



**Kwamboka & another v Public Service Board, County Government
of Nakuru & 2 others (Employment and Labour Relations Cause
140 of 2018) [2022] KEELRC 12894 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12894 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 140 OF 2018**

**HS WASILWA, J
OCTOBER 13, 2022**

BETWEEN

JACQUELINE SIEKEI KWAMBOKA 1ST CLAIMANT

JOB NYANGAU KENYANYA 2ND CLAIMANT

AND

**PUBLIC SERVICE BOARD, COUNTY GOVERNMENT OF
NAKURU 1ST RESPONDENT**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF NAKURU 2ND
RESPONDENT**

COUNTY GOVERNMENT OF NAKURU 3RD RESPONDENT

JUDGMENT

1. The claimants instituted this suit by a memorandum of claim dated May 10, 2018, alleging to have been unfairly terminated and seeking for compensation for the alleged unfair termination. They prayed for the following reliefs;
 - a. A declaration that their dismissals and/or termination of their employment was wrongful, unfair, unconstitutional and unlawful hence null and void *ab initio*.
 - b. An order for reinstatement or re-engagement of the claimants to employment with back pay and with no loss of seniority, privileges, salaries, allowances and benefits.
 - c. An order that the claimants be employed by the respondents on a permanent and pensionable basis.



- d. In the alternative to (b) & (c) above, compensation for unlawful and unfair termination equivalent to 12 months gross salary.
- e. In the alternative to (b) & (c) above and in addition to (d) above, payment in lieu of notice.
- f. An order for compensation by way of general damages to each of the claimants for unfair termination.
- g. Payment of the salaries retained by the respondents for the months they were unfairly dismissed.
- h. An order directing the respondents to remit all the statutory deductions on the claimants' salaries to their respective accounts.
- i. Costs of the claim.
- j. Interests on all the payments above if awarded, as from the date of judgment until payment in full.
- k. Any other or further relief that the court may deem fit to grant in the interest of justice.

Claimants' Case.

2. At all material times, the claimants were employed by the respondent as clerical officers, in Nakuru county, under the Ministry of Finance and Economic Planning.
3. That sometimes in the year 2014, the claimants applied for position of accountants in the Ministry of Finance, Nakuru county government, under the department of Revenue Reconciliation with the 3rd respondent. That interviews were conducted and the claimants emerged the best. They were then appointed *vide* the letters of appointment dated April 30, 2014, as clerical officers on casual terms with effect from May 5, 2014. Their basic salary was Kshs 15,606 and a house allowance of Kshs 1,725.
4. It is stated that the claimants worked for the respondent on the said casual terms for a few years and on inquiring about their employment status being converted to permanent, the chief officer, promised that their employment would be made permanent and pensionable with time. Subsequently, and following advertisements made for position to be filled on permanent and pensionable terms, the claimants tendered their application seeking for their employment to be converted to permanent terms, however the claimants were never considered, while employees who had less qualification were employed.
5. Sometimes on November 4, 2017, the claimants' services were abruptly terminated without any notice or hearing in total violation of section 41 and 43 of the *Employment Act* as read with articles 41 and 47 of the *Constitution*.
6. Prior to the said termination, on August 4, 2017, the claimants aver that they inquired, through their advocate, the reason why their employment had persisted on casual basis for over 3 years and urged the respondent to confirm them on permanent and pensionable terms. This letter was not received well by the respondents who instead of giving answer on the claimants' employment status, quickly terminated their services.
7. Upon termination, the claimants were not paid their November, 2017 salary or any of their terminal dues.



8. During hearing, Jacqueline Siekei, the 1st claimant, testified as CW-1 and adopted her witness statement of May 10, 2018
9. Upon cross examination by Abuya Advocate, the witness testified that she was employed as a casual employee in the department of finance. That he applied several times to be made permanent but the respondent did not confirm their employment even after working on casual basis for 3 years, over the statutory time of 6 months. She denied ever absconding duty and instead testified that she performed her duties with utmost diligence. She testified that she was called and informed that her services were no longer required and maintained that they were not paid November, 2017 salary or any terminal benefits upon the said termination.

Respondents' Case

10. The respondents entered appearance and filed a response to the claim on the October 11, 2018 denying all the contents of the claim. Instead it was stated that the claimants' were employed on casual basis depending on availability of work in the ministry of Finance and Economic Planning in Nakuru county government.
11. Contrary to the allegation by the claimants' the respondents aver that the salary given to the claimant was not subjected to any deductions and nothing was thus remitted as statutory deductions as alleged.
12. It is the respondent's case that the claimants' work ethic was wanting as it was riddled with desertion of duty, underperformance and absenteeism and despite several warnings, the claimants did not change their ways. That their behaviour was one that could have attracted summary dismissal contemplated under section 44(4) of the [Employment Act](#).
13. It was therefore contended that the claimants were not confirmed on permanent terms due to the nature in which they carried out their duties as casual employees, therefore that the respondents cannot be faulted for not absorbing them into their employment on permanent basis.
14. The respondent did not call any witness in support of their case.

Claimants Submissions.

15. The claimants submitted on two issues; whether the claimants were unfairly terminated and whether they are entitled to the reliefs sought.
16. On whether the termination was unfair, it was submitted that the claimants were engaged as clerical officers on casual basis for three years without their employment being confirmed. They were later terminated without any notice or hearing contrary to the provisions of the [Employment Act](#). To support its case they relied on the case of [Mary Chemweno Kiptui v Kenya Pipeline Company Limited](#)[2014] eKlR, where the court held that;

“section 41 of the [Employment Act](#) is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”



17. It was submitted that the claimants were victimized for seeking to have their employment converted to permanent by the letter dated August 7, 2017, and instead of the said confirmation being made, the respondents terminated their services without reason. The allegation of absenteeism and underperformance by the respondents were not backed with any evidence to justify the said termination as such their allegations remained as such and the facts by the claimants ought to stand. To support this argument the claimants relied on the case of *Juliana Mulikwa Muindi v Board of management Yangua Mixed secondary School & another* [2018] eKLR, where the court relied on the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001 Lesiit J expresses herself as follows;

“It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.”

18. Accordingly, that since there was no substantiated reason for terminating the services of the claimants, their termination was unfair as contemplated under section 45 of the *Employment Act*. To support this position they relied on the case of *Kenfreight (E.A) Limited v Benson K Nguti* [2019] eKLR and the case of *Michael Odbiamba Opiyo v Bidco Africa Limited* [2021] eKLR, where the court held that;

“The employer has to exercise a lot of caution during the steps that lead up to the said termination so that the process does not appear cosmetic. Specifically, an employer must not ambush the employee. The employee must be given adequate time prepare his defence, gather his evidence, and consult with the colleague or union official whom he chooses to accompany him during the disciplinary hearing.”

19. On the reliefs sought, the claimants submitted that having proved its case to the required standard and with absence of any contradicting evidence by the respondents, the claimants ought to be allowed as prayed.

Respondents’ Submissions.

20. The respondents submitted on similar issues; whether the termination of the claimants was unfair and whether the claimant are entitled to the reliefs sought.

21. With regard to the first issue, the respondent cited the case of *Joseph Mwaniki Nganga v United Millers Limited* [2022] eKLR where the court held that;

“The question for this court then become whether these are valid and fair reasons for an employer to terminate an employee. Section 43(2) of the *Employment Act* defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee. In the case of *British Leyland UK Ltd v Swift* (1981) IRLR 91 Lord Denning described the test of reasonableness in the following words:

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be



quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

22. Accordingly, it was argued that the test is that of reasonableness in determining whether the actions of the employer was justified in terminating the services of the employee. Additionally, that the termination of the claimants services was justified in the circumstances.
23. On the reliefs sought, it was submitted that that the claimants should not be reinstated since the cause of action arose more than 3 years ago as such the said relief is no longer available for the claimants.
24. On compensation for the unfair termination, it was submitted that the termination of the claimants was reasonable, lawful, procedural and fair in the circumstances. In this they relied on the case of *Joseph Mwaniki Nganaga* (supra) and the case of [Samuel Kalomit Murkomen v Telkom Kenya Limited](#) [2017] eklr.
25. On costs, it was submitted that costs follow event and urged that since the claimants have failed to prove their case to the required standard, costs be awarded to the respondents.
26. I have examined all evidence and submissions of the parties herein. The claimant’s evidence is that they were employed by the respondents as casuals *vide* letters of April 30, 2014.
27. The said letters were exhibited in court. Indeed the claimants served on these casual basis with effect from May 5, 2014.
28. They aver they served continuously from that moment and later requested to be confirmed on permanent and pensionable terms *vide* a letter of August 4, 2017 but there was no response.
29. They aver that they were finally terminated in November 2017 and were not paid their November 2017 salary.
30. Section 37 (1) of the [Employment Act](#) 2007 states as follows;
 - “37. Conversion of casual employment to term contract
 - (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”.
 - (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,
- (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”.
 - (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,
31. The law envisages that an employee can remain as a casual for periods not exceeding 3 months but where the work to be performed exceeds this period, then the employees terms of engagement convert to permanent and pensionable terms where provision of section 35 (1) (c) apply.
32. In the case of the claimants, they served continuously for over 4 years.
33. They were never converted to permanent and pensionable terms. The claimants exhibited evidence that the respondents submitted remittances for NSSF and NHIF in a continuous period. It is therefore my finding that these claimants having served for all the said period from 2014 to 2017, their terms of engagement converted to permanent and pensionable terms and if the respondents were of the view that the claimants be dismissed then they were to be subjected to a fair disciplinary process as per section 41 of the Employment Act 2007 which states as follows;

“41. Notification and hearing before termination on grounds of misconduct

- (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.
- (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.
- (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.
- (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.



34. The claimants were never taken through any disciplinary process and I therefore find their termination was unfair and unjustified as per section 45(2) of the Employment Act 2007 which states as follows;-

“ 45. (1).....

(2) 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”.

35. The respondents tendered no evidence before court and therefore the claimant’s case remained uncontroverted.

36. They indeed filed a defence and submissions but these remained as mere pleadings which are not evidence.

37. As concerns remedies to grant, I find for claimants and i award each claimant as follows;-

- 1. 1 month salary *in lieu* of notice = 17,331/=
 - 2. 12 months compensation for the unfair and unlawful termination = 12 x 17,331 = 207,972/=
 - 3. November 2017 salary = 17,331/=
- Total = 242,634/=**
- 4. The respondents to remit all statutory deductions to NSSF not remitted.
 - 5. The respondents will pay cost of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF OCTOBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kahiga for Respondents – present

Njogu for Claimants – present

Court Assistant – Fred

