



**Migwi v Amboseli Court Limited (Cause 1829 of 2017)
[2022] KEELRC 3780 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3780 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1829 OF 2017
SC RUTTO, J
AUGUST 19, 2022**

BETWEEN

SAMUEL MAINA MIGWI CLAIMANT

AND

AMBOSELI COURT LIMITED RESPONDENT

JUDGMENT

1. The claimant through a Memorandum of Claim filed on 13th September, 2017, avers that he was employed by the respondent as a general labourer with effect from 20th February, 2013. That he performed his duties continuously with due diligence and to the respondent's satisfaction. The claimant further states that on or about 20th July, 2015, he was informed by the respondent's supervisor by the name Mr. Amos, that his services were no longer required due to reduction of work. He regards the reason given by the respondent for his termination, as being far-fetched and only meant to push him from employment. Consequently, he avers that his dismissal from employment was unfair, unlawful and inhumane. As a result, he claims against the respondent compensatory damages, service gratuity, notice pay, severance pay and untaken leave days all totaling the sum of Kshs 209,000/=.
2. Opposing the claim, the respondent avers that the claimant was a casual worker and did not work continuously for more than four days in a week. The respondent further states that the claimant would frequent its site in search of casual work hence would be hired when the general work was available. The respondent thus asks the Court to dismiss the claim with costs.
3. When the matter came up for hearing on 25th April, 2022, the respondent was not present in Court. The claimant through his Advocate produced an Affidavit of Service sworn by one Ms. Owuor Reen on 9th December, 2021, wherein she deposed that she had effected service of the day's hearing notice upon the respondent. Annexed to the Affidavit of service was a copy of the hearing notice which bore the receiving stamp of the Advocate on record for the respondent.



4. The Court being satisfied with the return of service and being guided by Rule 22 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, directed that the matter proceeds, the respondent's absence notwithstanding.
5. Following close of the trial, the matter was mentioned on 24th May, 2022 for purposes of confirming filing of submissions and taking a judgment date. On the said date, the respondent's advocate, Mr. Nyaga, who was present, informed Court that although they did not participate in the hearing, he wished to file submissions hence sought leave. The leave was granted.

Claimant's case

6. The claimant testified in support of his case and at the start of the hearing, sought to rely on his witness statement and documents filed together with his claim. He asked the court to adopt the same as part of his evidence in chief. The documents were also produced as the claimant's exhibits before court.
7. As per his testimony, he was employed by the respondent as a general labourer and he worked continuously for two and a half years. That on 20th July, 2015, his supervisor informed him that there was no work hence his services were no longer required. He termed the reason given by the respondent as a white lie since the respondent was still employing other workers. That further, the site was yet to be completed.
8. The claimant further testified that the respondent's action to declare him redundant was in bad faith, unfair and unlawful. It was his further testimony that the respondent did not issue him with a redundancy notice nor inform the labour office of the intention to declare him redundant. That as a result of the abrupt and unfair dismissal, he faced an abrupt loss of income, trauma and inability to meet his financial obligations.

Respondent's case

9. As the respondent failed to call oral evidence, its case is as per its defence to the memorandum of claim. The respondent avers that the claimant was a casual labourer who did not work continuously. That as such, the claimant is not entitled to annual leave nor notice to terminate.

Submissions

10. The claimant submitted that he worked continuously from 20th February, 2013 to 20th July, 2015 when he was dismissed from employment. That his work was without a break for the entire period hence he was not a casual labourer. That therefore, his employment was deemed terminable by 28 days' notice under section 35(1) (c) of the *Employment Act*. To this end, the claimant sought to rely on the case of *Chemelil Sugar Company v Ebrahim Ochieng Otuon & 2 others* (2015) eKLR.
11. It was the claimant's further submission that the respondent did not follow the procedure set out under section 40(1) of the *Employment Act*. That further, the fairness test was not achieved. To this end, he asked the court to consider the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR.
12. The respondent did not file submissions despite being granted leave to do so.

Analysis and determination

13. From the pleadings on record as well as the evidence placed before court, the following issues stand out for determination: -



- a. On what terms was the claimant engaged by the respondent?
- b. Was the claimant's termination fair and lawful?
- c. Is the claimant entitled to the reliefs sought?

Terms of engagement between the claimant and the respondent?

14. It is the claimant's case that he worked continuously for the respondent since 20th February, 2013 to 20th July, 2015. The respondent denied the claimant's assertion and contends that he did not at any point in time work for a period beyond four days. This contest thus makes it imperative for the Court to determine at the outset, the nature of the claimant's engagement.
15. Section 2 of the *Employment Act* defines the term "casual employee" to mean:-

“.. an individual 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”.
16. The import of the above statutory definition is that a casual employee is an employee who is engaged for twenty four hours at a time. In terms of section 35(1) (a) of the *Employment Act*, such engagement is terminable by either party at the end of the day, without notice.
17. In addition, by dint of Section 37 of the *Employment Act*, such engagement may be converted to a regular term contract. What this means is that such conversion entitles an employee to safeguards which are ordinarily available to an employee on a regular contract of employment for instance, issuance of notice prior to termination or payment of salary in lieu of notice, protection from unfair termination, benefits such as leave, rest days and issuance of certificate of service.
18. In this regard, Section 37 provides as follows: -
 - (1) Notwithstanding any provisions of this Act, where a casual employee—
 - (a) works 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
 - (b) 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, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
 - (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
 - (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
 - (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power



to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.
19. Having set out the key statutory provisions, it is now time to analyse the evidence on record *vis a vis* the evidential burden of each party.
20. To support his case, the claimant exhibited a copy of his National Hospital Insurance Fund (NHIF) statement, indicating that the respondent was remitting contributions in his favour for a considerable period of time.
21. A perusal of the said NHIF statement indicates that the respondent remitted contributions continuously with effect from July, 2014 until March, 2015. That is a period of nine months.
22. On the respondent's part, and despite asserting that the claimant was employed as a casual worker, it did not tender any form of evidence whether oral or documentary, to counter the claimant's averments. On this score, it is notable that the provisions of section 10(7) of the [Employment Act](#) provide that "if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
23. Essentially, the burden of disproving the fact that the claimant was not a casual employee lay squarely on the respondent as the employer.
24. Evidently, the respondent did not discharge this burden as there was no evidence to discount the claimant's assertions.
25. As was held by the Court of Appeal in [Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune](#) [2021] eKLR: -
- [15]. In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the [Employment Act](#) to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by Section 37 of the [Employment Act](#) from claiming that she was a casual employee."
26. In following with the above determination, I am led to conclude that the contractual relationship between the parties was not casual and indeed, going by the claimant's NHIF statement, the same went beyond three months hence assumed permanency and was deemed to be one where wages are paid monthly.
27. In the same breath, the Court of Appeal in [Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others](#) [2018] eKLR, held as follows: -
- "Section 37 of the [Employment Act](#), 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The respondents were



entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.”

28. In a similar fashion, I find that the provisions of section 37(1) of the *Employment Act* became applicable to the claimant’s contract of service hence his casual employment was converted into a contract of service where wages are paid monthly.
29. In light of the foregoing, I find and hold that the nature of engagement between the claimant and the respondent was not on casual basis but rather, regular term employment hence he had a right not to be terminated without due process.
30. Having found as such, the next logical question to ask is whether the claimant’s termination was fair and lawful.

Was the claimant’s termination fair and lawful?

31. Section 43(1) of the *Employment Act*, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination unfair. In addition, section 45 (2) of the *Employment Act*, regards a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee’s conduct, capacity or compatibility; or based on its operational requirements.
32. While the claimant avers that he was told that his services were no longer required, the respondent did not present any reason at all for disengaging him. Its only contention was that he was a casual employee. As such, it is not possible to clearly tell the real reason that led to the cessation of the employment relationship between the claimant and the respondent.
33. What this means is that the respondent failed to discharge its evidential burden under section 43(1) of the *Employment Act* by proving the reason for the claimant’s termination.
34. In addition, the respondent was required to comply with the requirements of sections 45 (2) (c) and 41 of the *Employment Act*. In this regard, it was required to notify the claimant of the intended termination and the reasons thereof in a language he understands and in the presence of another employee or a shop floor union representative.
35. In this case, there was no suggestion at all by the respondent that it undertook any process akin to that contemplated under section 41 of the *Employment Act*. In the premises, it can only be presumed that none was undertaken.
36. Consequently, in absence of compliance with the mandatory provisions of section 41 of the *Employment Act*, the respondent is at fault.
37. The total sum of the foregoing is that the reasons for the claimant’s termination having not been proved and there being no evidence that he was given an opportunity to present his explanation or defence prior to termination, the Court arrives at the determination that the claimant’s termination was unfair and unlawful in terms of sections 43(1) and 45(2) of the *Employment Act*.
38. In arriving at this determination and as I conclude this issue, I wish to reiterate the legal threshold established by the Court of Appeal in the case of *Janet Nyandiko versus Kenya Commercial Bank Limited* [2017] eKLR thus: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the



termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

Reliefs

39. Having found that the claimant's termination was unfair and unlawful, I will award him five (5) month's gross salary as compensatory damages. This is noting the length of the employment relationship and failure by the respondent to prove reasons for the claimant's termination and its failure to follow due process.
40. The claimant is further awarded one (1) month's salary in lieu of notice as per the provisions of section 35 (1) (c) of the *Employment Act*.
41. The claimant is also entitled to service pay as there is no evidence that he fell under the exclusions under section 35(6) of the *Employment Act*.
42. The claim for severance pay is denied as the real reason for the claimant's termination was not clearly ascertained hence could not be attributed to redundancy.

Orders

43. To this end, Judgment is entered in favour of the claimant against the respondent and he is awarded: -
 - a. Compensatory damages in the sum of Kshs 60,000.00 which sum is equivalent to five (5) months of his gross salary.
 - b. One (1) month's salary in lieu of notice being Kshs 12,000.00.
 - c. Service pay for 2 years being Kshs 24,000.00.
 - d. The total award is Kshs 96,000.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.



f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Alividsa

For the Respondent Mr. Nyaga

Court Assistant Abdimalik Hussein

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 had 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 {>/akn/ke/act/1924/3 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.

STELLA RUTTO

JUDGE

