



**Mbugua v University of Nairobi (Cause 1114 of 2018)
[2022] KEELRC 3824 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3824 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1114 OF 2018
AN MWAURE, J
AUGUST 18, 2022**

BETWEEN

GRACE WAMBUI MBUGUA CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

Claimant's Case

1. The claimant filed her claim dated April 18, 2019. She says she was employed by the respondent in January 2007 as a cleaner. Her wages were Kshs 527/= per day, it was later increased to Kshs 984/58 per day payable monthly in advance. It was exclusive of house allowance. She says she did to get a written contract but was oral.
2. The claimant says she worked for the respondent diligently until 2017 when she was unlawfully terminated from her employment.
3. She says here termination was oral and was not issued with notice to terminate her employment on notice of any misconduct. She says also she was not paid her final dues.
4. She prays the court to declare her termination was unlawful and unfair and to award her prayers as particularized in her claim.

Respondent's Case

5. The respondent filed a response dated April 1, 2019. He admits they had employed the claimant but as a casual employee from December 1, 2016 to February 20, 2017 and from April 24, 2017 to June 30, 2017 and from October 2, 2017 to end of December 2017.



6. The respondent denies having engaged the claimant since 2007 and also denies he unlawfully terminated the claimant from its employment. He says he does not owe the claimant refunds for purchase of protective gear and retaliates claimant was employed as a casual labourer.
7. The respondent they do not owe the claimant the amounts claimed any dues prayed in her claim. It prays therefore that her claim be dismissed with costs

Claimant's Submissions

8. The claimant in her submissions says her employment had ceased being a casual employment and had converted to an employee under a contract of service for payment of monthly salary under section 37 of the *Employment Act*. She says the respondent is culpable of having dismissed her unlawfully in contravention of section 45 of the said *Employment Act*. The claimant says she availed bank accounts to the claimant from 2013 until termination.
9. She says she worked for ten years and in between got letters of recommendation from the employer. The claimant says her employment converted to contract of service and she relies on case of *Joseph Okelo Adhiambo & another v IJ Elimi & 2 others* and *John Mwaniki Kilimo v Kak Enterprises* [2013] eKLR where the court held that under section 37(3) of the Act, an employee who after converting from casual employment works continuously for two or more months from the date of employment, the employee becomes entitled to such terms and condition of service as he would have been entitled under the Act had he not initially been employed as a casual employee.
10. The claimant avers she was a permanent employee and the respondent failed to give her contract document. She avers therefore she was employed on permanent basis and pleads for her dues as prayed.

Respondent Submission

11. It is the respondent's submissions that the claimant was a casual labour and had agreed to work on casual terms and for periods and times that were not continuous as evidenced by the roster produced by the respondent's witness. The respondent avers therefore that the claimant has failed to prove that she was unlawfully or wrongfully dismissed from employment.
12. He says the claimant had agreed to a casual contract and so long as such a contract is compliant with the law the courts have no reasons to interfere. The respondent relies on the case of *Josphat Njuguna v High Rise Self Group* [2014] eKLR where court held inter-alia that

"it is a misinterpretation of section 37 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..."

The respondent submits that the claimant is not entitled to the reliefs sought.

Decision

13. The main issue for determination is whether the claimant herein was unlawfully terminated from the employment. The same issue is closely tied up with the question if whether the claimant was a casual labourer or was a regular employee. Of course if she was a casual labourer unlawful termination does not arise because the employee works per day and is paid for the day's worked and can then depart the same day.



14. However there are numerous authorities that support that casual employment does convert to regular employment. Section 37(3) of the [Employment Act](#) in particular provides that :-

“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.”

15. In the cause of [Humphrey Omondi v Vishu Builders Ltd](#) [2013] eKLR the court held that if a casual employee work for a continuous period of working days equal one month or more he/she converts to an employee under a contract of service for payment of monthly salary under section 37 of the [Act](#) and the employer is bared by section 45 of the [Act](#) for dismissing employee unfairly.

16. It is also notwithstanding that the respondent did not avail the claimant contract documents. In the case of [Francis Maina Kamau v Lee Construction](#) [2014] eKLR the court held:-

“It is not in contest that the claimant’s employment with the respondent was not documented. The law places the responsibility of documenting an employment relationship on the employer and where there is divergence of evidence in cases of an oral contract of employment, the court will adopt the testimony of the employee.”

17. The claimant in this case says she worked for the respondent for 10 years. The respondent did not provide her with contract documents.

18. She however produced bank statements showing she was receiving wages from the respondent from 2015 to 2017 and seems is continuous from the bank statements with no breaks as alleged by the respondent.

19. The claimant also produced a letter of recommendation from the respondent dated July 23, 2013 which stated that the registrar of the respondent had known the claimant for three years and said she had no problem to recommend her as a worthy employee.

20. These records are considered to confirm a regular employee and not a casual employee as claimed by the respondent. This is despite that the respondent did not avail any contract documents to the claimant. This then means the claimant’s word is acceptable in the absence of any written documents. The claimant avers she worked for the respondent from 2007 to 2017.

21. The documents in the court records at least are the claimant’s bank statements which are from 2013 – 2017 and the letter from the Registrar of the respondent. Going by those documents I am well persuaded that the claimant has proved her employment was regular and so she was entitled to be treated as per provisions of law and especially section 41 of the [Employment Act](#); section 45 of the [Employment Act](#) provides:-

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove——
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason——
 - (i) related to the employees conduct, capacity or compatibility; or



- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure."

22. The court finds the respondent did not give any valid reason why they terminated the claimant's employment and the procedure provided in section 41 of the Employment Act was also not followed. Section 41 provides as for

"Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service."

23. The termination of an employee must therefore pass the fairness test. For this to be proved it ought to be shown that there was not only substantive justification for the termination but also procedural fairness as well held in the case of Walter Ogal Anuro v Teachers Service Commission Cause No 955 of 2011.

24. In view of the foregoing, I am persuaded that claimant was a regular employee of the respondent and she was not a casual labourer as provided in section 37(3) of the employment Act. I am therefore persuaded she was unlawfully and wrongfully terminated and I therefore enter Judgement in her favour.

25. Having found that the claimant was unlawfully and wrongfully terminated I proceed to award the following reliefs:

- a. One month salary in lieu of notice.....Kshs 16,363/35
- b. Salary for 24 days worked in December 2017.....Kshs 13,080/=
- c. House allowance from 2013 to 2017 will adopt 2013 as per records and so is 15% of 16,363.36x12x5.....Kshs 147,261/=
- d. Service pay is not payable as claimant was not declared redundant and is not proved was a condition of the contract of employment and so is disallowed.
- e. Annual leave pay is allowed as respondent did not provide documents to establish the claimant went of leave and so the same is awarded for
5 years (5) x 16,363.....Kshs 81,815/=
- f. The uniform refund and all associated accessories are not proved and so are disallowed.
- g. Off days are also not proved and so are declined.



- h. The general compensation will be allowed equivalent of 5 monthsKshs 81,815/=
- i. Costs are also awarded to the claimant.
- j. Also interest is awarded at court rates from date of judgement till full payment.
Total awarded isKshs 340,334/35
Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH AUGUST, 2022

ANNA NGIBUINI MWAURE

JUDGE

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 March 15, 2020 and subsequent directions of April 21, 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 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.

ANNA NGIBUINI MWAURE

JUDGE

