



**Njoki v University of Nairobi (Cause 2411 of 2017)
[2022] KEELRC 1547 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1547 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2411 OF 2017
AN MWAURE, J
AUGUST 4, 2022**

BETWEEN

ESTHER NJOKI CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

1. The claimant filed her statement of claim dated November 2, 2017 and the respondent filed his response dated June 7, 2018.

Claimants case

2. The claimant states that she got into a contract of employment 1992 as a cleaner and librarian. She says on June 29, 2017 she was informed she had been dismissed from employment.
3. She says that prior to the dismissal she had not been given any notice or called for disciplinary meeting. There were no benefits given to her. She says she worked for the claimant for 25 years. She is claiming for her dues amounting to KShs.1,842,300/-.

Respondents claim

4. The respondent admits that the claimant was employed by the respondent as an unskilled employee but refutes the averment that he was employed in 1992.
5. He says he was not bound to issue the claimant with a notice or to pay her any benefits. He says he did not terminate the claimant unlawfully and puts her to strict proof. He says she was on casual employment which was terminable by each party giving notice at the close of the day. He says the claimant was entitled to terms and conditions of service of a casual employee.



6. The respondent avers he is not liable to pay the claimant any dues amounting to KShs.1,842,300/- or at all. He prays that the claimants claim be struck off and dismissed with costs.

Claimant's evidence

7. Claimant says she was employed in 1992 and was earning KShs.15000. She was terminated in 2017.

Respondents evidence

8. The respondent witness was Hassan Shimanyi who said he was a Senior Registrar of the University of Nairobi. He says Claimant worked at the University as a cleaner on casual basis. He says her evaluation documents are stamped from 2013 and she was earning KShs.13935/- per month. He says by 16.5.2017 she was paid Kshs.93935/-. He also says casuals can be terminated by close of day.

Decision

9. The court did not have the benefit of the parties submissions despite giving them time from March 21, 2022 up to May 19, 2022. The issues for determination are:-
- a. Whether the claimant was a full term employee of the respondent or she was a casual employee.
 - b. Was she terminated unlawfully or was her termination in terms of her employment as a casual employee.
 - c. Is she entitled to the reliefs prayed.
10. The claimant claims she was employed from 1992 by the respondent and worked until 2017 when she was unfairly and unprocedurally terminated. She says she worked for the respondent for 25 years. Her monthly salary was KShs.13800/-.
11. The respondent's defence was that the claimant was an unskilled worker who was working for the claimant but on casual basis. he says that the claimant was therefore not entitled to be given any notice as either party could terminate the contract by giving notice at the close of the day. He also says that the claimant is not entitled to any sums or reliefs sought.
12. This is a common case in this terrain where an employee works for a lengthy period for an employer on the assumption that he/she is a casual employee. He is not given an appointment letter and is paid minimum wage for years and years. The days comes when the parties have to part ways as it were. Then the employee leaves empty handed. He then realizes there is something in law referred as section 37 of the [employment Act](#) 2007 which can assist her/him. The same 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 No. 3 of 1997.

The [Employment Act](#), 2007 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 88 of this Act shall apply.
13. This is such one case where even the respondent has as good as admitted in writing that the claimant was their full time employee. A letter written by Chief Technologist of the University of Nairobi and dated May 30, 2012 provides that Esther Njoki worked for the University from 2004 – 2009 as a book binder. That in itself shows claimant had already worked for over 5 years by 2009. In 2017 June 29th the casual workers were given a notice to terminate their services and claimant was one of those terminated. Harrison Akala in his evidence in court said claimant worked till 16.5.2017 but in his witness statement he says claimant worked until end of June, 2017. That verifies the claimant’s testimony. In the circumstances the court is convinced the claimant was not just a casual worker but was a full term employee of the respondent of many years. However it is not clear if it is from 1994 or 2004. At least the records in court show she worked from 2004 to 2017.
14. With the support of the case of *Francis Ndirangu Wachira Vs. Betty Wairimu Maina* Cause 252 of 2017, the Judge held that a person “having worked continuously for longer than one month, the Claimant’s terms of employment converted by operation of the law to regular employment as provided in section 37 of the *Employment Act*. He is not therefore a casual employee as he was initially...”
- Similarly in this case the claimant’s employment converted to regular employment. She was therefore entitled to be subjected to the provisions of the employment laws and in particular section 45, section 45 and section 35 of the *Employment Act*.
15. The respondent needed to give the claimant a valid reason for terminating her employment. But if the reason was on the basis of redundancy then the respondent need to follow section 40 of the *Employment Act*. Section 40 of the *Employment Act* provide as follows:-

40.

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -
 - (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date



of the intended date of termination on account of redundancy:

- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer ;
- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

- (2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part IX in which case that Part shall be applicable.
- (3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

- 16. The respondent having just woken up on the June 29, 2017 and informed their employees including the claimant that their employment would cease the following day, they contravened the law related to the termination of employment where section 45 requires the employer to give a valid reason in terminating the employment of an employee or in case of redundancy to follow the provisions of section 40 of the *Employment Act*.
- 17. Further the law requires the right procedure be followed as provided in section 41 of the same *Employment Act*.



18. The court finds in view of the foregoing the respondent failed the fairness test in terminating the claimant as provided in section 41 of the Employment Act which 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) Notwithstanding any other provision of this Part,
- (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.
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-
 - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
 - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
 - (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
 - (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;



- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

19. In view of the aforesaid the court rules that the respondent acted unfairly and unlawfully towards the claimant and failed to follow the fairness test provided in the relevant sections of Employment Act 2007 referred here before.

Remedies

20. The court have found the Claimant was unlawfully and unfairly terminated and proceeds to award her the following reliefs:-

- a. One month payment in lieu of notice- KShs.13,800/-
- b. 10 months payment as compensation- KShs.138,000/-
- c. Unpaid leave days for 12 years – 156,000/-
- d. Severance pay is declined as claimant was not declared redundant
- e. The prayer for balance of years not worked not supported by any evidence or documents and is disallowed.
Total awarded Kshs 307,800/-
- f. Costs are awarded to the claimant.
- g. Interest is also awarded from date of judgement till full payment.
- h. Certificate of service to be given to the claimant within 14 days from today's date.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 4TH 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 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 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

