



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 446 OF 2017**

**KENYA BUILDING CONSTRUCTION TIMBER & FURNITURE INDUSTRIES**

**EMPLOYEES UNION.....CLAIMANT**

**ANTHONY NDIRANGU.....GRIEVANT**

**VERSUS**

**PAVAN PUTRA ENTERPRISES LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed the suit seeking recompense for unlawful and/or unfair dismissal of 3 Grievants who were its members. At the time the suit came up for hearing, the putative Claimant withdrew the cases on behalf of two Grievants Mr. Isaac Kariuki and Mr. Joseph Mugambi whose claims had been settled. Only the case of the 3<sup>rd</sup> Grievant Anthony Ndirangu was up for determination. The Claimant averred that the Grievant was employed by the Respondent in the year 2013 and that he was a member of the Union by virtue of paying the union dues. The Claimant averred that the Grievant was unlawfully and unfairly terminated from employment with no reasons being assigned contrary to Sections 41(1) and 45(1) and (2) of the Employment Act. The Claimant averred that it attempted to settle the dispute between the parties but the Respondent was not cooperative. It averred that a dispute was reported to the Minister of Labour for possible conciliation and the Minister appointed a conciliator who invited the parties for conciliation meetings at his office but all were futile as the Respondent failed to co-operate. The Claimant averred that the Conciliator issued a referral certificate upon being unable to reconcile the parties. The Claimant sought a declaration that the termination of the Grievant was unlawful and unfair and prayed for 12 months compensation for unlawful termination and payment of terminal benefits including notice – Kshs. 18,200/-, annual leave – Kshs. 18,200/-, prorata leave – Kshs. 9,450/-, service – Kshs. 11,200/- making a grant total of Kshs. 57,050/-. The Claimant also sought the costs of the suit.

2. In the defence filed, the Respondent averred that the Grievant was intermittently engaged on a casual basis, with no binding contractual employment terms save for the agreed daily wages if and when applicable and that no instance of unfair or unlawful dismissal could thus arise. The Respondent admitted the existence of conciliatory proceedings as averred and contended that the said proceedings were undue as there was no enforceable employment contract between the parties amenable to such proceedings and hence no incidents of terminal benefits arose in favour of the Grievants as claimed. The Respondent averred that the claim herein against on behalf of the Grievant Isaac Kariuki Njuguna is *res judicata* as the Claimant had prior to this suit filed a similar claim vide Nyeri ELRC Cause No. 198 of 2017 which is still pending in court. The Respondent averred that it would raise a preliminary objection in respect thereof.

3. The Claimant Antony Ndirangu testified that he was employed by the Respondent as a mason earning Kshs. 700/- a day and that he was not given any document upon his employment. He stated that the project was for the construction of a lodge at Mt. Kenya Village homes. He testified that they would be paid weekly after which they would sign a payment voucher which the Respondent would retain. He testified that they were paid only for the days worked and if any of them was absent on a day that he was supposed to work, the employer would look for them and ask for the reason of absenteeism. He testified that in March 2015 they were told that the work had come to an end. He stated that the project had about 100 houses and that it is not complete yet. He testified that masonry work continued and that is why he came to court to seek for redress. In cross-examination he stated that once dismissed one was told that there was no work. He said that they knew that there was work but the Respondent did not want to give them work. The Grievant prayed that the court finds that his termination was unlawful and that he should be paid his terminal dues as sought in the claim.

4. The Respondent failed to call a witness in support of their case and also failed to file submissions.

5. The Claimant filed submissions and isolated two issues for determination. Firstly, whether the Grievant was a casual laborer and secondly, whether the Grievant is entitled to the terminal dues sought from the Respondent. The Claimant submitted that the Respondent did not avail records to prove that indeed the Claimant was a casual labourer. It relied on the provisions of Section 2 of the Employment Act which defines a casual employee as one who is paid at the end of each day and who is not engaged for a longer period than twenty four hours at a

time. The Claimant cited provisions of Section 37 of the Employment Act on the automatic conversion of a casual employment to term contract. The Claimant submitted that he worked for a period exceeding one year without interruption hence he is entitled to the protections under Section 35(1)(c) of the Employment Act. The Claimant submitted that the termination of the Grievant's employment would have been at the end of a period of 28 days following the giving of a notice in writing. It submitted that since the Respondent did not issue the said notice the termination was unlawful and unfair as the Grievant's employment had been converted from casual to a term of contract by operation of time. The Claimant relied on the case of **Francis Ndirangu Wachira v Betty Wairimu Maina [2017] eKLR** where the court held that an employee who had worked continuously for longer than one month had his terms of employment converted by operation of law to regular employment as provided in Section 37 of the Employment Act. The Claimant urged the Court to hold that the Grievant was unfairly terminated and that he is entitled to the benefits sought.

6. The Grievant was represented by the Kenya Building Construction Timber & Furniture Industries Employees Union. The Union concedes it had not recognition agreement with the Respondent. In essence, the requirements for the Labour Institutions Act and the Labour Relations Act were not in place. As such, the role of the union in the conciliation and in the proceedings before me was misplaced. The Grievant had a legitimate claim he could have pressed on his own and in that regard I strike out the name of the Claimant and substitute it therefore with the name of the Grievant as Claimant. The Claimant averred that he was paid Kshs. 700/- a day but the money as paid at the end of the week. He was a mason engaged in the construction of a home in the Mt. Kenya Homes. He asserts that his contract converted to a monthly contract yet he did not avail any evidence of his working for more than a month. He did not aver how long he worked as a mason in the said project. Section 37 of the Employment Act was cited. It provides as follows:

*37. Conversion of casual employment to term contract*

*(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. (underline mine)*

7. The law is clear that there has to be evidence of the work extending to a period in the aggregate of over 3 months and the work being done by the employee continuously for days amounting to one month. In the case of the Claimant herein, there is no such evidence and in light of there being a paucity of evidence in support of his work for over the period of one month he cannot claim the conversion under the Act. He asserts that he was terminated without notice in March 2015. If that indeed was so, because he was paid weekly the notice period he was entitled to was one week. He sought a plethora of reliefs which he did not properly articulate such as service and pro rata leave. No definite period of service was indicated to enable court ascertain if indeed there was pro rata leave due or even leave due if any, service or the like. As this element of the claim was unproved the court finds only in respect of the notice period which he was entitled to receive prior to termination. He is therefore not entitled to any of the other claims under the suit he filed and is only to recover

a. Kshs. 4,900/-

It is so ordered.

**Dated and delivered at Nyeri this 17<sup>th</sup> day of February 2020**

**Nzioki wa Makau**

**JUDGE**