



**Mbukha v CRJE (East Africa) Limited (Cause 767 of 2017)
[2022] KEELRC 4059 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4059 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 767 OF 2017
M MBARÚ, J
JUNE 30, 2022**

BETWEEN

BONFACE MBUKHA CLAIMANT

AND

CRJE (EAST AFRICA) LIMITED RESPONDENT

JUDGMENT

1. On 23rd August, 2015 the respondent employed the claimant as a causal worker at a wage of ksh.400 per day which payments were made through Mpesa phone No.0726xxxxxx every two weeks. The total salary was ksh.11, 200 per month without a house allowance.
Work hours were 8am to 5pm.
2. The claim is that on 26th August, 2016 the claimant reported to work and around 9am when he was mixing concrete together with other employees, the security team found 3 packets of cement in a lorry. They called the safety personnel, Mr Collins and who then called the manager. The driver was questioned and he agreed to pay ksh.9,800 as damages.
3. Once this issue of cement was resolved, the supervisor Mrs Wang told the claimant that she suspected that he was involved and was working with the driver and he should not report to work the next day.
4. On 3rd September, 2016 the claimant reported to work and before changing to his work apparels, Mrs Wang detained him and called the police. He was arrested and taken to Karen Police Station and Locke up until 11PM. He was then released without any charges.
5. The claim is that there was breach of contract and statutory duty of care when employment was terminated without notice, hearing or payment of terminal dues. the claimant is seeking the following;
 - a. Notice pay Ksh.12,880;



- b. House allowance Ksh.13,440;
- c. Overtime worked Ksh.19,321.20;
- d. 12 months' pay in compensation; and
- e. Costs.

The claimant testified in support of his case.

6. In response, the respondent never filed a defence save for the Memorandum of Appearance. At the close of the hearing both parties filed written submissions.
7. The claimant submitted that by virtue of section 9 and 37 of the *Employment Act*, the claimant was a full time employee of the respondent and as held in *Christopher Baraza Wasike v Pemco Agencies limited* [2018] eKLR where an employee worked continuously for two years, then such became a full time employee with rights and benefits under the law. Due process is a legal obligation under Section 43 of the *Employment Act* as held in *David Gichana v Mombasa Maize Millers Limited* [2014] eKLR.
8. The claimant was dismissed unfairly without notice, hearing or due process and the claims made should issue with costs.
9. The respondent submitted that the claimant did not submit any evidence of employment as an employee of the respondent as required under Section 107 of the *Evidence Act* and the Mpesa statements submitted is not proof of payment as held in *Samuel Lukayu Agumi v Steel Structures Limited* [2013] eKLR.
10. Section 37 of the *Employment Act* applies where a casual employee is in the continuous service of an employee which was not the case for the respondent s held in *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another* [2018] eKLR and the claims made should be dismissed.

Determination

11. In employment and labour relations, the employer has the legal duty to submit work records. Section 10(6) and (7) of the *Employment Act*, 2007 (the Act) mandates the employer, upon a suit being filed, to file all the work records with regard to the subject employee. Such duty has not been discharged by the respondent in this case and the application of Section 107 and 109 of the *Evidence Act* does not remove the threshold pursuant to the provisions of Section 20 of the *Employment and Labour relations Court Act*, 2011.
12. In the absence of a defence or work records, the court must believe the employee.
13. An employee who works continuously for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or 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 and has no employment contract defining such employment, such an employee becomes protected with right an benefits under the Act. such an employee converts from causal employee to an employee protected in law as held in *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another* [2018] eKLR.
14. The claimant testified that he was employed by the respondent on 23rd august, 2015 and worked until 3rd September, 2016 when he was arrested for alleged collusion with a driver over missing 3 packets of cement. Upon his arrest he was later released without any charges. The respondent did nothing in



terms of addressing any misconduct or any matter the claimant may have committed as required under Section 35, 41 and 44 of the Act.

15. Such resulted in unfair termination of employment that was devoid of due process. Such is contrary to Section 43 and 45 of the Act.
16. Notice pay is due at the rate of last gross wage. The applicable daily rate in the year 2016 was kssh.527.10 inclusive of house allowance while the monthly wage was ksh.10, 954.70 and a house allowance thereof of ksh.1, 643 total being Ksh.12, 597.10.
17. The claimant is entitled to compensation in terms of Section 45 and 49 of the Act and an award of 3 month is found appropriate based on the last gross wage all at Ksh.37, 791.30.
18. Overtime claimed is on the basis that each day the claimant did 9 hours. The claimant under paragraph 4 of the Memorandum of Claim stated that his work hours were 8am to 5pm. In the claims he is seeking overtime pay for working for 9 hours per day and hence one hour overtime. On the pleading, there is no overtime hours or payment due for any extra hours.
19. On the claim for house allowance, on the daily wage paid at Ksh.400 this was below the daily minimum wage. The claim for Ksh.13, 440 in house allowance is justified.
20. A certificate of service should issue in terms of Section 51 of the Act.
21. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
 - a. Compensation Ksh.37,791.30;
 - b. Notice pay ksh.12,597.10;
 - c. House allowance Ksh.13,440;
 - d. A certificate of service shall issue; and
 - e. Costs.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

..... and

