



REPUBLIC OF KENYA



**Maina & another v Gititu Coffee Growers Cooperative Society Limited
(Cause 2192 of 2017) [2022] KEELRC 16 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 16 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2192 OF 2017**

JK GAKERI, J

MAY 5, 2022

BETWEEN

DOMINIC GITHUA MAINA 1ST CLAIMANT

MICHAEL KINUHI MUCHAI 2ND CLAIMANT

AND

**GITITU COFFEE GROWERS COOPERATIVE SOCIETY
LIMITED RESPONDENT**

JUDGMENT

1. The Claimants initiated this claim by a Memorandum of Claim dated 1st November 2017 filed on 3rd November 2017 alleging that they were unlawfully or unfairly terminated from employment and were not paid terminal dues.
2. The Claimant prays for:
 - a. A declaration that the Claimants are still employees of the Respondent to date and or were employees of the Respondent from the time of their arrest up to their subsequent acquittal.
 - b. A decision that the Respondents aforesaid actions to arbitrarily terminate the Claimants from employment amounted to unlawful and unfair termination.
 - c. A declaration that the Claimants are entitled to payment of their dues inclusive of withheld salary, terminal dues and compensatory damages as pleaded.
 - d. An order for the Respondent to pay the Claimants their terminal benefits and compensatory damages totalling to Kshs.257,400 and kshs. 279,000 respectively.
 - e. General damages for diminished employability, mental anguish and embarrassment suffered.
 - f. Interest on (d) and (e) above from the date of filing suit till payment in full.



- g. Costs of this claim plus interest
3. The Claimants' case is pleaded as follows:
4. The Claimants were employed by the Respondent as night guards on 7th May 2012 and 2nd October 2010 respectively and worked continuously with zeal and diligence at Kshs. 300 per day exclusive of house allowance. It is averred that on 14th July 2014 the Respondent instigated their arrest and subsequent prosecution for theft of coffee beans at one of the Respondents factories – Ngemwa Coffee Factory and were acquitted on 29th April 2015.
5. It is the Claimants' case that attempts to follow up the status of their employment and/or payment of terminal dues yielded no results and despite demand the Respondent did not respond.
6. It is further averred that the Respondents refused to pay their withheld salaries since 14th July 2014 to 29th April 2015 and/or update them on the status of their employment since 29th April 2015 to date offended express provisions of *the Constitution of Kenya, 2010*, *Employment Act, 2007* and natural justice and amounted to unlawful and unfair termination. That no termination notice was given, no salary as the criminal trial proceeded or damages and are thus entitled to terminal benefits and compensatory damages.
7. The specific items of claim are as follows:

Dominic Githua Maina

- a. Withheld salary from:
14th July 2014 to 29th April 2017 Kshs.90,000
- b. Salary in lieu of notice Kshs.27,000
- c. Leave accrued Kshs.18,900
- d. Service Kshs.13,500
- e. 12 months compensation Kshs.108,000

Total Kshs.257,000

Michael Kinuhi Muchai

- a. Withheld salary from:
14th July 2014 to 29th April 2017 Kshs.90,000
- b. Salary in lieu of notice Kshs.27,000
- c. Leave accrued Kshs.31,500
- d. Service Kshs.22,500
- e. 12 Month's compensation Kshs.108,000

Total Kshs.279,000

Respondent's Case

8. In its Memorandum of Reply filed on 29th May 2018 the Respondent denies that the Claimants were its employees as night guards, that if they were its employees, they were casual employees and the employment was discontinuous but admits having engaged them in October 2010 and May 2012



to guard wet coffee beans and were paid a daily wage of Kshs.200/- and were not entitled to house allowance.

9. It is further averred that the Respondents coffee beans were stolen on 14th July 2014 at Ngemwa Coffee Factory when the Claimants were serving as night guards. That the police investigated the matter and charged the Claimants. The three night guards were prosecuted but eventually acquitted. That the complaint to the police was not actuated by malice.
10. It is the Respondents case that the Claimants casual employment came to an end when the police charged and prosecuted the Claimants in Criminal Case No. 822 of 2014 and had paid wages for the days worked. That the Respondent breached no law and is not liable to the Claimants as set out in paragraph 12 of the Statement of Claim and denies owing the Claimants the amounts claimed.
11. The Respondent prays for dismissal of the suit with costs.

Evidence

12. Both witnesses adopted their statements and were cross-examined. The identical statements rehash the contents of the Memorandum of Claim.
13. On cross-examination the 1st Claimant confirmed that the theft of coffee beans was reported to the police by the Respondent. The police came to the factory in the morning including the investigating officer. That the Claimants responded to the questions asked by the police. It was CW1's testimony that the police told them that they were under arrest and took them to Githunguri Police Station where they recorded statements. The witness confirmed that the police concluded that the theft was an inside job and charged the Claimants in court but they were subsequently acquitted.
14. The witness also confirmed that his wage was Kshs.200/- per day and was unaware of the Kshs.300/- in the memorandum of claim. That witness testified that he was terminated when they were arrested but was not informed. He confirmed that he had no appointment letter and was a casual employee of the Respondent and had worked for 2½ years. The witness was not sure of when he was employed by the Respondent.
15. Intriguingly, the witness confirmed that he had not demanded the allowances he is claiming and had not been paid for July 2014.
16. On re-examination the witness testified that his salary per month was Kshs.6,000/-.
17. The 2nd Claimant confirmed that he had no training on security matter but was a night guard at the Ngemwa Coffee Factory when theft of coffee beans took place. It was his testimony that his salary was Kshs.300/- per day and worked for 3 years but had no employment letter and worked as a guard irrespective of the season.
18. The witness confirmed that the respondent reported the theft to the police, that the investigating officer one Nyongesa, came in the morning and he is the one who decided that the Claimants be charged in court. That he was not paid for the duration of the case and had not proceeded in leave nor paid leave allowance.
19. Finally, the witness confirmed that he was not paid for the month of July 2014.
20. RWI testified that he was the manager at Ngemwa Coffee Factory at the time but had since left. It was his testimony that the Claimants were casual employees of the Respondent and he knew them well and gave them agreement forms every 3 months. The witness told the court that he was not present



when the guards were interrogated by the investigating officer but was there when they were taken to the police station by Mr. Ngongesa. He stated that their daily wage was Kshs.200/-.

21. On cross-examination the witness confirmed that he knew the Claimants for the duration they served the Respondent. That he had no evidence to prove that they were casual employees nor did he have evidence that they were paid.

Claimants' Submissions

22. The Claimants submissions are centred on three issues, namely whether the Claimants were casual employees, underpayment and termination.
23. As to whether the Claimants were employed as casuals, it is submitted that they were not as testified by Mr. Michael Kinoti Muchai and had a salary of Kshs.6,000/= per month. Section 2 of the *Employment Act*, 2007 is relied upon to urge that the Claimants were not casual employees. The Court of Appeal decision in *Nanyuki Water & Sewerage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR is relied upon in support of the submission as are the decisions in *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited* [2015] eKLR, *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited* [2013] eKLR and *Chemelil Sugar Company v Ebrahim Ochieng Otuon & 2 others* [2015] eKLR.
24. On the basis of these authorities, the Claimants submit that the Respondent cannot insist that they were in casual employment.
25. As regards the alleged underpayment, it is submitted that the salary of Kshs.6,000/- amounted to underpayment. Reliance is made on Legal Notice No. 197 of 2013 Regulation of Wages (General) (Amendment) Order 2013 which capped the salary of a night guard at Kshs.470.60 per day. No specific prayer is made on this issue.
26. As regards termination of the contract of employment, it is submitted that it was not conducted in accordance with a fair procedure. It is argued that after the Claimants were charged and had taken plea on 16th July 2014, they discovered they had not been paid at the end of the month yet they expected their pay for July 2014 and after acquittal in 2015 efforts to follow up on their status of employment elicited no response from the Respondent.
27. It is the Claimants' submission that the conduct of the Respondent offended the provisions of Section 41, 43 and 45 of the *Employment Act*, 2007. The decision in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR is relied upon to reinforce the submission urging that the Claimants' acquittal in the criminal case vindicated them.
28. It is further submitted that the Respondent led no evidence that it notified the Claimants the reason(s) for their termination in consonance with Section 43 of the *Employment Act* and therefore the termination of employment was unfair.
29. The Respondent intimated to the Court that it would rely on the pleadings and evidence before the Court as well as the law and would not file submissions.

Analysis and Determination

30. After careful consideration of the pleadings, evidence on record and submissions by Counsel, the issues that commend themselves for determination are whether:
 - i) The Claimants were casual employees of the Respondent



- ii) Termination of the Claimants' employment was unfair;
 - iii) The Claimants are entitled to the reliefs sought.
31. As to whether the Claimants were casual employees or not the home port are the provisions of the *Employment Act*, 2007 and relevant judicial articulations.
32. Section 2 of the *Employment Act* defines a casual employee as:
- 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;
33. This was affirmed by the Court of Appeal in *Nanyuki Water & Sewerage Company Limited v Benson Mwiti Ntiritu & 4 others* (*supra*).
34. Evidence on record demonstrates that the Claimants were employees of the Respondent for more than three months and although RW1 testified that he gave them contracts for three months which was renewed regularly, he furnished no evidence of the agreements.
35. The Court is in agreement with the Claimants' submission that their employment fell within the provisions of Section 37(5) of the *Employment Act*, 2007 and thus transited from casual employment to permanent terms.
36. The Court is in agreement and bound by the sentiments of the Court of Appeal in *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited* (*supra*) as well as *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited* (*supra*). In the latter case the Court expressed itself as follows:
- “The *Employment Act*, 2007 has now created a fundamental shift from the previous *Employment Act*, Cap 226 with regard to who a casual employee is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified as casual workers or casual labourers. This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and coverts such casual employment into term contract status.”
37. For the foregoing reasons, the Court is satisfied that the Claimants have on a balance of probabilities established that they were not casual workers or employees as alleged by the Respondent's witness who puzzlingly admitted that they had served for the durations they allege to have served but denied their employment status.
38. As to whether termination of the Claimants' employment contract was unfair, the Court is guided by the provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act* and the requirements of fair and valid reason(s) for termination justification and the procedural requirements.
39. Courts have authoritatively established that for a termination of employment to pass as fair, it must be substantively justifiable and must have been conducted in accordance with a fair procedure. The Court of Appeal was so emphatic in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR and reiterated the same in *Naima Khamis v Oxford University Press [EA] Ltd* [2017] eKLR.
40. On the duration of employment, the Claimants gave contradictory evidence. While Michael Muchai testified that he worked for three years, from 2nd October 2010, Dominic Githua stated that he served for 2½ years but did not state the date of employment. Puzzlingly, their statements state that they were



employed on 7th May 2012 and the Respondent's witness led no evidence of when they were employed. The Court will rely on the written statement.

Reason for Termination

41. The pith and substance of the Claimant's case is that the Respondent instigated their arrest and prosecution for alleged theft of coffee beans on the night of 14th July 2014 at Ngemwa Coffee Factory but were acquitted on 29th April 2015 after which they followed up with the Respondent about the status of their employment and payment of dues.
42. Intriguingly, the Claimants' led no evidence on when and how their employment was terminated by the Respondent. They adduced no evidence of any attempt to report to work but were denied the opportunity to serve since they were freed on bond during the trial. From evidence on record, it appears that the Claimants did not report to work after 14th July 2014. This is reinforced by the fact that they are claiming salaries from 14th July 2014 to 29th April 2015 when they were acquitted and are blaming the Respondent for having not updated them on their employment status since then or paid their dues. Were the Claimants' employees of the Respondent until they were acquitted on 29th April 2015? Did the Respondent's conduct amount to constructive dismissal of the Claimants?
43. The Claimants have neither alleged nor adduced evidence that they were constructively dismissed.
44. To determine the issue of termination of employment in situations analogous to the instant case, it is elemental to interrogate the duties of the employer and its conduct in the circumstances.
45. From the evidence on record, it is clear that the Respondent had a good reason to terminate the Claimants' employment subject to compliance with the provisions of the [Employment Act](#), 2007.

Procedural Fairness

46. The procedural requirements of Section 41 of the [Employment Act](#), 2007 have been explained in many decisions such as the Court of Appeal decision in [Kenya Postal Corporation of Kenya v Andrew K. Tanui](#) [2019] eKLR which itemised four requirements as follows:

“Four elements must thus be discernible for the procedure to pass muster: -

- i. An explanation of the grounds of termination in a language understood by the employee.
 - ii. The reason for which the employer is considering termination.
 - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
 - iv. Hearing and considering any representation made by the employee and the person chosen by the employee.”
47. Having found that the Claimants were not casual workers or casual employees of the Respondent, it behoved the Respondent to take them through the prescribed termination process by issuing a notice to show cause for their response and a disciplinary hearing thereafter. The Respondent availed no evidence of a notice to show cause, invitation to a disciplinary hearing or disciplinary proceedings or termination letter, if the Claimants had absconded duty.



48. It was the Respondent's duty to find out why they did not report to work as alleged. Reasonable attempts must have been made to ascertain the reasons for their absence at the work place and a notice to show cause should have followed and ultimately a dismissal letter, if no cause is shown.
49. The Respondent's assumption that their arrest, arraignment in Court and prosecution terminated their employment is unsustainable in law. It was the Respondent's duty to close the employment relationship with the Claimants but it did not.
50. Thus, although the Respondent had a valid and fair reason to terminate the employment of the Claimants, it did not comply with the requirements of Section 41 of the *Employment Act*, 2007 as regards procedure.
51. It is the finding of the Court that termination of the Claimants' employment was procedurally flawed.

Reliefs

52. As regards reliefs, the Claimants pray for various declarations as well as general damages for diminished employability, mental anguish, embarrassment, terminal dues and compensatory damages.
53. Having found that termination of the Claimants' employment contract was unfair for want of procedural propriety, a declaration to that effect is hereby issued.
54. On terminal dues and compensatory damages, the Court proceeds as follows:

a. Withheld salary from 14th July 2014 to 29th April 2017.

55. The Claimants led no evidence that they were employees of the Respondent after 31st July 2014 or rendered any services as night guards at the Respondent's factory. They adduced no scintilla of evidence of having reported to the work place after 14th July 2014.
56. The Respondent on its part tendered no evidence of the action it took after 14th July 2014 coupled with how it brought the contracts of employment between itself and the Claimants to closure. This Court considers it unreasonable for the Claimants to assume that they remained employees of the Respondent yet they had not been rendering services and had not been denied the right to do so by the respond.
57. In the Court's view the only sustainable claim is for the 17 days of the month of July 2014 during which time the Respondent should have ascertained the employment status of the Claimants.
58. Consequently, the claim for the 17 days of July 2014 is allowed.

b. Salary in lieu of notice

59. The Claimants led no evidence on when the Respondent ordered them not to report to work and no documentary evidence attests to any date. The Claimants do not attribute termination of their employment to the conduct of any employee of the Respondent.
60. In the Court's view, they absconded duty and the Respondent took no steps for closure of the employment relationship. For these reasons the claim for salary in lieu of notice fails.

c. Leave Accrued



61. The claimants testified that they worked every day and did not proceed on leave for the entire duration of their employment and the Respondent did not contradict this evidence. Leave is a statutory entitlement by dint of Section 28 of the Employment Act and the same is awarded.

d. Service

62. The Respondent led no evidence that it had registered the Claimants with the National Social Security Fund (NSSF) or any other pension scheme and paid contributions as required by law. For these reasons the claim for service pay is allowed.

e. General Damages

63. General damages for diminished employability, mental anguish and embarrassment suffered. This prayer was not established. The essential particulars were not unpackaged by the Claimants.
64. On cross examination, the 2nd Claimant confirmed that the Respondent reported the theft of coffee beans to the police. That they was interrogated by a Mr. Nyongesa, the investigating officer and was thereafter arrested by the police and charged.
65. The 1st Claimant affirmed the testimony of the 2nd Claimant on report to the police, arrest and writing of statement. The witness confirmed that it was the police who concluded that the theft was an inside job and charged the Claimants. It was his testimony that the Respondent could not have reported the theft elsewhere.
66. None of the witnesses testified that the Respondent reported that they had stolen the coffee beans. It was common ground that the Respondent reported the theft to the police who carried on independent investigations and made a decision to charge the Claimants.
67. The 2nd Claimant testified that he did not seek employment elsewhere.
68. In the totality of the evidence before the Court, it is evident that the Respondent was not to blame for the arrest charge and prosecution of the Claimants for the theft of coffee beans at the Ngemwa Coffee Factory on the night of 14th July 2022. Consequently, the prayer for general damages is dismissed.

f. 12 months' compensation

69. Having found that the termination of the Claimants' employment was unfair for want of procedural propriety, the Claimants are entitled to the remedy prescribed by Section 49(1)(c) of the Employment Act, 2007 and as required by Section 49(4) of the Act, the Court has taken into account the following factors:
- i. The claimants were employees of the Respondent for about two years and two months and wished to continue.
 - ii. The Claimants had no previous record of warning or notice to show cause.
 - iii. The Claimants substantially contributed to the loss of employment.
 - iv. The Claimants made no attempt to engage the Respondent after the arrest and subsequent arraignment in Court.
70. In light of the foregoing, the equivalent of two (2) months' compensation is fair.
71. In conclusion judgment is entered for the Claimants as follows:



1. Dominic Githua Maina
 - a. Salary for 17 days of July 2014.
 - b. Accrued leave of two years.
 - c. Service pay for two years.
 - d. Equivalent of two months' compensation.
 2. Michael Kinuhi Muchai
 - a. Salary for 17 days of July 2014
 - b. Accrued leave of two years.
 - c. Service pay for two years.
 - d. Equivalent of two months' compensation
 3. Counsels for the parties to compute the respective amounts for leave, service and compensation and file the same in Court within 30 days for adoption with or without modification.
 4. Salary to be computed on the basis of the prevailing minimum wage of management guards according to the relevant Regulation of Wages (General) Amendment) Orders.
 5. Costs of this suit.
 6. Interest at Court rates from the date of judgment till payment the full.
72. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF MAY 2022

DR. JACOB GAKERI

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 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.

DR. JACOB GAKERI

JUDGE

