



**Baraza v Real Careers Limited (Cause 1824 of 2016)
[2022] KEELRC 13483 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13483 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1824 OF 2016
AN MWAURE, J
DECEMBER 7, 2022**

BETWEEN

EMMANUEL OKUMU BARAZA CLAIMANT

AND

REAL CAREERS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant filed this suit by a memorandum of claim dated August 10, 2016 and filed on September 7, 2016. He states that he was employed by the respondent as a Loader from September 2011, and was deployed to Kenafric Industries Limited Company, which was his work station up until June 2015 when he was unlawfully terminated by the respondent.
2. The respondent entered appearance by way of a memorandum of appearance dated September 23, 2016 and filed on September 27, 2016, and also filed its response to the memorandum of claim on October 13, 2016.

The Claimant's Case

3. The claimant avers that he was employed by the respondent in the capacity of a Loader, earning a monthly salary of Kshs 10,772.00.
4. He states that his monthly compensation was equivalent to 8 hours of work and that he was not compensated for 4 extra hours worked.
5. He also states that he diligently discharged his duties in the said job for the period he was employed.
6. The claimant gave oral evidence that he never went for leave nor compensated for the same during the period of employment.



7. The claimant says that on or about July 2015, the respondent terminated his employment without any sufficient explanation and that no notice was issued over the same.
8. In his sworn testimony, the claimant says that he was terminated by his supervisor who was from the respondent company.
9. The claimant therefore says that he was unfairly and unlawfully terminated from employment and prays for judgment against the Respondent on terms set out in his claim as follows:
 - a. One month's salary in lieu of notice Kshs 10,722
 - b. 12 months' salary for wrongful dismissal Kshs 128,664
 - c. House allowance @ 15% of the basic salary per month for the 4 years worked Kshs. 77,558.40
 - d. Unpaid overtime @ 4 hours per day for 313 days in a year for 4 years Kshs 263,472
 - e. Untaken leave @ 21 days for every year served Kshs 34,801.80
 - f. Severance pay Kshs 33,11.62

TotalKshs 548,414.10

Respondent's Case

10. The respondent admits that the claimant worked for them as a loader and was deployed to Kenafric Industries Limited.
11. The respondent denies terminating the claimant and states that the claimant was terminated by the overall supervising staff of Kenafric Industries and not the respondent's agent as alleged.
12. The respondent therefore states that the claimant ought to have reported back to the respondent for redeployment, and that the claimant's failure to do so amounted to voluntary absconding of duty, and thus prays that the claimant's claim be dismissed with costs.

Claimant's Evidence

13. Claimant's evidence in court is that he was employed by the respondent as a store keeper and was paid a monthly salary of Kshs 10,772 and was deployed to Kenafric Industries Limited. He stated that he was never paid overtime and never took leave days. He further stated that in July 2015, they were called to the office by the Supervisor and told not to report to work the next day, and that the Supervisor who terminated him was from the respondent company, one Mr Duncan Makokha . On cross-examination, the claimant stated that he was not a permanent employee of the respondent and that His Salary used to differ from month to month.

Respondent's Evidence

14. The respondent's witness is Benjamin Mutua who testified that he is the supervisor. He stated that the claimant was not a permanent employee and was only engaged when there was work. He says that the claimant's pay included overtime and other dues of wages and would be paid twice a month.
15. He says that sometime around June 2013 when the claimant says he was terminated, an incident happened at Kenafric Industries Limited dispatch area in which 13 employees were summoned, including the claimant. The Director wanted to find out what had happened but the employees refused



to say and were consequently told to leave. He says that Kenafric Industries had no authority to dismiss employees of the respondent but the employees could be sent back for redeployment.

16. The witness also says that the respondent did not terminate the claimant and the claimant was therefore considered to have absconded duty in failing to report back to the respondent for redeployment.
17. On cross-examination, the witness admits that no notice to show cause was issued to the claimant.

Claimant's Submission

18. The claimant in his submissions dated August 31, 2022, says he was terminated by the respondent from employment without any explanation or notice over the same. He says he was just chased from the work premises and told to go home.
19. The claimant, while relying on the case of *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited* [2013] eKLR avers that his employment had converted from casual employment to regular contract within the dictates of section 37 of the *Employment Act 2007*, having worked continuously for a period exceeding one month.
20. The claimant also says that he was unfairly terminated as per section 45 (2) of the *Employment Act* and that the claimant never absconded duty as alleged by the respondent since no notice to show cause letter was issued to that effect. Further, the respondent never made reasonable attempts to contact the claimant regarding absconded duties. The claimant relied on the case *Simon Mbiti Mbane v Inter Security Services Limited* [2018] eKLR and *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR in asserting that he was unfairly terminated.

Respondent's Submission

21. The respondent in its submissions says the claimant was a daily rate/casual worker of the respondent, and is affirmative that it did not terminate the claimant. While relying on section 43(1) of the *Employment Act* and the case of *Ann Njoroge v Topex Petroleum Limited*, Cause No 1248 of 2012, the respondent says the claimant absconded duty and thus the claim for unfair termination cannot hold.

Issues for Determination

22. From the foregoing, the following issues arise:
 - a. Whether the claimant was a permanent employee of the respondent.
 - b. Whether the claimant was unfairly and unlawfully terminated.
 - c. Whether the claimant is entitled to reliefs sought.

Determination

23. On issue a) above, section 37 of the *Employment Act* as well as case laws cited by the claimant in his submission, clearly indicates that the nature of employment had converted from casual to regular employment. (Claimant worked for the respondent for 4 years).

The definition of a casual employee as in section 2 of the *Employment Act* 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.

24. Similarly, section 37 of *Employment Act, 2007* provides the following concerning conversion of a casual employee to a regular employee 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”
25. The claimant’s evidence is that he worked for the respondent from September, 2011 up to June 2015 (for about 4 year). He produced as his exhibits his bank statements of co-operative bank from January, 2016 to July, 2015. The bank statements constantly confirm Real Careers Limited made payments to the claimants consistently for those months and sometimes they would be depositing thrice a month.
26. All the above goes to respond to the first issue of whether the claimant was a regular or casual employee. In case of Humphrey Nyaga Thomas v Kenyatta University Case 93 of 2018 the court held

“for a duration of employment pursuant to section 37(4) of the Act the court is directed to convert casual employment to term contract or terms and condition that are favourable to the employee. Such provisions must be read together with section 26(2) of that Act and which requires that the more favourable terms to the employee should apply. The claimants employment converted to term contract by the operations of law.”
27. As to the second issue of whether the claimant was unlawfully terminated or not the circumstances under which he left employment are still hazy. He admits he was assigned to work at Kenafric premises. He says in July, 2017 the respondent terminated his employment without any notice or reason for the said termination.

The explanation by the respondent however is that the claimant was chased away by their client Kenafric industries where he had been assigned duties. The respondent further says the claimant left employment and never reported back to work where he could have been assigned duties elsewhere.
28. The explanation given by the respondent as earlier said seems hazy and quite fantastic. If at all they had assigned duties to their employees in their clients premises they should have given them clear instructions that if anything went wrong in the said clients premises then they should report back to them. But now the claimant says he was called by the supervisor of the respondent and told he was not needed in the respondent’s services anymore. He had worked for the respondent from 2011 to 2015 June.
29. The respondent witness while giving evidence in court admitted that they conducted some investigations with their clients Kenafric industries concerning thirteen employees who they found were dishonest and were told to leave employment. In the same breath the said witness Benjamin Mutua retracts they were part of the team that investigated the claimant and his colleagues.
30. He however does admit that the claimant and his other colleagues were told to leave employment of Kenafric Industries for being dishonest. He says the claimant was expected to report back to Real Careers premises for redeployment. The claimant however is emphatic he was told to leave by the director of Real Careers and he insists he was employed by Real Careers though he was assigned duties at Kenafric Industries.



31. The court finds the evidence by the claimant believable that he was terminated without notice and no valid reason was given to him as to why he was terminated. The respondent says that their clients Kenafric Industries investigated the claimant and other employees and found them dishonest and so told them to leave. This clearly breaches the fair labour practices of an employee.

According to employment law an employer who is considering terminating an employee on grounds of ill health, poor performance or gross misconduct must inform the employee the reason for his termination. The reason must be clear and valid. If employee is accused of being dishonest the dishonesty should be broken down. Section 45 of *Employment Act* provide that giving a valid reason for termination is in clear mandatory terms.

32. Tied up to presenting a valid reason the law also provides the employer must follow the procedure laid down in section 41 of the *Employment Act*. Section 41(1) of *employment Act* provides as follows:-

41.(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.

33. If the employer does not give a valid reason to terminate the employee and fails to follow the procedure then he is found to have fallen ... of the fairness test provided in the law.

To buttress the above in the case of *Walter Anuro Ogal v Teachers Service Commission* Case No 955 of 2011 the court held:

“For termination to pass the fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness. Substantive justification refers to the reasons for termination and procedural fairness is the process applied to conduct the disciplinary proceedings.

34. From the foregoing it is now clear that the court has drawn from the law, facts and authorities and found the following:-

- i. The claimant’s employment had converted to regular employment from a casual employment by provision of law and is protected within rights and benefits of *Employment Act*.
- ii. The respondent did not give valid reason to terminate the claimant and secondly, failed to follow procedure provided in the employment laws and so respondent is declared to have terminated the claimant unfairly and unlawfully.
- iii. The claimant is entitled to some reliefs as follows:-

35. Remedies

- a. One month salary in lieu of notice Kshs 10,772/-
- b. 5 months’ salary for wrongful dismissal Kshs 53,860/-
- c. House allowance is declined as claimant did not raise the claim in the life of his employment of 4 years.
- d. Overtime is specific prayer yet no support documents is declined.
- e. Untaken leave days also not specifically proved



f. Severance pay no applicable as is not a case of redundancy

Total awarded is Kshs 64,632/- plus interest at court rates from date of judgment till full payment.

g. Costs are awarded to the claimant.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7TH DECEMBER, 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 March 15, 2020 and subsequent directions of April 21, 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

