



**Odhiambo v Kapi Limited (Cause 212 of 2016)
[2022] KEELRC 4008 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4008 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 212 OF 2016
HS WASILWA, J
SEPTEMBER 27, 2022**

BETWEEN

PHILIP OWINO ODHIAMBO CLAIMANT

AND

KAPI LIMITED RESPONDENT

JUDGMENT

1. The claimant sued the respondent, his former employer, vide a memorandum of claim dated June 3, 2016, alleging to have been unfairly dismissed and seeking compensation for the said termination. He sought the following reliefs;
 - a) A declaration be made to the effect that the claimant's termination was unlawful and unjustified as the same was not within the ambits of the *Employment Act, 2007* and other employment laws.
 - b) The claimant herein be awarded 12 months compensation for the unlawful and unjustified termination of his employment as provided for under section 49(c) of the *Employment Act, 2007* Laws of Kenya of Kshs 275,310.
 - c) That the respondent to pay the claimant all the claims presented for normal overtime worked beyond the eight(8) hours stipulated in the *Employment Act, 2007* and *Labour Institutions Act*, number 12 regulations of wages order all of Kshs 1,163,042.95.
 - d) That the respondent pay the claimant all the claims presented arising from rest days for all the days worked over and above the six days provided for in the *Employment Act* and *Labour Institutions Act* of Kshs 775,361.96.
 - e) That the respondent to pay the claimant all the dues for gratuity of Kshs 137,652.
 - f) One-month salary in lieu of notice of Kshs 22, 942.



- g) Annual leave pay for the six years worked of Kshs 96,356.40.
 - h) Certificate of service.
 - i) Costs of this claim and interests on all the claims listed.
 - j) Any other relief that this court may deem necessary to grant.
2. The summary of the claim is that, he was employed by the respondent on February 1, 2010 as a general worker in the machine department, a position which he held until his termination on May 4, 2016.
 3. The circumstances leading to the said termination, is that on April 23, 2016, the claimant reported to work as usual for evening shift and were informed by Rosemary and Purity, the General manager and Human Resource manager respectively, that a grinder had been lost on the April 22, 2016 in the workshop department. They were instructed to proceed with their shift but to report to the administration on Monday morning where investigations would be carried out on the missing grinder.
 4. On Monday the April 25, 2016, the claimant reported to the respondent as directed and was questioned by several officers including; General Manager, Human resource manager and an officer from security department. Thereafter he was instructed to record a statement and proceed to work on the day shift, which he complied.
 5. The next day, while the claimant was at work, he was summoned by one Yvonne, the respondent's Accountant and instructed to disclose who had stolen the grinder, failure to which his services would be terminated. The claimant states that he informed the said Yvonne that he was suspecting, another employee called Chege though did not have evidence of the suspicion. He was immediately send back home until the grinder is found.
 6. On Friday that week, the April 29, 2016, being their pay day, the claimant went to collect his pay for the week but none was paid and instead the respondent directed him to report, the following week on the May 3, 2016. On May 3, 2016, the claimant together with his colleagues who had been suspected for the theft, reported to work and were ushered into Mr Ian Shaw's, company director, office, where they were further questioned and Mr Shaw insisted on being told who stole the said Grinder and since none of the employees knew who stole it but merely suspected Mr Chege, they were all fired.
 7. The Claimant states that they were directed to collect their dues the next days and on May 4, 2016 he collected his salary and left the respondent's employment.
 8. He contends that, during the pendency of the employment, he used to report to work at 7pm to 6am on night shift, whereby he was paid 599 from the time of employment on February 1, 2010 till June 1, 2015 where his pay was enhanced to Kshs 665.
 9. It is the claimant's case that the termination was unfair because it was not preceded by a notice or disciplinary process. Also that the reason for termination was on suspicion of theft which was never established by the respondent.
 10. He states that, in the six (6) years worked for the respondent, he was not allowed to take leave, neither was it paid for it.
 11. The respondent entered appearance and filed a response to claim on November 15, 2016 denying all the contents of the claim and stating that the claimant was employed as a casual labourer on need basis, therefore the employment was not continuous rather off and on depending on availability of work. It is stated that the claimant was deployed to drier department and paid on a daily basis.



12. The respondent states that on the April 23, 2016, it came to their knowledge that two of their grinders had been stolen the night of April 22, 2016. The issue was raised among all the employees who were working on the night shift when the said grinders were stolen. The respondent then carried out investigation into the loss of the two grinders and questioned all the employees on the night shift on the fateful night. Soon thereafter the respondent states that the claimant deserted his duties and he had to be called back by the Human Resource officer to record statements which he did on the April 25, 2016.
13. The respondent maintained that the claimant deserted work and none of the employees were fired as alleged. During the pendency of the claimant's employment, he was earning a daily wage of Kshs 484, working 8 hours' day shift and Kshs 665 for night shift, which he worked three hours' overtime, which was fully paid for.
14. The respondent contends that the claimant was not terminated and in fact that the outcome of the investigations into the theft of the two grinders is yet to be know since the matter was reported to Central Police Station on April 26, 2016 under OB Number April 26, 2016.

Hearing.

15. The claimant testified as CW-1 and adopted his witness statement which basically reiterates the claim herein. In Addition, he stated that he did not receive overtime pay as alleged by the respondent and the documents exhibit by the respondent do not bear his signature. He also testified that he worked 7 days in a week and never went for any off duty as insinuated by the Respondent.
16. Upon cross examination by Githiru advocate, the claimant testified that he worked daily as work was available daily. He denied the signature in the respondent's documents and stated that he does not have any document showing his dismissal from the respondent's employment. He stated that the Kshs 665 paid did not include overtime pay.
17. On re-examination the claimant maintain that he worked on daily basis and was never told he was a casual employee. Also stated that his case was not consolidated with Opondo's case and he has never been recalled to work.
18. The respondent's Director, Ian Shaw, testified as RW-1 and adopted hi statement. He testified that Philip was a casual employee who was employed in October, 2014, where he was paid on daily basis. That the claimant left employment on May 3, 2016. He testified that two grinders were reported missing from the store on the April 23, 2016 and investigations were carried out and the theft reported to police station, all this while all the employees who had been questioned continued working. He stated that the said claimant was never terminated and in fact between 2016 and 2020, the claimant has worked for them on several occasions.
19. He testified that the claimant worked daily from 6:30 pm to 6:30 am where he was paid Kshs 665, which included overtime pay. He stated that another case which had earlier been filed by another employee was dismissed and the said employee is still working for them as a casual.
20. Upon cross examination Tanga Advocate, RW-1 testified that the claimant was employed in October, 2014 not 2010. He testified that the Kshs 665 paid to the claimant on daily basis included overtime pay. He stated also that on the July 1, 2016, January 2, 2016 and February 1, 2016, the claimant was paid Kshs 1306 because he worked on holiday. He admitted that the claimant worked 3 hours overtime but could not explain the discrepancy on pay of Kshs 609 on the October 28, 2014. He stated further that the claimant was a NSSF paid up member.



Claimant's Submissions.

21. The claimant submitted that he was employed on February 1, 2010 and the allegation by the respondent that he was employed in October, 2014 is unfounded. He argued that since the date of employment is disputed, the respondent ought to have tabled evidence to ascertain the employment date of the claimant as provided for under section 9(2) and sections 10(6) & (7) of the *Employment Act*. In support of this argument, the claimant relied on the case of *David Kipkosgei Mutai v green Palms Academy* [2014] eKLR and the case of *Esther Muringi Wabome & 5 others v Cementers Buildings and Civil Engineering Contractors Limited* [2016] eKLR.
22. The claimant submitted that the Kshs 665 paid was his basis pay and not inclusive of overtime as urged by the respondent. He argued that the muster roll exhibited by the respondent was not signed by him, in any case that the signature appearing in various days are different.
23. On off duty, it was submitted that the claimant worked for the respondent continuously as such he was entitled to one paid rest day in a week, which was not given. He argued that even though RW-1 testified that he worked on need basis, the evidence before court is to the contrary, as such he prayed for off day pay for the years worked.
24. The claimant further submitted that he was terminated without notice or disciplinary hearing contrary to provisions of section 41 and 43 of the *Employment Act*, therefore that the termination was unfair. In this he relied in the case of *Peter Mutua Mwanzia v Mini Bakeries (Nairobi) Limited* [2016] eKLR
25. In conclusion, the claimant maintained that he was terminated and never deserted duty as alleged. He urged this court to find in his favour and allow the claim as prayed.

Respondent's Submissions.

26. The respondent submitted on five issues; whether the claimant was a casual labourer, whether a casual worker was entitled to one-month salary in lieu of notice, whether the claimant is entitled to gratuity sought, whether the claimant is entitled to rest days and leave pay sought and whether overtime claim is due.
27. On the first issue, it was submitted that the claimant was a casual worked and not an employee as per the definition of section 2 of the *Employment Act*. It was argued that the claimant was paid on a daily basis a fact which was admitted by the claimant in cross examination. Also that the claimant did not work full time but based on availability of work as seen in the muster roll produced before court. To support his case he relied on the case of *Ali Adrian v kapi Limited*; Nakuru ELRC Cause number 213 of 2016, where this court had found the claimant to a casual worker. He relied also in the case of *Rashid Mazuri Ramadhan and 10 others v Dosbi and Company (Hardware) Limited and another* [2018] eKLR , where the court held that;

“the respondents admitted that the appellants (the employees) were casual labourers employed on availability of work basis and were paid a daily wage as per the petty cash analysis that was produced in evidence....”
28. On the claim for one month pay in lieu of notice, it was submitted that the claimant was not terminated as alleged rather that the claimant absconded duty on his volition and being a casual worker couple with the fact that the machines that were used in the production were stolen, there was no work available for the claimant. It was further argued that the claimants in ELRC cause number 211 and 214 of 2016 have



all gone back to work, indicating that indeed there was no termination of their services. Additionally, that the claimant being a casual employee is not entitled to one month pay in lieu of notice.

29. On gratuity pay claimed, it was submitted that section 35(5) of the *Employment Act*, provides for gratuity pay for employees whose wage is paid on intervals not exceeding one month and the claimant being a casual labour cannot claim gratuity. In this he also relied on the case of *Ali Adrian Obondo V Kapi Limited*, where the court found gratuity pay without foundation as the claimant was not under employment contract to warrant such payment.
30. On the leave and rest day claim, the respondent submitted that the claimant, being a casual worker, never worked continuously for 12 months to deserve leave as envisaged under section 28(1)(a) of the *Employment Act*.
31. On overtime pay sought, it was submitted that the claimant did not give particulars of the number of days worked overtime, considering that he worked depending on availability of work and not on continuous basis. It was argued further that the claimant was paid a sum of Kshs 665 which was over and above the Kshs 432 which is provided for under Minimum wage order, 2013 that was applicable during the period the claimant was working for them, the extra pay covered any overtime pay earned as such the respondent does not owe the claimant any dues on this head. To support his claim, the respondent relied on the case of *Felix Odhiambo Mwai v PN Masbru Limited* [2017] eKLR.
32. In conclusion, the respondent submitted that the claimant has failed to prove his case contrary to the dictates of section 107 and 109 of the *Evidence Act*. On the flipside that they have demonstrated that the claimant was a casual worker, who was never terminated as alleged and that he was paid all his rightful dues earned. On that basis the respondent urged this court to dismiss the case herein with costs to them.
33. I have examined all evidence and submissions of the parties herein. The claimant's case is that he was terminated by the respondents on suspicion of being involved in theft.
34. The respondents contend that they never dismissed the claimant at all but that the claimant absconded duty and had to be called back to record a statement which he did on April 25, 2016.
35. There is evidence that the claimant worked for the respondent for long periods of time. The respondents aver that the claimant absconded duty but appeared on April 25, 2016.
36. There is no indication that after he reappeared as alleged, he was issued with any summons to show cause why he should not be dismissed for absconding duty.
37. Section 41 of *Employment Act, 2007* is clear on procedure to be followed before any termination for whatever reason. This procedure was not followed.
38. Section 45(2) of *Employment Act, 2007* also states as follows;
 - “ 45.
 - {1} A termination of employment 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 employee's 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”.

39. Whereas the respondent alleged the claimant absconded duty, there is no evidence to support this. Since also the claimant was not subjected to any disciplinary hearing, I find he was terminated unfairly and unjustly and I declare the termination as such.

40. In terms of remedies, I find for claimant and award him as follows;

1. 10 months salary as compensation for the unfair and unjustified termination = $10 \times 22,942 = 229,420/=$
2. 1 month salary in lieu of notice = $22,942/=$
3. Leave for year preceding termination as other period was time barred = $22,942/=$
4. Gratuity not payable as claimant was a member of NSSF.
5. Claim for overtime not proved and also one for holiday pay and is disregarded.

Total Payable = 275,304/=

Less statutory deduction

6. The respondent will pay costs of this suit with interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tanga holding brief for Getanda for Claimant – present

Oseko for Respondent – present

Court Assistant – Fred

