



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 545 OF 2016

RUTH NYASUGUTA AREIMBA.....CLAIMANT

VERSUS

CONFERENCE CATERERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 5.4.2016 alleging that she was employed by the Respondent as a casual employee from 22.11.2012 to 2.12.2015 earning Kshs. 450 per day but paid on weekly basis. He averred that the Respondent dismissed her summarily on 2.12.2015 without any reasonable cause and without following due process. Therefore, she prayed for:

- (a) Declaration that her dismissal was unlawful.
- (b) 3 months' salary in lieu of notice.....Kshs. 32,400
- (c) Accrued leave for 4 years.....kshs. 43200
- (d) Service pay for 4 yearsKshs. 43,200
- (e) Salary compensationKshs. 88,400

Total **Kshs. 207,200**

- (f) General damages for wrongful dismissal
- (g) Costs and interest.

2. The Respondent filed defence on 19.7.2016 admitting that it employed the Claimant as a casual employee between 22.11.2012 and 2.12.2015, but contended that she never served continuously but only as and when the need for her service arose. Therefore it prayed for the suit to be dismissed with costs because the claimant is not entitled to the reliefs sought.

3. On 8.3.2021, the parties agreed to dispense with oral hearing and opted the written witness statements and documentary evidence filed and disposed of the suit by written submissions.

CLAIMANTS CASE

4. The Claimant's case is that she worked as casual employee for the Respondent from 22.11.2012 to 2.12.2015 when she was dismissed without prior notice or hearing and without any valid reason. Therefore she contended that the dismissal was unfair and unlawful.

5. She submitted that although she was a casual employee, under section 37 of the Employment Act, her employment had converted to contract of service for payment of monthly salary and section 35(1)(c) of the Act applied to her. For emphasis she relied on **Humphrey Omondi v Vishnu Builders Ltd [2013]eKLR**, and **Kesi Salim v Kwale International Sugar Co. Ltd.[2017]eKLR** where the court held that if a casual employee works for a continuous period of working days equal to one month or more, he converts to an employee under a 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.

6. The Claimant further submitted that since she had ceased being a casual employee, the Respondent dismissed her wrongfully by failing to comply with section 45 of the Act. For emphasis, she relied on **Joseph Okelo Adhiambo & Another v Y.J. Elmi and 2 Others[2012] eKLR and John Mwaniki Kihimo v KAK Enterprises[2013]eKLR** where the court held that under section 37(3) of the Act, an employee who after converting from casual employment works continuously for two or more months from the date of employment, the employee becomes entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee.

7. Finally, the Claimant submitted that she is entitled to the reliefs sought and prayed for judgment, costs and interest as set out in her Memorandum of Claim.

DEFENCE CASE

8. The Respondents case is that it intermittently engaged the Claimant as a casual employee between 22.11.2012 to 2.12.2015 as and when the need for services arose. It admitted that her daily wage was Kshs. 450 but it was paid on weekly basis. It contended that, there are times when business went low due to security at the Kenyatta Conference Centre and the Claimant's services would be stopped.

9. It submitted that the Claimant did not adduce any evidence to show that she worked continuously from 22.11.2012 to 2.12.2015 and maintained that her employment never converted from casual to contract of service under section 37 of the Employment Act. Consequently, it submitted that the issue of unfair dismissal did not arise since she remained a casual employee and termination of her employment was not subjected to substantive and procedural fairness under section 36, 40,41 and 45 of the Employment Act.

10. For emphasis, it relied on **Bernard Ocheing Odhiambo & Another v Prime Aluminium Cement Casement Ltd. [2016]eKLR** where the court dismissed the suit because the Claimant did not plead or tender any evidence to prove that he worked continuously as required under section 37 of the Act.

11. Finally, the Respondent submitted that the Claimant is not entitled to the reliefs sought because she did not prove conversion of her casual employment to contract of service under section 37 of the Act. Therefore, it prayed for the suit to be dismissed with costs.

ISSUES FOR DETERMINATION

12. I have carefully considered the pleadings, evidence and submissions presented to the court by the parties. There is no dispute that the Claimant was employed by the Respondent as a casual employee between 22.11.2012 and 2.12.2015. The issues for determination are:

(a) Whether the Claimant's casual employment converted to a contract of service for payment of monthly salary.

(b) Whether the termination of the Claimant's employment was wrongful and unlawful

(c) Whether the Claimant is entitled to the reliefs sought.

CONVERSION FROM CASUAL EMPLOYMENT

13. Section 37 (1) of the Employment Act provides that:

"... 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."

14. Section 35(1) (c) of the Act provides that where contract to pay wages or salary periodically in intervals of or exceeding one month, the contract shall be terminable by either party at the end of the period of 28 days next following the giving of notice in writing.

15. In this case the Claimant contended that he worked for the Respondent from 22.11.2012 to 2.12.2015 as casual employee and as such her casual employment converted to contract of service in which wages are paid monthly. However, the Respondent contended that the Claimant did not serve continuously during the stated period but only when her services were needed and as such the issue of conversion of contract of service did not arise.

16. I have considered the written statements of the witnesses and the payment records for the Claimant produced by the employer. The payment records produced are for the month of September 2015 to 30.11.2015. The parties did not adduce any other employment records for the period between 22.11.2012 and August 2015. The said records are obviously in the custody of the employer who chose to withhold the same from the court. The only inference I can draw from that is that the records were unfavourable to the Respondent's case.

17. The foregoing notwithstanding, I have carefully considered the payment records produced for September, 2015 to November 2015 and noted that the Claimant worked 5 days continuously every week during the said period which exceeded one month in aggregate. Consequently, I find and hold that the Claimant's casual employment converted to a contract of service for payment of monthly salary within the meaning of section 37(1)(a) of the Employment Act and thereby became protected from unfair and wrongful termination by the employer by dint of section 45 of the Act.

WRONGFUL AND UNLAWFUL DISMISSAL

18. Under section 45 of the Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. In this case the Claimant contended that she was dismissed on 2.12.2015 without any just cause and without being accorded a chance to defend herself. She further contended that the dismissal was done without prior notice.

19. The Respondent did not cite any reason for the dismissal and it did not adduce any evidence to prove that a fair procedure was followed. It contended that a Claimant was a casual employee who was not entitled to substantive and procedural fairness under section 36,40,41 and 45 of the Act before dismissal.

20. Having found that the casual employment of the Claimant converted to contract of service for payment of salary monthly, and only terminable with a notice of 28 days under section 35(1) (c) of the Act, I further find that the Respondent has failed to discharge the said burden of proof under section 45 of the Act. Consequently, I proceed to hold that the failure to prove a valid reason for the dismissal and that fair procedure was followed before dismissing the Claimants, has rendered the dismissal of the claimant on 2.12.2015 unfair, wrongful and unlawful within the meaning of section 36 and 45 of the Employment At.

RELIEFS

21. In view of the foregoing, I declare the dismissal of the Claimant by the Respondent to be wrongful and unlawful as prayed. In addition I award the Claimant one month salary in lieu of notice plus three (3) months' salary as compensation for unlawful termination of her employment. In awarding the said damages I have considered that the Claimant served for three (3) years and did not contribute to the dismissal through misconduct

22. The Claimant is also awarded 21 leave days per year for the three (3) years worked equalling to 63 days by dint of section 28 of the Act.

23. Finally, I award the Claimant service pay under section 35(6) of the Act at the conventional rate of 15 days' pay per year for three (3) years' service.

DISPOSITION

24. For the reasons set out herein above, I enter judgment for the Claimant in the following terms:

- (a) NoticeKshs. **10,800.00**
- (b) Compensation.....Kshs. **32,400.00**
- (c) LeaveKshs. **22,680.00**
- (d) Service Pay**Kshs. 16,200.00**
- TOTALKshs. 82,080.00**

25. The said award is subject to statutory deductions but in addition to costs and interest from the date hereon.

Dated, signed and delivered at Nairobi this 3rd day of June, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE