



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 407 OF 2017

NELSON MAINA.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant was a casual employee of the Respondent and he has sued the Respondent for wrongful and unfair termination of employment and non-payment of annual leave. He asserts that he was employed as a casual labourer in November 2006 working as a cashier in the Respondent's finance department. He worked in the student mess as well as the culture village restaurant up to about 2009. The Claimant also worked in the maintenance store where his duty was to receive building materials, signing delivery notes and dispatching materials to the various building sites up to about 2016. In the course of his delivery of services to the Respondent, the Claimant also worked at the weigh bridge within the university where his duty was to weigh the loaded and empty weight of the vehicles delivering material, generate a record, sign and pass to the store clerk. He finally was posted to the central stores where his duties were to receive stationery from suppliers, sign delivery notes, take custody of the stores and issue to the various departments as and when necessary until February 2017 when he was dismissed without any reason being given and without notice. He averred that he was paid an average of Kshs. 25,034/- a month calculated on the basis of a muster roll. The Claimant asserted that he never allowed to go on annual leave for ten years and the attendant benefits as required by law. The Claimant stated that he worked continuously from the time he was first engaged and was never issued with a contract. The Claimant further avers that his termination was never communicated to him and that he only learnt of it through a colleague who sent a copy of a letter of termination via WhatsApp. The said letter was not addressed to the Claimant though.

2. The Respondent in its memorandum of response denies the Claimant's allegations and puts him to strict proof thereof and asserts that the Claimant was first employed as a casual worker in October 2009 as communicated in the internal memo dated 19th October 2009. The Respondent further asserts that the Claimant's services were on a three-month contractual basis and he used to be paid a daily wage as opposed to a monthly salary as alleged by the Claimant and it depended on the number of days he had worked for that particular month. The Respondent further avers that the Claimant's final engagement as a casual worker was on 19th December 2016 for a period of 3 months which lapsed sometime in February 2017.

3. The hearing took place on 21st January 2019 whereat the Claimant testified and the Respondent did not call any witnesses in support of their case. The Claimant told the court that he was employed by the Respondent on attachment in 2006 and also reiterated that he worked in various departments since 2006. He testified that initially he used to be paid in cash after two weeks. He stated that from the year 2007, he was paid monthly after 30 days and that he had a P9 form to confirm the same. He further averred that he was dismissed in February 2017 and that he was not issued with any notice. He was not notified of the reason for his removal but upon following up he received a letter from a friend through WhatsApp, however the letter wasn't addressed to him. He denied having knowledge of the three months contractual engagement and asserted that he had worked for 10 years without leave. On cross-examination he denied that he was a casual worker and insisted that he used to be paid monthly and that he used to work even on weekends. He however agreed that the letters of authority exhibited by the Respondent were for three months engagement contract but said that they were never issued to him and that he did not get another contract upon the expiry of the 3 months in February 2017. He also confirmed in his testimony that he used to be paid in accordance with the number of days worked, not daily but aggregately at the end of the month. The amount would vary depending on the number of days worked.

4. The Claimant filed submissions on 22nd February 2019 and submitted that the Respondent's allegations that the Claimant was on a fixed short term contract is not factual since he worked continuously without being informed of the alleged renewals or changes in his employment. He submitted that his evidence remained uncontroverted as the Respondent had not called any evidence. He cited the case of **Jamlick Muchangi Miano v Attorney General [2017] eKLR** where the Court held that where a respondent does not call any evidence to support its case then the claimant's evidence remains unchallenged. He further argued that he was never given notice of termination nor was he taken through any hearing and hence he is entitled to compensation. He relied on the case of **John Otieno Uyoma & 3 Others v Chemartin Tea Co. Ltd [2018] eKLR** and submitted that there was no evidence that the Respondent had any valid reasons to terminate his employment and therefore he should be compensated. He relied on the case of **Kenya Plantation & Agricultural Workers' Union v Keen Kleeners Limited [2014] eKLR** where the Court observed that where employees work continuously the term converts from casual to

contract

employment.

5. The Respondent submitted the Claimant was employed as a casual labourer in various roles from time to time for periods not exceeding three months depending on availability of work. It further submitted that the Claimant was not employed continuously but intermittently and that his last engagement was the three month period running from 19th December 2016. The Respondent submitted that the case of **Jamlick Muchangi Miano v Attorney General** (*supra*) cited by the Claimant was distinguishable as Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016 provide for determination of a suit by way of documentary evidence. It was submitted that nothing in the Rules precludes the court from making a determination based on the Respondent’s pleadings and submissions. The Respondent submitted that the term of the Claimant did not covert into a contract in terms of Section 37. The Respondent urged the court to be guided by the case of **Rashid Mazuri Ramadhani & 10 Others v Doshi & Company (Hardware) Limited & Another [2018] eKLR** in dismissing the Claimant’s case.

6. From the foregoing, the following issues fall for determination:-

- a. Whether the Claimant’s employment had converted from casual to a regular term contract.
- b. Whether the termination was wrongful and unfair.
- c. Whether the Claimant is entitled to the remedies as prayed for in the memorandum of claim.
- d. Whether the Claimant’s employment had converted from casual to a regular term contract.

7. In the Respondent’s submissions it was argued that the Claimant was employed as a casual labourer in various roles from time to time for periods not exceeding three months depending on availability of work and that he was not employed continuously but intermittently depending on the availability of work. The Claimant on the other hand contends that he used to work continuously without knowledge of the alleged three month contract renewals or changes in his employment. Was the Claimant a term contract employee or had his term of employment converted in terms of Section 37 of the Employment Act? Under Section 2 of the Employment Act, a casual employee is defined 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 twenty-four hours at a time. Having due regard to the muster rolls that it is evident that the Claimant worked continuously without leave and sometimes on weekends. It is apparent that he worked every month of the year from the year 2009 to the year 2016. The Claimant was unaware of the term contracts the Respondent had designed. Indeed the memos that the Respondent exhibited, these were addressed to the Chief Finance Officer and were authority to engage casuals not contracts for execution by the Claimant. Section 37 of the Employment Act provides as follows with respect to casual employment:-

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)

(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)

(5).....

(underline mine)

Having worked continuously for longer than one month, the Claimant's terms of employment converted by operation of the law to regular employment as provided in section 37 and he therefore was not a casual employee. The case of **Kenya Plantation & Agricultural Workers’ Union v Keen Kleeners Limited** (*supra*) the court held that the continued service albeit under periodic arrangements entitled the grievants to be entitled to treatment as regular employees. In this case the casual employment had converted from casual to term contract under Section 37(1) and (3) of the Employment Act and the Claimant was therefore subject to the provision of Section 35(1)(c) of the Act. As to whether the termination was wrongful and unfair, the law provides that a termination is unlawful if an employer fails to prove that the reason for the termination is valid, that the reason for the termination is a fair reason and that the employment was terminated in accordance with fair procedure. By fair procedure is meant the hearing or safeguards afforded an employee prior to dismissal. In this case, the Claimant was not given a notice or hearing before dismissal. The Claimant prayed for 1 month’s salary in lieu of notice amounting to Kshs. 25,034/-, annual leave for 10 years amounting to Kshs. 175,240.80, 12 months’ salary compensation for unlawful and unfair termination, a Certificate

of service as well as costs and interests of the suit. He clearly cannot recover for any period beyond one year for leave not taken as this was a continuing wrong and he never sought to recover the dues that he was entitled to. He thus would only be entitled to the following:-

- a. One month's salary in lieu of notice – Kshs. 25,034/-
- b. One month's salary in lieu of leave – Kshs. 25,034/-
- c. 6 month's salary compensation for unlawful and unfair termination – Kshs. 150,204/-
- d. Costs of the suit
- e. Certificate of service
- f. Interest on a), b) and c) above from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 25th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar