked continuously for days, which in the aggregate was more than a month and as such under Section 37(1) (a) they had become protected by Section 35(1) (c) from arbitrary dismissal. ...
34. Under the protected employment, the claimant is entitled to payment of her wages for every month, whether at work or not. The defence that the claimant could not be paid simply because the school was not in session and therefore no money, such would have well been addressed in a written contract of service for term contract of piece-rate/work contract.
35. Without issuing the claimant with a written contract with an outline of the nature of work or the months to be at work and or out of work, for the entire period the claimant remained at the disposal of the respondent for work and including school holidays, she is entitled to a wage.
36. Where the claimant failed to attend work from January, 2017 as alleged, such amounted to gross misconduct, and under the law, the respondent was justified to issue her with notice and summary dismissal. The respondent stood back and under the false assumption that the claimant had failed to secure her contract. No such contract is produced. No notice recalling the claimant to work issued.

The court finds employment terminated unfairly and without justification.

37. The respondent's case is that the claimant was last earning a wage of Ksh.10, 000. Statements have been filed in this regard and Mr Muchai asserted in his evidence that the last wage paid was for the sum of Ksh.10, 000 per month. That he owes the claimant the wage for November, 2016 at Ksh.10, 000.
38. On this basis the court has no doubt that the last wage paid to the claimant is Ksh.10,000 and notice pay is due on the finding that employment terminated unfairly and the claimant is awarded Ksh.10,000 pursuant to Section 35 of the Act.



39. Compensation is due and a wage for 3 months is hereby found appropriate all at Ksh.30, 000.
40. On the claim for salary arrears, on the analysis above that the respondent failed to pay the claimant for months she was on school holiday under the false mistake that for such time she had no contract, such sum is due and owing all at Ksh.55,000.
41. On the claim for service gratuity, the claimant had no written contract giving such a benefit. Such is declined.
42. On the claim for house allowance, such is due in terms of Section 31 of the Act. The defence that the wage paid was consolidated is without evidence and no payment statement is filed by the employer as required under section 20 of the Act;
1. An employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.
 2. The statement specified in subsection (1) shall contain particulars of—
 - a. The gross amount of the wages or salary of the employee;
 - b. the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and
 - c. Where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.
 3. This section shall not apply to a casual employee or an employee engaged on piece-rate or task-rate terms or for any period not exceeding six months.
43. As a protected employee, the claimant was entitled to a house allowance for the duration of employment.
44. From May, 2010 to 2014 the claimant was earning ksh.5, 500 per month. The respondent is noted to be based in Ruiru, outside of Nairobi.
45. Though there is no claim for underpayment, the monthly wage for a general employee from May, 2010 to April, 2011 was ksh.6, 221 and 15% house allowance at ksh.933 all at ksh.11, 196.
- From May, 2011 to April, 2012 the basic wage was Ksh.6, 999 and house allowance due Ksh.1, 049 all at Ksh.12, 588.
- May, 2011 to April, 2012 the basic wage was Ksh.7, 915 and house allowance Ksh.1, 187 all Ksh.14, 268.
- May, 2012 to April, 2013 the basic wage was Ksh.9, 024 and house allowance Ksh.1, 353 all Ksh.16, 236.
- The same wage applied in the 2013/2014 year all Ksh.16, 236.
- In 2015 the basic wage was ksh.10, 107 and house allowance Ksh.1, 516 all due Ksh.18, 192.
- In 2016 the wage was the same and due house allowance Ksh.18, 192. Total house allowances due Ksh.106, 908.
46. On the claim for leave pay for 7 years, the claimant testified she was a teacher and would not be paid during school holidays on the grounds that on such periods she was not at work. She cannot enjoy



time off work and then claim for leave pay. The failure by the respondent to pay for time out of work is addressed and redressed.

47. A certificate of service is due at the end of employment.
48. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
 - a. Compensation Ksh.30,000;
 - b. Notice pay Ksh.10,000;
 - c. Wage arrears ksh.55,000;
 - d. House allowance Ksh.106,908;
 - e. A certificate of service shall issue in accordance with Section 51 of the [Employment Act](#), 2007; and
 - f. Each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 4TH DAY OF APRIL, 2022.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

