



REPUBLIC OF KENYA



KENYA LAW
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**Gacheru v Kenyatta University (Cause 971 of 2016)
[2022] KEELRC 1449 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1449 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 971 OF 2016
NZIOKI WA MAKAU, J
JUNE 27, 2022**

BETWEEN

JANE WANGUI GACHERU CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

1. The claimant instituted this claim *vide* a memorandum of claim dated May 23, 2016 suing the respondent for unfair and unlawful dismissal and non-payment of terminal dues and compensatory damages. She avers that the respondent employed her as a General Labourer from the year 2018 and that she rose through the ranks to be a fixer. That her last salary was computed at Kshs 830/- per day (Kshs 24,900/- per month) which was payable at the end of the month. It is the claimant's averment that she reported to the respondent for duty daily at 8am until 5pm from Monday to Sunday and that she never went for her off days nor go for public holidays.
2. The claimant avers that on or around August 11, 2015 the respondent communicated to its entire workforce of its intention to take stock of materials used for construction and she was subsequently advised to go home and wait to be called. That she later inquired from the officer in charge of casual labourers who advised her to wait but that she was never recalled to work. It is the claimant's position that the respondent's actions amounted to unfair and unlawful constructive dismissal that was also contrary to the principles of natural justice and the tenets of fair labour practice. She avers that this is further because no show cause or notice was ever issued to her and no hearing ever took place before the alleged decision to dismiss her was reached and that she had not done anything to warrant the dismissal. She avers that she is thus entitled to payment of her terminal benefits including; one month's salary in lieu of notice; unpaid salary for 11 days worked in August 2015; payment in lieu of untaken/ unpaid leave for the period of service between 2008 to August 11, 2015; deducted but unremitted NSSF dues from January 2011 to August 2015; off days worked for the entire period of service; and compensatory damages for the wrongful, unlawful and unfair dismissal.



3. The respondent filed a memorandum of response on November 21, 2016 averring that it engaged the claimant from time to time as a casual labourer and which engagement was dependent on the availability of work. The respondent avers that despite not paying the claimant at the end of the day and hiring her for more than 24 hours, it was not obliged to deem her as a regular or permanent employee within the province of section 37(1) of the [Employment Act](#). It denies that it constructively dismissed the claimant or that she is entitled to the reliefs sought and prays that the claim herein be dismissed with costs.
4. The respondent also filed a witness statement made on September 14, 2020 by its Human Resource Manager, Mr Nderitu Gikaria who states that the respondent engaged various skilled and unskilled workers to provide labour for its construction projects and that the claimant was one of the casual workers engaged for three months for a project with effect from August 1, 2015. That the workers were also informed that upon expiry of the three months period, the casual labourers would be required to re-apply for their positions and undergo a vetting process so as to be reengaged. He states that at the expiry of the three months engagement, the claimant did not apply for re-engagement and the respondent was as such unable to vet her. He contends that the claimant having triggered her own termination of employment, she cannot be heard to aver that she was terminated by the respondent.
5. The claimant submits that her un rebutted evidence revealed that the respondent never gave her a letter of employment whereas her bank statement in sample clearly shows that she earned a monthly salary from the respondent who also paid NSSF and other statutory dues for her from the year 2011 to August 2015. The claimant submits that the respondent's witness on the other hand failed to produce a single record showing that she was a contract employee even though he agreed that the employer has the duty to keep records. She submits that she deserved due process before dismissal as an employee of 7 years and that sections 41, 43 and 45 of the [Employment Act](#) and articles 41 and 47 of the [Constitution](#) of Kenya call for fair treatment.
6. The respondent on its part submits that the evidence submitted by the claimant does not support the claim that the respondent employed her in 2008. The respondent submits that the claimant was not a contractual employee as described at section 2 of the [Employment Act](#) and that the respondent's witness also testified that the claimant was only engaged as a steel worker for a specified period of time on casual terms. The respondent submits that the [Employment Act](#) defines a casual employee as a person whose terms of engagement provide for his/her payment at the end of each day and who is not engaged for a longer period than twenty-four hours. It avers that its decision to make monthly payments as opposed to daily ones was purely a logistic decision to ensure proper records and accountability as a public institution. The respondent submits that in construing the nature of the relationship between the claimant and the respondent, should this honourable court find that the claimant was a casual labourer, it ought to find no fault in the cumulative payment of her wages. The respondent submits that this honourable court may be guided by the Court of Appeal case of [Rashid Odhiambo Allogob & 245 Others v Haco Industries Limited](#) [2015] eKLR which cited with approval the case of [Josphat Njuguna v High Rise Self Group](#) [2014] eKLR where the court held that:

“It is a misinterpretation of section 37(1) of the [Employment Act](#) to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours. The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any



other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates."

7. It is further the respondent's submission that should the honourable court construe the engagement between the parties herein as employment, the order sought by the claimant cannot be granted as she triggered her own termination by not re-applying. It submits that the claimant has also not provided any evidence of having been employed by it as a general labourer for over seven years from 2008 to 2015. That in any event, if the claimant believed that such employment documents existed, she should have filed an Application for Discovery as provided under section 20 of the *Employment and Labour Relations Court Act*, 2011 as affirmed in the case of *Nicholas Muturi Okemwa & 8 Others v Judicial Service Commission* [2015] eKLR which quoted with approval the case *Oluoch v Charagu* [2003] 2 EA 649. The respondent further submits that the principle of he who alleges must prove applies to the claimant and in this respect relies on the case of *Shadrack Kabungani Mukwana v Wines of the World Limited* [2014] eKLR.
8. It is submitted by the respondent that the burden of proving the claim of unfair or unlawful dismissal rests with the employee while the burden of justifying grounds for the termination of employment or wrongful dismissal shall rest on the employer. The respondent submits that having established that the claimant was a casual worker, the procedure for termination of such a contract is as provided in section 35(1)(a) of the *Employment Act* such that either party can terminate the contract at the close of any day without notice. It submits that the claimant has failed to discharge the duty of proving the allegation of unfair termination of employment so as to warrant the respondent to justify such termination and that he is thus not entitled to the reliefs sought. The respondent submits that however should the honourable court be persuaded to find that the claimant was engaged as a piece meal worker, it should be guided by the provisions of section 18(5) of the *Employment Act*. It is submitted that the respondent paid the claimant her wages in full and the reliefs she seeks in the claim are thus untenable in law.
9. It was asserted that the claimant was employed on casual basis. As confirmed by parties she was paid at the end of the month. In line with the *Employment Act* her contract therefore was altered to a monthly contract for which she was required to get notice prior to her dismissal as well as the safeguards under the law for an employee employed on contract. The respondent argues that the periodic (monthly) payments were purely for logistical purposes. That flies in the face of sections 37 and 35(1)(c) of the *Employment Act*. The claimant was enjoying a contract that had been converted to term contract and as such she was entitled to notice at the time her contract was terminated. In addition she was entitled to the unpaid salary for 11 days worked in August 2015; payment in lieu of untaken/unpaid leave for the year 2015; as well compensatory damages for the wrongful, unlawful and unfair dismissal. In the final analysis I enter judgment for the claimant for:-
 - i. One month's salary in lieu of notice – Kshs 25,800/-.
 - ii. Unpaid salary for 11 days worked in August 2015 – Kshs 9,460/-;
 - iii. Payment in lieu of untaken/unpaid leave for the year 2015 – Kshs 25,800/-;
 - iv. Compensation for the wrongful, unlawful and unfair dismissal amounting to one month's salary – Kshs 25,800/-.
 - v. Costs of the suit.
 - vi. All the sums in (i), (ii), (iii) and (iv) above shall be subjected to statutory deductions.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2022



NZIOKI WA MAKAU
JUDGE

