



REPUBLIC OF KENYA



KENYA LAW
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**Orienyi v Home Builders Ltd (Cause 721 of 2016)
[2022] KEELRC 13560 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13560 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 721 OF 2016
J RIKA, J
DECEMBER 16, 2022**

BETWEEN

EDWIN ORIENYI CLAIMANT

AND

HOME BUILDERS LTD RESPONDENT

JUDGMENT

1. The original file in this claim, sadly disappeared without trace, and an order for its reconstruction issued on June 3, 2021, under Miscellaneous Application Number 61 of 2019.
2. The claimant proceeded to give evidence and closed his case upon the file reconstruction, on December 17, 2021.
3. The respondent's witness Manmohan Singh Chawla, gave evidence on March 8, 2022, closing the hearing.
4. The claimant's position is that he was employed through an oral contract by the respondent, on or about December 6, 1995, as a carpenter, earning a monthly salary of kshs 15,400.
5. His contract was terminated unfairly and unlawfully by the respondent, through redundancy, on August 10, 2015.
6. There was no notice leading to termination, and no disciplinary proceedings. The claimant was denied house allowance and annual leave, for the entire period of service. He worked for 20 years. The respondent acted in violation of sections 9, 28, 31, 41, and 44 of the *Employment Act*.
7. He was not paid terminal dues. He prays for these, and compensation for unfair termination, detailed as follows: -
 - a. Salary in lieu of notice at kshs 19,600.



- b. House allowance at kshs 693,840.
 - c. Leave days at kshs 274,400.
 - d. Compensation for unfair termination at kshs 235,200.
 - e. Service pay at kshs 196,000.
 - f. Arrears of salary of 2 weeks at kshs 9,800.
- Total...kshs 1,428,840.
8. The respondent filed an amended statement of response, amended on January 25, 2017. The pleading does not indicate the date of the original statement of response.
 9. The respondent's position is that the claimant approached the respondent, sometime in December 1995, seeking casual carpentry work. He was not employed. He was advised there was no work. Around May 5, 2010, he re-approached the respondent with the same request. He was advised he would be engaged as a casual worker, when need arose for such work. His work was carpentry-related, involving slab-setting and roofing at respondent's construction sites. Whenever a task was completed, the engagement was over. There was never expectation from either party, of continuous engagement.
 10. He was summarily dismissed by the respondent, on or around August 5, 2015. He unlawfully conspired with a Driver to one of the respondent's Suppliers, to unlawfully take timber that properly belonged to the respondent, and keep it for himself. The respondent's director and the supplier reported the incident to the police. He was lawfully dismissed. He was paid an ex gratia of kshs 35,000 between August 14, 2015 and August 20, 2015, to cover any back-wages that may have been due to him. The respondent prays for dismissal of the claim.
 11. The claimant adopted his statements of claim and witness, and his bundle of documents [exhibit 1], as his evidence.
 12. On cross-examination, he told the court that he had an oral contract. Witnesses to the contract are no longer available. His last salary was kshs 19,600, not kshs 15,400. He did not have documents to show this. He worked daily. He was advised by the respondent that he was on permanent terms. He was unfairly dismissed. He does not have a document to show unfair dismissal. He seeks leave, house allowances and service. His computation is not discretionary, but is guided by the law. He did not know Geoffrey Kakulu. He was not instructed to buy timber by the respondent, in August 2015. There were allegations that timber was stolen. The claimant went back to work, after the allegations. He worked for 2 days, 11th and August 12, 2015, and was instructed to leave. He was familiar with the Certificate of Payment, exhibited by the respondent, showing he was paid kshs 15,000 by the respondent, in full and final payment. It was overtime payment, not his salary. He did not understand the document. He did not sign it. He did not report forgery of his signature, to the police. Redirected, the claimant told the court that he was dismissed and told to go away without any terminal benefits. Police did not find the claimant culpable of any criminal offence.
 13. Chawla adopted the amended statement of response, his witness statement and documents filed by the respondent, as his evidence. The claimant was a casual employee. He was called by the respondent as, and when required. He was brought to the construction sites by the Foreman. He did not have a contract with the respondent. He was paid by the Foreman.
 14. He was instructed to get timber from the respondent's supplier. What was supplied turned out to be less that was requisitioned. The claimant had sold some, on the way from the supplier to the respondent's premises. He was arrested. His wife approached Chawla crying, and pleading for the



- claimant's release. On humanitarian grounds, he had the claimant let free by the police, after 2 days in the custody. He never went back to work. He was paid his dues, and signed payment vouchers on record.
15. Cross-examined, Chawla told the court that he is the CEO of the respondent. He has been in the position for more than 20 years. The claimant was a casual employee. He was handled by the Foreman. Chawla did not recall stating this, in his witness statement. The statement of response, paragraph 12, states that the claimant was not entitled to payments. The respondent acted on the guidelines of the Ministry of Labour, in paying the claimant. He worked at 2 sites- Masanduku Lane, and Padmore Lane. There were 3 blocks of flats. They took 1- ½ years to complete. He was paid weekly. He conspired with the supplier's driver, to steal timber. Chawla did not have evidence of conspiracy. Dismissal was on the ground of theft of timber. The respondent had ordered 4,000 pieces of timber. Chawla did not have receipts for the order. It was 4,000 feet, not pieces. Chawla called the Supplier Teresa Kamau, who confirmed she had supplied the right quantity. The supplier's driver conceded theft. the supplier reported theft to the police. The claimant did not work alone. He was involved in procurement of timber. Chawla withdrew the complaint because the claimant's wife approached him in tears. This was not recorded in Chawla's Witness statement, filed in court. The claimant signed and thumb-printed on the certificate of payment, dated August 14, 2015. Other certificate of payment is dated August 20, 2015. Both were explained to the claimant by the respondent. Chawla acted on the final payments.
 16. Redirected, he told the court that construction was not a continuous process. The claimant was a carpenter, and not needed throughout. He was on site irregularly. He came to do the roofing. The projects were not back-to-back. They were completed in about 1 year.
 17. The issues are: whether the claimant was a regular Employee of the respondent; whether his contract was terminated by the respondent fairly or at all; and whether he merits the remedies sought.

The Court Finds:-

18. It is not convincing that the claimant, a carpenter at construction sites where the respondent was contracted to build homes, worked in continuity, for 20 years.
19. The respondent was not shown by the claimant, to have been building homes in continuity for 20 years, and it cannot be that the claimant was involved in carpentry at various sites, for 20 years.
20. The respondent named 2 sites – Masanduku Lane and Padmore Lane- where the claimant supplied carpentry services, in projects that lasted about 1 ½ years. The claimant names other sites, in his supplementary witness statement dated November 11, 2016- Kitanga, Valley Arcade, Kenya High, Spring Valley, and Westlands. He did not clarify, when he worked on these projects, and for how long. He did not state whether these were back-to-back projects.
21. The court finds the position taken by the respondent more probable. The projects were unrelated, and the claimant was offered kibarua through the respondent's Foreman. He did not work in continuity. He worked whenever he was required, whenever there was an ongoing project. Carpentry services at construction sites, within the building and construction industry, are normally time-bound, task-bound, and project-related. Years of service, even if shown to amount to 20 years, would be truncated, with each project having its own terms and conditions, a commencement and a closing date. Carpentry work is not likely to match, the entire lifespan of each project. It takes place in a fraction of the lifespan. There was no continuous service, with cumulative benefits.



22. His prayer for annual leave days and service pay have no foundation and are declined. The claimant was paid a sum of kshs 600 daily, or kshs 3,600 weeklies. He did not place before the court any evidence, supporting his claim of monthly salary, at kshs 19,600.
23. Did he leave employment at the end of the projects the respondent was carrying out, or was he dismissed by the respondent?
24. The respondent told the court that the claimant was involved in theft of timber, and that this was the reason the claimant left. He was instructed to procure 4,000 feet of timber from a supplier, teresa kamau. he and the supplier's driver converted some of the timber to their own use. They were reported to the police and placed in custody. the claimant's wife approached respondent's director Chawla, and tearfully pleaded for release of the claimant. Chawla was touched, and on humanitarian ground, advised the Police to release the claimant, after 2 days in custody. Theft was confirmed by the Supplier.
25. There is no proof of this ground in justifying termination. There was a police abstract exhibited by the respondent, showing that Chawla made report to the Police, for theft of 40 pieces of timber.
26. There is nothing connecting the claimant with the report. It is not clear if, what was stolen was 40 pieces of timber, or 4000 feet of timber, or whether the 40 pieces were the equivalent of 4,000 feet. There were no charges preferred against the claimant. The respondent did not take him through a disciplinary process. There is nothing on record, to link the claimant to loss of timber, whatever quantity that timber was.
27. The respondent instead states that it met with the claimant on August 14, 2015, where it paid to the claimant kshs 15,000 in full and final settlement. The respondent paid to the claimant kshs 10,000 on August 20, 2010 from Padmore site, and kshs 10,000 from Masanduku site. In both instances, the payments were stated to be in full and final settlement. In total the claimant received kshs 35,000 from the respondent.
28. Termination was flawed on account of procedure and validity of reason. The respondent was in contact with the claimant after theft allegation, but did not issue any letter to show cause, or convene disciplinary proceedings against the claimant. It is not true that the claimant did not report to work after he was released from Police custody. He was available at least on August 20, 2015, when he was alleged to have signed and thumb-printed the discharge vouchers. There was nothing to prevent the respondent from convening disciplinary proceedings against the claimant, spell out the charges, and establish the employment offence of gross misconduct.
29. The court would therefore conclude that termination was unfair, under sections 41, 43 and 45 of the [Employment Act](#). The claimant did not establish the number of years worked, but the respondent acknowledges working with the claimant, from 2010. The number of sites the claimant alleges he was involved in, would suggest that he worked for a good number of years for the respondent, albeit not in continuity. The court does not think the claimant would as a matter of right, expect to continue working for the respondent. The respondent's business was project-based. Carpenters are in high demand, in the booming building and construction industry, and it would be expected that the claimant moved, on and secured kibarua elsewhere.
30. Based on his weekly rate of kshs3,600, the court grants him compensation for unfair termination, equivalent of 7 ½ months' salary, at kshs 108,000.
31. He merits and is granted notice pay equivalent of 1-month salary, at kshs 14,400.



32. He was an employee of the respondent, until mid- August 2015. He prays for 2 weeks' salary at kshs 9,800. The court has concluded that his salary was kshs 3,600 weekly, which would result in a salary of kshs7,200 in 2 weeks. He is granted salary for 2 weeks at kshs7,200.
33. The vouchers signed by the claimant show payments made comprised leave, notice and ex gratia. It is not clear what comprised leave or notice, or ex gratia from the total sum of kshs 35,000 paid to the claimant. To avoid the possibility of double compensation, the court orders that the sum of kshs 35,000 shall be deducted from the sum awarded herein.

In sum, It is ordered: -

- a. It is declared that termination was unfair.
- b. The respondent shall pay to the claimant, compensation at kshs 108,000; notice at kshs 14,400; and salary for 2 weeks worked in August 2015, at kshs 7,200 – sub-total kshs 129,600.
- c. Less paid at kshs 35,000 –total kshs 94,600.
- d. Costs to the claimant.
- e. Interest allowed at court rates, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 16TH DAY OF DECEMBER 2022.

JAMES RIKA

JUDGE

