



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT AT NAIROBI**

**CAUSE NO. 1709 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 9<sup>th</sup> July, 2020)**

**EDWARD MUNENE KANYI.....CLAIMANT**

**VERSUS**

**KENYATTA UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1. The Claimant, Edward Munene Kanyi instituted this suit vide a Memorandum of Claim dated 23/09/2015 and later filed an Amended Memorandum of Claim dated 07/01/2016 for unfair termination of his employment against the Respondent, Kenyatta University.

2. He avers that he was employed by the Respondent as a Machine Operator/Library Assistant on 08/10/2009 on a salary of a daily rate Kshs. 666/= and that by the time of termination, his salary was Kshs. 25,020/- per month. That in March 2015, the Respondent unfairly, unlawfully and in total breach of the employment contract and his basic rights, orally terminated his employment without giving him a chance to be heard. That the Respondent further neglected to pay or settle his terminable dues computed as follows:-

<i>i. Three (3) months' salary in lieu of notice</i>	<i>Kshs. 75,060.00</i>
<i>ii. Unlawful dismissal 12 months' salary</i>	<i>Kshs. 300,240.00</i>
<i>iii. Service pay (5) five years</i>	<i>Kshs. 62,550.00</i>
<i>iv. Leave pay (5) five years</i>	<i>Kshs. 125,100.00</i>
<i>v. Leave allowance for (5) five years</i>	<i>Kshs. 17,500.00</i>
<i>vi. Pro-rata leave for 2015 three (3) months worked</i>	<i>Kshs. 875.00</i>
<i>vii. House allowance for five (5) years and three (3) months</i>	<i>Kshs. 1,071,000.00</i>
<i>viii. Commuter allowance for five (5) years and three (3) months</i>	<i>Kshs. 504,000.00</i>
<i>ix. NSSF unremitted dues for two (2) years and two (2) months</i>	<i>Kshs. 10,400.00</i>
<b>TOTAL</b>	<b><i>Kshs. 2,166,725.00</i></b>

3. The Claimant further avers that the Respondent has had due notice and he prays for judgment against it for Kshs. 2,166,725.00, such other dues as may be found due to the Claimant and any other reliefs the Court may deem fit to grant.

4. The Respondent filed an Amended Statement of Defence dated 22/01/2016 averring that the Claimant was employed on a casual basis when there was work to be done, was paid on a daily basis and was therefore not entitled to any terminal benefits.

5. It avers that the Claimant was never engaged for a period longer than twenty four hours at a time and that he was only called to work when there was work to be done and was remunerated daily for any day worked. That the Claimant remained a casual employee whose engagement did not require a written notice for termination and that the same could be terminated without any notice.
6. The Respondent admits receiving a demand notice which it contends was of no consequence given the contents of its defence and avers that the Amended Memorandum of Claim discloses no reasonable cause of action against it and should thus be struck out with costs.
7. The Respondent also filed a Witness Statement dated 15/02/2013 made by its Chief Librarian, Dr. George Gitau Njoroge who states that prior to the Claimant's appointment, Stella Ondari who has since been transferred to the Examination Section, was working at the Respondent's Post Modern Library and that it is she who enlightened the Claimant about the photocopying section at the library.
8. That photocopying services in the said library normally operated from 9am to 5pm on weekdays and 8am to 5pm on Saturdays and that the services were not provided on Sundays. That the main customers of the photocopying services are students and members of staff and that library staff are not charged for using the photocopying services, while the cash received from photocopying is handled by the cashier at the Library. That the photocopying machine was at any single time manned by one person who was required to take a meter reading of the photocopier at the close of business.
9. He states that on 12/02/2014, the Claimant and Stella Ondari reported that the cashier at the Post Modern Library had two receipt books and that the cashier only wrote some transactions in the receipt book while omitting others. Further, that the cashier did not indicate whether the money collected was for fines, lost books or photocopying.
10. He confirms that over the course of his employment, he realised that the readings from the photocopier and the monies collected did not tally and which prompted him to write to the Respondent's Chief Internal Auditor on 18/02/2015 requesting him to audit the same.
11. The photocopying services were then reviewed for three months being between 01/11/2014 and 31/01/2015 which resulted to a report in the form of an internal memo from the University dated 13/03/2015 issued by the Chief Internal Officer to the VC of the. That the audit report conclusions confirmed his concerns that there was an average of 45% of photocopying work which was not genuine and unaccounted for while the issuance of photocopying papers is well accounted for. That this implied that unaccounted photocopying work either used photocopying papers from other sections of the library or from outside the library.
12. He states that the Internal Audit recommended for the members of staff dealing with photocopying to be transferred with immediate effect in order to improve efficiency and that the Respondent then immediately suspended both the Claimant and Stella Ondari for them to explain the theft.
13. That when the reports were reviewed, the HR Manager, N. Gikaria directed that the Claimant's employment be terminated and be blacklisted for gross misconduct and further issued a memo dated 19/03/2015 informing Dr. Gitau of the same. That the memo also required the director of security to ensure that the Claimant did not access the university premises, for the Chief Finance Officer to stop salary of the Claimant and further, the General Registry was to remove the Claimant from the University Database.
14. The Claimant then filed a Reply to Amended Statement of Defence dated 10/02/2016 denying that he was a casual labourer or that he did not require a written notice of termination.
15. He avers that his employment automatically translated into a permanent employee once he had worked for (1) one month and reiterates that a reasonable cause of action has been disclosed. He prays that the Amended Statement of Defence be dismissed with costs.
16. On 21<sup>st</sup> January 2019, parties to this suit jointly filed a Statement of Agreed Issues as follows:-
1. *Whether Claimant was employed on casual basis? (Paragraph 3 of Amended Statement of Defence?)*
  2. *Whether Claimants engagement required written notice of termination? (Paragraph 4 of Amended defence)*
  3. *Whether Claimant entitled to terminate benefits including those particularize claims in paragraph 5 (i) - (ix) of Amended Memorandum of Claim? (Paragraph 5 of Amended Statement of Defence?)*
  4. *Whether Claimant was an employee of the respondent? (Paragraph 6 of Amended Statement of Defence)*
  5. *Whether Amended Memorandum of Claim discloses a reasonable cause of action? (Paragraph 8 of Amended Statement of Defence)*
17. The Claimant testified in court and adopted his witness statement together with a list of documents dated 23/09/2015 and a further list of documents filed on 10/04/2018, as his evidence. RW1, Nderitu Gikaria testified and relied upon his witness statement dated 31/10/2019 together with a list of documents dated 15/02/2018, as his evidence in Court.

### **Claimant's Submissions**

18. The Claimant submits that the Respondent never gave him a termination letter on reasons for termination or a hearing in adherence to

principles of a fair hearing and the tenets of natural justice. He relies on the case of **Antony Musyoka Musembi vs. Nairobi Ironmongers Limited (Employment and Labour Relations Court at Nairobi Cause No. 660 of 2015).**

19. He further submits that the Respondent's evidence in court exonerates him from the loss of money as his work did not involve handling of cash and that he relies on Bank Statements filed in the **Claimant's further statement on 10th April, 2018.** That there is further evidence in the form of NSSF remittances for the years 2014 and 2015 being that such NSSF remittances are normally paid for permanent workers. That the salary payments were remitted to the bank at the end of the month and not daily for any day worked as alluded by the Respondent whose witness failed to produce the terms of employment when he was challenged in Court to do so.

20. That he also filed a Notice to produce on 10<sup>th</sup> April 2018 which the Respondent never responded to despite an Order of the Court on 3<sup>rd</sup> May 2018 requiring him to do so. He submits that the Respondent failing to produce terms of employment, failed to discharge the burden placed on him and he relies on the **Nakuru Petition 2 of 2013, Peter Wambugu Kariuki and 16 others Vs. Kenya Agricultural Research Institute.** That the case of **Peter Wambugu** above abolished casual employment in Public Service.

21. The Claimant submits that **Section 37(1) of the Employment Act** converts casual employment to term contract. That there is evidence in form of an Internal Memo from the Deputy University Librarian to him dated 8<sup>th</sup> July, 2010 transferring him from circulation services to the Acquisitions Section. That the said Memo filed in the **Claimant's further statement of 10<sup>th</sup> April, 2018** gives credence to his evidence that he was employed by the Respondent on 8<sup>th</sup> October, 2009 and has worked uninterrupted until the date of termination.

22. That he relies on the casual Saturday, Sunday and weekly shifts filed in the **Claimant's further statement on 10<sup>th</sup> April, 2018** for the year 2013 and submits that he could not have been paid for the period between May and September if he was not working. He requests the court to expunge the Respondent's last Witness Statement filed on 03/12/2019 because it was filed after he had testified.

23. It is submitted by the Claimant that in light of the evidence before Court, he is entitled to one month's notice as under **Section 36 of the Employment Act** seeing that he was paid salary on a monthly basis. That further as under **Sections 35(5), 28(1) (a) and 31(1)**, he is entitled to service pay, leave and housing allowance.

24. That House Allowance and Commuter Allowance are provided for in the **Terms of Service for Kenyatta University Grade A-F.** That a reasonable cause of action has been disclosed and that since the Respondent breached the provisions of **Section 41 of the Employment Act**, his dismissal was unlawful and the court should award him general damages.

#### **Respondent's Submissions**

25. The Respondent submits that the main question before this Court is whether the Claimant's casual employment with the Respondent was converted into a fixed term by dint of **Section 37 of the Employment Act** to warrant the reliefs sought.

26. It refutes the Claimant's claim of wrongful and unfair termination and asserts that the Claimant being a casual worker, his employment could be terminated at a day's notice and did not require a written notice for termination. That the Court of Appeal in the case of **Rashid Mazuri Ramadhani & 10 others vs. Doshi & Company (Hardware) Limited & another [2018] eKLR** 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/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month.”*

27. That the Claimant admitted in his cross-examination that he was assigned work by the Respondent as per the weekly rotas for casual shifts and that according to the Weekly Casual Shift Rota, he was to work on Wednesday from 2:00 pm to midnight and on Thursday from 8:00 am to 8:00 pm. That he also confirmed he worked once on a Saturday and Sunday in the years 2013-2014. It submits that the Claimant has failed to prove that his casual employment had been converted into a term contract within the meaning of Section 37 of the Act.

28. It is submitted by the Respondent that while the Claimant relied on a copy of a bank statement in his testimony to show that he was paid regularly on a monthly basis, it emerged under his cross-examination that different figures were paid on different months and that the amount was a cumulative total of the number of days worked and not a monthly salary as alleged.

29. That it was further established that the copy of the bank statement showed sporadic payment for the year 2014 and the Claimant did not produce or show any accounts for the year 2009 to 2013.

30. That the Claimant's cross-examination also established that the NSSF remittance was not regular since where there was no remittance, no assignment had been given to the Claimant. That it is also evident he was paid a daily rate whose monthly cumulative was dependent on the different shifts.

31. The Respondent submits that failure to pay wages at the end of the day does not by itself remove a person from the scope of a casual worker. The Court of Appeal in **Rashid Odhiambo Allogoh & 245 others vs. Haco Industries Limited [2015] eKLR** cited with approval the case of **Josphat Njuguna v High Rise Self Group [2014] eKLR** where the Court held that:-

*“It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.... section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees*

*merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates."*

32. It submits that **Section 47(5) of the Act** provides that in a claim for unfair termination of employment or wrongful dismissal, the burden of proving its occurrence shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

33. That having established that the Claimant was a casual worker, then the procedure for termination of such a contract is as provided in **Section 35(1) (a) of the Act** where either party can terminate the contract at the close of any day without notice. That the Claimant has failed to discharge the duty of proving the allegation of unfair termination of employment and is thus not entitled to the reliefs sought.

34. The Respondent urges this Court to be guided by the decision of the Court of Appeal in **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another** above in dismissing the Claimant's Claim.

35. I have considered the evidence and submissions of the Parties herein. The main contention by the Respondent is that the Claimant was a Casual employee and therefore liable to be dismissed without any notice.

36. The Claimant disputes this fact. The Claimant contends that the Respondent remitted his NSSF payments as per his page 8 of the bundle of documents.

37. The NSSF statement produced indeed show that NSSF remittances for the Claimant were remitted from 2011 to 2014 continuously. These remittances were made by his employer Kenyatta University.

38. Some remittances were made in erratically in 2015 upto March 2015. Though the Claimant indicated that he was employed in October 2009, there is no evidence of any records from 2009 except those starting 2011.

39. From the records of 2011, the Claimant was indeed employed by the Respondent who dutifully remitted his NSSF deductions.

40. From the bank statement, he was paid monthly from 2013 to 2014. The fact that he worked continuously over time for period longer than 3 months, his employment terms should have fallen under Section 37 of the Employment Act 2007 which 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.....**

**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".**

41. The Respondent invited Court to consider the Court of Appeal decision in **Rashid Odhiambo Allogoh Cabow**, which *indeed alluded to the fact that an employee worked for over 24 hours is not a good reason to oblige an employer to absorb in his workers.*

42. Indeed even when relying on this precedents in the case of the Claimant, it is not only that fact of working for over 24 hours that exit. In the Claimant's case, he worked for years. There is evidence that he worked from 2011 to 2015 and his NSSF remittances were made. His bank statements show the salary payments on a monthly basis for over 2 years.

43. There is evidence that he was on a duty schedule as a Casual worker. That however is so because that is what the Respondent chose to consider him but in this Court's view, the fact that the Claimant worked for Respondent for the period he did being paid monthly with NSSF remittances being made for over 3 years he qualified to be considered a permanent and pensionable employee.

44. I make a finding that considering the length of time served continuously with NSSF contributions being made and salary paid monthly, the Claimant was one whose employment converted from casual to permanent and he should therefore have been terminated after due notice and with valid reasons.

45. Given that the Claimant was terminated orally and without notice or hearing, his termination was unfair and unjustified as provided under Section 45(2) of Employment Act 2007.

46. In terms of remedies, I find that the Claimant is entitled to remedies as follows:-

*1. 1 months' salary in lieu of notice = Kshs.25,020/=*

*2. 10 months' salary as compensation for unlawful and unfair termination = 25,020 x 10 = 250,200/=*

*3. Service pay equivalent to 15 days salary for each year worked being 2011 to 2015 = 4 years =  $\frac{1}{2}$  x 25,020 x 4 = 50,040/=*

*4. House allowance not paid for the 3 years period the rest of the Claim being time barred = 15% of 25,020 x 26 months = 325,260/=*

**TOTAL = 650,520/=**

*5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.*

**Dated and delivered in Chambers via zoom this 9<sup>th</sup> day of July, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ms. Njiru for Claimant – Present

Ms. Kanda holding brief for Respondent – Present