



**Mutinda v Tononoka Rolling Mills Limited (Cause 330 of 2017)  
[2022] KEELRC 12998 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12998 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 330 OF 2017  
SC RUTTO, J  
OCTOBER 28, 2022**

**BETWEEN**

**VINCENT MUEMA MUTINDA ..... CLAIMANT**

**AND**

**TONONOKA ROLLING MILLS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant states through his memorandum of claim that he was employed by the respondent from April, 2009, as a tongs man, with his last salary being computed at the daily rate of Kshs 654.00. That in the month of December, 2015, the respondent took a christmas break and notified all employees to report back in January, 2016. That upon reporting back, the claimant was informed by the respondent's supervisor that his services were no longer required.
2. The claimant has thus termed the alleged actions of the respondent as amounting to unlawful termination. As a result, he claims against the respondent several reliefs including one month's salary *in lieu* of notice, unpaid house allowance, service gratuity and compensatory damages.
3. Responding to the claim, the respondent avers that the claimant was a casual labourer whose engagement was based on availability of work. That between November 17, 2014 and December 17, 2014, the claimant was employed on a fixed term contract earning a monthly salary of Kshs 11,200,00 together with house allowance of Kshs 1,679.00. That upon expiry of the said contract, the claimant declined to sign any further term contract hence was engaged on a casual basis depending on availability of work. That in the month of January, 2016, the claimant was not reengaged due to non-availability of work. That he was therefore not terminated unlawfully. The respondent denied owing the claimant money and urged the court to dismiss the claim with costs.
4. The matter proceeded for trial on June 9, 2022 and both sides presented oral evidence.



### **Claimant's Case**

5. At the commencement of the hearing, the claimant testified in support of his case. He proceeded to adopt his witness statement and the bundle of documents, filed together with his claim to constitute his evidence in chief. The claimant further produced the said documents as his exhibits before court.
6. It was the claimant's testimony that when he reported to work in January, 2016, after Christmas, he was informed by one Samwel Muema, a supervisor in the respondent company, that his services were no longer needed. That according to him, this amounted to unfair termination. That he was not issued with a notice of intention to terminate his services and due process was ignored in terminating his employment. That throughout his employment, he was not provided with housing or paid house allowance. That further the respondent made service gratuity deductions from his salary for a period of 11 months but failed to remit the same to the relevant authorities.

### **Respondent's Case**

7. The respondent's testimony was presented through Ms Elsa Okumu who testified as RW1. She identified herself as the respondent's Human Resource Manager. She also adopted her witness statement and the documents filed on behalf of the respondent to constitute her evidence in chief.
8. It was RW1's testimony that the claimant started working for the respondent from 2009. That he only worked continuously for one month and thereafter he was engaged whenever there was work. That the claimant was not always at work, for instance, in the event of loss of power or machine breakdown.
9. It was her further testimony that the claimant was not reengaged in January, 2016 due to non-availability of work. That the respondent paid leave pay for casual employees at the end of every year or as agreed with the individual employee. That the claimant was paid all his dues including leave and service pay in respect of all the days worked in the year 2015. That the claimant's gross earnings in December, 2015 was inclusive of notice pay. That all his other leave and service pay entitlements for the period worked had been paid.
10. RW1 further testified that the daily wages paid to the claimant was inclusive of house allowance. That his salary was not fixed and was paid according to the days worked.
11. She further stated that on November 27, 2014, the claimant was issued with a warning letter for leaving work without permission and causing stoppage of production. That further, all his statutory deductions were duly remitted to the relevant authorities. In concluding her testimony, RW1 asked the court to dismiss the claimant's suit with costs.

### **Submissions**

12. It was submitted on behalf of the claimant that he was summarily dismissed for no reason and without due process. That the respondent's argument that the claimant was engaged as a casual had no basis in fact, as there was no record to show when he was engaged.
13. On its part, the respondent, submitted that the claimant was engaged on a casual basis as he declined to sign a formal contract. That the respondent complied with the provisions of sections 35 and 41 of the *Employment Act* on terminating the claimant's employment. That the claimant had not discharged the burden placed on him under section 47(5) of the *Employment Act*.



## Analysis And Determination

14. Flowing from the pleadings, the evidence on record, as well as the rival submissions, the following issues stand out for determination by the court:
- a. What was the nature of the employment relationship between the parties?
  - b. Was the claimant unfairly and unlawfully terminated from employment?
  - c. Is the claimant entitled to the reliefs sought?

## The Nature Of The Employment Relationship Between The Parties

15. It is the respondent's case that the claimant was engaged on a casual basis depending on the availability of work. Section 2 of the [Employment Act](#) (Act) defines a "casual employee" 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”.
16. What this means is that a casual employee is engaged for twenty four hours at a time. In terms of 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.
17. Pursuant to the section 37 of the [Employment Act](#), engagement on a casual basis may be converted to a regular term contract. Such conversion entitles an employee who was erstwhile serving on a casual basis 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.
18. Section 37 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.
  - (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.
19. Turning to the case herein, the respondent exhibited a schedule of payments being final payments for its casual employees in respect of 2009, 2011 and 2012. It is notable that the schedule of payments in respect of 2012 indicates “5” in a column titled “full months worked”. The schedule further shows leave due to each employee per month for the entire year. In this regard, the leave due to the claimant in respect of 2012, was 8.75 days.
20. Further, it bears to note that the claimant’s pay for December, 2015 was inclusive of notice pay. Indeed, RW1 admitted that the claimant was given a verbal notice in December, 2015.
21. What is apparent from the foregoing, is that although the claimant was regarded as a casual employee, his engagement with the respondent did not seem as much. The hall mark of employment on casual terms is that it is terminable at the end of the day by either party. Put another way, there is no assurance of future reengagement.
22. In this case herein, the engagement between the claimant and the respondent seemed to go beyond 24 hours. For instance, why would the respondent pay the claimant notice pay in December, 2015 before disengaging him? This is rather odd bearing in mind that casual employment is terminable without notice at the end of each day.
23. The payment of notice pay to the claimant and leave days therefore implied that the engagement went beyond what would ordinarily characterize an employment on casual terms.
24. It is also worth noting that despite the respondent’s assertions that the claimant was a casual employee, it did not adduce evidence in the form of an attendance register or muster roll to prove that the claimant’s attendance to duty was intermittent. In any event, the payment schedules exhibited by the respondent confirm that the parties’ engagement was anything but casual.
25. In light of the foregoing, the court is enjoined under section 37 of the *Employment Act*, to declare the claimant as having been converted from a casual employee to one employed on regular terms hence entitled to all the rights and safeguards under the Act.
26. On this issue, I concur and reiterate the determination by the Court of Appeal in the case of *Nanyuki Water & Sewage Company Limited v 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.”

27. I now move to determine whether the claimant’s termination was fair.

### **Unfair And Unlawful Termination?**

28. It was not in contest that the claimant was disengaged by the respondent in the month of January, 2016 for what it has termed as non-availability of work.



29. Pursuant to sections 43, 45 and 41 of the 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. This is the legal threshold applicable in determining whether an employee's termination was fair or not.
30. Under section 43(1) of the Act, an employer is required to prove the 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. Section 45 (2) (a) and (b) of the Act provides 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.
31. Therefore, the pertinent question in this case is whether the respondent had a valid reason to terminate claimant's contract of employment. As stated herein, the reason for the claimant's termination was non-availability of work. No evidence was adduced by the respondent to prove this fact. All it did was assert that the claimant was a casual employee hence it could let him go due to non-availability of work. There was therefore no justification for the claimant's termination.
32. In regards to procedural fairness, the reason given by the respondent for terminating the claimant was non-availability of work. It can thus be inferred that the reason fell under termination on account of redundancy. The following procedural requirements in respect of termination on account of redundancy are stipulated under section 40 (1) of the Act:
- (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.
33. Essentially, the respondent ought to have complied with the foregoing requirements if it was to let go of the claimant on account of non-availability of work. Except for payment of salary in lieu of notice and untaken leave days, it is evident that the respondent did not comply with the other requirements under section 40 (1) of the Act. Thus, the termination was rendered unlawful.



34. In total sum, the court finds that the claimant's termination was unfair and unlawful, having fallen below the threshold stipulated in the *Employment Act*.

#### **Available Reliefs?**

35. As I have found that the claimant's termination was unfair and unlawful, the court awards him six (6) month's gross salary as compensatory damages. This award is informed by the length of the employment relationship.
36. The claim for notice pay collapses as it is evident that the claimant was paid the same as part of his terminal dues upon exit from the respondent's employment.
37. The claim for service pay is declined as it is crystal clear that the claimant is a registered member of the National Social Security Fund (NSSF) hence falls within the exclusions under section 35(6) of the Act.

#### **Orders**

38. Accordingly, I enter judgment in favour of the claimant against the respondent and he is awarded compensatory damages in the sum of Kshs 117,720.00 which sum is equivalent to six (6) months of his gross salary calculated at Kshs 654.00 per day. Interest shall apply on the award at court rates from the date of judgement until payment in full.
39. The claimant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2022.**

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**STELLA RUTTO**

**JUDGE**

#### **Appearance:**

For the Claimant Mr. Namada

For the Respondent Ms. Nyaencha

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**

