



**Katore v Rabco Agencies Limited (Cause 571 of 2016)
[2022] KEELRC 1153 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1153 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 571 OF 2016**

B ONGAYA, J

MAY 13, 2022

BETWEEN

COSMAS KITSAO KATORE CLAIMANT

AND

RABCO AGENCIES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 02.08.2016 through Kenga & Company Advocates. The claimant alleges that the respondent employed him as a supervisor on 28.03.2012 at a daily wage of Kshs.1, 000.00. Further on 14.05.2015 the respondent without any lawful cause or justification wrongfully, illegally, unfairly, unlawfully and unprocedurally terminated the claimant's employment on account of a purported claim that his services were no longer required and at a time, "...the claimant's monthly salary was Kshs.800.00 per day." The claimant's case is that lawful procedure was not followed in his termination from employment and he claimed as follows:

- a. One-month salary in lieu of notice payment under section 40(1) (f) of the *Employment Act, 2007* as read with sections 49(1) (a) and 50 of the Act, Kshs. 20, 800.00.
- b. 3 years' annual leave payment per section 40 (1) (e) of the Act Kshs. 50, 400.00.
- c. Severance pay per section 40(1) (g) of the Act Kshs. 36, 000.00.
- d. Payment per section 49(1) (c) of the Act Kshs. 20, 800 x 12 = Kshs. 249, 600.00.
- e. Total claim for Kshs. 356, 800.00.

The claimant prayed for judgment against the respondent for:

- a. Payment of Kshs. 356, 800.00.
- b. Interest on (a) from 14.05.2015 till payment in full.



- c. Costs of the suit.
2. The respondent filed the memorandum of response on 16.08.2016 through J.K. Mwarandu & Company Advocates. The respondent's case is that it employed the claimant as a casual labourer and which contract lasted the assigned job. The respondent denied that it employed the claimant on 28.03.2012 as a supervisor earning Kshs.1, 000.00 per day and further denied terminating the claimant on 14.05.2015. Further, the contract of service lasted for 3 days or a week depending on the duration of the ships docking at the port of Mombasa. The claimant denied all claims and prayers made for the claimant and prayed that the claimant's suit be dismissed with costs.
 3. The claimant testified to support his case. The respondent's witness (RW) was the director one Emmanuel Munga. Parties filed their respective final submissions. The Court has considered all the material on record and makes findings as follows.
 4. The 1st and main issue for determination is whether the claimant was a casual employee serving on piece work basis and when work was available or was a casual servant on continuous service without break thereby converting to service subject to minimum statutory terms as envisaged in section 37 of the Employment Act, 2007.
 5. The claimant exhibited temporary port movement control permits. The permits show the employer as the respondent and bear a note thus, "Note: This PERMIT is valid up to 2300 Hours of the expiry date and must be surrendered at the gate on leaving". The permits appear to be issued for a weekly period of five days (presumably starting Monday to Friday). They state the claimant's occupation variously as casual, DR, clerk, driver. They are not for the entire period the claimant says he worked for the respondent without break. The claimant testified that he was not a member of the NSSF and further that he was paid for all the work done. The Court finds that the claimant has not exhibited the temporary port movement control permits for the entire period he alleges he worked in the employment of the respondent without a break. The permits further show that he was engaged by the respondent sporadically in various capacities as casual, DR, clerk, or driver. The failure to be registered with NSSF shows that indeed he was a casual and piece worker and he was not on continuous employment as was alleged for him.
 6. The Court finds no reason to doubt RW's evidence thus, "The claimant worked by recruiting loaders. It was a gang. We paid gang whenever we had work. If we did not have work at port, they did not work. We paid on daily basis on need basis. Claimant had no contract of service. It was work at warehouses such as when trucks brought sacks of load for loading or to be loaded for transit. I have never sacked him. One day he misbehaved. My client Regional Logistics rejected him. They said they did not want him. I stopped working with him. I had no option. I adopt my witness statement."
 7. The Court finds it as credible and honest when RW testified that RW orally engaged the claimant as a gang leader to work casually and further thus, "... I see claimant's exhibit 1. It was to access port.... I see claimant's exhibit 4. It says he is clerk. It depended with work. If he went to recruit he was designated supervisor. If going for tallying work, he was clerk. Gate pass reflected work for the day as assigned. It was a daily engagement on casual basis. It was not continuous job. We would be paid, share the money for the day and separate for the day. I cannot tell the aggregate days he worked."
 8. In view of the evidence, the claimant has failed to establish that the otherwise casual and piece work relationship amounted to conversion to employment subject to minimum terms of service as per section 37 of the Employment Act, 2007. That not having been established, the claimant's claims and prayers will collapse as not justified at all.



9. The Court has considered the respondent's failure (as per RW's testimony) to keep proper records of the claimant's service and which would have forestalled the present suit and returns that each party to bear own costs of the suit.
10. In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit and each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13TH MAY, 2022.

BYRAM ONGAYA

JUDGE

