



**Kathure v University of Nairobi (Cause 115 of 2018)
[2022] KEELRC 14661 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14661 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 115 OF 2018
M MBARŪ, J
OCTOBER 27, 2022**

BETWEEN

SELINA KATHURE CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

1. The respondent employed the claimant on 20th March, 2004 as a cleaner at the College of Education and Eternal Studies earning Ksh.527 per day and payable at month end for every 27 days worked without payment of a house allowance. The employment remained on oral terms.
2. The claimant worked until 24th December, 2017 when the respondent terminated her employment without notice or reasons or payment of terminal dues. The claimant had no disciplinary matter or a notice to show cause issued over any alleged misconduct contrary to Section 41 of the *Employment Act* and which resulted in unfair termination of employment.

The claimant is seeking the following terminal dues;

- a. One months' notice pay ksh.16,363.35;
- b. Salary for 24 days worked in December, 2017 at Ksh.12,648;
- c. Underpayments for the period of May 2017 to December, 2017 Ksh.18,760;
- d. House allowances for the period of March, 2004 to December, 2017 Ksh.352,167.75;
- e. Service pay for 13 years Ksh.791,314.70;
- f. Leave pay for 13 years ksh.171,811.50;
- g. Uniform refund for the duration worked;



- h. Off days for the duration Ksh.347,820;
 - i. 12 months compensation; and
 - j. Costs of the suit.
3. The claimant testified in support of his claim that upon employment by the respondent she worked continuously and without stoppage from the year 2004 to 24th December, 2017 when the respondent verbally terminated her employment without prior notice, hearing or payment of her terminal dues. On 10th October, 2013 the claimant was issued with a contract and the CBA without being issued with a copy as to the terms and conditions.
 4. The claimant also testified that the respondent in response has claimed that she was a casual employee but she was paid monthly until 24th December, 2017 when her employment was terminated verbally. The respondent purports to have issued 3 months contract but the claimant did not sign any contract or issued with a copy thereof and for 10 years she remained in the service of the respondent.
 5. The claimant called Grace Wambui Mbugua as her witness and who testified that she worked with the claimant after joining the respondent service in January, 2017 as a cleaner and together with the claimant; their employment was terminated on 24th December, 2017 without notice. Their wages would be paid based on a daily wage paid monthly.

Response

6. In response, the respondent's case comprise mere denials and that the claimant was engaged as an unskilled casual worker and the claims made for various terminal dues are without merit and should be dismissed. on 29th April, 2016 the claimant was issued with a letter of engagement for casual engagement for 3 months; on 20th July, 2016 the claimant was issued with letter of engagement as a casual worker and in the internal memo of 8th September, 2016 the claimant is listed as a casual worker.
7. In evidence the respondent called Harrison Akala the Deputy Registrar, Industrial Relations of the respondent and who testified that the claimant was fixed term contract for 3 months each and were non-renewable and the last contract ended in December, 2017. The claimant was not covered under the CBA to justify her claims based on the CBA terms and all her dues were fully settled at the end of the last term contract in December, 2017. Salaries were paid based on a daily rate which was inclusive of a house allowance.
8. At the close of the hearing, both parties filed written submissions which have been put into account and the issues which emerge for determination can be summarised as follows;
 - Whether there was unfair termination of employment;
 - Whether the remedies sought should issue; and
 - Who should pay costs.
9. The claimant's case is that she was employed by the respondent from 20 March, 2004 and worked continuously until 24th December, 2017 when her employment was unfairly terminated without notice or payment of terminal dues. The claimant was retained on a daily wage paid monthly and on 10th October, 2013 she was made to sign a contract but was not issued with a copy.
10. The respondent's case is that the claimant was an unskilled casual worker employed on 3 months fixed term contracts and paid her daily wages monthly. The last contract ended on 24th December, 2017 and



was not renewed. It was not automatic and the claimant was not unionised so as to benefits from the CBA in force.

11. The employer is the custodian of work records pursuant to Section 10 (6) and (7) of the [Employment Act](#), 2007 (the Act). upon the employment of the claimant, the respondent is legally bound to produce the employment records with regard to the alleged 3 months fixed term contract and the payments for the same. Section 10 (7) requires that;
 - (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
12. The respondent in response to the claim filed various letters allegedly with regard to the claimant's employment.
13. There is letter dated 29th April, 2016 a letter of offer for casual engagement. It is for a term of 3 months with effect from 1st May to 31st July, 2016.
14. The letter has provision for acceptance by the employee, the claimant but such part the writing is obliterated and not legible.
15. There is letter/internal memo dated 20th July, 2016 Engagement of casual Workers by the College Registrar directing all section heads that casual employees be engaged for 3 months.
16. The respondent filed letter dated 8th September, 2016 to suggest that the claimant was engagement as a casual employee but there is no acceptance of the same by the claimant.
17. Several other lists of casual employees have been filed without corresponding contracts issued to the claimant or her acceptance of any form of fixed term contract.
18. The claimant testified that on 10th March, 2013 she was issued with a contract which she signed but was not issued with a copy. The signed contract is not filed by the respondent.
19. As the employer, as outlined above, the respondent failed in a material way to ensure the claimant was under a written contract of employment. for the entire period of employment, the respondent was hence exposed since without a written contract of employment accepted and signed by the claimant save for the one issued on 10th March, 2013 the claimant became a protected employee under the provisions of Section 37 of the Act. She became entitled to rights and benefits secured under the law as of such date, 10th March, 2013 and any claims of unpaid dues accrue therefrom.
20. The claimant testified that she was not literate. In court she testified in Swahili assisted by her Advocate.
21. The documents and records filed by the respondent with regard to the claimant failed to address the claimant's circumstance and the fact that she was not conversant with the English language and which was applied in the alleged letters issued to her contrary to the mandatory provisions of Sections 9(4) of the Act that;
 - (4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands



And Section 35(3) of the Act that;

- (3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

And Section 41(1) of the Act to the effect that;

- (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.

22. The language of the employee is relevant and crucial in employment and labour relations hence the prominence given by the law as addressed above. The claimant's rights at work were not secured by the respondent as the employer.
23. Before termination of employment, the claimant was entitled to notice, a hearing and or justified and valid reasons leading to termination of employment which matters are lacking in this case under the respondent's false belief that the claimant was an unskilled casual employee and at the same time under fixed term contracts of 3 months which contracts have not been produced. This resulted in unfair termination of employment and the claims made shall be assessed on the merits.
24. Without a written contract, the claimant who remained in the continuous service of the respondent without stoppage was entitled to payment of wages under the Regulation of Wages (General) (Amendment) Orders.
25. As of December, 2017 the wage due to the claimant as a cleaner was KShs. 12,926.55 which is due in notice pay.
26. On the claim for pay for the 24 days worked in December, 2017 the respondent failed to file any records of such payment. Had such monies been paid at the end of employment, nothing would have been easier for the respondent but to file these records with the court.
27. On the due monthly wage of Ksh.12,926.55 for the 24 days worked, the claimant is entitled to ksh.10, and 340.80 for 24 days worked in December, 2017.
28. On the claimed underpayments from May, 2017 to December, 2017 the claimant claim is that she was paid ksh.527 per day for 27 days each month all being Ksh.14,229 while a monthly wage was ksh.12,926.55 under the Wage Orders meaning the respondent paid above the minimum wages and the alleged underpayment does not apply.
29. On the claim for house allowances from March, 2004 to December, 2017 the claimant having admitted that she was under a contract dated 10th march, 2013 she cannot backdate her claims to the year 2004 taking into account such contract changed her terms of employment until its lapse and after which there was no renewal and after which the claimant reverted to a protected employee.
30. The breakdown of the wages earned from the 10th March, 2013 to the last phase at ksh.527 is not outlined. On the analysis above, the claimant as at 24th December, 2017 was earning a higher wage than the minimum by Ksh.1,303 commensurate to a 15% payable in house allowance and to claim more would amount to unjust enrichment.



31. Service pay is due to an employee protected under Section 37 of the Act and where the employer fails to comply with the provisions of Section 35(6) of the Act. There is no evidence that the respondent was paying and or remitting statutory dues with regard to the claimant. For the period of 2013 to 2017 the claimant had 5 years the claimant is entitled to a service pay of 15 days' pay for every year based on the last due wage of ksh.12,926.55 being Ksh.6,463 x 5 all being Ksh.32,315 in service pay.
32. Annual leave with full pay is due to a protected employee and there is no record the claimant was allowed annual leave or payment in lieu thereof. For the 5 years the claimant was entitled to 21 days leave or pay in lieu and without taking the same, based on the basic pay and payment of ksh.9,048.20 x 5 all at ksh.45,241 in leave pay.
33. Every employee is entitled to work tool provided by the employer. The claimant is claiming various refunds for gum boots, gloves, dust coat, bar soap and tissue papers. Where the respondent failed to supply the claimant with the work tools, the claimant then had to purchase these items but she has not submitted any receipts for the purchase of these items. There was unfair termination of employment but for these items, specific proof was called for.
34. As a protected employee, the claimant was entitled to a day off weekly with full pay. there is no record of such right being secured and the claim for the same is due save this arose from 10th March, 2013 to 24th December, 2017 a total of 58 months with 4 days each total days being 232 days x a daily wage of Ksh.430 total being 99,961.
35. For the unfair termination of employment without good cause, notice or payment of the terminal dues, he claimant is entitled to compensation pursuant to Section 49 of the Act and the court finds a 3 months gross wage compensation at ksh.12,926 x 3 total of ksh.38,778 being appropriate compensation.

On the finding above, the claimant is entitled to costs of the suit.

36. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that employment terminated unfairly;
 - b. Compensation awarded at ksh.38,778;
 - c. Notice pay ksh.12,926.55;
 - d. Leave pay Ksh.45,241;
 - e. rest days at Ksh.99,961; and
 - f. Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

