



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.126 OF 2016

JUSTUS MUNYAO MULEICLAIMANT

VERSUS

COMET PLASTICS LIMITED.....RESPONDENT

JUDGMENT

1. By memorandum of claim dated 26th January 2016 and filed in court on the 1st February 2016 the Claimant sought the following reliefs:-
 - a. A declaration that the respondent's dismissal of the Claimant from employment was unlawful, unfair and inhumane.
 - b. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
 - c. An order for the Respondent to pay the Claimant his due terminal benefits totaling to Kshs. 562,333.30/-
 - d. Interest on (c) above from date of filing suit until full payment.
 - e. Costs of the suit.
2. The Claimant filed together with the claim a verifying affidavit and a demand letter by his advocates addressed to the Respondent dated 11th September 2015. The Claimant filed a witness statement dated 10th June 2019.
3. The Respondent entered appearance and filed memorandum to the Reply dated 14th March 2016 and attached several petty cash vouchers. The Respondent filed 2 witness statements by Mahesh Gudka and Rohit Vyas both dated 16th March 2020
4. The case was heard on the 27th July 2021 with both parties calling witnesses. Parties requested to file written submissions after the hearing and were allocated time with mention before the DR on the 13th September 2021 whose record is that the parties have filed submissions.
5. The Claimant's written submissions are dated 10th August 2021. The written submissions by the Respondent are dated 28th August 2021

The Claimant's case

6. The Claimant, Justus Munyao Mulei adopted his statement dated 10th June 2019 as his evidence in examination in chief. The Claimant produced as his evidence demand letter dated 11th September 2015.
7. The Claimant told the court that he lives at Mukuru Kwa Njenga doing jua kali work. The Claimant told the court that he was employed as a store keeper by the Respondent in 2007. He counted incoming stock to the store. He was paid wages weekly. That his total weekly salary was Kshs.3,500/-
8. The Claimant told the court that he did not have disciplinary issues during his employment. He told the court he was not paid for NSSF. That he took out NSSF card and when he presented it to the employer his boss called Maish threw the card away.
9. The Claimant told the court that he was not given reasons for the termination. The Claimant denied the defence by the employer that he

was to be paid daily. The Claimant told the court that the cash vouchers produced by the employer in court were for the payment of casuals who were called in to off load material that he used to get cash and pay them.

10. During cross examination by Mr. Baraka for the Respondent, the Claimant admitted that he had not produced contract of employment with the Respondent. The Claimant confirmed that he was paid Kshs. 3500/- per week. The Claimant told the court that there were some employees paid end month being the machine operators. He stated that he was not a machine operator.

11. The Claimant told the court that in 2007 when he joined the Respondent he was paid Kshs. 3500/- per week and that would be like Kshs. 523/- per day

12. The Claimant told the court that the Respondent was producing paper but he was not involved in that. He stated that he supervised the off-loading of polythene material and taking material to the stores. He told the court the off-loading was done by workers from the community. That he was the one to confirm the quantity of raw material delivered to the Respondent's premises.

13. The Claimant told the court that the off-loading workers were paid Kshs. 250/- per sack and were paid for total sacks carried. The delivery of the material was not daily. That when there was no delivery he had no people to supervise. That he did not call the workers when there was no delivery and hence no payment to the off-loaders.

14. The Respondent produced vouchers issued to the Claimant marked Exhibit R1. The vouchers refer to off-loading and transfer of goods. The Claimant confirmed that the name Justus on the vouchers referred to him. He told the court that the vouchers referred to payment made to him. He admitted the vouchers did not provide he was to remit the money to somebody else. He stated that he paid the workers for off-loading as the bosses did not want strangers to come to the office.

15. The Claimant told the court that his employer was called DK at work and was a director and he did not know the name of the human resources manager. That the off-loaders came on need basis and were not paid for leave or housing or NSSF. The daily workers are also not paid gratuity. It is not compulsory for the daily workers to come to work daily. He stated that he did not have any document to show that the Respondent terminated his employment. That he had not brought a witness to prove he was terminated by the Respondent's company. That he was the only witness of the fact that he was terminated. The off-loaders would not claim for terminations as they are not recognized by the employer.

16. The Claimant was referred to paragraphs 5 and 6 of his witness statement witness which confirmed that there was more one person when the termination occurred not just DK as testified by client.

17. In re-examination the Claimant told the court that he picked cash for other workers. That he was paid per week and there was no day he did not work, that his work was at the stores to count stock delivered. That he was sacked by DK Ashin. That he started working in 2007 and the cash vouchers are for 2014. That he brought in a card for NSSF and he was stopped from working.

18. The Claimant told the court that he was paid by vouchers and was not given copies and that he was not given a certificate of service. He said that he was paid for the week after termination and was the only working at the stores and only one paid weekly.

The Respondent's case.

19. The Respondent called 2 witnesses

20. RW1 Rohit Vyas. He adopted his witness statement dated 6th March 2020 as his evidence in examination in chief. He adopted and produced as Respondent's evidence the cash vouchers attached to the response.

21. RW1 told the court that the Claimant's work was loading and off-loading and that he worked 3 to 4 times a week. When there was no work the Claimant stayed and no payment was done. When the lorry arrived, he worked with people from outside. His work was on raw materials which he and other workers like 5 to 6 to off-load and put in the stores.

22. RW1 stated that they did not give contracts to off loaders, did not pay for NSSF as they come in and leave after the job is done and casuals are not terminated. He told the court that if there is no work that does not mean the workers are terminated. That there is no house allowance for workers like Justus and that he knew that. That the Claimant was not entitled to notice as he was casual, was not on the record of employees and worked for daily wages. That the Claimant is not entitled to gratuity or service as he is not on the record of employees. RW1 denied that they sacked Justus. If there is no work he was told there was no work. He told the court the casuals are not on NSSF. The Claimant had a choice to come to work failing which they would pick the available worker. Failing to come to work does not mean the Claimant was terminated from employment.

23. RW1 told the court that in his company there were other casuals like Justus and permanent employees. The casuals are for off-loading and are paid Kshs. 250/- per sack. That the vouchers produced are for the Claimant. RW1 told the court the Claimant picked cash to pay other off loaders who he worked with.

24. During cross examination by Mr. Upendo for the Claimant RW1 told the court that he was the General Manager and had known the Claimant since 2007. That he had engaged the Claimant for off-loading and used to pay him by way of vouchers. That he paid the Claimant for work done. RW1 told the court that the vouchers produced in court were for the Claimant paid cash to share with the other workers. The vouchers have name and signature of the Claimant only. The Claimant was paid for the week and was not a store man. He did work off-loading and was not a supervisor. He was off-loading and also calling other workers in. RW1 told the court he could not recall any break from work by the Claimant from 2007 to 2014. RW1 told the court the workers are paid by cash vouchers and are not given copies and are

paid on Fridays or Saturdays.

25. During re- examination RW1 told the court that the Respondent pays Kshs.2.50/- per sack off loaded and for small amounts like for 3 sacks being Kshs. 7.50/- off loaded no cheque is issued and workers are then paid in cash end of the day after working. He stated that the Claimant used to work every time there was off loading work and that no one controlled his movement. The Claimant like other casuals would not leave if not paid. RW1 stated that he did not terminate the Claimant as he was not on record of permanent employees. He was on daily records on payment.

RW2

26. RW2 Mahesh Gudka told the court that he was a director of the Respondent. He stated that they have a person who takes care of employees and stated that he did not terminate the Claimant. RW2 adopted his statement dated 16th March 2020 as his evidence in chief. RW2 denied the contents of the statement of the Claimant. RW2 told the court that the Claimant absconded himself from work by not showing up after which someone else started doing his work. That whatever was to be paid to the Claimant was paid. RW2 stated that they do not pay NSSF for casuals.

27. During cross examination by Counsel for Claimant RW2 stated that he was a director of the Respondent. That the Claimant was engaged in 2007 as a casual paid on daily basis when he off loaded goods. That the cash vouchers were available and they produced vouchers for 2014 as samples. RW2 told the court that the monies for 3 to 4 days was paid on Fridays and others paid on daily basis for off loading depending on the work. RW2 told the court that the vouchers must have been authorized by one of the directors and were genuine vouchers in their books. That the Claimant had no role but was employed to off load material. The 1st voucher produced was for Kshs. 643/- and the 2nd for Kshs. 500/- , the voucher dated 20th March 2014 was for Kshs. 150/- . RW2 stated that the payment to the Claimant could not exceed Kshs.500/-. The voucher dated 18th March 2014 is for Kshs. 1150/- and was for the Claimant to share with other workers they worked together. The money for off-loading is paid the same day. RW2 stated that he had no idea of how many others the Claimant shared the money with. That was the same position with the voucher dated 21st February 2014.

28. RW2 stated that he could not recall when the Claimant absconded work but it must have been 2015/2016. That if he does not show up another person is engaged. That they never terminated the services of the Claimant. He did not show up for work. RW2 told the court that the Claimant was in their engagement from 2007 to 2014 as casual and that they produced samples of vouchers for 2014.

29. During Re-examination RW2 told the court that the sample of vouchers are for 4th April 2014, 2nd April 2014, 3rd April 2014, 20th March 2014 , 18th March 2014, 13th March 2014 and 21st February 2014 . RW2 told the court there were gaps in the vouchers. That the gap does not mean they had terminated the Claimant. When the Claimant was at work he was paid and when he did not show up for work there was no need for the Respondent to call and follow up. That he was paid for load carried accumulated to pay end week or pay daily. The Claimant had agreed to that mode of payment.

Legal analysis and findings

30. The parties identified the following as issues for determination in the List of agreed trial issues filed in court on 6th February 2019 and dated same and signed by both counsel for parties as follows:-

- a. Was the Claimant employed by the Respondent as store keeper?
- b. On what grounds was the Claimant dismissed?
- c. Was the Claimant found guilty of any misconduct?
- d. Was the Claimant accorded due process before being dismissed?
- e. Was the respondent justified to dismiss the Claimant?
- f. Was the Claimant entitled to his terminal dues and compensatory dues upon being dismissed?
- g. Is the Claimant entitled to the reliefs sought?
- h. Who bears the costs of the suit?

31. After carefully analyzing the Parties' filed list of issues and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- a. Whether the Claimant's engagement with the Respondent was that of employer employee relationship or casual for piece work?
- b. Whether the procedure for termination of employment was fair and lawful?
- c. Whether Claimant is entitled to reliefs sought.

32. The Court addressed the issues as follows:-

a. Whether the Claimant's engagement with the Respondent was that of employer employee relationship or casual for piece work?

33. The Claimant testified he was employed as store keeper on the 3rd March 2007. He did not produce a letter of employment. He told the court that his last salary was computed at Kshs. 3,500/- per week making Kshs. 14,000/- per month. He did not produce any document on the payment. His only exhibit was the demand letter by Namada & Co Advocates. He testified that he was paid Kshs 3500/- per week. He told the court he was paid by vouchers and did not get copies. The Respondent denied having employed the Claimant and told the court that the Claimant was engaged on piece work basis. The court did not find evidence that the Claimant was employed as a store keeper. What was apparent from the evidence before the court by the Claimant, RW1 and RW2 was that the Claimant worked at the Respondent's company 2007 to 2014 and was involved in off-loading material to the stores and payment of casuals. It is apparent that in 2007 the Claimant was engaged as a casual and paid wages whether weekly or by vouchers retained by Respondent. During cross examination by Mr. Upendo for the Claimant RW1 told the court that he was the General Manager and had known the Claimant since 2007. That he had engaged the Claimant for off- loading and used to pay him by way of vouchers. That he paid the Claimant for work done. RW1 told the court that the vouchers produced in court were for the Claimant paid cash to share with the other workers, the vouchers have name and signature of the Claimant only, the Claimant was paid for the week and was not a store man, he did work of off- loading and was not a supervisor and that he was off- loading and also calling other workers in. RW1 told the court he could not recall any break from work by the Claimant from 2007 to 2014. RW1 told the court the workers are paid by cash vouchers and are not given copies and are paid on Fridays or Saturdays. It is the position of the court that it was the duty of the Respondent as employer to produce the records of the Claimant's employment for the entire period. Consequently the lack of production of the record by the respondent for the period of employment of the claimant, the claim of the claimant as employee on the ground of continuous employment form 2007 to 31st July 2015 by the Respondent and payment of Kshs. 3500/- weekly is taken as the truth.

34. The Employment Act of 2007 section 2 defines a casual employee to mean '*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 24 hours at a time*'.

Section 37 of the same Act provides circumstances of conversion of casual employment to term contract. *37(1)(a) works for a period or a number of continues working days which amount in the aggregate to the equivalent of not less than one month or (b) where a casual employee performs work which cannot be reasonably expected to be completed within a period of a number of working days amounting in 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.*

35. The evidence before the court is that the Claimant worked for the Respondent from 2007 to sometimes in 2015 when is said to have absconded work or failed to turn up for work. The Respondent's Witness told the court that the Claimant sometimes accumulated wages and was paid end of the week. RW1 during cross examination told the court he does not recall break from work by the Claimant in the period between 2007 and 2014. The Submission by the Respondent at page 9 that the Claimant never proved that he worked for the Respondent continuously for more than one month is thus not true. The Respondent's witness RW1 testified that the Claimant was issued with cash for himself and to pay other casuals through the cash vouchers produced in court. This is a clear indication that the Claimant was more than a mere casual. The employer would not have entrusted a casual worker with the responsibility to pay other casuals. This was a demonstration of trust that had developed over time between the Claimant and the Respondents directors. Further both the respondent's witnesses testified that they had known the Claimant from 2007 to sometimes in 2015 when he stopped coming to work. The court believes the testimony of the Claimant that the vouchers produced for 2014 payments were for remittance by the Claimant on behalf of the Respondent to other casual employees.

36. It was the duty of the Respondent as employer to produce the records of the Claimant's employment for the entire period. Consequently the lack of production of the record by the Respondent for the period of employment of the Claimant, the claim of the Claimant as employee on the ground of continuous employment form 2007 to 31st July 2015 by the Respondent and payment of Kshs. 3500/- weekly is taken as the truth.

37. The court adopts the decision cited by the Respondent of Peter Maundu Malonza v Frigoken Limited (2020)eklr as adopted by Onesmus Makau J in Rapid Kate Services Limited v John where the Court of appeal held that:-

' our reading of section 37 of the Employment Act reveals that before the court can convert a contract of service thereunder, the Claimant ought to establish first, that he has been /she has been employed by the employer in question on casual basis and second he/she has worked for the said employer for a period aggregated to more than one month.'

38. The court has established the above threshold as stated by the Court of Appeal, being, first the Claimant was employed as a casual by the Respondent and secondly he worked for the said employer for a period aggregated to more than one month. Further, the Claimant was paid weekly Wages. The court finds that the kind of engagement the Claimant had with the Respondent from 2007 to sometimes in 2015 falls within the provisions of section 37 of the employment act of 2007 as outlined above. The Court finds that the Claimant terms of engagement amounted to a contract of service and hence employee employer relationship was in place,

b. Whether the procedure for termination of employment was fair and lawful?

39. The Respondent in submissions addressed the issue under title as '*whether there was need for a notice or disciplinary hearing? On the other hand the Claimant in submissions addressed the issue under title 'was a fair procedure applied before the claimants dismissal?*

The Respondent submits that there was no need for termination notice as a causal contract is terminable by either party at the close of any days without notice and relies on section 35(1)(a) of the employment Act to the extent that in a contract to pay daily wages the contract is terminable any day without notice.

40. The court has already found that the casual employment had converted to employer employee relationship. The submission by the Respondent on the issue are thus not relevant.

The Claimant told the court he was ordered to leave the premises on presenting NSSF card so that he can be placed on scheme. RW testified that the Claimant did not come back to work and was replaced. Whatever the reason of termination, there was no notice or hearing under section 41 and 45 of the Employment Act of 2007.

41. To buttress its claim the Claimant cited the case of **Donald Odeke v Fidelity Security Ltd Cause No. 1998 of 2011** by Lady Justice Ndolo of which I adopt with approval where she stated in part... *'if the employee is not heard the termination is ipso facto unfair'*.

I find the termination of the Claimant, having served the Respondent continuously from 2007 to sometimes 2015, without notice or hearing is unfair and unlawful.

c. Whether Claimant is entitled to reliefs sought?

42. Having found the engagement of the Claimant as casual in 2007 by the Respondent had converted to that of employee employer employment by time of termination in 2015 and having found the termination was unfair and unlawful I will now consider the reliefs sought.

(i) Notice pay of 1 month is due under the provisions of section 35 of the Employment Act of 2007. I already found that the Claimant was paid kshs. 3500 per week accumulating to Kshs.14000 per month. On notice pay section 36 of the Employment Act applies. The claimant is entitled to notice pay of 1 month being Kshs. 14,000/-.

(ii) On accrued leave, for the 8 years and 4 months the Claimant was in employment, annual leave was due or payment in lieu thereof under section 28 of the Employment Act. The Claimant is entitled to 21 days wages per month for 8 years and 7 days prorated for the extra 4 months. 3500 for a week amounts to Kshs 500/- per day. Thus 21days x 500x12x8 +500x7= Kshs. 87,500/-

(iii) The Claimant is entitled to housing allowance under section 31 of the Employment Act at 15% of the gross salary per month of Kshs. 14000/- for 8 years and 4 months served total $8 \times 12 + 4 \times 14000 \times 15/100 =$ Kshs 210,000/= due as housing allowance.

(iv) The Claimant is entitled to service pay for every complete year served on basis that the Respondent did not produce record of statutory dues in terms of section 35 of the Employment Act of 2007. Thus the Claimant is entitled to 15 days service pay for every complete year worked thus $7500 \times 8 =$ Kshs. 60,000/=

(v) On claim for damages for unprocedural termination I have considered the fact that reinstatement is not an option available to the Claimant, I have taken into consideration the long period of service and the lack of promotion over the years by the Respondent and the oppressive terms of service for that long period like not getting medical cover among other benefits enjoyed by employees. I have also taken into account the fact that the Claimant told the court he is doing 'jua kali' work which court took to mean menial jobs and the Claimant has not been able to get similar or suitable job after termination. I consider as fair compensation 12 months' salary based on the accumulated wages of Kshs. 14,000 per month total Kshs.168,000/-.

(vi) The Respondent shall issue the Claimant within 30 days of the judgment with certificate of service in compliance with section 51 of the employment Act of 2007.

All the award amounts are subject to statutory deductions.

(vii) The Claimant will get costs and interest on awarded amount at court rates if the same are not settled in full within 30 days of the judgment date

CONCLUSION AND DISPOSITION

43. The Court has found the engagement of the Claimant as casual in 2007 by the Respondent had converted to that of employee employer employment by time of termination in 2015. The Court further found the termination was unfair and unlawful. Accordingly, judgment is hereby entered for the Claimant against the Respondent in the following terms:-

a. Compensatory damages Kshs.168,000/-

b. Notice pay of Kshs. 14,000/-

c. Service pay Kshs. 60,000/-

d. Accrued leave Kshs. 87,500/-

e. Unpaid Housing allowance Kshs. Kshs 210,000/=

The award in (a) to (e) above is subject to statutory deductions.

f. I also award the Claimant interest on the sum at court rates from the date of judgment if the full amount is not paid

within 30 days of this judgment.

g. Issuance of certificate of service under section 51 of the Employment Act.

h. Costs of this suit for the Claimant shall be borne by the Respondent

Written and Dated the 2nd Day of November 2021 at BUNGOMA

.....

J.W. KELI

JUDGE.

DELIVERED AND DATED THIS 2ND DAY OF NOVEMBER 2021 AT NAIROBI

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JUDGE

In the presence of.....