

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 194 OF 2015

JAMES MUNENE KAIRU.....CLAIMANT

VERSUS

NANYUKI YOUTH POLYTECHNIC.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent his former employer seeking to recover for breach of contract particulars whereof were pleaded to be failure and/or wilful refusal to serve the Claimant with any notice, give the Claimant any hearing, to pay the Claimant his rightful dues in lieu of notice, to do anything within its abilities and powers to adhere to the Claimant's contract of service. The Claimant also accused the Respondent of summarily dismissing him. The Claimant averred that on several occasions he orally and in writing demanded his rightful dues but the Respondent has adamantly and defiantly in breach of the contract of service refused, ignored and/or neglected to make good the Claimant's demand hence this suit. The Claimant sought salary for the month of August 2015 Kshs. 6,000/-, three months salary in lieu of notice Kshs. 8,000/-, salary arrears @ 10,000/- for 23 months Kshs. 23,000/-, annual leave pay earned Kshs. 16,000/- and one year accrued leave Kshs. 6,000/-. He also claimed general damages for wrongful dismissal from employment, costs of the suit and interest thereon from the date of dismissal.
2. The Respondent denied the claim and averred that the Claimant was employed from 1st September 2013 as a senior cook up to 3rd August 2015. It denied that the Claimant was dismissed on 3rd August 2015. The Respondent averred that it did not owe the Claimant any dues and denied that there were oral or written demands for payment of any dues or otherwise. The Respondent averred that the Claimant was employed on a 3 months contract and that he left on 31st July 2015 on expiry of his contract. The Respondent asserted that the Claimant was not entitled to any of the reliefs he sought in his claim which was stated to be incompetent and an abuse of the process of the law, offending the Government Proceedings Act to which a preliminary objection would be raised at the hearing. The Respondent sought the dismissal of the Claimant's claim with costs.
3. The Claimant testified on 15th May 2018 and stated that he was employed by the Respondent as a cook from 20th January 2008 till 10th July 2011 for which he received a certificate of service dated 8th July 2011. He stated that he was dismissed and later worked for the Respondent as a cook from 1st September 2013 till 31st July 2015. He asserted that there was a strike at the Respondent which was blamed on him and his dismissal was as a result of the blame heaped on him in place of the carpentry teacher. He stated that he had a certificate of 3rd August which indicated the period of service. He testified that he was dismissed unceremoniously and was not given a letter of dismissal. He sought a letter of recommendation. He stated that in the earlier period he earned Kshs. 4,500/- a month and in the second stint earned Kshs. 6,000/- a month. He stated that he sought the increase of the salary to Kshs. 10,000/- and that he worked from 4.00am till 8.00pm and never went on off or rest on public holidays. He testified that his dismissal was without any adherence to a notice to show cause, appearance before a board. He was paid for July 2015 but there was no pay for August and that he caused a demand letter to be issued on 17th August 2015 to which there was no reply. He thus sought the dues as per his claim.
4. In cross-exam he testified that he was employed from 20th January 2011 till 10th July 2011 and that he was informed of a vacancy by his friend and that he applied and was employed. He stated that he found a notice on the noticeboard and he applied for the vacancy for a cook. He testified that he did not have any qualifications as a cook but he applied and was given a letter to sign but was not issued with a copy. He stated that he was informed there would be shifts but his assistant used to reside outside the polytechnic and that he boiled water for students and made tea by 6.00am. He testified that he was to work from 6.00am till 1.00pm and the next shift was from 1.00pm till 8.00pm. He stated that in 2008 he had no assistant and that he worked alone and that the assistant was employed in 2011. He was referred to his claim and he confirmed that there was no claim for overtime. He stated that the students were at the polytechnic from January till March and that the students would be at the polytechnic for three months and they would take one month. He stated that during the one month he would work at the gate or in the *shamba*. He conceded that he did not put that in his claim. He testified that he complained but not in writing and that there was a strike which did not involve hi in any way but that it was alleged that he contributed. He stated that he did not get a letter of dismissal and that he received a recommendation letter from the Respondent. He recognised the contract he had signed which was a seasonal contract from 1st May 2015 to 31st May 2015 and that he did not get a chance to read it. He testified that he received Kshs. 6,000/- which was pay for 8 hours worked per day and that the sum of Kshs. 6,000/- was paid monthly. He confirmed that the contract indicated that his employment would terminate in July.
5. In re-examination he testified that he was employed pursuant to an advert on the notice board and that no expertise was sought. He was referred to the contract exhibited by the Respondent and he noted that there was no indication of a renewal. He stated that he used to work from January till December and that in April he would work as a watchman and in the *shamba* on duties assigned by the manager. He stated that he complained and was dismissed.
6. The Respondent called Justus Kinyua Murimi the deputy project manager of the Respondent. He stated that the Respondent was a government institution and under the devolved system of government the employees were employed through the county government. He

testified that when need arises they employ casuals and that they did not engage the casuals during the holidays. He stated that the Claimant was employed as a casual on 3 months contract which were with an option for renewal. He stated that when the polytechnic closes there is no need for workers and that he had signed the Claimant's contract for 3 months. He stated that at the end of the 3 months the Claimant did not renew his contract and that the Claimant sought a recommendation letter which was given. He testified that the contract was terminated by effluxion and that the Claimant was not dismissed by the Respondent.

7. In cross-examination he testified that the Claimant worked on 3 months contracts between 2008 till 2011 and that he was reliable in his work. He stated that the Claimant did not work continuously and that the contract clearly stated that it was a 3 month contract that was renewable. He stated that the Claimant signed and the contract was clear it would terminate after the end of the contract. He testified that the current watchman was Abdul who was there and that the Claimant always worked as a cook. He stated that the casuals were not given a letter of employment.

8. In re-exam he testified that the Claimant was not dismissed and if he had been dismissed he would have been given a dismissal letter. He stated that had the Claimant been terminated he would not have been engaged and that there was no termination on 3rd August 2015 and that his services were to terminate on 31st July 2015.

9. That marked the end of oral testimony and parties were to file submissions. Only the Claimant's submissions were filed at the time this decision was penned. The Claimant's submissions were filed on 23rd May 2015. In the submissions the Claimant submitted that the Claimant worked for the Respondent for 3 years without interruption and that between 1st September 2013 to 31st July 2015 the Claimant worked without interruption drawing a salary of Kshs. 6,000/- and was issued with a recommendation letter on 3rd August 2015. He submitted that he was unlawfully terminated on 3rd August 2015 summarily on allegations that he had incited students to go on strike and that his salary for August 2015 was not paid. He submitted that he was not accorded any hearing or an opportunity to defend himself. He submitted that he had proved his case on a balance of probabilities and that the issues for determination were whether or not the Claimant's contract was terminated by operation of the law or and that it was terminated contrary to the provisions of the Employment Act and the Constitution. He submitted that pursuant to Section 37 of the Employment Act his contract of service was converted into a term contract by operation of the law. Reliance was placed on the case of **Wilfred Bukachi Opwaka v Ready Consultancy Limited [2012] eKLR** where the court observed that the law relating to casual employment was contained in Section 37 and that the law deemed one who had worked continuously for one month to be have converted the contract to a monthly contract on monthly terms at the expiry of one month. He submitted that he was therefore entitled to annual leave and one month notice. He relied on the case of **Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited [2013] eKLR** where the court held that the Employment Act had created a fundamental shift from the previous Employment Act cap 226 with regard to casual employees and that this followed many decades of abuse, violation and disregard of the rights of workers who were classified as casual workers or casual labourers. The Claimant submitted that he was not a casual but was on a monthly contract and his termination therefore unfair. The Claimant cited Section 43(1), 47(5) and 45 of the Employment Act, and submitted that the Respondent unfairly terminated the Claimant's contract of service without according the Claimant any safeguard as provided under the law for a hearing precedent to the dismissal. The Claimant submitted that the contract produced by the Respondent was invalid and was one that had been manufactured to defeat the course of justice.

10. The Claimant's claim must fail as it is without any basis. His contract which he admitted to having signed was a fixed term contract. He was not dismissed on 3rd August 2015 which was the date when he was issued with his recommendation letter. His contract came to an end on 31st July 2015 and had no life in August. He was not entitled to any notice nor was he entitled to any payment in August 2015 as he did not work for the Respondent in August. His last day of service was 31st July 2015. He asserted that he had made several demands both oral and written yet he did not produce any other demand letter except the demand letter penned on 17th August 2015. He relied on the cases of **Wilfred Bukachi Opwaka v Ready Consultancy** and **Silas Mutwiri v Haggai Multi Cargo** (citations above) which were both not on all fours with his case. He was on a fixed term contract which was served to its conclusion. There was no dismissal as there was an end to the contract. That is a far cry from the situation where a casual employee is engaged continuously for a period beyond 3 months entitling the casual employee to claim a monthly contract. There was no claim for overtime and the Claimant did not aver that he worked as a cook, watchman and gardener and his testimony to this effect at the trial was deceit calculated to evoke the sympathy of the court yet he was never at work during the holidays he correctly pointed out were at 3 month intervals and lasted one month. He came across as a person whose testimony was full of misinformation and deception and therefore he failed to prove his case on a balance of probabilities. The suit therefore is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 24th day of September 2018

Nzioki wa Makau

JUDGE