



Kitavi v Tononoka Rolling Mills Ltd (Employment and Labour Relations Cause 670 of 2016) [2022] KEELRC 13303 (KLR) (25 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13303 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 670 OF 2016
SC RUTTO, J
NOVEMBER 25, 2022**

BETWEEN

ANTHONY KITAVI CLAIMANT

AND

TONONOKA ROLLING MILLS LTD RESPONDENT

JUDGMENT

1. The claimant brought the instant suit vide his memorandum of claim dated April 21, 2016, which was later amended on April 21, 2016. The claimant avers that he was employed by the respondent on or about March 1, 2008. That he served with loyalty and diligence until December 23, 2015 when he was wrongfully and unlawfully terminated from employment. That he was not paid terminal dues following his termination. The claimant has termed his termination as manifestly unprocedural and unfair hence claims against the respondent the sum of Kshs 296,187.50 being one month's salary in lieu of notice, leave pay for eight years and compensatory damages.
2. The claim did not go unopposed. The respondent avers through its memorandum of defence dated June 16, 2016 that the claimant was engaged as a casual laborer depending on availability of work on diverse periods between the year 2010 and 2015. That the claimant was never in continual employment and though intermittent, the engagement ended in December, 2015. The respondent further denied terminating the claimant's employment. Consequently, the respondent has asked the court to dismiss the claimant's suit with costs.
3. The matter proceeded for hearing on May 16, 2022 and both sides presented oral evidence in support of their respective cases.



Claimant's case

4. The claimant testified as CW1 and at the outset, sought to rely on his witness statement together with the documents filed with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.
5. It was his testimony before court that he was employed by the respondent as a tongs man on March 1, 2008. That he was not issued with a letter of appointment and was earning a monthly salary of Kshs 15,000.00 at the time of his termination. That he was wrongfully and unfairly terminated on December 23, 2015 and was not paid terminal dues. That after his attempts to have the respondent pay his final dues failed, he visited the offices of Kituo Cha Sheria who in turn, issued a demand letter to the respondent. That the respondent was non-responsive to the said demand letter hence he moved the court through the instant suit.
6. The claimant further testified that at the time of his termination, the respondent informed him that his services were no longer required. That he was not given any notice or hearing prior being terminated from employment.
7. That while in the respondent's employment, he was a member of the National Social Security Fund (NSSF) and while the respondent would effect deductions from his salary, it never remitted his dues for 25 months between March, 2008 and March, 2010. That in some instances, the respondent failed to make full remittances of his dues.
8. It was the claimant's further testimony that during his employment with the respondent, he never proceeded on leave and worked from Monday to Saturday.
9. In closing his case, the claimant asked the court to allow his claim as prayed.

Respondent's case

10. The respondent presented oral evidence through Ms Elsa Okumu who testified as RW1. She identified herself as the respondent's human resource assistant. She proceeded to produce the documents filed on behalf of the respondent as exhibits before court.
11. Ms Okumu told the court that she knew the claimant as he was working for the respondent as a casual employee since March, 2008 and at the time, he was earning a daily wage calculated at the rate of Kshs 310.00. That the wages were paid on a weekly basis. That in 2014, the respondent introduced contracts from November 17, 2014 to December 17, 2014. That in 2015, the claimant declined to sign the contract hence he reverted to casual employment.
12. That in 2015, he was earning a daily wage rate of Kshs 759.00. That there would be breaks in the claimant's employment for instance during machine break downs or during the period he took personal leave. That the respondent paid leave for all its employees twice a year and the same was based on the full months worked.
13. It was her further testimony that the claimant left employment on December 23, 2015 and was paid all his dues, which he acknowledged receipt of. That in January of every year, the respondent is never certain as to whether it will take in casual employees.
14. With regards to the claimant's allegations to the NSSF dues, Ms Okumu stated that the respondent remitted all his dues for every day worked.
15. Concluding her testimony, Ms Okumu asked the court to dismiss the claim with costs.



Submissions

16. The claimant submitted that he had a legitimate expectation that his contract would be renewed in the month of January every year. That his termination was therefore premeditated based on assumptions and not reality on the ground. In support of his submissions, the claimant cited the case of [*Keen Kleeners Limited vs Kenya Plantation and Agricultural Workers Union \(2021\) eKLR*](#).
17. In further submission, the claimant stated that the respondent failed to prove a valid and fair reason for not renewing his employment contract.
18. On the other hand, the respondent submitted that the claimant left employment as he was employed on a casual basis hence was aware that his contract of employment depended on availability of work. That further, the claimant was notified that he would not be reengaged from January, 2016.
19. It was the respondent's further submission that the claimant had not discharged the burden placed on him under section 47(5) of the [*Employment Act*](#). That on its part, it complied with the procedure stipulated under the [*Employment Act*](#) in so far as the reasons for termination of employment were explained to the claimant. That as such, it acted in accordance with justice and equity in terminating the claimant's employment. To buttress its submissions, the claimant asked the court to consider the determination in the cases of [*George Onyango Akuti vs G4S Security Services Kenya Ltd \(2013\) eKLR*](#), [*Sarah Wanyaga Muchiri vs Rt Rev Bishop Henry Kathii & another \(2014\) eKLR*](#) and [*Nairobi ELRC Cause No 348 of 2016, Osore Sammy Mohan vs Tononoka Rolling Mills Limited*](#)

Analysis and determination

20. I have considered the pleadings on record, the evidence, as well as the opposing submissions and find that the court is being called upon to resolve the following questions:
 - a. What was the nature of the employment relationship between the parties?
 - b. Whether the claimant was unfairly and unlawfully terminated from employment.
 - c. Is the claimant entitled to the reliefs sought?
Nature of the employment relationship**
21. It is the respondent's case that the claimant's employment was not continuous and was dependent on availability of work. On the other hand, the claimant contends that he worked continuously from 2008 upto 2015. In view of this contest, it is imperative to evaluate the evidence presented by both sides alongside the applicable law.
22. The term casual employee is defined under section 2 of the [*Employment Act*](#) 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'.
23. Accordingly, an engagement on a casual basis is limited to 24 hours at a time and is terminable by either party at the end of every day. It does not go beyond one day. That is to say, tomorrow is never promised. This position is backed by section 35(1) (a) of the [*Employment Act*](#), which provides that such an engagement is terminable by either party at the end of the day, without notice.
24. Pursuant to section 37 of the [*Employment Act*](#), employment on a casual basis may however change and the employment relationship may metamorphosize to a regular term contract. Such conversion



is pursuant to proof that the employee has been engaged by the employer for a period aggregating to more than one month. The section 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.
25. The significance of the aforesaid provision is that where the terms of an employee who was previously engaged on a casual basis are converted to those of an employee on a regular term contract, then he or she becomes entitled to certain safeguards within the *Employment Act* for instance leave, termination by notice, protection from unfair termination, certificate of service etc.
26. In the case herein, the respondent exhibited a schedule of final payments for casual workers from 2008-2014. It has a column referenced 'full months worked'. In this regard, it indicates that in 2008, the claimant worked for one full month while in 2010, he worked for two full months and in 2012, he worked for five full months.
27. It is therefore evident that there are instances when the claimant worked for a full month.
28. It is also worth noting that the claimant's pay slip for the month of December, 2015, indicate that he had been given an advance payment in November in the sum of Kshs 1,500.00, hence the same was deducted from his pay. It is rather odd to have an employee on casual terms paid an advance as it is not guaranteed that he would be engaged in the subsequent days. This implies that the parties were in an employment relationship that was so structured as for the claimant to give an advance payment. This is presumably on the basis that he would be expected to work in the subsequent month. This is outside the character of an employment on casual basis.



29. It is also evident that the claimant was paid notice pay in the month of December, 2015. This is also uncommon in casual employment as I have stated herein, tomorrow is not guaranteed hence the issuance of notice does not raise.
30. Coupled with the foregoing, the claimant's NSSF statement indicate that the respondent made his remittances from April, 2010 through to December, 2015. Notably, the said statement identified the respondent as the employer.
31. Therefore, what manifests from the foregoing is that in as much as the claimant was regarded as a casual employee, the evidence states otherwise. In the circumstances, the claimant's employment with the respondent was converted pursuant to section 37 of the Employment Act and was deemed to be a regular term contract of service where wages are paid monthly.
32. I must also add that the respondent was under a duty under section 10(7) of the Employment Act to dispel the inference that the claimant's casual engagement was converted to a term contract, by availing the necessary evidence. The said statutory provision is couched as follows:

' 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.'

33. The Court of Appeal considered the import of this provision in the case of Jackson Muiruri Wathigo t/a Murtown Supermarket vs Lilian Mutune [2021] eKLR thus:

' [15]. In any event, as per the respondent, the burden lay with the appellant by virtue of section 10(7) of the Employment Act to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by section 37 of the Employment Act from claiming that she was a casual employee.'

34. Therefore, the respondent was required to do more by availing the necessary evidence before court, for instance the attendance records, so as to prove that the claimant's engagement was intermittent. In absence of such evidence, I am led to conclude that the claimant's engagement although initially on casual terms was converted to a regular term contract and the respondent is estopped from asserting the contrary. This being the case, the claimant was protected from unfair termination in terms of the Employment Act.
35. This takes me to the second issue for determination.

Unfair and unlawful termination?

36. The claimant has alleged that he was wrongfully and unlawfully terminated from employment. The respondent states otherwise and holds that the casual jobs were no longer available. During cross examination, the claimant testified that he was informed together with his coworkers that the respondent had acquired automatic machines that would do their jobs hence their services won't be required. Therefore, and considering the version of both the claimant and the respondent, it can be deduced that he was disengaged on account of redundancy.
37. Section 2 of the Employment Act, defines the term 'redundancy' to mean 'the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination



of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment’.

38. The Court of Appeal in the case *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR* noted that redundancy could arise as a result of adaptation of modern technology and not just economic downturn. Githinji, JA (as he then was) stated thus:

‘ Besides economic distress, redundancy can also arise where the employer finds that he can employ modern technology to run his business more efficiently and/or profitably. This is the crisp of the International Labour Organization’s Recommendation No 166--Termination of Employment of 1982 and the decision in the case of GN Hale & Son Ltd v Wellington Caretakers IUW.⁴’

39. Therefore, in the event the respondent was adopting another mode of production, then nothing stopped it from declaring a redundancy situation. Indeed, this ties to section 40 of the *Employment Act*, which evidently, allows an employer to declare redundancy.

40. The foregoing notwithstanding, an employer is required under sections 43 and 45(2) (a) and (b) of the *Employment Act*, to prove the reason behind the redundancy. Such was the determination in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (supra), where it was held that, ‘for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair’.

41. Substantive justification entails proof of the reasons which resulted in an employee’s termination and failure to do so, such termination is deemed to have been unfair within the meaning of section 45 of the *Employment Act*. Speaking to the issue of a redundancy, such reasons ought to be fair, valid and related to the employer’s operational requirements.

42. In this case, the respondent did not lead any evidence to prove that it had a justified reason to terminate the claimant’s engagement. The respondent’s only contention was that it did not have casual jobs any more. Needless to say, the reasons for the claimant’s termination were not proved within the terms of section 45 of the *Employment Act*. Therefore, the respondent’s evidential burden under the *Employment Act* remained undischarged.

43. Beyond proof of reasons, the respondent was also expected under section 40(1) of the *Employment Act* to prove that it complied with the procedural requirements in declaring the claimant redundant.

44. At the risk of sounding repetitive, I wish to underscore the holding in Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (supra), where the court found that a termination of employment under redundancy must be both substantially justified, and procedurally fair, for it to be lawful.

45. The procedure for redundancy under section 40 (1) of the *Employment Act* is as follows:

- 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.
46. Save for payment of the salary in lieu of notice, the respondent did not lead evidence let alone, suggest that it complied with the above procedural requirements prior to terminating the claimant's employment. In absence of such evidence, I am led to conclude that the respondent terminated the claimant unprocedurally.
47. The totality of my findings is that the claimant's termination from employment was unfair and unlawful in terms of sections 40, 43 and 45 of the [Employment Act](#).

Appropriate reliefs

48. The claimant is awarded six (6) months gross salary as compensatory damages in light of the fact that the court has found that his termination was unfair and unlawful. This award has taken into account amongst other factors, the length of the employment relationship.
49. The claim for one month's salary in lieu of notice is declined as the respondent proved that it paid the same together with the claimant's salary for December, 2015, when it disengaged with the claimant.
50. The claim for leave is also declined as the respondent did not particularize the period for which he is claiming the unpaid leave. Besides, the schedule of payments for casual workers exhibited by the respondent indicate that he was compensated for leave earned for each year.

Orders

51. Against this background, the court enters judgment in favour of the claimant against the respondent and he is awarded compensatory damages in the sum of Kshs 90,000.00 which sum is equivalent to six (6) months of his gross salary. Interest shall apply on the award at court rates from the date of judgement until payment in full.
52. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2022

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STELLA RUTTO

JUDGE

Appearance:



For the Claimant Mr. Ongeru

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 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.

STELLA RUTTO

JUDGE

