



REPUBLIC OF KENYA



KENYA LAW
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**Ouma v Steel Makers Limited (Cause 259 of 2015)
[2022] KEELRC 12737 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12737 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 259 OF 2015
MA ONYANGO, J
OCTOBER 4, 2022**

BETWEEN

DENNIS ODUORI OUMA CLAIMANT

AND

STEEL MAKERS LIMITED RESPONDENT

JUDGMENT

1. The claim herein was instituted vide the claimant's Memorandum of claim dated 3rd February, 2015 and filed in Court on 26th February, 2015. It is the claimant's averment in the Memorandum of Claim that he was employed by the Respondent herein on 1st December, 2011 as a casual labourer earning Kshs.462/- per day translating to Kshs.13,840/- monthly.
2. He further averred that he was never issued with any appointment letter or an employment contract for the time he was under the Respondent's employment.
3. The Claimant averred that during the subsistence of his employment with the Respondent he performed his duties diligently and to the Respondent's satisfaction until 27th June, 2013 when his employment was unlawfully and unfairly terminated without just cause or notice.
4. In the claim he prays that judgment be entered in his favour against the Respondent as follows: -
 - i. Unfair termination Kshs.143, 280
 - ii. Notice Kshs.11,940
 - iii. Service Pay Kshs.11,940
 - iv. Leave Pay Kshs.23,880
 - v. Overtime Kshs.424



Total Kshs.191,464

- vi. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order.
 - vii. Any other just and equitable relief as this Honourable Court may deem appropriate.
5. The Respondent filed its Memorandum of Defence on 17th September, 2015 in which it admits having engaged the Claimant on casual basis earning a daily wage of Kshs.349/-. The Respondent avers that the Claimant was engaged on and off for a period not exceeding 1 year contrary to his averment in the memorandum of claim.
 6. The Respondent further avers that the Claimant's employment was never terminated as alleged and that it does not owe him any terminal dues as claimed in his Memorandum of Claim. It is the Respondent's contention that the Claimant failed to present himself at the Respondent's premises alongside other casuals for consideration.
 7. In conclusion the Respondent urged this Court to find the Claim devoid of merit and prays that the same be dismissed with costs to the Respondent.

Evidence

8. This matter was thereafter scheduled for hearing on 4th December, 2019 and 30th November, 2021 with the Claimant testifying as CW1 and the Respondent calling one witness RW1 who testified on its behalf.

Claimant's Case

9. CW1 adopted his witness statement dated 3rd February, 2015 and a further statement dated 26th April, 2019 as his evidence in chief. He testified that he worked for the Respondent continuously despite not being issued with any documentation to confirm his employment.
10. He testified that he was asked to deposit his national identification card at the gate every time he reported for duty. He further testified that he worked for 7 days in a week from 7 am to 7 pm.
11. CW1 testified that he reported to work as usual on 27th June, 2013 and was informed that the management had left instructions that no one was to be allowed into the premises.
12. On cross examination CW1 stated that he was employed in the position of a runner and that his role involved holding hot metal rods and placing them on the cooling belt.
13. He testified that he was paid at the end of each working day and that he would sign upon receipt of payment. He testified that on the day of his employment was terminated, he was not allowed into the Respondent's premises. He further testified that he was informed by the Respondent's security guard that the only members that were allowed to get into the Respondent's premises were those who had received calls earlier.
14. On re-examination CW1 stated that he was not trained prior to his recruitment but received instructions from his supervisor on how to work. He further stated that he was paid overtime whenever he worked overtime. That all payments were made in cash and that he signed to confirm receipt of such payment on the Respondent's signing sheet.



Respondent's Case

15. RW1, James Murigi adopted his witness statement dated 10th May, 2019 as his evidence in chief. RW1 adopted the list and bundle of documents dated 10th May, 2019 as exhibits in this matter.
16. RW1 admitted that the Claimant was a casual employee and that his wages were paid on a daily basis as evidenced by the signed daily wage sheet. RW1 further testified that the Claimant's daily wage as indicated in the wage sheet was Kshs.336/-.
17. RW1 denied the Claimant's allegation that he was denied entry into the Respondent's premises and maintained that the casual staff were only picked on a needs basis.
18. RW1 contended that the Claimant is not entitled to notice as his wages were promptly paid at the end of each day of service. He further contended that the Claimant is not entitled to leave pay, service pay and overtime.
19. RW1 denied the allegation that the Claimant was unfairly and unlawfully terminated by the Respondent and urged this Court to dismiss the Claim in its entirety with costs to the Respondent.
20. On cross examination, RW1 stated that the Claimant worked as a casual employee for a period of one and a half years. He further stated that the Claimant was paid a daily wage of Kshs.336/- which amount was later increased to Kshs.349/-.
21. On re-examination RW1 stated that the Claimant was not engaged continuously despite the fact that he worked for a period of one and a half years.

Claimant's Submissions

22. The Claimant submits that he was a victim of constructive dismissal as he was denied access into the Respondent's premises without prior communication and/or notice or payment of his terminal dues. To buttress this argument the Claimant relied on the case of [*Coca Cola East & Central Africa Limited v Maria Kagai Lugaga*](#) [2015] eKLR on constrictive dismissal.
23. The Claimant further submitted that having worked as a casual labourer for a continuous period of one and a half years his engagement was converted into a term contract in line with the provisions of Section 37 of the [*Employment Act*](#), 2007. For emphasis the Claimant cited the case of [*Francis Ndirangu Wachira v Betty Wairimu Maina*](#) (2019) eKLR and [*Kesi Mohamed Salim v Kwale International Sugar Co. Ltd*](#) (2017) eKLR where the Court held that where there is evidence of continuous service for a casual labourer the engagement falls under the ambits of Section 37 of the [*Employment Act*](#).
24. The Claimant further submits that the Respondent failed to provide him with an employment contract and/or appointment letter despite the fact that it retained his services for one year and a half contrary to the provisions of Section 10 of the [*Employment Act*](#), 2007. For emphasis he cited the cases of [*Peterson Guto Ondieki v Kisii University*](#) [2020] eKLR and [*Sikuku Nzuvi v Gacal Merchants Ltd*](#) [2015] eKLR.
25. The Claimant further submitted that the termination of his employment was unfair, unlawful, illegal and contrary to the mandatory provisions of Section 41 and 45 of the [*Employment Act*](#), 2007. To buttress this argument the Claimant relied on the findings in the cases of [*Charles Onchoke v Kisii University*](#), ELR Cause No. 24 of 2017, [*Francis Ndirangu Wachira v Betty Wairimu Maina*](#) [2019] eKLR and [*John Wafula Simiyu v Star Publications Limited*](#) [2016] eKLR on what constitutes fair termination.



26. The Claimant submitted that as a result of the unfair termination he is entitled to the reliefs sought in his Memorandum of Claim and urged this Court to allow the same as prayed. For emphasis the Claimant cited the case of Charles Onchoke v Kisii University (supra) where the Court held that where a Claimant has won a case for unlawful termination he is entitled to the reliefs sought.

Respondent's Submissions

27. The Respondent submitted that the claim of constructive dismissal lacked basis and therefore urged this Court to dismiss the same.
28. The Respondent submitted that the Claimant's engagement was on a casual basis and that there was no evidence availed to this Court for the conversion of the same to a term contract in line with the provisions of section 37 of the *Employment Act*, 2007. To fortify this argument the Respondent cited the Court of Appeal decision in the case of Mazuri Ramadhani & 10 Others v Doshi & Company Limited & Another [2018] eKLR.
29. The Respondent contends that no evidence has been availed by the Claimant to prove that he had worked for the Respondent for a continuous period of more than 30 days for conversion of his terms of engagement to apply. For emphasis the Respondent relied on the decision in the case of Josphat Njuguna v High Rise Self Group [2014] eKLR where the Court held that conversion is not automatic.
30. The Respondent submits that it had discharged its burden of disapproving that the Claimant was a permanent employee and the provisions of Section 45 of the *Employment Act*, 2007 do not apply in the circumstances.
31. The Respondent further submits that the Claimant has failed to discharge the burden of proving unfair termination as required under Section 47(5) of the *Employment Act*, 2007. The Respondent submitted that the instant claim is devoid of merit.
32. On the claim for unfair termination, the Respondent maintained that no proof for compensation has been made by the Claimant under this head.
33. On reliefs sought, the Respondent submitted that the Claimant is not entitled to any and urged this Court to dismiss the claim in its entirety with costs to the Respondent.
34. It is further submitted that the Claimant is not entitled to payment in lieu of notice by virtue of the fact that his engagement with the Respondent was on a casual basis.
35. The Respondent further argues that the Claimant is not entitled to service pay on the ground that he failed to prove continued service for more than one (1) year required for eligibility.
36. The Respondent further submitted that the Claimant is not entitled to any leave pay the same having been time barred under the provisions of Section 90 of the *Employment Act*. The Respondent argued that such a claim ought to be filed within 12 months which was not done.
37. The Respondent maintained that the Claimant admitted in cross examination having received overtime payment and thus cannot be compensated under this head.
38. The Respondent submitted that the claims raised by the Claimant are outrageous, lacked basis and therefore urged this Court to dismiss the Claim in its entirety with costs to the Respondent.



Analysis and Determination

39. I have carefully considered the pleadings, evidence, the written submissions and authorities cited by the parties. The following issues arise for determination:
- a) Whether or not the Claimant was a casual employees;
 - b) Whether the termination of the Claimant's employment was valid both procedurally and substantively;
 - c) Whether the Claimant is entitled to the reliefs sought.

Whether or not the Claimant was a casual employee

40. The *Employment Act* defines a casual employee 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.
41. The Respondent admitted that it engaged the Claimant as a casual and on a needs basis. The Respondent insisted that the engagement was between 29th December, 2011 and 2nd June, 2012 and produced copies of the Casual Labour Daily Wage Sheets to confirm the position. On cross examination RW1 testified that the Claimant worked as a casual labourer for one and a half years though not on a continuous basis.
42. The Claimant on the other hand maintained that he worked as a casual with effect from 1st January, 2011 up to 27th June, 2013 on a continuous basis. He further maintained that the Respondent neither issued him with an employment contract or appointment letter as proof of the terms of engagement.
43. The Claimant averred that his wages were paid in cash upon which he signed a wage sheet that was kept by the Respondent.
44. The Respondent did not adduce evidence to rebut the Claimant's evidence that he worked for 2½ years. It is the duty of the employer to keep and produce employment records to the Court. The Respondent should have produced all records of the period the Claimant alleges to have been in its employment to disapprove his averments.
45. From the foregoing I find that the Claimant was engaged by the Respondent for a period of two and a half (2½) years from January 2011 to June 2013.
46. Having worked continuously for more than one month, the Claimant was not on casual employment at the time of the termination of his employment. Section 37 of the Act provides for conversion of casual employment to term contracts as follows:
37. Conversion of causal 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.

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.
46. The terms of engagement of the Claimant automatically converted to monthly term contract upon completion of one month's continuous service by operation of the law. I therefore find and hold that the Claimant was not a casual employee.

Whether the termination of the Claimants' employment was valid both procedurally and substantively

47. The procedure for fair or lawful termination is provided for in Section 41 and 43 of the [Employment Act](#) 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.
 43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
48. Section 45 of the [Employment Act](#), 2007 prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and have valid reason for the termination.
49. Section 45 provides as follows:
45. Unfair termination
1. No employer shall terminate the employment of an employee unfairly.
 2. A termination of employment by an employer 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.
50. In this case the Claimant testified that the termination of his employment was unlawful, wrongful and unfair contrary to the express provisions of the [Employment Act](#).
51. The Claimant testified that there was no notice issued to him prior to his untimely termination. It was his evidence that he reported to work and was informed by the security guard that there was no more work for him.
52. There is no evidence adduced by the Respondent to prove that the Claimant was taken through any process termination as required under the mandatory provisions of Section 41 of the [Employment Act](#), 2007.
53. It is therefore my finding that the Claimant has discharged the burden of proving unfair termination of his employment by the Respondent as required under the provisions of Section 47(5) of the [Employment Act](#), 2007.
54. In the Court of Appeal decision in the case of [Kenfreight \(EA\) Limited v Benson K. Nguti](#) [2016] eKLR, the Court held that: -
- “It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”
55. Having found that the termination of his employment was unfair, the Claimant is entitled to salary in lieu of notice. He is further entitled to compensation for unfair termination under Section 49 of the [Employment Act](#), 2007.
56. He is also entitled one month’s notice or pay in lieu thereof.



57. I further award the Claimant leave pay. The Respondent did not adduce any evidence to rebut the Claimant's entitlement to the same.
58. The Claim for overtime is however dismissed as the Claimant admitted in cross examination that overtime was duly paid by the Respondent.
59. On damages for unfair termination the Claimants prayed for the maximum 12 months' salary as compensation. Taking into account all relevant factors as provided in Section 49(4) of the Act, compensation equivalent to five (5) months' salary is reasonable in the circumstances. I award accordingly award him same.
60. The Claimant testified that his daily wage was Kshs.462/-. However from the Daily Wages Sheet attached to the Respondent's list and bundle of documents the Claimant's last daily wage is Kshs.349/-. This Court will therefore tabulate the Claimant's award using a daily wage of Kshs.349/- and not Kshs.462/-.
61. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows:-
- i. Compensation for unfair termination
Kshs.349 x 30 = Kshs.10,470 as monthly salary x 5 months Kshs.52,350
 - ii. Pay in lieu of notice Kshs.10,470
 - iii. Leave pay Kshs.23,880
 - iv. Service pay at 15 days' pay per year worked Kshs.10,470
Total Award is Kshs. 97,170
 - v. The Claimant is awarded costs of the suit and interest shall accrue from the date of judgment until settlement in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF OCTOBER 2022

MAUREEN ONYANGO

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 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.

MAUREEN ONYANGO

JUDGE

