



**Johana v Managing Director All -Time Agencies Ltd (Cause  
119 of 2017) [2022] KEELRC 1686 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1686 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 119 OF 2017  
AN MWAURE, J  
AUGUST 4, 2022**

**BETWEEN**  
**HERMAN CLYDE JOHANA ..... CLAIMANT**  
**AND**  
**MANAGING DIRECTOR ALL -TIME AGENCIES LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant (Herman Clyde Johana) filed his Memorandum of Claim on 24<sup>th</sup> January 2017 wherein he claimed that he had been unlawfully and wrongfully dismissed from employment by the Respondent Company. He sought Kshs. 1,264,058.60 compensation computed as follows:
  - i. One month salary for October 2016 Kshs. 12,221.10
  - ii. One month payment in lieu of notice Kshs. 12,221.10
  - iii. Salary underpayment from 15/12/2013 to 2/10/2016 Kshs. 298,612.80
  - iv. Service Pay Kshs. 34,219.80
  - v. Annual leave pay Kshs. 34,219.00
  - vi. Off-duties Kshs. 112,588.70
  - vii. Overtime payment Kshs. 550,118.30
  - viii. Compensation for Unfair dismissal Kshs. 14,665.20
  - ix. Public Holidays Kshs. 21,110.40
  - x. Leave travelling allowance Kshs. 7,200



- xi. House allowance Kshs. 87,991.90
  - xii. Failure to issue certificate of service Kshs. 100,000.00
2. The Respondent filed its Response to the Memorandum of Claim on 20<sup>th</sup> May 2021 wherein it stated that it has never provided security services as alleged by the Claimant. It thus put the Claimant to strict proof of the allegations in the Memorandum of Claim.

### **The Claimant's Case**

3. The Claimant avers that he was employed by the Respondent on the 15<sup>th</sup> of December 2013 as a security guard and was summarily dismissed on 2<sup>nd</sup> October 2016 without due regard to the stipulated labour laws of the country.
4. The Claimant states that the procedure adopted in reaching the decision was not just as there was no written reasons for the said termination. He further states that the Respondent was supposed to explain to him in a language that he understands the reason for the termination. There was also need for a representative of his choice to be present during the hearing of the case, the Claimant adds.
5. The Claimant avers that the terms of the employment contract was oral. He was being paid a monthly salary of Kshs. 6000/=. He says that he was being underpaid and had to live under difficult economic conditions. The Claimant holds the position that he was an employee of the Respondent and even relies on a dispatch note issued by the Respondent on 10<sup>th</sup> November 2013. The dispatch note describes him as a regular guard. Additionally, he denies that he was a casual labourer as he was under a monthly salary.
6. In examination-in-chief the Claimant states that when he asked for leave, his employer terminated him after having worked for 3 years and 8 months. He avers that he has never been granted any leave even when they got a baby. He adds that the Respondent never paid his NHIF and NSSF dues.
7. He submits that he is entitled to the reliefs he sought in his Memorandum of Claim as the actions of the Respondent towards him fundamentally breached procedural and substantive labour laws.

### **The Respondent's Case**

8. In its Response to the Memorandum of Claim, the Respondent stated that it does not provide security services as claimed by the Claimant. It also denied having ever employed the Claimant.
9. It is the Respondent's case that the Claimant ought to demonstrate that he was employed under a contract of service. It quotes Section 107 of the Evidence Act which it says places the burden of proof on the Claimant. It adds that the Claimant ought to provide evidence to prove existence of an employer-employee relationship. It is the Respondent's position that the Claimant was a casual labourer who was only entitled to monthly wages as per the Regulation of Wages (Agricultural Industry) (Amendment) Order 2015.
10. The Respondent avers that the relationship that existed between the two included that of a casual labourer for a period of 3 months as evidenced by the bank statements for the months of July, August and September. The Respondent witness claimed that the Claimant used to be at work occasionally as it was not a continuous job for the months stated.
11. It states that there can be no claim for unfair termination as there existed no employment in the first place. It thus follows that the reliefs sought by the Claimant cannot be granted. The Respondent witness claimed that the dues the Claimant sought were in fact not factual.



12. The Respondent avers that there was no contract between Claimant and the Company but there was a document at the office where the Claimant would always sign. It was added that the Claimant was always paid on Kshs. 1000 on the 15<sup>th</sup> of every month and the remaining Kshs. 5000 at the end of each month through a co-operative bank account.
13. The Respondent attached its Memorandum of Association to buttress its position that it does not provide security services.

#### **The Claimant's Submissions**

14. The Claimant claims to have worked for the Respondent from November 2013 to October 2016 as a security guard at a monthly salary of Kshs 6000/=. He says he was employed by the Respondent as the respondent produced a dispatch note on 10<sup>th</sup> November 2013. He says that according to Section 07 and 108 of the Evidence Act, he who asserts must prove. The Respondent did not prove that the Claimant was not his employee.
15. He says that the Claimant was a regular employee of the Respondent as he used to receive monthly payment as per the bank statement from Co-operative Bank Ltd.
16. He therefore says that he was a regular employee and he was unfairly terminated by the Respondent without due regard to the law.

#### **The Respondent's Submissions**

17. The Respondent submits that the Claimant never produced any document to prove he was not employed on casual basis. He says that the Claimant also did not produce any documents to prove he was employed by the Respondent.

#### **Decision**

##### **Issues for Determination**

18. The Court has considered the pleadings, oral testimonies and witness statements herein. It has thus framed the following as issues for determination:
  - i. Whether the Claimant was an employee of the Respondent
  - ii. Whether the Claimant was unfairly terminated and should be compensated
  - iii. Whether the Claimant is entitled to the reliefs sought if any

##### **Whether the Claimant was an employee of the Respondent**

19. It is imperative that the word employee be defined as the disputants herein do not seem to agree on the same. For the purposes of Section 2 of the Employment Act 2007, an employee is defined as a person employed for wages or a salary and includes an apprentice and indentured learner. The same section defines a casual labourer as a person 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.
20. From the definition it is prudent to ask if the Claimant is a casual or a regular employee. The Claimant herein was not being paid on daily basis. In his examination the Respondent's representative stated that the Claimant was paid on a monthly basis. He stated that the claimant was always paid Kshs. 1000 on the 15<sup>th</sup> of the month and Kshs. 5000 at the end of the month. There are no records to demonstrate how long the Claimant has worked for the Respondent. What seems to be confirmed is the fact that



the employer-employee relationship existed as per the bank statements of the Claimant for a period of three months. Section 18 (2) of the Employment Act guides us on when wages and salaries are due. It states as hereunder:

“Subject to subsection (1), wages or salaries shall be deemed to be due—— (a) in the case of a casual employee, at the end of the day;

21. The Respondent also produced a dispatch note dated 10/9/2013 which shows the Claimant was their guard. In the case of Joash Ogara Mainga & Christopher Munyoki Munene v DHL Exel Supply Chain (K) Limited [2021] eKLR at paragraph 54 the Court held:

“The state of confusion as regards legal status of an employee as is in this matter, where even the employer itself does not seem to be sure of the exact character of its relationship with its employee, shall continue to abound for as long as employers are unwilling and or unconcerned to adhere to the duty bestowed upon them to by provision in section 9 of the Employment Act, 2007 to reduce contracts of employment into writing, and in so doing to supply the particulars of employment therein in terms of section 10 of the Act.”

22. The Claimant avers that he was employed on 15<sup>th</sup> December 2013. He also stated that he used to be paid through Co-operative Bank. However, there is no evidence to support his position as to the date he was employed. As proof that there existed an employer-employee relationship the Claimant produced bank statements for the months of July, August and September 2016 only. By operation of Section 37 of the Employment Act the Claimant cannot be deemed to be a casual labourer. Section 37(1) to (3) of the Employment Act 2007 provides:

37.

- (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.



23. In the case of *Silas Mutwiri v Haggai Multi Cargo Handling Services Limited* [2013] eKLR the Court held that:

“This kind of the employment where the casual employee is not terminated at the end of the day and continues to work continuously for over a month up to and until over three months, then the law converts the same into a contract term employment.”

24. Similarly, the Court in *Kesi Mohammed Salim v Kwale International Sugar Co. Ltd* [2017] eKLR held as hereunder:

“The respondent has admitted that the claimant worked continuously for about 8 years on casual basis. She produced as exhibit schedule of the days worked by the claimant in 2015 which show that he worked over 36 weeks continuously which is way more than the minimum days required for casual employee to convert to regular term contract under Section 37(1) and (3) of the Act. Consequently it is my finding of fact and indeed my declaration that the claimant’s casual employment had converted from casual to term contract under Section 37(1) and (3) of the Act and he was therefore subject to the provision of Section 35(1)(c) and 45 of the Act.

25. Having expressed itself as hereinabove, the Court finds that the burden of proof that the Claimant was an employee from 2013 lay on the Claimant himself. The Court will only rely on the evidence before it and find that the Claimant was an employee of the Respondent for the three months in 2016 only where at least there are records to establish the same.

#### **Whether the Claimant was unfairly terminated and should be compensated**

26. The Claimant told the Court that the Respondent, terminated him without due regard to both substantive and procedural law. Yet again, this Court wishes to state that the evidential burden of proving that unfair termination has occurred rests on the Claimant. Section 47(5) of the *Employment Act* 2007 provides that:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

27. Courts have interpreted Section 47(5) to mean that an employee has only to place a prima facie evidence before court that termination occurred. Once this is done, the burden of proof shifts to the employer. In *Josephine M Ndung’u & Others v Plan International Inc* [2019] eKLR the Court stated:

“Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.

28. The Claimant informs the Court that having worked for the Respondent for about 3 years, he was unlawfully terminated on 2nd October 2016. The Claimant says he was wrongfully terminated without any written notice or reason for such termination. The Respondent did not give or produce any evidence to demonstrate how or why the separation happened between them and the employee.



29. The Respondent released the Claimant without following the procedure set out in 41 and 45 of the Employment Act. The law and especially Section 45 of the Employment Act provides that the employer must have a valid reason to terminate the employment of the employee.

30. Section 41 of the said Act also provides as follows:

41.

- (1). 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.

The Court finds that in this case the Respondent did not follow the substantial and procedural requirements in termination of the Claimant's employment. It is unfortunate to say that it is not even clear how the Claimant was separated from his employment for lack of any documents. We can only go by the Claimant's evidence that he requested for leave and was ordered to leave the employment abruptly.

31. In conclusion, the Court finds that the Claimant was unfairly and unprocedurally terminated from his employment and so judgment is entered in his favour.

## Remedies

32. Having found that the Claimant was unfairly terminated I proceed to give him the following reliefs:

- a. One month salary in lieu of notice three months prorata 4000/-
- b. No proof of having worked in October 2017- so it is disallowed
- c. Salary underpayment-(Being a special damage, it is not specified) - it is thus disallowed.
- d. Severance pay (3 months) equivalent Kshs. 4,000
- e. Annual leave Kshs. 4,000
- f. Off duties (No proof-being special damages) is disallowed.
- g. Long-working hours (No proof- being special damages) is disallowed
- h. Compensation for unfair dismissal (2 months) Kshs 24,442
- i. Public Holidays (No proof-being special damages) is disallowed.
- j. Leave travelling allowance (No proof) is disallowed.
- k. House Allowance Kshs. 5499.45



- l. Failure to issue certificate. This calls for a fine not damages so is declined.
- m. Respondent is however ordered to give the Claimant the Certificate of Service within 14 days hereof.
- n. Costs are awarded to the Claimant.
- o. Interest is also awarded at Court's rates from date of filing the suit till full payment.

Total award is Kshs 41,941/45

Orders accordingly

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 4<sup>TH</sup> 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 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

