



**Mulika v Kenya Bus Service Management Limited (Cause 1865 of 2017)
[2022] KEELRC 3880 (KLR) (1 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3880 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1865 OF 2017
AN MWAURE, J
SEPTEMBER 1, 2022**

BETWEEN

JULIUS WANJALA MULIKA CLAIMANT

AND

KENYA BUS SERVICE MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. Julius Wanjala Mulika (herein the claimant) filed a memorandum of claim dated September 18, 2017 wherein he claimed that he had been unlawfully dismissed from employment by the respondent. He sought an order of reinstatement or in the alternative compensation as particularized hereunder:
 - i. One month's salary in lieu of notice Kshs 12,795.25
 - ii. Payment in lieu of untaken and unpaid leave for 6 years Kshs 52,022.034247
 - iii. Payment in lieu of unpaid travelling allowances for 6 years and 9 months
 - iv. Gratuity at the rate of one month's salary for each year worked Kshs 76,711.50
 - v. Twelve months' salary for wrongful dismissal Kshs. 153,543.00
 - vi. A declaration that the dismissal was unlawful
 - vii. Any other relief or orders the honourable court may deem fit and just to grant
2. The respondent filed its memorandum of defence dated July 10, 2018 which was responded to on August 9, 2018 by the claimant.



The Claimant's Case

3. The claimant avers that he was employed by the respondent as a casual permanent laborer in its cleaning department. His duties included *inter alia* cleaning the respondent's motor vehicles. He states he was employed in September 2009.
4. As an employee, he served dutifully and diligently for a period of 6 years and 9 months. During this period he was paid a consolidated salary of Kshs 12,795.25 (Kshs 412.75 per day). Despite serving with a clean record, the claimant was summarily dismissed on May 30, 2016.
5. The claimant states that on March 3, 2016 a lorry brought stones and he with others were asked to offload it. During the process, the lorry rolled backwards and crushed him and was injured. His medical bill was settled by the company, he states.
6. He says that on May 30, 2016 he was summarily dismissed. The claimant contends that the dismissal was unlawful since it did not follow the due process. He was neither given a letter to show cause nor a notice of termination. He claims he was not afforded a hearing before dismissal. The respondent did not also give him any reason for termination.

The Respondent's Case

7. The respondent states that the claimant was engaged on piece rate contracts that provided the rate of pay per work done. It denies that the claimant was on a fixed monthly salary of Kshs 12795.25. It also states that the claimant has not adduced any evidence supporting his position.
8. In its memorandum of defence, the respondent confirms that the claimant got injured on March 3, 2016 and was admitted at Melchizedek Hospital on the same day until March 16, 2016. The claimant was found to be suffering from severe pain and was unable to ambulate. The respondent settled the Kshs 289,645 hospital bill for the claimant.
9. He therefore could not have possibly been at work any time for him to be summarily dismissed. The respondent states that it would be unimaginable for it to settle the claimant's hospital bill only for it to summarily dismiss him. It is the respondent's contention that the claimant did not seek any work from them after the accident but instead chose to file the present suit.
10. The respondent's states that the claimant is not entitled to any of the prayers sought since there was no termination and that he was working on piece rate terms.

Claimant's Submissions

11. The claimant states he was unfairly dismissed from his employment without any plausible reasons when he got injured while working for the respondent on March 3, 2016. He says further he had contracts of employment and so was under expectation to continue being offered contract of employment by the respondent.
12. The claimant has cited several authorities *inter alia* case of Kenya Union of Commercial Food And Allied Workers Ltd v Meru North Farmers Sacco Limited [2013] eKLR where court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right. He claims he was not given any valid reason for termination and was also not accorded a hearing.
13. The claimant further in his submissions states he was a permanent employee of the respondent and this is affirmed by the fact that he was subject to disciplinary proceedings by the respondent and was



guaranteed of work on daily basis. He had no freedom to do any other work outside the respondent's employment and so avers he had a contract of service with the respondent and prays for compensation.

14. The court did not have the benefit of the respondent's submissions despite being given leave to file its submissions.

Issues For Determination

15. After careful perusal of the file, the court has framed the following as issues for determination:
 - i. Whether the claimant was an employee of the respondent.
 - ii. Whether there was termination and was it lawful.

Whether The Claimant Was An Employee

16. The court seeks to understand whether the claimant was a regular employee or a casual labourer. As per section 2 of the *Employment Act 2007* an employee is as a person employed for wages or a salary and includes an apprentice and indentured learner. It also 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.
17. From the above definition it is imperative that we look at the terms of engagement between the claimant and the respondent herein. On the one hand the claimant avers that he was a regular employee as he was always paid Kshs 12,795.25 per month while on the other hand, the respondent states that he was always paid per day as he was engaged on piece rate contracts. None of the parties has tendered any evidence in court supporting their individual position regarding payment.
18. What seems to be clear to the court is that there existed an employer-employee relationship between the two parties. 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”

19. The court invokes section 37 of the *Employment Act*. In that regard, it is of the view that the claimant cannot be deemed to have been a casual labourer. From the evidence on record as per his contract of appointment produced before the court the claimant had been working for the respondent from November 1, 2012 until he was injured in 2016. Section 37 (1) to (3) of *Employment Act* 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 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.
20. The court relies on the case of 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.”

21. Additionally, on the issue of conversion of status of employment under section 37, learned judge 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.”

Having found that the claimant was a regular employee of the respondent, the court proceeds to deal with the second issue for determination that is whether there was the termination and was it lawful.

Whether There Was Termination And If So Was It Lawful

22. It is the claimant’s contention that he was summarily dismissed from employment on May 30, 2016. The respondent however maintains that it did not dismiss the claimant.
23. When a claimant alleges unlawful termination, it his or her statutory duty to place before court *prima facie* evidence that the same occurred. In the present case, the claimant alleges that he was unfairly terminated by the respondent as he was neither given notice nor a chance to be heard. 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.”

24. Section 47(5) is interpreted 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*.

25. The court having found the claimant was a service employee of the respondent also finds the claimant was separated from employment in unclear circumstances. He says he was terminated on May 30, 2016 but does not give specific conditions on why he was terminated. All he says is that he was injured on March 3, 2016 by a bus of the respondent while in the respondent's employment. The evidence adduced is that the claimant was admitted in hospital until March 16, 2016 and the respondent paid his entire medical bill amounting to Kshs 289,645/-
26. He says when he attempted to go to work on May 30, 2016 he was summarily dismissed from work. The employer should not dismiss an employee on ground of ill health. In the case of *Kenya Plantation and Agriculture Workers Union v Rea Vipingo Plantations & another* [2015] eKLR it was held
- “where an employee is injured or taken ill during employment the employer has an obligation to reasonably accommodate the employee...”
- The essence of this is that an employer should not dismiss an employee on basis of ill health. If anything he should even give such an employee alternative employment within the same enterprise.
27. In that case the respondent should not have dismissed the claimant simply because he could not ambulate. Under the circumstances the court finds the claimant was unfairly terminated and hence judgment is entered in his favour.

Remedies

28. Having entered judgment in favour of the claimant he is awarded the following reliefs:-
- a. One month salary in lieu of notice Kshs 12,795/25
 - b. Untaken leave for 6 years and 3 months not proved as there is no prove how many years claimant worked and so is declined.
 - c. Payment of unpaid travelling allowance is unspecified and is not proved and so is declined.
 - d. Payment of service pay; years served as earlier explained is not proved and so even service pay is not proved and is declined.
 - e. As for compensation for unlawful termination I will fairly award him 4 months equivalent of the years worked amounting to Kshs 51,181/-.
 - f. Costs are awarded to the claimant
 - g. Interest is also awarded at court rates from date of judgment till full payment.
- Total awarded is Kshs 63,976.25

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 1ST DAY OF SEPTEMBER 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 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 [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.

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

ANNA NGIBUINI MWAURE

JUDGE

