



**Ochanda & another v Judicial Service Commission & 2 others (Cause 2046 of 2015) [2019] KEELRC 254 (KLR) (29 November 2019) (Judgment)**

*Jacktone Ngolo Ochanda & another v Judicial Service Commission & 2 others [2019] eKLR*

Neutral citation: [2019] KEELRC 254 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 2046 OF 2015**  
**ON MAKAU, J**  
**NOVEMBER 29, 2019**

**BETWEEN**

**JACKTONE NGOLO OCHANDA ..... 1<sup>ST</sup> CLAIMANT**  
**ALICE BUSERA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**  
**MINISTRY OF LABOUR AND HUMAN RESOURCE ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimants filed a Statement of Claim on 17<sup>th</sup> November, 2015 alleging that their services were unfairly and unlawfully terminated by the 1<sup>st</sup> Respondent herein. They therefore seek the following reliefs:
  - a) A declaration that the Claimants' employment terms were duly converted from casuals to permanent and pensionable employees in terms of Section 37 of the Employment Act, 2007.
  - b) A declaration that the termination of the Claimants was unfair.
  - c) The Claimants be paid terminal benefits as set out in Paragraph 22 hereinabove totalling to Kshs. 2,413,500/-
  - d) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the end of justice.



- e) A declaration do issue that the Claimants' constitutional right under Article 27 and 41 of the Constitution were violated.
  - f) The Respondent be ordered jointly and severally to pay the Claimants damages for violation of their constitutional right under Article 27 and 41 of the Kenya Constitution.
  - g) The Respondents be ordered to issue the Claimants with certificates of service as required by the provisions of Section 51 of the Employment Act, 2007.
  - h) The Respondents to pay the costs of this Claim
  - i) Interest on the above at Court rates.
2. The facts of the case according to the Statement of Claim dated 17<sup>th</sup> November, 2015 are that the claimants were initially employed by the 2<sup>nd</sup> respondent on casual basis at the Industrial Court, starting the year 2006 and 2009 respectively, and later their services were transferred to the 1<sup>st</sup> respondent when the court was moved to the Judiciary under the 2010 constitution. They averred that they earned Kshs.350 per day which amount was later increased to Kshs.1,000/- per day.
  3. The Claimants aver they both continued to work continuously for the 1st Respondent diligently and to its satisfaction until 18<sup>th</sup> November, 2014 when their services were unfairly and unlawfully terminated without any notice or being accorded any hearing contrary to the principles of natural justice and the provisions of Section 41 of the Employment Act, 2007.
  4. The 1<sup>st</sup> Respondent filed her defence on 26<sup>th</sup> January, 2018, denying that the claimants were not employed by it. It is further contended that the Claimants transited from the defunct Industrial Court but were never offered employment by the 1<sup>st</sup> Respondent. She averred that the Claimants' engagement at the Employment and Labour Relations Court was renewed on a time to time basis and thus their employment was never converted to a term employment.
  5. The 1<sup>st</sup> Respondent further denied having violated any of the Claimants' rights to fair Labour Practices or discriminated them as alleged and averred that the termination of the claimants' services was done after following fair procedure since both were given one month's notice prior to their termination vide the 1<sup>st</sup> Respondent's letter dated 1<sup>st</sup> May, 2014. She further averred that there was no contract between itself and the Claimants from the period 1<sup>st</sup> June, 2014 to 31<sup>st</sup> October, 2014. She therefore contended that the instant suit is misconceived and does not disclose any reasonable action against her and prayed it to be dismissed with costs.
  6. The 3<sup>rd</sup> Respondent on his own behalf and on behalf of the 2<sup>nd</sup> Respondent filed defence on 26<sup>th</sup> January, 2018, in which he confirmed that the Claimants herein were engaged as casual workers by the 2<sup>nd</sup> Respondent in the Industrial Court and they continued to work there, after the court was taken over by the Judiciary under the new constitution, until 15<sup>th</sup> May, 2014 when their services were terminated after being served with one month's notice as required by the Employment Act, 2007.
  7. The 2<sup>nd</sup> Respondent further averred that she paid the Claimants for the work done during the subsistence of their employment relationship and that the Claimants have no claim against her. She therefore urged the Honourable Court to dismiss the Claim with costs. In the alternative the 3<sup>rd</sup> Respondent urged this Court to discharge the 2<sup>nd</sup> Respondent from the proceedings.
  8. The main issues for determination arising from the pleadings are whether the Claimants' employment converted from casual to permanent employees pursuant to the provisions of Section 37 of the



Employment Act, 2007; whether they ever appointed by the 1st respondent as her employees; and if so, whether the employment was unfairly terminated.

9. The matter was heard on 20<sup>th</sup> March, 2019 and 15<sup>th</sup> May, 2019 with both parties tendered evidence and thereafter filed written submissions.

#### **Claimant's Case.**

10. The 1<sup>st</sup> Claimant testified as CW1 and basically adopted his Statement of Claim, 34 supporting documents annexed thereto and written Statement filed on 16.8.2018 as his evidence. In brief, he stated that he was engaged by the Industrial Court in 2006 as a subordinate staff handling cleaning of toilets and corridors when the Court was under the Ministry of Labour. He further stated that his starting wage was Kshs.350 per day but the amount was subsequently increased to Kshs.1,000 per day in 2012. He further stated that he was not housed by the employer or paid house allowance but he was working five days a week.
11. CW1 further testified that in 2012, the Industrial Court was taken over by the Judiciary and relocated from the NSSF Building to Milimani Commercial Court Building. He further testified that he continued working for the Court as support staff and his wages paid by Judiciary until May 2014 when he was served with a termination notice. He however contended that he was not released by the Principal Judge of the court and he continued to work until November 2014 when his services were terminated unfairly without being paid salary for May to November 2014 and terminal dues.
12. Upon cross examination CW1 admitted that his appointment letter was for a period of 29 days. He further admitted that the termination letter dated 1/5/2014 by the Chief Registrar of Judiciary (CRJ), indicated his last day of service was to be 31/5/2014. He confirmed that after receiving the said notice, the Principal Judge of the Court told him to continue working as the PJ engaged the CRJ on the matter. He however admitted that he was not given any reinstatement letter or paid salary until November 2014 when he was told to hand over to the Executive Officer, Mr. Wambua.
13. CW1 confirmed that he was never interviewed or appointed by the Judicial Service Commission but maintained that he was inherited from the Ministry of Labour when the Industrial Court was taken over by the Judiciary. He contended that there existed an employment relationship with Judiciary because she was paying his salary on a monthly basis.
14. The 2<sup>nd</sup> Claimant testified as CW2, and also adopted her written statement filed on 13.5.2019 as her evidence. In brief she stated that in February 2006 she was employed by the Ministry of Labour as a Support Staff in the Industrial Court. Her daily wage of Kshs.250 per day which amount was later increased to Kshs.1,000 per day. The said amount was paid on a monthly basis in arrears but she was not paid any house allowance. She worked daily and continuously except Saturdays and Sundays and that between the years 2006 to 2012 her salary was being paid by the 2<sup>nd</sup> Respondent while from 2012 the Judiciary started paying her salary.
15. CW2 further testified that she received a letter in May 2014 informing her to stop working but the Principal Judge of the court failed to release her and wrote a letter to CRJ requesting that she continues working since the Court had no other staff members to do the tasks she and the CW1 were performing. She therefore continued working until November 2014 but no salary was paid to her from May 2014. According to her the termination was without any just reason and as such she prayed for reliefs set out in the suit.
16. Upon cross examination, CW2 admitted that as per the termination notice, her last working day was 31/5/2014. She stated that the Principal Judge of the Court informed them to continue working. She



further testified that another letter dated 3/6/2014 was done by the Deputy Registrar of the ELRC seeking revocation of the Claimants termination letters. She however confirmed that she did not receive any letter revoking her termination.

17. CW2 admitted that she was never interviewed and/or appointed by the Judiciary at any time but contended that her salary was being paid by the Judiciary until May 2014. She further admitted that she was never appointed on permanent basis by the 2<sup>nd</sup> respondent before joining the Judiciary. She however contended that she voluntarily chose to continue working for the Judiciary when other members of staff of the Industrial Court returned to the Ministry. She concluded by stating that she worked for a total of 9 years of continuous service in the Industrial Court without proceeding for any leave.

### **Defence Case**

18. The 1<sup>st</sup> Respondent called her Assistant Director Human Resource & Administration, Mr. Peter Bunde who testified as Rw1. He also adopted written statement filed on 28<sup>th</sup> September, 2018 as evidence in chief. In brief he stated that the Claimants were never employed by the 1<sup>st</sup> Respondent. He however contended that the claimants' engagements were renewed from time to time and as such their contracts were never converted to term employments by operation of the law. He added that the claimants were terminated vide the letter dated 1<sup>st</sup> May, 2014 that gave the claimants one months' notice and clearly informed them that their last day of service shall be 31<sup>st</sup> May, 2014. He therefore contended that any work done by the Claimants after the said date was not official work for the Judiciary.
19. RW1 denied that the termination of the claimants' employment was illegal and unlawful and contended that the termination was done in accordance with the Judicial Service Act. He stated that, by a letter dated 3<sup>rd</sup> June, 2014, the Deputy Registrar of the Court confirmed that the Claimants engagement in the Industrial Court had been terminated on 31<sup>st</sup> May, 2014 and requested the 1<sup>st</sup> Respondent to consider re-engagement but the request was declined. He therefore prayed for the Claim against the 1<sup>st</sup> Respondent to be dismissed with costs.
20. Upon cross examination, RW1 admitted that the Claimants were casual employees attached to the Industrial Court but under the new constitution they transited to the Judiciary in the year 2012. He further admitted that after the transition the Judiciary begun paying the Claimants salaries which at the time was Kshs.1,000 per day and that the same was paid in arrears at the end of the month.
21. RW1 further admitted that the Principal Judge and the Deputy Registrar of the Court handle administrative issues at a station but contended that the two do not handle Human Resource issues. He maintained that as per the letter of termination, both Claimants were given a 30 days' notice and after that period they were not entitled to salaries. Further, he contended that the Claimants' termination was not on disciplinary basis and as such there was no reason of serving them with a show cause letter and/or conducting a disciplinary hearing.
22. He however admitted that the 1<sup>st</sup> Respondent did not make any statutory deductions like NSSF from the Claimants' salaries and also never paid them cash in lieu of leave. He further admitted that she never issued the Claimants with a certificate of service upon separation. He denied that the 1<sup>st</sup> Respondent violated the Claimants' constitutional rights as alleged but admitted that the Claimants worked continuously under casual terms after they transited from the Ministry of Labour. In conclusion, he contended that the claimants were paid all their dues up to May, 2014 when the separation occurred.
23. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent closed their cases without calling any witnesses. Parties thereafter filed and exchanged their written submissions.



### **Submissions by the Parties.**

24. It is submitted on behalf of the Claimants that their casual engagements were converted by operation of law in conformity with Section 37 of the Employment Act, 2007 as the two had worked continuously for the Industrial Court since January 2006 and February 2009 respectfully having been engaged by the Ministry of Labour up to 2014 when their engagements were terminated.
25. The Claimants further submitted that the 1<sup>st</sup> Respondent had no valid reason for terminating their services. It is further the Claimants' contention that the Respondents have failed to prove to the Court by way of evidence that there were justifiable reasons to terminate their employments. The Claimants relied on the provision of Section 47 (5) of the Employment Act, 2007.
26. They further submitted that the Respondents failed to observe procedural fairness and principles of natural justice in terminating their employments as envisaged under Section 41 and 45 (4) (b) of the Employment Act, 2007 thus making their termination unprocedural and unfair. To buttress this argument, the Claimants cited and relied on the case of Gilbert Mariera Makori Vs Equity Bank Limited (2016) eKLR.
27. The Claimants further contended that they are entitled to the reliefs as sought in their Memorandum of Claim and thus urged this Honourable Court to allow the same as drawn.

### **1<sup>st</sup> Respondent's Submissions**

28. The 1<sup>st</sup> Respondent on the other hand submitted that Section 37 of the Employment Act, 2007 does not apply to the Claimants herein and therefore their casual contracts were not converted to term employments. She further submitted that she was not involved in any appointment of the Claimants and that they did not go through any competitive process of recruitment with her and can therefore not be equated to an appointment. To buttress this argument, the 1<sup>st</sup> Respondent cited and relied on Agnes Wanjiku & 10 Others Vs Chief Registrar of the Judiciary & Another (2017) eKLR.
29. The 1<sup>st</sup> Respondent further submitted that the Claimants served the Judiciary during the transition of the defunct Industrial Court transit to the Employment and Labour Relations Court. She further submitted that there was no competitive recruitment process to fill their positions and thus urged the court to find that their recruitment was unlawful. For emphasis the 1<sup>st</sup> Respondent relied on the case of Trusted Society of Human Rights Alliance Vs Nakuru Water & Sanitation Services Company & Another (2013) eKLR where the Court considered appointments made without following due process and held that a recruitment undertaken outside established policy guidelines and regulations were unlawful.
30. The 1<sup>st</sup> Respondent further submitted that since she had not employed the Claimants herein, the letter dated 1<sup>st</sup> May, 2014 was not a termination letter but a notice that their engagement as casuals had come to an end in accordance with Article 41 and 47 of the Constitution. It is on this basis that the 1<sup>st</sup> Respondent contended this action did not amount to unfair termination.
31. The 1<sup>st</sup> Respondent further submitted that, she gave the Claimants notice as provided under Section 35 (1) (a) of the Employment Act, 2007. To buttress this argument, the 1<sup>st</sup> Respondent cited and relied on the case of Nelson Onyango Othoo Vs Wilham Kenya Limited (2012) eKLR.
32. The 1<sup>st</sup> Respondent submitted that the termination of the claimants' services was lawful and consequently, they are not entitled to any of the remedies as sought in their Claim. As regards the Claim for reinstatement, the 1<sup>st</sup> Respondent submitted that the said relief is not available to the Claimants



herein because were engaged on a casual basis. In support of this submission the 1<sup>st</sup> Respondent relied on William Basil & 3 Others Vs Colour Print Limited (2019) eKLR.

33. She denied the claim for one month's salary in lieu of notice and submitted that the Claimants were given one month's notice of the intended termination vide the letter dated 1<sup>st</sup> May, 2014. She further contended that the Claimants are not entitled to gratuity and payment in lieu of leave because they casual employees. She further contended that the claim for Kshs. 30,000 per year in lieu of leave lacks particulars of how it was arrived at.

### **2<sup>nd</sup> Respondent's Submissions**

34. The 2<sup>nd</sup> Respondent submitted that the Claimants have not established any cause of action against her and as such the Claim against her ought to be dismissed. To buttress this argument, the 2<sup>nd</sup> Respondent cited the cases of National Bank of Kenya Limited Vs Hamida Bana & 103 Others (2017) eKLR and Kenya Airways Limited Vs Aviation & Allied Workers Union & 3 Others (2014) eKLR.
35. The 2<sup>nd</sup> Respondent further submitted that any claim the Claimants may have against her are statute barred under the provisions of Section 90 of the Employment Act, 2007 and the same can therefore not be granted. For emphasis the 2<sup>nd</sup> Respondent cited the case of Samson O. Ngonga Vs Public Service Commission & 5 Others (2013) eKLR.

### **Analysis and Determination**

36. There is no dispute that the Claimants were initially employed by the Ministry of Labour on casual basis from the year 2006 and 2009 respectively until 2012 when the Industrial Court in which they were attached, was transferred to the Judiciary. It is further not in dispute that after the takeover of the Court by the Judiciary, the Claimants continued working for the Industrial Court, now referred to as the Employment and Labour Relations Court and drew salary from the Judiciary until 31<sup>st</sup> May, 2014 when their services were terminated. The issues for determination are:
- a) Whether the Claimants' employment terms converted from casual to permanent employees pursuant to the provisions of Section 37 of the Employment Act, 2007.
  - b) Whether the Claimants' employment was unfairly and unlawfully terminated by the respondents.
  - c) Whether the Claimants' Constitutional rights under Articles 27 and 41 of the Constitution were violated.
  - d) Whether the Claimants' are entitled to the reliefs sought.

#### **(a) whether the casual employment converted to permanent employment**

37. Under section 37(1) of the Employment Act, casual employment converts into contract of employment for payment of monthly salary if the casual employee:

“(a) works for a period or a number of continuous working which amount in the aggregate to the equivalent of not less than one month;”

38. I have carefully considered the various correspondences between the Registrars and the ministry and also the appointment letters given to the claimants by the court on behalf of the 2<sup>nd</sup> respondent. There is no doubt that the employer never intended to employ the claimants permanently and she was careful not to enter into any relationship which could be deemed as permanent employment with the



claimants or any other person appointed on casual basis. The letters were faithful to the Circular from the Office of the President Ref No. OP/CAB.228A/(5) dated 6.1.2006 which authorised hiring of casual employees by the permanent Secretaries / Authorised Officers after seeking approval from the Directorate of Personnel Management and the Ministry of Finance.

39. The letter to the 2<sup>nd</sup> claimant dated 27.8.2008 offered her casual employment for 30 days starting 1.7.2008 for payment of Kshs.250 per day in line with the General Wage order published vid Legal Notice number 38 of 2006 and the Circular from the Office of the President dated 6.1.2006. The letter made it clear that:

“Note that the job is purely casual with no guarantee of permanent employment but due to the financial regulations and procedures involved in payment, your daily pay will be accumulated and paid at the end of the each [sic] month.

Sign the certificate below if you are in acceptance with the above terms.”

40. The claimant accepted the said terms of the appointment. Thereafter the court was served with a further Circular from the Office of the President dated 24.6.2008 which cautioned all Heads of Departments on the effects of section 37 of the Employment Act to casual employment if they served continuously. As result, the claimants were now hired on casual basis for periods of 29 days for a daily rate of Kshs.250 with no guarantee of permanent employment and they accepted. In view of the foregoing facts, it clear that from the start and throughout the period the claimants worked for the 2<sup>nd</sup> respondent, the parties did not intend to enter into permanent employment contract but only casual employment relationship. In addition, the claimants have not proved that they served the 2<sup>nd</sup> respondent for any continuous one month period after the 2<sup>nd</sup> respondent was served with the Circular dated 24.6.2008. They indeed admitted in evidence that they were working from Monday to Friday which translates to five (5) days a week and twenty (20) days a month. I therefore return that their service was below one month continuous period at any one term and it never converted to permanent employment under section 37 of the Act.
41. As regards the 1<sup>st</sup> respondent, I am satisfied that the claimants’ employment was transferred to the Judiciary under the same terms as when the court was under the 2<sup>nd</sup> respondent save that the wages were increased to Kshs.1,000 per month. Under section 2 of the Employment Act, a contract of employment means any agreement whether written or oral and whether expressed or implied. All what matters is whether the attributes of an employment relations are discernible including payment of salary or wages as consideration for the services rendered, and control of the employee by the employer to name but a few.
42. However, like in the time the claimants served the 2<sup>nd</sup> respondent, they never worked for the Judiciary for one-month continuous period but 20 days at any particular cycle of payment going by the pay rolls produced as exhibits. They therefore remained casual employees of the Judiciary and they never converted to permanent employees under section 37 of the Act. Their status as casual employees never changed despite the fact that they were occasionally invited to take part in training programmes of the Judiciary to improve their skills, and were issued with certificates as proof of participation.
43. However, the foregoing must not be viewed behind the lenses of Article 172 of the Constitution, which recognises that the Judicial Service Commission is the employer of all staff in the Judiciary. The Judicial Service Commission receives the said mandate from Article 172 of the Constitution which provides that the Commission shall:-

“(1)



- (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates and other Judicial Officers and other staff of the Judiciary, in a manner prescribed by an Act of Parliament.

“(2) In the performance of its functions, the Commission shall be guided by the following:-

- (a) competitiveness and transparent process of appointment of judicial officers and other staff of the judiciary; and
- (b) the promotion of gender equality.”

44. In this case, I am satisfied that the alleged “appointments” of the Claimants to the Judiciary did not involve the Judicial Service Commission. The fact that Claimants transited from the 2<sup>nd</sup> Respondent and continuing to work for the judiciary in the same capacity held therein did not amount to appointment by the JSC. The two institutions, JSC and the Judiciary are not the same both in structure and operations.

45. Further, in the case of Trusted Society of Human Rights Alliance vs. Nakuru Water & Sanitation Services Company & another (2013)eKLR Hon. J. Ongaya considered appointments made without following due process and held that a recruitment undertaken outside established policy guidelines and regulations were unlawful. In the end I return that there was never employer-employee relationship between the Claimants and 1<sup>st</sup> Respondent.

**(b) Whether the Claimants’ employment was unfairly and unlawfully terminated**

46. In view of the finding that the claimant’s where not employees of the 1<sup>st</sup> respondent, I dismiss the allegation that she unfairly and unlawfully dismissed them. Likewise, I dismiss that allegation against the 2<sup>nd</sup> respondent because the claimants admitted that they voluntarily chose to leave her in 2012 and joined the Judiciary.

**(c) Whether the Claimants’ Constitutional rights under Articles 27 and 41 of the Constitution were violated.**

47. The claimants did not plead with precision, or demonstrate how their rights under Article 27 and 41 of the constitution were violated. Consequently, I return that the said allegation lacks merits.

**(d) Whether the Claimants’ are entitled to the reliefs sought.**

48. In view of the earlier finding that there was no employment relationship between the claimants and the 1<sup>st</sup> respondent, there is no legal basis upon which to find her liable for any reliefs sought by the claimants herein. Likewise, the claimants are not entitled to any relief from the 2<sup>nd</sup> respondent because they left voluntarily leaving behind any accrued benefits. Even if there were any entitlement, the same would still fail because it expired three (3) years after the claimants separated from the 2<sup>nd</sup> respondent.

49. In the circumstances, the suit is dismissed with no order as to costs.

**SIGNED, DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019**

**JUSTICE ONESMUS N. MAKAU**

**JUDGE**

