



**Kihara v Saikabe Construction Company Limited (Cause  
124B of 2017) [2022] KEELRC 1558 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1558 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 124B OF 2017  
DN NDERITU, J  
JULY 28, 2022**

**BETWEEN**

**AMOS MWANGI KIHARA ..... CLAIMANT**

**AND**

**SAIKABE CONSTRUCTION COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this cause by way of a statement of claim dated March 17, 2017 filed in court on even date. The said statement of claim is accompanied by a verifying affidavit sworn by the claimant and a bundle of documents.
2. The claimant seeks for the following reliefs:
  - (a) A declaration that the claimant's termination was unfair as provided under section 49(sic) of the *Employment Act*.
  - (b) Kshs 1,521,000/= plus interest thereon at 14% Per annum from (sic) until payment is made in full.
  - (c) Costs of this suit plus interest.
3. The sum of kshs 1,521,000/= claimed above is broken down in clause 12 of the statement of claim and each item shall be dealt with at a later part of this judgment.
4. The respondent filed a memorandum of response to the claim dated May 3, 2017 and filed in court on May 9, 2017. The respondent denies all the material parts of the claim and prays for the dismissal of the claim with costs.
5. The claimant filed a further list of documents together with his witness statement both dated February 3, 2020 and filed on even date.



6. The respondent filed witness statement by Benard Kariuki dated November 15, 2017 and a supplementary list of documents dated September 28, 2021.
7. Counsel for both parties filed a statement of agreed issues dated February 21, 2018 raising nine (9) issues for determination by this court.
8. This cause came up in court for hearing on January 31, 2022 when the claimant (CW1) testified and closed his case. On the same day Benard Njenga Kariuki (RW1) testified for the respondent and the respondent closed its case as well.
9. Counsel for both parties addressed the court by way of written submissions. Willy Maina & Co Advocates for the claimant filed their submissions dated February 24, 2022 on March 4, 2022 while Rodi, Orege & Co Advocates for the respondent filed theirs dated March 7, 2022 on March 14, 2022.

## **II. Claimant's case**

10. As far as it can be deduced from the pleadings, oral and documentary evidence, and the submissions by his counsel, the claimant's case is as hereunder.
11. The claimant alleges in paragraph 3 of the statement of claim that he was an employee of the respondent on permanent basis as a driver at a monthly salary of kshs 60,000/= for six(6) years, from December 10, 2010. However, in his oral testimony in court the claimant alleged that he started at a salary of kshs 18,000/= per month till 2013. He alleged that upto 2013 he was driving motor vehicle KBS 080K belonging to the Respondent.
12. The claimant testified that from 2013 the monthly salary was agreed at kshs 20,000/= and he was driving motor vehicle KBX 499L. He alleged that sometimes in 2014 he moved to Mombasa still working for the respondent where he used to deliver limestones from Kaloleni to Athi River Mining Company Limited.
13. The claimant produced a hand written record of deliveries that he allegedly made while at Mombasa. He testified that at Mombasa he started with a daily wage of kshs 1,500/= which was later adjusted to kshs 2,000/=. He alleged that he was paid either in cash or via Mpesa. He insisted that he was a month to month employee and not a casual and that by the time he was terminated he was owed salary arrears for the months of June, July, and August, 2016.
14. The claimant alleges that when he travelled to Nakuru from Mombasa on September 4, 2016 to meet RW1 to discuss settlement of the above salary arrears he was terminated without notice and for no lawful reason. He alleges that he was not given a hearing and that the dismissal was grossly unfair.
15. In cross-examination the claimant alleged that he spent a sum of kshs 25,750/= of his personal money in purchase of engine oil for and on behalf of the respondent.
16. He also admitted that he did not work on Sundays and public holidays during cross-examination. He alleged that his salary was kshs 2,000/= per day payable at the end of each month.
17. It is on the basis of the foregoing that the claimant prayed to be granted the prayers set out in the statement of claim.

## **III. Respondent's case**

18. As it can be distilled from the pleadings filed and the oral and documentary evidence adduced by RW1, the respondent's case is as hereunder.



19. RW1, a director, testifying for and on behalf of the respondent stated that the claimant was respondent's employee on casual basis who was engaged on need basis as a driver. He alleged that the claimant worked for the respondent from about 2010 to March, 2013 when the respondent sold motor vehicle KBS 080K. The claimant then left his employment but came back in September, 2014 by which time the respondent had bought another vehicle KBX 499M.
20. RW1 testified that the claimant was always engaged as a casual worker on agreed daily wage and that he was assigned work at Athi River Mining Company in Mombasa where the respondent had a contract of delivery of limetones from Kaloleni to Athi River Mining Company Limited.
21. RW1 produced a record of deliveries made by the claimant using motor vehicle KBX 499M to demonstrate that the claimant did not work each day. RW1 further testified that the claimant was on a daily wage of ksh 1,000/= payable either in cash or via M-pesa as per the instructions from the claimant.
22. On cross-examination, RW1 maintained that the respondent does not and cannot employ drivers or indeed other employees on permanent or monthly basis as it depends on contracts in construction works and hence calls for workers on need basis.
23. RW1 admitted that the respondent does not keep records of the casual employees that it engages and that it always paid wages on daily basis or on weekends for days worked. He insisted that the respondent's record of deliveries made by the claimant in KBX 499M is the correct one as the same was obtained from Athi River Mining Company Limited. RW1 alleged that the claimant was not respondent's only driver and that he was free to drive for other companies and that he indeed worked for other companies when the respondent had no work for him or whenever he wished to do so.
24. The respondent denied that the claimant was owed or entitled as prayed for in the claim and prayed that this cause be dismissed with costs.

#### **IV. Issues for determination**

25. Flowing from the foregoing summary of the positions taken by both parties the following issues commend themselves to this court for determination.
  - (a) What was the nature of employment relationship between the claimant and the respondent?
  - (b) Was the termination of the claimant by the respondent unfair and unlawful?
  - (c) Is the claimant entitled to the prayers sought for?
  - (d) Costs

#### **V. Employment**

26. The parties herein have taken diametrically opposed positions on this issue. On the one hand, the claimant alleges that as at the time he was terminated by the respondent he was a month to month employee at a monthly salary of kshs 60,000/=. On the other hand, the respondent proclaims that throughout the employment relationship the claimant was engaged on casual basis depending on availability of work and need for his services as a driver.
27. In paragraph 4 of his written submissions counsel for the claimant submits "that indeed as shown by the claimant herein he was being paid on a monthly basis for driving However, counsel has not pointed out to that evidence. It was the claimant who alleges that he was an employee of the respondent at monthly salary of kshs 60,000/=. It was incumbent upon the claimant to prove on a balance of



probabilities that he was indeed such an employee. He who alleges must prove -See section 107 of the Evidence Act (cap 80).

28. The claimant did not allege that there was any written contract of employment between him and the respondent. To that extent there was no written contract which the respondent was obliged to keep under sections 10 and 74 of the Employment Act (the Act).
29. The claimant did not provide any evidence of payment of the monthly salary of kshs 60,000/= either by way of M-pesa or bank statements, vouchers, or by calling a witness to such payments.
30. It was incumbent upon the claimant to prove that he was indeed an employee of the respondent on the alleged permanent or month to month basis. That burden did not shift or belong to the respondent just because the respondent did not keep the records.
31. It is the view and holding of this court that even if the respondent opted to say nothing on this issue and or failed to adduce any evidence, the claimant failed to prove the allegation that he was a permanent employee of the respondent at a monthly salary of kshs 60,000/=.
32. In general terms, section 10 of the Act relates to terms in written contracts of service. Section 74 of the Act obligates an employer to keep records of employees. The respondent herein admitted that it failed to keep such records. The situation that the claimant finds himself cannot be salvaged by section 10(7) of the Act as the claimant is unable to prove and demonstrate that indeed he was on a permanent month to month contract at a monthly salary of kshs 60,000/= as at the time of the alleged termination on September 4, 2016.
33. In his evidence under cross-examination, the claimant admitted that he did not work on all days of the week and neither on Sundays or public holidays. He further alleged that he was paid kshs 2,000/= per day making the alleged kshs 60,000/= per month.
34. On the other hand RW1 testifying for the respondent alleged that as at the time of his departure the claimant was on a daily wage of kshs 1,000/= payable daily or weekly only for the days worked. He stated that the claimant was either paid in cash or via M-pesa depending on his preferences.
35. In the circumstances, and in view of all the foregoing, this court finds and holds that the claimant was engaged on day to day basis (casual) depending on availability of work at the rate of either kshs 1,000/= or kshs 2,000/=. However, this court notes that a daily wage of kshs 2,000/= was neither plausible nor reasonable or logical in 2016, as the same would have been too high for a driver. RW1 alluded to that observation in his evidence.

## VI. Termination

36. Going by the finding and holding by this court on the issue of employment in Part V above, that the claimant was a day to day employee of the respondent on need basis, it follows that no notice was necessary in terminating the claimant. Once the respondent had no more work for the claimant it sufficed to just not engage the claimant any more. It is not alleged that the claimant had any disciplinary issues that required a hearing under sections 41, 42, 44 or 45 of the Act and hence the submissions by counsel for the claimant in this regard is wrong and misleading. The authorities cited by counsel for claimant in Milkah Khavavi Kulati v Sandstorm Africa Limited [2014] eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR do not support the claimant's cause as the context and circumstances are completely different.



## VII. Reliefs

37. The claimant is seeking various monetary reliefs amounting to kshs 1,521,000/= as set out in paragraph 12 of the statement of claim.
38. Prayer (a) is for one month's salary in *lieu* of notice in the sum of kshs 60,000/=. As it has been held above, that the claimant was on a day to day engagement based on availability of work, this claim must fail. No notice was necessary in terminating the claimant in his casual engagement and hence no pay is due and payable in lieu of such notice.
39. Prayer (b) is for unpaid salary arrears for three (3) months. The claimant was not a month to month employee and this claim must fail. The claimant has not detailed the days on which he worked in the months of June, July, and August, 2018 for the same to amount in arrears in the sum of kshsc180,000/=.
40. Prayer (c) for unpaid leave in the sum of kshs 360,000/= shall also fail for the foregoing reasons. The claimant has been found to have been a casual day to day worker and as such the issue of annual leave does not arise.
41. For the same reasons stated above the claim for twelve month's salary in compensation in prayer (d) in the sum of kshsc720,000/= shall fail.
42. Prayers (e) and (f) on severance pay and overtime shall also fail for the reasons stated above repeatedly.
43. There is no evidence whatsoever that the claimant spent his personal money in the sum of kshsc25,750/= in purchase of oil for and on behalf of the respondent.

## VIII.Costs

44. Costs are in the discretion of the court. Ordinarily, costs follow event. The claimant has failed to prove his case on a balance of probabilities and in ordinary circumstances he should be ordered to meet the costs of this litigation. However, notwithstanding the vehement submissions by claimant's counsel that costs follow event, this court is of the view that each party should bear own costs in this cause.

## IX. Disposal

45. In conclusion, this cause is dismissed with each party ordered to meet own costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS. 28TH DAY OF JULY 2022.**

.....

**DAVID NDERITU**

**JUDGE**

