



**Mwiso v Vegpro (K) Limited (Cause 1750 of 2017)  
[2022] KEELRC 1538 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1538 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1750 OF 2017  
SC RUTTO, J  
AUGUST 5, 2022**

**BETWEEN**

**RUTH NDETO MWISO ..... CLAIMANT**

**AND**

**VEGPRO (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant brought the instant suit vide a Memorandum of Claim dated 30<sup>th</sup> August, 2017. She states that she was employed by the respondent as a casual labourer from January, 2000. That it was on 21<sup>st</sup> December, 2016 when she was informed at the respondent's human resource office, that her name no longer existed in its data base. She contends that the manner in which she was backlisted from the respondent's data base amounted to unlawful termination. It is for this reason that she seeks against the respondent one month's salary in lieu of notice, compensatory damages and service pay.
2. The claim was opposed with the respondent stating that the claimant was not its employee and that she was only a casual worker whose work was terminated at the end of each shift. That the question of natural justice does not arise given that the hiring of casual workers does not include a procedure. The respondent asked the Court to dismiss the claim with costs.

**Claimant's case**

3. At the hearing which proceeded on 23<sup>rd</sup> March, 2022, the claimant testified as CW1 and at the outset, sought to rely on her witness statement together with her bundle of documents, which she produced as exhibits before Court. She asked the Court to adopt the same as part of her evidence in chief.
4. The claimant told Court that she started working for the respondent sometimes in January, 2000. That though she was a casual employee, she worked every day until when she was terminated from employment. That on 9<sup>th</sup> December, 2016, she was moved to a different department and when she



went to enquire the reason for the move from the human resource department, she was directed to go back to her usual department.

5. That as per the respondent's policy, an employee being deployed to a different department had to undergo training of the work entailed in the new department. That in this case, she had not been taken through any training of the intended new department being the premium department.
6. That when she went back to work, her supervisor by the name Mr. Bernard Balongo declined to allocate her duties and also exhibited animosity towards her. That when she forwarded the matter to the human resource department, the assistant human resource manager asked her to report to work the following day. That she went back to work on 21<sup>st</sup> December, 2016 when she was informed by the secretary to the human resource assistant, that her name had been removed from the respondent's data base and backlisted on the company's check off system and thus, she was no longer an employee of the respondent. In concluding her testimony, she asked the Court to allow her claim as prayed.

### **Respondent's case**

7. The respondent called oral evidence through Mr. John Matanyi who testified as RW1. He identified himself as the respondent's Human Resource Manager and proceeded to adopt his witness statement as his evidence in chief.
8. RW1 testified that he knew the claimant as she worked as a casual worker in the respondent company. That the respondent has a labour force of about 1500 employees. He testified that the respondent has three (3) categories of employees, that is, permanent, seasonal and casual. That casual employees are engaged daily when there is work demand from time to time. That the claimant was assigned various duties at different times depending on the need for casual labourers. That her duties changed depending on the various duties assigned by the supervisor.
9. He further testified that after the claimant demanded to be deployed to a particular department of the respondent which demand could not be met, she never offered her services to the respondent. That it is not the duty of the respondent to go and find casual workers rather it is the duty of those in need of the job to answer its call for casual workers and present themselves for hiring.
10. RW1 contended that the claimant was not a permanent employee hence she presented herself whenever the need arose. That as a casual worker, she was required to work where she was assigned duties by her supervisor and therefore, had no reason to refuse any assignment when she presented herself for hire. That the question of natural justice does not arise as hiring of casual does not include a procedure.
11. It was the testimony of RW1 that on 21<sup>st</sup> December, 2016, the claimant was reported to his office for refusing to work where she had been assigned duty. That the claimant neither answered the subsequent calls of the respondent nor offered herself for hiring as a casual.
12. RW1 further testified that the respondent does training of its employees whether permanent or casual, adding that the same is a requirement by its customers. That in this regard, the claimant was only trained for two weeks. In closing his testimony, RW1 asked the Court to dismiss the claim with costs.

### **Submissions**

13. In her submissions, the claimant argued that she was not a casual worker as she was engaged for a longer period than twenty four hours at a time. That she served for many days without any break in her service. That the respondent did not produce any evidence as exhibit including the schedule of the days worked to show the number of days and periods the claimant was engaged. That the claimant's terms of employment were therefore converted by operation of the law to regular employment under



section 37 of the *Employment Act*. To buttress this position, reliance was placed on the case of *Chemelil Sugar Company vs Ebrahim Ochieng Otuon & 2 others* (2015) eKLR.

14. It was further submitted on behalf of the claimant that fairness was never achieved as there was no substantive justification for the respondent to terminate her employment and equally, she was not taken through a fair process. The cases of *Walter Ogal Anuro vs Teachers Service Commission* (2013) and *Kenya Union of Domestic Hotels, Educational Institutions & Hospitals Workers vs Mombasa Sports Club*, Cause No. 440 of 2013 were cited in support of this argument.
15. On its part, the respondent, submitted that the claimant was not engaged for a period longer than a day and was only called upon when and as the need arose and therefore, was a casual worker. The respondent invited the Court to consider the findings in *Francis Runji Karingi & 5 others vs China Hebei Water Conservancy Engineering Bureau* (2014) eKLR and *Kenya Union of Sugar Plantation and Allied Workers vs West Kenya Sugar Company Limited* (2018) eKLR.
16. It was further submitted on behalf of the respondent that the claimant never filed a complaint with the labour officer in terms of Section 37(4) of the *Employment Act*. That further, there is no documentary evidence that the claimant was an employee of the respondent and that there is also no evidence that the claimant wrote to the respondent requesting for conversion of her employment status from a casual to a contractual employee. That therefore, the Court has no jurisdiction to grant the prayers as that would amount to conversion of the claimant's status from casual to term contract. That further, the issue was not pleaded by the claimant hence she is bound by her pleadings. The cases of *Abdul Shakoora Sheikh vs Abdul Majied Sheikh and 2 others* LLR No. 2219 (CAK) and *Captain Harry Grandy vs Caspair Air Charters Limited* Civil Appeal (1956) 23 EACA 139 were cited in support of this argument.
17. The respondent in further submission stated that the claimant had the burden to prove that her work was within the scope of section 37 (1) (a) (b) (2) of the *Employment Act*. It was the respondent's further submission that the claimant was a casual worker hence the provisions of section 41, 43 and 45 of the *Employment Act* do not apply.

### **Analysis and determination**

18. I have considered the issues raised in the pleadings, the rival submissions as well as the evidence on record and to my mind the Court is being called to resolve the following questions: -
  - a. What was the nature of the employment relationship between the parties?
  - b. Whether the claimant was unfairly and unlawfully terminated from employment?
  - c. Is the claimant entitled to the reliefs sought?

### **The nature of the employment relationship between the parties**

19. It is common ground that the claimant's initial engagement was on a casual basis. The dispute now is whether moving forward, her engagement metamorphosized from casual to regular term employment by operation of law.
20. Section 2 of the *Employment Act* is key in this regard as it defines the term "casual employee". The term is defined 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”.



21. Essentially, a casual employee is therefore an employee who is engaged for twenty four hours at a time. As per the provisions of section 35(1) (a) of the *Employment Act*, such engagement is terminable by either party at the end of the day, without notice.
22. Engagement on casual basis may be converted to a regular term contract in terms of Section 37 of the *Employment Act*. It is instructive to note that this conversion is significant in that, such an employee becomes entitled to the safeguards available to an employee on a regular contract of employment. Such safeguards may include, 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.
23. Section 37 is couched 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.
24. It was the claimant's case that she was employed by the respondent with effect from January, 2000 as a general labourer and that she worked continuously upto sometimes in December, 2016 when she alleges to have been dismissed from employment. This period is roughly 16 years.
25. In support of its assertion, the claimant exhibited a certificate of training awarded to her by the respondent on 27<sup>th</sup> June, 2014. The claimant further exhibited a certificate of completion of a course titled HERproject Peer Education Training. It is indicated on the said certificate that the training was from May, 2014 until June, 2015.
26. RW1 was categorical that they train all their employees including casuals. He further testified that the only training the claimant participated in, was for two weeks. Going by the certificate of completion



- on record, this does not seem to be the case. It is notable that the respondent did not challenge the certificates produced by the claimant in evidence. Indeed, it is rather odd that the respondent would expend resources training an employee who had the potential of being employed for only a day. This does not seem logical at all.
27. On its part, the respondent did not produce any evidence to counter the assertions of the claimant by proving that she was not in its employment regularly and continuously from January, 2000 to December, 2016.
  28. On this note, it is imperative to refer to the provisions of Section 10 (7) of the *Employment Act* which provides 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. The import of this provision is that the respondent being the employer, was under an obligation to disprove the fact that the claimant was not a casual employee.
  29. In this regard, and being the party responsible for maintenance of employment records, the respondent was under an obligation to prove by way of evidence that the claimant was engaged intermittently and not for a continuous period exceeding three (3) months.
  30. The respondent could have achieved this by producing the relevant work attendance records or muster roll in respect of the claimant. Evidently, it did not do any of this, hence the burden remained undischarged.
  31. On this score, I am fortified by the determination by the Court of Appeal in *Jackson Muiruri Wathigo t/a Murtown Supermarket vs Lilian Mutune* [2021] eKLR where it was held that: -

“[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.”
  32. The respondent having failed to discharge its evidential burden, I am led to conclude that the contractual relationship assumed permanency and was deemed to be one where wages are paid monthly. In essence, section 35 (1) (c) of the *Employment Act* became applicable to the respondent’s contract of service in terms of section 37(1). Such was the determination by the Court of Appeal in the case of *Nanyuki Water & Sewage Company Limited vs Benson Mwiti Ntiritu & 4 others* [2018] eKLR where it was 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.”
  33. I am fully aligned to the above determination by the Court of Appeal and apply the same to the case herein. I must also add that the respondent’s argument that the claimant did not apply for conversion does not hold water as conversion was by operation of the law.



34. It is against this background that I find that the engagement of the claimant was converted from casual to regular term employment hence she was protected against unfair termination.
35. Having found as such, I now move to determine whether the claimant was unfairly and unlawfully terminated.

**Was the claimant's termination unfair and unlawful?**

36. The claimant has alleged that she was unfairly and unlawfully terminated from employment. Pursuant to sections 43, 45 and 41 of the *Employment Act* (Act), an employer is required to prove that there was substantive justification to warrant an employee's termination and that such an employee was accorded procedural fairness. Essentially, this is the standard for determining whether an employee's termination was fair or not.
37. Section 43(1) of the Act, provides for substantive justification. It entails proof of reasons which resulted in an employee's termination. Further, failure on the part of an employer to prove reasons for termination, renders such termination as unfair. In this regard, Section 45 (2) (a) and (b) of the Act goes ahead to provide that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
38. That is not all as there is a requirement for procedural fairness, with the starting point being Section 45(2) (c) of the Act which provides that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the Act sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
39. In the instant case, the respondent states that the claimant demanded to be deployed to a particular department and never showed up when her demand could not be met. Essentially, the circumstances under which the claimant allegedly left the respondent's employment was on account of abscondment of duty and insubordination.
40. Since the respondent denied that the claimant was its employee, it did not present any evidence to prove the validity and fairness of her termination. Having found that the claimant's employment was converted from casual basis to term contract, the respondent was bound to prove that the reasons for which it let go of the claimant, were valid and fair.
41. The respondent did not lead evidence in whatever form or manner to prove the claimant's abscondment of duty and insubordination. No attendance register or muster roll was produced by the respondent to prove the claimant's absence from work. Further, there was no evidence or statement from the claimant's supervisor to the effect that she had refused to work in the department she had been assigned duty.
42. As regards fair process, the respondent was categorical that since the claimant was a casual employee, the question did not arise. Having found to the contrary, the respondent was bound to subject the claimant to the process contemplated under section 41 of the *Employment Act*.
43. To this end, the respondent would have asked the claimant to show cause why her employment should not be terminated for whatever reason.
44. As it is there was no indication, leave alone a suggestion by the respondent, that it undertook any process similar to the one contemplated under section 41 of the *Employment Act*.



45. In the circumstances, I cannot help but find that the respondent is at fault for want of procedure.
46. The totality of the foregoing is that it is my finding that the respondent's termination was unfair and unlawful in terms of sections 41, 43 and 45 of the *Employment Act*.

### **Appropriate Reliefs**

47. Having found that the claimant's termination was unfair, the Court awards her seven (7) month's gross salary as compensatory damages.
48. The claimant is further awarded one (1) month's salary in lieu of notice.

### **Orders**

49. Accordingly, I enter Judgment in favour of the claimant against the respondent and she is awarded: -
- a. One month's salary in lieu of notice being the sum of Kshs 15,840/=.
  - b. Compensatory damages in the sum of Kshs 110,880/= which sum is equivalent to 7 months gross salary calculated at Kshs 528 per day.
  - c. The total award is Kshs 126,720/=.
  - d. Interest on the amount in (c) at court rates from the date of Judgement until payment in full.
  - e. The claimant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF AUGUST 2022.**

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**STELLA RUTTO**

**JUDGE**

#### **Appearance:**

For the Claimant Ms. Alividsa

For the Respondent Ms. Oduo

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *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**

