



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2326 OF 2016**

**(CONSOLIDATED WITH CAUSE 2327 OF 2016, 2328 OF 2016, 2329 OF 2016, 2330 OF 2016, 2331 OF 2016, 2332 OF 2016, 2333 OF 2016, 2334 OF 2016, 2335 OF 2016, 2336 OF 2016, 2337 OF 2016, 2338 OF 2016, 2339 OF 2016, 2340 OF 2016, 2341 OF 2016, 2342 OF 2016, 2343 OF 2016, 2344 OF 2016, 2345 OF 2016)**

**(Before Hon. Justice Hellen S. Wasilwa on 26<sup>th</sup> January, 2021)**

**FELIX LUVANDA MWIRITSA & 19 OTHERS.....CLAIMANTS**

**-VERSUS-**

**CABINET SECRETARY, MINISTRY OF INFORMATION, COMMUNICATION**

**AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. The Claimants served the 1<sup>st</sup> Respondent in different capacities and for different periods before their employment was terminated on 31/10/2016. They instituted this claim to challenge the said termination which they termed unlawful, and sought the following reliefs:-

**i. A declaration that the Claimants had legitimate expectation to be in permanent employment once the 1<sup>st</sup> Respondent maintained their services beyond the statutory period of a casual.**

**ii. A declaration that the 1<sup>st</sup> Respondent agreed to change the Claimants' employment to permanent once he maintained their services beyond the statutory period of casuals.**

**iii. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to immediately reinstate and/or re-engage the Claimants as permanent employees without loss of benefits.**

**iv. An order that the Claimants are entitled in the employment of the 1<sup>st</sup> Respondent on regular, permanent and pensionable basis with effect from the date of lapsing of their respective initial contractual terms of service.**

**v. That in the alternative an order directing the 1<sup>st</sup> Respondent to compensate the Claimants the following: –**

**a. Salary in lieu of notice.**

**b. Leave pay.**

**c. Housing allowance.**

**d. Service pay.**

**e. Compensation for termination on grounds of redundancy.**

**f. Damages for unfair termination.**

**vi. A certificate of service to be issued to the Claimants.**

**vii. An order for the Respondent to pay costs of this suit plus interest thereon.**

**viii. Any other relief as the Court may deem just.**

### **The Claimants' Case**

2. The Claimants averred that their employment was terminated without adherence to the law as they were never granted a fair hearing, leading them to conclude that they had been declared redundant.

3. Jairus Okare testified for the Claimants' case as CW1. He relied on all the Claimants' witness statements sworn in their respective claims. He told this Court that he was giving evidence on behalf of all the Claimants.

4. He stated that he was currently unemployed. It was his testimony that the 1<sup>st</sup> Respondent had initially employed them as casual workers on a 3-month contract though they were working in different departments. They were employed on diverse dates. Some were employed in 2009, others in 2011 while others were employed in 2014.

5. He told this Court that they all worked continuously even after the lapse of the 3 months and were even trained on certain issues. He stated that they had hoped to be permanent employees but on 31/10/2016, they received a letter dated 14/10/2016 terminating their services. They were not paid their salaries for the 14 days they worked in October.

6. On cross examination, it was his testimony that he had the legitimate expectation that his employment would be converted to permanent and pensionable. He stated that they were assured by the Human Resource and the Director that they would be employed as permanent and pensionable employees, but conceded that he had no proof of this statement.

7. He admitted that the circular issued in 2016 was to be effected before casual employees were employed as permanent and pensionable. He conceded that the Permanent Secretary was to ensure that there were funds, need and vacancy before employing anyone. It was his testimony that they never applied for leave as they were told that casuals don't take leave. He admitted that his employment letter never indicated that his employment would be converted to permanent and pensionable.

8. During re-examination, he clarified that they worked beyond the three months indicated in their contracts hence their legitimate expectation that their employment would be converted to permanent and pensionable.

### **The Respondents' Case**

9. The Respondents contended that due procedure was followed, termination notices duly issued and the Claimants paid all their outstanding wages. They further contended that the subject contract and notice were issued on 1/7/2016.

10. The Respondents averred that the Claimants were aware of their rules and regulations but still ascribed to them knowing that their engagement as casuals would not guarantee them a permanent and pensionable employment status with the Respondents.

11. Wilfred Amollo testified on behalf of the Respondents as RW1. He adopted his witness statement as his evidence. He told this Court that he was the Human Resource Management Director at the Ministry of Correction Services and had previously worked in the Ministry of Information and Communication.

12. It was his testimony that the Ministry engaged casuals having considered the existing regulations at the time and after the approval of the Public Service Commission. He stated that the terms of engagement were that the Claimants were casual employees. He contended that there was no guarantee that they would be employed as permanent and pensionable and that their appointment letters were clear on that. He asserted that only the PSC could hire staff in the public service.

13. During cross examination, it was his testimony that the termination letters had indicated the reason for termination as the expiration of contracts for 1/7/2016. He also stated that all the Claimants had contracts for this period. On re-examination, he clarified that they gave a recommendation letter for this period.

14. The hearing was marked as closed and parties directed to file their written submissions with all the parties filing the same.

### **The Claimants' Submissions**

15. The Claimants submitted that pursuant to Section E21 of the 2<sup>nd</sup> Respondent's Code of Regulation, the 1<sup>st</sup> Respondent had the mandate to employ casual employees and had acted within the law. They further submitted that though they were employed as casual employees, their contracts converted to a contract of service where their wages were paid monthly by dint of section 37 of the Employment Act and to which Section 35 (1) (c) applies. They relied on the cases of **Chemelil Sugar Company vs. Ebrahim Ochieng Otuo & 2 Other** [2015] eKLR

and Nanyuki Water and Sewerage Company Limited vs. Benson Mwiti Ntiritu and 4 Others [2018] eKLR, to fortify this position.

16. It was their submissions that the termination of their employment was unfair and wrongful as they were not accorded substantive and procedural fairness as required by Section 45 (2) of the Employment Act. They relied on the cases of Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR, Lilian Nyaboke Nyaribo vs. Wireless Innovations Nairobi Limited [2013] eKLR and Alphonse Maghanga Mwachanya vs. Operation 680 Limited [2013] eKLR where the respective Courts held that procedural and substantive justice was vital before an employee's services could be terminated.

17. The Claimants submitted that they were entitled to an award for salary in lieu of notice as they were not issued with a notice before their employment was terminated. They submitted that they were entitled to an award of house allowance and service pay due to the 1<sup>st</sup> Respondent's failure to produce their pay slips as required by section 74 of the Act.

18. It was the Claimants' submissions that they were entitled to leave pay as they had never taken any leave. It was also their submissions that they were entitled to damages for unfair and wrongful termination having proven the 1<sup>st</sup> Respondent's failure to follow due procedure. They relied on the cases of Mary Mutanu Mwendwa vs. Ayuda Ninos De Africa-Kenya [2013] eKLR and Joshua Otiego Apiyo vs. Modern Coast Express Limited [2019] eKLR.

19. They urged this Court to award them costs as it was on account of the 1<sup>st</sup> Respondent's failure to follow the law that they filed their respective suits.

### **The Respondents' Submissions**

20. The Respondents submitted that the Claimants were not casual workers by dint of the definition in Section 2 of the Employment Act, and relied on the case of Peter Wambugu Kariuki & 16 Others vs. Kenya Agricultural Research Institute [2013] eKLR to support this position.

21. It was their submissions that the termination of the Claimants' employment was inevitable as it would have been against the labour laws for the 1<sup>st</sup> Respondent to retain the Claimants as casual employees yet retaining them depended on the need for their services and available budgetary provisions. They contended that public service employees were paid from public coffers hence the Claimants should not be paid for work not done.

22. The Respondents submitted that the Claimants' engagement letters were express that they were not entitled to any other benefits and allowances during the period of engagement and that the engagement letter did not have any guarantee that the same would convert to permanent employment. As such, the issue of legitimate expectation did not arise.

23. It was their submissions that the contract had an express term that it was liable to be cancelled without notice and that renewal was not guaranteed at the end of the contract period. They relied on the case Jiwaji vs. Jiwaji [1968] EA 547 where it was held that where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties. They also relied on the case of National Bank of Kenya vs. Pipelastik Samkolit (K) Limited & Another [2001] eKLR where it was held that Courts cannot rewrite a contract and parties were bound by the terms of the contract unless coercion, fraud or undue influence are pleaded.

24. Finally, the Respondents submitted that the Claimants were paid all their outstanding wage arrears on 17/11/2016.

25. I have examined all the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

**1. Whether the employment of the Claimants was subject to be made permanent and pensionable.**

**2. Whether the Claimants termination was unfair and unjustified.**

**3. What remedies if any the Claimants are entitled to.**

### **Issue No. 1**

26. From the contracts issued to the Claimants dated various dates, they were employed on casual basis. The period of this casual employment was 3 months. The salary attached to the engagement was also indicated for each Claimant.

27. The contract was also clear that they were not entitled to any other allowances and benefits during the period of employment and that the contract could be terminated without notice and renewal was not guaranteed as it was based on performance. The contract was also clear that the employment did not carry any guarantee for permanent employment then and in future.

28. My understanding of the appointment letter is that it was purely on casual basis and there was no guarantee of any permanent engagement in future. There was no expectation of the Claimants being offered future permanent and pensionable employment. It was also clear that the engagement was based on an approval by the Authorised Officer and on temporary basis. This casual employment was renewed it seems albeit silently as there is no evidence that there were periodic renewals after the expiration of the initial three months period.

29. The Claimants have submitted that though they were employed as causals, their contracts converted to a contract of service where their wages were paid monthly by dint of Section 37 of the Employment Act 2007.

30. Section 37 of the Employment Act 2007 states 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.

31. Indeed, where the agreement is silent on features of an employment contract for instance date of renewal and expiry and its form, Section 37(1) of the Employment 2007 comes into play.

32. In the case of the contract affecting the Claimants, the form of the contract was very clear and unambiguous. It was stated clearly to be causal and with no expectation of it being made permanent and pensionable.

33. In Jiwaji v. Jiwaji (1968) EA 547 the Court held that where there is no ambiguity in an agreement, it must be construed according to the clear words used by the Parties.

34. In National Bank of Kenya vs Pipelastik Samkolit (K) Limited and Another (2001) eKLR, the Court held that a Court of law cannot purport to rewrite a contract between the Parties and that the Parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

35. In the circumstances, it is true that the Claimants cannot insist on being engaged on permanent and pensionable basis while in the first instance, they knew that the appointment/engagement did not carry any guarantee for permanent employment.

36. It is therefore my finding that the employment of the Claimants based on the contracts issued and which they accepted was not subject to conversion to permanent and pensionable terms.

#### **Issue No. 2**

37. On issue of whether the termination of the Claimants was unfair or unjustified, the Court had considered the termination letters issued to the Claimants. The letters are dated 14/10/2016 and they were indicated that the contract was expiring on 30<sup>th</sup> September 2016 and that payment will be upto and including 31<sup>st</sup> October 2016.

38. The anomaly I detect in this is that the termination was backdated to 30<sup>th</sup> September 2016 yet the letters were forwarded on 31<sup>st</sup> October 2016 whereas others, even the date of their receipt is not known. In the circumstance, it is clear that this termination was unfair as it provided no period of preparation to exit the employment and also because the contracts termination were backdated.

#### **Issue No. 3**

39. In terms of remedies, given the unfairness in issuing backdated termination letters, the Claimants are entitled to a reprieve of compensation of 3 months' salary each and also 1 months' salary as notice period. The totals are as follows: -

= 68,140/= less statutory deduction plus interest at Court rates with effect from the date of this judgement.

40. The Respondent will also pay costs of this suit.

**Dated and delivered in Chambers via zoom this 26<sup>th</sup> day of January, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**