



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.24 OF 2017

(Before D. K. N. Marete)

CHARLES ONCHOKE.....CLAIMANT

VERSUS

KISII UNIVERSITY.....RESPONDENT

JUDGEMENT

This matter was originated by way of a statement of claim dated 25th April, 2017. The issues in dispute are therein cited as;

- a) *Wrongful and unfair dismissal of the claimant;*
- b) *Unlawful Termination of the Claimant's Employment;*
- c) *Failure to issue Termination Notice & Notice to-show-cause;*

The respondent in a Respondent's Statement of Defence dated 5th June 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that in January, 2013 he was offered employment by the respondent as a casual labourer. He worked until his employment was terminated in December, 2016. At the time of termination he earned Kshs.1,119.80 per day translating to Kshs.33,594.00 per month. This would fluctuate depending on the number of days worked in any given month.

The claimant's further case is that he worked with utmost dedication and diligence with best results leading to his rise to the position of a supervisor. His case is further presented as follows;

7. *THE Claimant avers that from the year 2013 to 2016, he worked continuously without stoppage as follows;*

- i) *2013, January to May;*
- ii) *2014, January to February; May to July; September to November;*
- iii) *2015, July to December;*

iv) 2016, January to December

8. *THE Claimant thus contends that his contract was by law converted to permanent one by virtue of his continuous service and that his wages were always paid at the end of each month.*

The claimants other case is that on 7th December, 2016, his employment was verbally terminated without any warning or notice in contravention of Section 41 and 45 of the Employment Act, 2007. This is despite his blemish free service.

The claimant avers that his termination of service was activated by malice and witch hunt as follows;

- a) *No particulars were given for the Claimant's termination;*
- b) *Failure to supply the Claimant with any report indicating him;*
- c) *No reason (s) were proffered for the termination;*
- d) *No explanation was sought from him or at all;*
- e) *No Notice was served upon him prior to the termination;*
- f) *No formal communication in form of a letter was issued to the Claimant.*

The termination also occasioned loss and damage as follows;

PARTICULARS OF SPECIAL LOSS

- a. *Payment in-lieu of NoticeKshs.33,594/=*
- b. *Salary for the month of December, 2016.....Kshs.33,594/=*
- c. *Pay for leave days not taken; - Kshs.33,594/26 x 21 =27,134/=*

He prays as follows;

- a. *A declaration do issue that the Respondent's employment had converted from casual to permanent.*
- b. *A declaration do issue that the Respondent's termination of the Claimant's Employment was UNFAIR, wrongful, unlawful and which act is unconscionable in law;*
- c. *The Respondent do pay the Claimant salary in lieu of Notice Kshs.33,594 x 1 = 33,594/=*
- d. *The Respondent pays the Claimant his Salary for the month of December, 2016.....Kshs.33,594/=*
- e. *The Respondent do pay the Claimant for the leave days due in*
- f. *December 2016 which were not take; - Kshs.33,594/26 x 21 = 27,134/=*
- g. *Service Pay of Kshs.33,594 x 12.....Kshs.403,128/=*
- h. *The Respondent pays the Claimant Damages for wrongful and unlawful dismissal;*
- i. *Interest on (b) above from the date of filing suit;*

- j. *The Respondent issues the Claimant with a Certificate of Service*
- k. *Costs of this suit;*
- l. *Any other relief requisite in the circumstances as the court deems fit.*

The respondent's case is a denial of employment relationship with the claimant. It is her further case that there was never a contract of employment, letter of appointment or any terms of contract *inter partes*.

The respondent however avers and admits that she hired the claimant as a casual worker on need basis but this was oral and never lasted a month. This also depended on the workload of the respondent per month and was never intended to be permanent. She denies the claim on daily or cumulated wages for the claimant or even the rise to a supervisor. She further posits as follows;

11. In response to paragraph 9 of the Statement of Claim, the Respondent maintains that like in the various times it had engaged the services of the Claimant and the work was completed, the Claimant was informed that his services were no longer needed at the institution, which action could not amount to unlawful termination as alleged by the Claimant.

The Respondent denies unlawful termination of employment and the accompanying particulars of malice. She further denies the particulars of special loss and damage for reasons that;

- *The Claimant's services were never terminated as such the claim that no one month salary in lieu of notice was paid does not arise.*
- *The claim for salary for the month of December, 2016 does not arise given that the Claimant was fully paid for the services rendered.*
- *The claimant is not entitled to unpaid leave dues as there were no unpaid leave due as he was never an employee in the first place and never worked for the Respondent for a complete year for leave to accrue.*

She in the penultimate avers that the claim is incompetent, fatally defective and that she shall apply for its striking out at the earliest and appropriate time as it does not disclose a cause of action against her.

The matter came to court variously until the 3rd May, 2015 when it was heard *inter partes*.

The issues for determination therefore are;

1. Whether there was employment of the claimant by the respondent.
2. Whether the claimant was a casual or permanent employee of the respondent?
3. Whether there was indeed a termination of employment of the claimant by the respondent.
4. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
5. Is the claimant entitled to the relief sought?
6. Who bears the costs of this cause?

The 1st issue for determination is whether there was employment of the claimant by the respondent. At the hearing, of this cause on 3rd May, 2018 CW 1 – Charles Maranga Onchoke, the claimant testified in reiteration of his case as pleaded. This was to the extent that he had worked for the respondent from the year 2013 to 2016. He also presented his witness statement dated 25th April, 2017 and a list of documents dated 19th February, 2017 as evidence in support of his case and prayed that these be adopted as evidence

in support of his case.

The evidence of the claimant supports a case for employment. The respondent's pleadings on this are as follows;

3. *In response to paragraph e of the Statement of Claim the Respondent denies ever employing the Claimant in January, 2013 or any day thereafter in the position of a Casual Labourer. The Claimant is thus put to strict proof thereof.*

6. *The Respondent avers that it engaged and/or hired the Claimant as a casual worker whenever there was work, which engagement was made orally and never lasted even for a month.*

7. *The Respondent further avers that the claimant never worked continuously, but was only engaged on a need basis given that the work the Claimant was engaged in depended on the workload the Respondent had for a particular month. The engagement was never at any given time intended to be permanent.*

Is this a contradiction or mere semantics?

The respondent in her written submissions dated 21st May, 2018 does not discount employment *per se* but the nature of employment. It is her profound position that the claimant was employed as a casual worker. This is expressed all over her pleadings and evidence. I therefore find a case of employment of the claimant by the respondent and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant was a casual or permanent employee of the respondent. The parties hold diametrically opposed positions on this.

A glance at the claimant's lists of documents dated 19th December, 2017, displays the following scenario on the number of days worked per month;

May, 2013 – 27 days

July, 2015 – 27 days

August, 2015 – 27 days

September, 2015 – 27 days

October, 2015 – 27 days

November, 2015 – 27 days

May, 2016 – 31 days

June, 2016 – 30 days

July, 2016 – 30 days

September, 2016 – 27 days

The respondent's submissions only recite the claimant's evidence *inter alia* at document No. 5 that he worked for 27 days and also that some casual workers worked for 28 days a month. She is silent on the other timelines for days worked by the claimant but insists on a case of casual employment of the claimant. This is as follows;

Upon cross-examination the Claimant stated as follows;

v I was employed as a casual worker

v Document No. 5 shows that I worked for 27 days and I was paid Kshs.379.30 per day which translated to Kshs.10,241.10 per month.

v When referred to document No.4 he stated that he worked for 20 days and was being paid Kshs.379.30 which translated to Kshs.7,586.00 while Jackline Asango worked for 13 days and was being paid Kshs.379.30 per day which translated to Kshs.4,930.90

v That Elvine K. Nyaanga worked for 6 days at a rate of Kshs.379.30 per day which translates to Kshs.2,275.80 per month.

v On document No. 3 he stated that he worked for 16 days at a daily rate of Kshs.379.30 which translates to Kshs.6,068.80 per month.

v On document No.15 he stated that he worked for 24 days some of the other casual workers worked for 28 to 22 days. Similar position to document No. 17 which reflects the month of January, 2016.

v That on document No. 5 the number of days worked vary and range from 5 to 27.

v That he never worked for a continuous month and that there were days that he never worked

v That the number of casual workers vary from day to day

v That he was employed as a casual worker

This contradicts the provisions of Section 37 (1) (a), (2) and (3) of the Employment Act, 2007. An overview of the number of days worked by the claimant on a monthly basis tells a different story. It reduced the employment of the claimant from casual to permanent in tandem with Section 37 above cited.

Section 37 (2) of the Employment Act, 2007 comes out as follows;

37 (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.

This *in toto* confirms the permanence of the claimant's employment. On an average of 27 working days a month, and inclusive of rest days and possible public holidays, the claimant put in thirty (30) or more days a month. This satiates the requirements of section 37 (2) above.

This also superbly fits into the claimant's submission and reliance on the authority of **Sikuku Nzuvi Ngii v Gacal Merchants Ltd [2015] eKLR**, Makau J. found thus;

It is further the considered view of the court that the claimant's employment had been converted from casual to permanent employee under section 37 (1) (a), (2) and (3) of the Employment Act.

Section 37 (1) (a) provides that where a casual employee works for a period or a number of continuous working days which amount an aggregate to the equivalent of not less than one month, the contract of service shall be deemed to be one where wages are paid monthly and the contract cannot be terminated without securing a notice of 28 days in writing as provided by section 35(1) (c) of the Employment Act. Section 37 (3) of the Employment Act provides that if an employee whose contract has been converted in accordance with sub section (1) above, works continuously for 2 months or more from the date of employment as a casual employee, he shall be entitled to such terms and conditions of service as he would have been entitled under this Act had he not

initially been employed as a casual employee. Consequently the court exercises the power given under section 37(4) of the employment to declare that the claimant's terms and conditions of service had long converted from casual to permanent employment and the terms of the contract are hereby according varied.

I therefore find a case of permanent employment of the claimant by the respondent and hold as such.

The 3rd issue for determination is whether there was indeed a termination of employment of the claimant by the respondent. The claimant's case and submissions is that he was dismissed on 7th December, 2016 on the prompting of a notice of even date by the respondent referenced permanent casuals as follows;

"This office has noted with great concern that some casuals have been engaged for several months non-stop. Kindly note that this totally contravenes Section 37 of the Employment Act (Cap 226 of the Labour Laws) and Section 3.14(d) of the Kisii University Human Resources Manual. This has to stop forthwith and therefore the purpose of this is to advise accordingly."

He was not subjected to any disciplinary process, or at all.

The respondent denies termination on grounds that the claimant was a casual employee and his employment ended when his services were no longer required. This is not so. On a finding that the claimant was a permanent employee by operation of the law, a termination of employment was had by the respondent. Moreover, the edict by the respondent on *permanent casuals* wholly betrays the situation on the ground. I therefore find a case of termination of employment and hold as such.

The 4th issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant's case is that he was not taken through appropriate disciplinary process in terms of Section 41 of the Employment Act, 2007 and therefore the termination was wrongful, unfair and unlawful. He seeks to rely on the authority of **John Wafula Simiyu v Star Publications Limited [2016] eKLR** where this court observed as follows;

'Secondly, he was not afforded appropriate disciplinary process as is required by the law in the termination of his employment. I agree with his submissions that performance monitoring proceedings are not indeed disciplinary proceedings and should not be an excuse of the same. I therefore find for a case of wrongful, unfair and unlawful termination of employment of the claimant by the respondent and hold as such ...

In the instant case, there was no pretention of disciplinary process, or at all. The claimant was merely released to walk home from employment. This was premised on the notion that the claimant was a casual employee and therefore not eligible for appropriate disciplinary process. This is not the case. Lack of due disciplinary process was tantamount to wrongful, unfair and unlawful termination of employment. I therefore find a case of wrongful, unfair and unlawful termination of employment and hold as such.

The 5th issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment he is entitled to the relief sought.

This court however faces the dilemma in a computation of relief sought in that the claimant did not have a monthly income but had pay dependent on the number of days worked in a month. A computation of the monthly pay of the claimant is the only way out of this problem. This can be achieved as follows;

Kshs.1,119.80 (daily wage) x 30 days = 33,594.00

This is the monthly salary of the claimant in a situation of continued work and permanent employment.

I am therefore inclined to allow the claim and award relief as follows;

- i. A declaration be and is hereby issued that the claimant's employment had converted from casual

to permanent.

ii. A declaration be and is hereby issued that the termination of employment of the claimant by the respondent was wrongful, unfair, unlawful and unconscionable in law.

iii. One (1) months salary in lieu of noticeKshs.33,594.00

iv. Six (6) months salary as compensation for unlawful termination of employment = 6 x33,594.00
.....=Kshs.201,564.00

Total of claim.....Kshs.235,158.00

v. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Mutiria instructed by Omondi Ogutu & Associates for the claimant.
2. Mr. Mukhabane instructed by Nyairo & Company Advocates for the respondent.