



Kenya Union of Domestic, Hotels, Educational Institutions Hospitals and Allied Workers v Strami Cleaning Company (Employment and Labour Relations Cause 1451 of 2016) [2022] KEELRC 12908 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12908 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1451 OF 2016
AN MWAURE, J
OCTOBER 13, 2022

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
HOSPITALS AND ALLIED WORKERS CLAIMANT**

AND

STRAMI CLEANING COMPANY RESPONDENT

JUDGMENT

1. The grievant union filed the memorandum of claim dated the July 8, 2016 on the July 26, 2016 seeking various remedies from court for the 3 individual claimants. It is stated for the 1st claimant that she was employed by the respondent on June 1, 2008 as a tea girl with a consolidated salary of ksh 6,000/=. It is averred that this was an oral contract not reduced into writing and that she worked for the respondent until November 30, 2014 when she terminated her contract of employment issuing a one month notice to the respondent. That she received various salary increments of ksh 500/- per day and at the time of termination she was earning a salary of ksh 9,000/- per month. She says she never went on her annual leave as provided by the law. She says she is asking for her dues which the respondent has refused to pay.
2. The 2nd grievant says she was employed by the respondent on the January 2, 2002 as a cleaner with a consolidated salary of ksh 3,000/- and was later deployed as a tea girl/general worker in the office. She says that it was an oral contract which was not reduced to writing and that she terminated the contract through the letter dated the January 28, 2015 giving a one month notice to the respondent. She asserts she was earning a consolidated salary of ksh 9,000/- per month. She says she worked for the respondent for 13 years and did not go for leave in the years 2011 and 2013. She further says she has been asking for her terminal benefits in vain.
3. The 3rd grievant says he was employed by the respondent on March 1, 2000 as a cleaner with a consolidated salary of ksh 3,000/= vide an oral contract and he terminated his contract on June 29,



2015 giving a one month notice to the respondent. The respondent, he says, was reluctant to pay his dues. At the time of termination, he was earning a consolidated salary of ksh 9,000/=.

4. The claimants pray for the following as captured in paragraph 36 of the claim.
 - a. Unpaid leave
 - b. Salary underpayments

Respondent's case

5. The respondent filed a memorandum of appearance on the September 22, 2016 through the firm of RO Nyamweya & Co Advocates. The respondent filed a memorandum of reply on the October 12, 2016. The respondent avers that the 1st grievant was employed from June 1, 2005 to November 30, 2014 when she deserted employment and there was no contract in writing since she could get work periodically. The respondent says 1st grievant was paid all her terminal dues as per the contract which pay was commensurate with labour laws. The respondent further says the grievant was not entitled to annual leave since she worked periodically breaking for two weeks.
6. In relation to the 2nd grievant, the respondent also says there was no contract reduced to writing since the grievant could get work from the respondent periodically and that it was the grievant by an undated letter who terminated her services and was paid all her terminal dues as per the contract and commensurate with the labour laws. The respondent also says she was not entitled to annual leave since she worked periodically breaking for two weeks.
7. For the 3rd claimant the respondent says he was employed by the respondent as from March 1, 2000 to January 29, 2015 when he deserted employment. That the contract was not reduced to writing since the claimant could get work from the respondent periodically. The respondent says the claimant terminated his services to the respondent and was paid all terminal dues as per the contract and which is commensurate to the labour laws. The respondent says the 3rd claimant was not entitled to annual leave since he worked periodically breaking for two weeks.
8. The respondent maintains that it never sacked anybody and that the claimants requested to be discharged from their duties

Claimants testimony in court

9. CW1 Ngula Mwaniki testified under oath that he was employed on March 1, 2002 and was earning ksh 3,000/= initially but it was later increased to ksh 9,000/=. He says he was not getting bus fare to Thika Road and worked for the respondent till January 26, 2015 when he could not afford to work as he had no bus fare. He testified he gave one month notice by the letter which he filed in court. That after giving notices he received a letter accepting his resignation dated the February 2, 2015. He said the resignation and acceptance letter is also part of his documents brought to court. The court held the letter of acceptance to have been introduced too late in the day and so does not form part of the records.
10. He further stated that he was receiving his salary in cash but towards the end was receiving the salary in equity bank. He prays that the court grants him what he deserves to be paid. He says he deserves to be paid Ksh 9,780/= plus house allowance of Ksh 1,467/= totalling 11,247/= in 2012. He says was being paid Ksh 9,000/= so is praying for a difference of 26,964/=.
11. Upon cross-examination, he said that he has the termination letter but the same was not in the court file. He said that he resigned from work and that he was employed by Mine Mutula who was the



proprietor of Strami Limited and that he was a permanent employee. He said that he wrote the letter of termination and said it was because of pressure he was getting.

12. On re-examination he said that he was employed by Strami and Mine was the HR in the company. He says his resignation was accepted and was taken to Barclays by the supervisor. He stated he used to work for 6 days but would leave at midday on Saturday. He says that he learnt he was underpaid on joining the union in 2013 and further says he has a union card. The witness gave evidence on behalf of the 2 other claimants with the written consent.

Respondent's testimony in court

13. Respondent witness No 1 Nicholas Mulinge gave sworn testimony and said that she works for Strami Limited as Manager. He said that they used to work with the claimants. He said the claimants used to wash houses, offices and so on. He testified that they used to get jobs for cleaning through tendering and once they get tender, they would advertise for workers. He testified that in that way the three claimants were employed. He said those could last six months to one year. They would pay the workers in cash according to the respondent witness.
14. The witness further said that the contract they had with the Barclays bank ended after one year. He testified that they tried getting the claimants work at transnational house. That the claimants asked for leave which he says they gave them and paid their dues. That the claimants went on leave and on their way back they all resigned from work and did not say why they were resigning. The witness says that the claimants wanted to rest and did not write to demand unpaid dues. He also adopted the witness statement dated January 9, 2021 as his evidence in chief. He also adopted the documents in the respondent's list dated the January 9, 2021 as exhibits.
15. On cross-examination, the respondent witness said that he has worked with the respondent company from 1999 and so he knew the claimants as he was their manager. He says the claimants were casual employees and worked at Barclays-plaza for one year. The witness said that employment of the claimants depended on contract from the clients. He further said that their contracts were oral. He further said that they used to pay the claimants weekly and not on a monthly basis but he said could not remember the daily rates. He mentioned and testified that they used to give leave days and would pay in lieu of leave but had no records. The witness was of the view that when the contract ended, the respondents wanted to give the claimants new assignments.

Decision

16. The parties filed written submissions which the court has duly considered together with the evidence adduced before court.

Claimant's submissions

17. The brief Submissions by the claimant are that the three grievants were members of the claimant (the union). They affirm they are represented by the union KUDHEIHA and have union cards. They further claim that the union which is registered with the Ministry of Labour is well mandated to represent workers.
18. They also say that the grievants were under paid by the respondents who did not comply with the government guidelines. They pray that the court orders they be paid what is rightfully theirs and also be awarded costs and interest.



Respondent's submissions

19. The respondents in its submissions which will be highlighted briefly avers that for a union to be recognised by the employer there must be a written agreement between the employer and the union. He says there is no evidence the union has complied with the requirement. His submissions therefore are that the union was not recognised by the respondent and has no capacity to institute legal proceedings against the respondents.
20. The respondent also submits that the grievants never worked continuously but worked as when need arose. It is the respondents averment that their employment never converted from casual employment to regular employment as provided in section 37 of Employment Act. Section 37 of the Employment Act provide:
- 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
21. As for the claim that the grievants were underpaid the respondent cite Kenya subsidiary legislation 2013 which provide that a cleaner in Nairobi is to be paid a rate of Kshs 480/- per day. They aver that the grievants contention for payment of Kshs 9,886.60 per month is unfounded and should fail. The respondent aver that the claimants have failed to establish any tangible evidence for their claim and urges the court to dismiss the same with costs.

Issues for determination

- a. Whether the claimants have legal standing to institute the proceedings
- b. Whether the claimants were casual employees
- c. Whether the claimants were underpaid.
- d. Whether the claimants qualified for any leave
- e. Who bears the cost.

Determination

22. The respondents in their submissions raise the issue that the claimant had no capacity to represent the grievants as it was not recognised by the respondent. The issue has been raised for the first time during the hearing. The capacity to sue in my view goes to the core of the suit as it underpins courts jurisdiction. It should have been raised as a preliminary objection. In *Oraro versus Mbaja (2005) 1 KLR 141* the court held that:

' A 'preliminary objection' correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary



objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from.

23. The respondent has not based the challenge on the capacity of the claimant union to sue on any material/ document before court and the point is not particularized and detailed to enable the court know the nature of the preliminary points of law raised. Also, the issue would require a finding by the court into whether there was a written recognition agreement. It was incumbent upon the respondent to raise the issue relating to non-availability of a recognition agreement in time with supportive material. The issue appears nowhere in the reply to the memorandum and there is no prior statement from any of the officers of the respondent that they did not recognise the union. It was raised for the first time during the hearing with no corroboration by respondent witness and also in the submission. Neither is there any other material on the face of the pleadings so filed in court from which the court can reach the conclusion that the grievant union was not recognised. The court finds that raising the issue of locus standi at the hearing and is not specifically pleaded is an afterthought and cannot be entertained by the court.
24. In any event if the union is registered by the Ministry of Labour and the workers as its members should be well mandated to represent its members. There should be no nexus between recognition of the union and representation of its members.
25. As to whether the grievant were casual workers within the meaning of section 37 of the [Employment Act 2007](#) the court interrogates section 37(1) of the Employment Court Act. Section 37(1) of [Employment Act](#) provides:-

' 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
- c. 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 under section 35(1) (c) of [Employment Act](#) shall apply to that contract of service.

26. The grievants employment converts into regular employment of contract of service where section 35 of the [Employment Act 2007](#) is applicable. Respondent witness one in his evidence in court in chief said they would normally advertise and would have the grievants work for 6 months or one year. In the memorandum of reply, the respondent says in relation to the claimant Eucabeth Akinyi that she was employed by the respondent from June 1, 2005 to November 30, 2014 but later on added that they would break the contract periodically. What comes out of all these is that the respondent at best appears to be saying that the claimants would be given short term fixed contracts as the need would arise but for a longer period than provided in section 37 (1) of the [Employment Act](#) thus converting to service contract.
27. This is a different thing altogether from saying that a particular worker is a casual. The court rejects the contention that the claimants were casuals within the meaning of section 37 of the [Employment Act 2007](#).



28. The respondent in his response states:
- a. Eucabeth Akinyi was employed on June 1, 2005 to November 2014.
 - b. Julian Akinyi from January 2, 2002 to January 28, 2015.
 - c. Ngula Mwaniki from March 1, 2001 to January 29, 2015. It is clear these grievants cannot under any standards be regarded as casuals.
29. It remains to be decided whether the claimants were underpaid in light of the decrees of the Labour Institution Act, 2007 (No 12 of 2007) as read with the derivative legislation thereto, that is the legal notice No 196 on the regulation of wages.
- Section 48(1) & (2) of the *Labour Institutions Act* provides that (1) notwithstanding anything contained in this Act or any other written law:-
- a. The minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement.
 - b. If the contract of an employee to whom the wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulations order, or provides for less favourable conditions of employment, than the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution of those terms.'
30. In *Cause Number 267 of 2018, Paul Mwakio versus Reliable Freight Services Ltd 2022 eKLR* the court held that:
- ' As 'correctly submitted on behalf of the claimant, employer-employee relationship is, more often than not, skewed with the scale tilted in favour of the employer when it comes to enforcement or negotiation of contracts. The respondent cannot argue that the claimant agreed to underpayment, and particularly when no agreement on waiver of the claimant's right was presented to court. The claimant is not barred from coming to this court and seeking relief on any proved underpayment'.
31. I have gone through the various regulations of wages amendments orders cited by the claimants and agrees that at all times they were underpaid below the minimum wage provided. The minimum monthly salary provided for under the 2013 order for instance is Ksh 9,780.95 without the house allowances which is higher than the Ksh 9000 provided for by the respondent for Eucabeth Akinyi and the other grievants. There is no attendance sheet provided on the breaks the claimants might have had whilst employed by the respondent and so are found to be regular employees.
32. On leave, only the employer would have proved whether or not the claimants took all their leave days through production of the necessary leave forms. No leave records are provided. There are equally no documentations from the claimants themselves to prove how they arrived at the figures in question. What is prayed for in my view takes the form of a special damage which the court cannot award in the absence of an explanation as to how the figures are arrived. The court is therefore unable to assess with certainty the amount of leave the claimants are entitled to. Courts cannot give an award in abstract. The prayer is therefore rejected.
33. The court is however unclear on how the claimants reached to the underpayment. The claimants are ordered to file fresh statements clarifying their underpayment clearly and make a presentation in court



with the support of the relevant regulations of wages order. The said statements to be presented in this court on November 14, 2022 to enable the court to make the final awards.

34. Costs are awarded to the claimants.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 13TH OCTOBER, 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 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.

ANNA NGIBUINI MWAURE

JUDGE

