



**Juma v University of Nairobi (Cause 1089 of 2018)
[2022] KEELRC 13157 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13157 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1089 OF 2018
AN MWAURE, J
NOVEMBER 2, 2022**

BETWEEN

NAHINYA JUMA CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated the June 27, 2018 on the 28th of June 2018 alleging unfair and wrongful termination. She avers that she was an employee of the respondent having been employed with effect from December 1, 2006 as a cleaner at the respondent 's institution earning Kes 527 per day payable at the end of the month for every 27 days worked exclusive of house allowance.
2. The claimant says that having worked at the respondent 's institution for 11 years her terms ought to have been confirmed as a permanent employee by dint of section 37 of the *Employment Act* 2007. The claimant says that she has offered diligent services until the April 2, 2018 when she fell ill and sought permission to go seek treatment which request was granted by her immediate supervisors only for her to resume duties on the April 11, 2018 when she was orally informed that her services were no longer needed at the institution.
3. The claimant avers that the decision to terminate her services was wrongful as there was neither a valid reason for the said termination nor was the stipulated procedure followed. She says she was never given the opportunity to show cause why she should not be terminated contrary to the basic principles of natural justice and section 41 of the *Employment Act*, 2007. She also alleges that during the entire time she worked for the respondent she was tasked to purchase protective gear but this was never refunded, she was neither granted leave, off days nor paid in lieu thereof for the same and that she was grossly underpaid contrary to the minimum wage orders in place.
4. The claimant provided the particulars as follows;



- a. One month salary in lieu of notice $14,229 + 2,134 = \text{Kes } 16,363$
 - b. Unpaid salary for February 2018 and March 2018 $16,363.35 \times 2 = \text{Kes } 32,726$
 - c. Underpayments for the period May 2017- April 2018 $622-527=95 \times 26 \text{ days} \times 11 \text{ months} \text{ Kes } 27,170$
 - d. House Allowance for the period December 2006- March 2018 $\text{Kes } 290,271.6$
 - e. Service pays for 11 years @ 31% yearly gross pay $60,870.36 \times 11 = \text{Kes } 669,573.96$
 - f. Leave pay for 11 years $\text{Kes } 145,378.96$
 - g. Uniform refund for the duration worked
 - i. Gumboots 2 pairs per year @ $\text{Kes } 1,500 = 3000 \times 11 \text{ years} \text{ Kes } 33,000/-$.
 - ii. Gloves 2 pairs per month @ $150 = 300 \times 12 \times 11 = \text{Kes } 39,600$.
 - iii. Dust coat 2 per year @ $1,500 = 3000 \times 11 \text{ years} \text{ Kes } 33,000/-$.
 - iv. Bar Soap 2 pieces per month @ $150 = \text{Kes } 39,600/-$
 - v. Tissue paper 2 pieces per month @ $25 = 50 \times 12 \times 11 = \text{Kes } 6,600$.
 - vi. Off days for the duration worked $4 \text{ days} \times 136 \text{ months} \times 527 \text{ Kes } 286,688$.
 - vii. 12 months gross salary compensation due to unfair termination and loss of employment. $12 \times 16,363.35 \text{ Kes } 196,360.02$
5. She prays for:-
- a. A declaration that the claimant's termination was unlawful, wrongful and devoid of procedure
 - b. The claimant be paid her salaries and terminal benefits as set out in above
 - c. The respondent be ordered to compensate the claimant for irregular loss of employment at the equivalent of 12 months gross salary
 - d. The honourable Court do give orders as it may deem fit to meet the ends of justice
 - e. respondent to pay costs of the claim
 - f. Interests at court rates
6. The respondent filed the memorandum of appearance dated the July 10, 2018 and filed on the July 11, 2018. The memorandum of response was filed on the August 29, 2018. The respondent whilst admitting employing the claimant in the Mamlaka Strategic Unit rejected the assertion that it engaged her services at a monthly salary of Kes 16, 363.35.
7. The respondent denied the tabulations given by the claimant and maintained that she was not unlawfully terminated from the service of the respondent . That she absconded duty for 10 working days contrary to the Work Code of Conduct. The respondent avers that the employment was on casual employment terms terminable by either party, at the close of the notice period. The house allowance according to the respondent is inclusive in the daily wages payable. The claimant is not entitled to salary arrears and terminal benefits from the respondent as casual employees are not entitled to equal rights and benefits of employment.



claimant 's Case

8. Nahinya Juma the claimant gave sworn testimony and said that she used to work for the University of Nairobi. She adopted the witness statement dated 27/6/2018 as her evidence in chief. She also adopted the list of document as exhibits 1-3 as well as the supplementary list of documents as exhibits 4-5.
9. She said that she did not abscond work but was sick and when she recovered, she went back to work but was told to go away. She said she was not given house allowance and other benefits. On cross examination she said that she was away from work for about one week and refers to the exhibit to demonstrate that she was under treatment. She said the document was shown to the supervisor
She said that they were casuals and were informed to leave the union. She also stated that she was not given a contract letter. She further told the Court that they used to sign in a book when they reported to work and were paid by the end of the month calculated day by day.
10. On re-examination she mentioned that she worked as a casual for 11 years and that she worked throughout the 11 years. She was not given payslip or letter of appointment. The Bank account, she said, showed the salary. She said that she gave the medical report to the supervisor.

respondent 's Case

11. Peter Mbuthia is the respondent witness and he gave sworn testimony and testified that he is the Deputy Registrar at the University of Nairobi. He adopted the witness statement dated the 31st of July 2018 as his evidence in chief. He also adopted the list of documents dated the July 31, 2018 as exhibits in the case which are numbered 1-5.
12. The witness testified that the claimant was a casual worker and was paid wages on daily rates. He says that the claimant deserted employment for 10 days. The witness said that since she was employed on daily basis, it was taken she was no longer interested in work. Casuals were not covered by the CBA agreement.
13. On cross-examination the witness said that the claimant used to work in the kitchen and had no letter of employment. He told the Court she was paid on daily rates. On the 31/5/2017 salary paid was Kes 15,537/= which was a consolidated salary and was a local arrangement in order to pay consolidated salary. He further said the claimant was a term employee as per the statement. He said that the claimant was terminated for absconding duty for 10 days but no termination letter or notice was given.
14. The witness further said that they did not keep master roll and so could not know when claimant was not around. The witness said that in February and March 2018 they did not owe the claimant any dues.
15. The witness further mentioned that on annexed CBA papers it is provided that a person can be employed for 3 months on temporary basis. He added that they settled all claimant 's February and March 2018 dues and there are no dues owed her. He said further that the employees of the University of Nairobi are paid house allowance. Her salary of Kes 527/= according to him included the house allowance. He said there was no letter of appointment to show salary was consolidated. According to him the severance pay for the 11 years was not paid as the claimant was not on permanent employment. The witness also said that the claimant is not entitled to leave as she used to have her normal breaks ie off days.
16. The witness also told Court that the claimant was given protective gear but they do not have anywhere she signed for the protective gear. The claimant according to her was not entitled to uniform and



was not issued with certificate of service as she did not ask for it. On re-examination she said that the payment voucher shown is for Nahinya and that she was paid her dues on the 23/5/2018.

claimant 's Submissions

17. The claimant submits that there was in existence a Collective Bargaining Agreement between Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied (KUDHEIHA) Workers and the University of Nairobi (2013-2017) which governed the manner in which the respondent dealt with its employees.
18. The claimant referred to clause 36 of the agreement saying that she was entitled to Uniform which was two pairs per annum consisting of the boots, shirts, trousers and overall; Artisans, sanitary staff, laboratory staff, library staff, headmen, Kitchen staff, Grounds staff, Office Messengers, Drivers and Motor mower Drivers, Cleaners and other category of staff including security staff were all entitled to uniform.
19. It is further argued that clause 37 of CBA said that the employer may appoint a person on temporary basis for a specified period not exceeding 3 months and advise the employee accordingly and temporary employees were to be subject to the same terms and conditions of service as other employees in accordance with the provisions of the *Employment Act*, 2007. It also provided that an employee by virtue of clause 40 was entitled to payment of gratuity of 31% of the basic salary and the gratuity shall be payable upon the expiry of the appointment.
20. The claimant referred to, *inter alia*, the case of *Humprey Omondi v Vishnu Builders Ltd* eKLR and *Kesi Salim v Kwale International Sugar Co Ltd* where Court held that if a casual employee works for a continuous period of working days equal to one month or more, he or she converts to an employee under contract of service for payment of monthly salary under section 37 of the Act and the employer is barred by section 45 of the Act from dismissing the employee unfairly. The claimant also argued that an allegation that an employee has absconded duties calls upon the employer to reasonably demonstrate that efforts were made to contact such an employee without success. To buttress, the claimant has relied on the case of *Simon Mbiti Mbane v Inter Security Services Ltd* 20118 eKLR.
21. The claimant submitted that since the claimant had ceased being a casual employee, the respondent wrongfully dismissed her by failing to comply with section 45 of the *Employment Act* 2007.
22. The claimant also says that in so far as the respondent did not give the claimant written notice of termination the court should return that the respondent had failed the test under section 47(5) of the Act.
23. The claimant says that the respondent should have issued a show cause notice outlining the allegations or charges against the claimant and request for a response from the employee within a reasonable time and that this was not done in the instant case.

Respondent's Submission

24. The respondent submitted that a casual employee is an employee whose terms of engagement provide for payment at the end of the day and who is not engaged for a period longer than 24 hours at a time. That the claimant meets all the elements in the definition and by her admission confirmed that she was indeed casual employee and never produced evidence to the contrary.
25. The respondent argues that the claimant never adduced any evidence that she had sought sick leave and the same had been granted. The respondent says that the claimant absconded duty. That as casual



worker the claimant cannot claim unlawful and unfair termination of employment for such a claim has no legal foundation.

Issues for Determination

- a. Was claimant a casual or regular employee
 - b. Whether there was unlawful/unfair termination
 - c. Whether the claimant is entitled to the reliefs sought
26. Section 45 (1) and (2) of the [Employment Act](#) 2007 provides that–

- “(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.”

27. Section 47 (1)(5) of the [Employment Act](#) 2007 provides that:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

28. The respondent has argued that the claimant was not an employee within the meaning of section 2 of the [Employment Act](#) 2007. Section 2 of the [Employment Act](#) 2007 provides that

‘Casual employee’ means 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’

29. Section 37 of the [Employment Act](#) 2007 provides that:

- “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.

30. Within the proviso of section 37 of the *employment act* 2007 the Court is persuaded by the evidence adduced by the claimant including her Equity Bank statements showing consistent payment of money which we can only rightly assume was for wages from the University of Nairobi to Nahinya Juma for the months of June 2017 up to December 2017. There is also another document which has a letterhead showing claimant was employed on December 11, 2016 by the University of Nairobi.
31. Further documents from the respondent show claimant was in the University of Nairobi records on diverse dates from March 2018, April 2018 and May 2018 and some show KRA Pin of the claimant s. The respondent s did not establish what they wished to prove with those documents but the Court in considering all the evidence, pleadings and documentary evince is persuaded the claimant was a regular employee of the respondent under the *Employment Act* 2007.
32. The Court applying the above provisions finds that the claimant was a regular employee within the meaning of section 37 as read with the section 2 of the Act. The Muster Roll provided shows that the work would be done over a month and she had been with the respondent for 11 years though they would at times break depending on the University opening and closing dates. This was a case of conversion from casual to regular employment.
33. The circumstances leading to the claimant leaving his employment with the respondent are straight forward. She says she fell sick and was unable to report to work. She also says that she sought permission from the immediate supervisor to go home and seek treatment. She later resumed work on the April 11, 2018 only to be told that her services were no longer required. The respondent says she absconded work for 10 days leading to the termination.
34. Absconding work as alleged by the respondent is a gross misconduct within the meaning of section 44 of the *Employment Act* 2007 and would ordinarily entitle the respondent to terminate employment without giving notice. In the case of *Seabolo v Belgravia Hotel* 1997 6 BLR 829 the Court stated:-

” Desertion is distinguishable from absence without leave in that the employee who deserts his or her post does so with an intention of not returning or having left his or her post subsequently formulates the intention not to return.
35. The Court is consistent on a doing of an employ who relies on the defence of desertion. In the case of *Boniface Francis Mwangi v B.O.M, Iyego Secondary School* (2018) eKLR It is good practice for an employ to take the initiative of contacting the employee where an employee absconds and find out the reasons for failure to present themselves to work.
36. Similarly as can be seen in the case of *Simon Mbithi Mbane versus Inter Security Services Ltd* 2018 referred to by the claimant *supra*, an allegation that an employee has absconded calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. The respondent never made attempts to contact the claimant during the periods she was said to be unavailable to perform her duties. The claimant who says she had worked for the respondent since the year 2006 would not ordinarily abscond from work. She is affirmative that she had obtained permission from her supervisor to go for treatment. That appears a plausible explanation.
37. Court has considered the case as presented herein and in its totality and finds the claimant having been a regular employee of the respondent deserved to be treated as such as provided in section 35 of the *Employment Act*. Having failed to do so and having just locked her out without following the



provision of sections 41 and 45(2) of the Employment Act the Court rules the claimant was wrongfully and unlawfully terminated from his employment.

38.

Remedies

1. The claimant is therefore awarded Kes 16,363/35 as one month salary = Kes 16,363/35 in lieu of notice.
 2. The court taking into consideration the provisions under section 49(1)(c) awards the claimant 7 months' salary compensation for unlawful termination Kes 16,363/30 x7= Kes 114,543/10.
 3. The claimant prayed for house allowance for the period of December 2006 - March 2018. The claimant never sought the house allowance before the dismissal. The court accepts the explanation given by the respondent that the salary was consolidated and included all the allowances.
 4. On leave, the respondent gave evidence which was unchallenged that the claimant would not work throughout but that they would be off depending on the college calendar which allowed the claimant leave days. The prayer for leave is therefore dismissed as well.
 5. The claimant did not tender evidence from NSSF to disapprove whether the same was remitted or not so same is disallowed so service pay is disallowed.
 6. The claimant has also asked for uniform refund consisting of the items she says she bought. This would in the Court's view consist special damages and has to be proved by way of receipts used to acquire the items. It is also to be remembered that the respondent maintained the protective gear was provided. The burden was on the claimant under sections 107 as read with section 108 of the Evidence Act that the items were not given by the respondent. There is no material on record on this item and clearly the same is not proved and so declined.
 7. On the claim for underpayment the minimum wage in the 2013 Regulation of Wages Order of the 2013 is Kes 9,780/- which was the minimum wage for general labourers which is lower than what the respondent provided. The claimant has not led evidence or submitted on the legal regime used to come up with the underpayments. The prayer therefore fails.
 8. The unpaid salary for February and March 2018 are allowed as claimant was locked out of employment in May 2018 and there is no evidence by the respondent that the said salary arrears was paid amounting Kes 32,726/70.
39. In conclusion the Court having entered judgment in favour of the claimant awards him a total award of Kes 163,633/15. He is also awarded costs and interest at Court rates from the date of judgment until the full amount is settled.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 2ND NOVEMBER, 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

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