



**Ochiki v Chandaria Industries Ltd (Cause 2248 of 2015)
[2022] KEELRC 1557 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1557 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2248 OF 2015**

**J RIKA, J
JULY 29, 2022**

BETWEEN

RUTH NYABOE OCHIKI CLAIMANT

AND

CHANDARIA INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The claimant filed her Statement of Claim on December 16, 2015.
2. She states, she was employed by the Respondent as a Wrapper, in September 2004. She resigned on 17th October 2011.
3. Her last salary was Kshs. 12,630 monthly.
4. She claims: -
 - a. House allowance from 2004 to 2011 at Kshs. 310,000.
 - b. Annual leave over the same period at Kshs. 79,569.
 - c. Leave travelling allowance over the same period at Kshs. 27,300.
 - d. Gratuity at 13 days' salary for each complete year of service at Kshs. 38,311.
Total...Kshs. 455,980.
 - e. Costs and interest.
5. The respondent filed its Statement of Response on February 16, 2016. It is denied that the claimant was employed by the respondent as a Wrapper, from September 2004. She was engaged as a Casual Labourer from time to time, depending on work requirements. She was paid wages on a daily basis. She was not paid a monthly salary of Kshs. 12,630 as pleaded. The respondent did not receive any



resignation letter from the Claimant. It was not possible for her to resign, as she was on casual engagement. If she was member of the Printing Union, the Union would have presented her claims, in accordance with the CBA. She is not entitled to benefits under the CBA.

6. The claimant testified, and rested her case, on July 16, 2021. She adopted her Witness Statement, which is a replica of the Statement of Claim. Cross-examined, she told the court that she was in casual employment. She worked from 2004 to 2011 in continuity. She was a Wrapper. She had been asking to be paid her dues in the course of employment, without success. She remitted monthly subscriptions to the Printing Union, but was not issued receipts. She did not have documents to show subscription.
7. Personnel Officer, Joash Mbulika Chahenza, gave evidence for the respondent on January 28, 2022, when the hearing closed. He relied on his Witness Statement, and Documents filed by the Respondent, in his evidence. The claimant was a Casual Employee. She was paid a daily wage. She was engaged when work was available. She was not a member of any Union. Casual Employees were not members of the Union. She resigned on October 17, 2011. Her Claim has no merit.
8. Cross-examined, Chahenza stated that he was employed in 2004. The respondent does not have a Human Resource Officer. He is the Head of Human Resource. Chahenza alleged in his Witness Statement that the Claimant did not resign. It is true that she did so. The CBA between the respondent and the Printing Union [KUPRIPUPA] does not cover Casual Employees. There was nothing to show, that this category of Employees was not covered. The claimant worked for 7 years. Her house allowance was incorporated in her daily wage. This is not shown in any contract of employment. She was not qualified for annual leave. The respondent paid N.S.S.F contributions for all Employees. The claimant was not a regular Employee. Redirected, Chahenza told the court that the claimant was paid a daily wage of Kshs. 340, which incorporated house allowance. She did not work in continuity. She was called when the respondent had an order for supply of products.
9. The Claim was last mentioned on June 22, 2022, when Parties confirmed filing and exchange of their last Submissions.
10. The issues are whether the claimant was in a regular or casual engagement with the Respondent; and whether she is owed the benefits claimed.

The Court Finds: -

11. In her evidence under cross-examination, on July 16, 2021, the claimant told the court:

“ I was a Casual Worker.”
12. This tallies with the evidence of the respondent that, the claimant was a Casual Worker, who was engaged on a daily rate, whenever there was work available for her. According to the respondent, she reported at the respondent’s gate alongside other potential workers. She could be taken in, or closed out, depending on the availability of work. She could keep away, without charges of being involved in absenteeism being made against her by the respondent.
13. Her statement that she was a Casual Worker however, appears to the court to be inconclusive, in light of other evidence. It was perhaps a statement made on cross-examination, in ignorance of the legal provisions on casual employment. Primarily, the Claimant worked for the Respondent as a Wrapper, for 7 years. This is conceded by both Parties. She was wrapping tissue paper, which is a core business of the Respondent.
14. It is not likely that she was called in only when customers placed orders for respondent’s products. The attendance records exhibited by the respondent show regular, if not all-time attendance, and



involvement of the claimant, by the respondent. The court would agree with the submission of her Advocate, that she would be deemed a regular Employee under section 37 of the Employment Act, by the time she resigned.

15. The Respondent appears to have accepted her as a regular Employee, accepting that she resigned on 17th October 2011. Casual Workers do not resign. They leave at the end of the day. They have the liberty not to return on the subsequent day. They do not ordinarily write resignation letters.
16. The court is satisfied that the relationship between the Parties stretched for a period of 7 years. It could not be taken as casual employment, by the time the claimant left employment.
17. The documents exhibited by the respondent titled 'Consolidated Analysis By Employee,' capturing the hours worked, rates paid, and deductions made, has an item indicated 'Unio.' The court understood this to mean deduction made on the Employees' wages, and remitted to the Union, which would suggest that the claimant was covered under the relevant CBA. Letter 'n' after letter 'o' is omitted perhaps for want of space in the document.
18. The CBA exhibited by the respondent unfortunately, is not of much assistance to the claimant. It covers the period beginning May 1, 2012, running for a period of 2 years. The claimant resigned on October 17, 2011. She did not exhibit a copy of the CBA which was in application, at the time of her resignation.
19. Although not applicable, the CBA exhibited by the respondent has useful clauses, which were probably carried over from the previous CBA. Clause 17 of the CBA states that Employees engaged for a long time, may be absorbed in regular employment. Clause 18 appears to set aside Wrappers from other Casual Workers, stating that all Wrappers, who are not in permanent employment, would be entitled to Kshs. 421 daily, for 8 hours. The clause buttresses the conclusion that after 7 years, the claimant would be deemed a regular Employee.
20. The claimant is deemed a regular Employee, but her attendance was not always continuous for the 7 years. There were days she was absent, which in the view of the court, would compensate her annual leave entitlement. The court does not think that she merits annual leave as prayed, because she was not at work, for each working day, for the whole of 7 years she was employed by the respondent. Her tenure was punctuated with days of absence.
21. The claimant has not persuaded the court that she is owed house allowance in arrears. She was paid a daily rate, which ordinarily, as per General Wage Order, includes the housing element.
22. While the claimant has shown that she was a regular Employee after 7 years; that she was subscribed to the Printing Union; and that she resigned on October 17, 2011, she did not exhibit the CBA applicable as at the time of her resignation. It was left for the respondent to exhibit a CBA which applied to the period after the Claimant had resigned. That CBA cannot extend the benefits claimed by the claimant, because she was a former Employee, at the time it became operational.

IT IS ORDERED: -

- a. The Claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT CHAKA, UNDER THE MINISTRY OF HEALTH JUDICIARY AND COVID-19 GUIDELINES, THIS 29TH DAY OF JULY 2022.

James Rika



Judge

