

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 222 OF 2016

PATRICK KIRIMI.....CLAIMANT

VERSUS

MERU CENTRAL DAIRY CO-OPERATIVE UNION LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 28th July, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 06.10.2016 in person. His case is that the respondent employed him on 28.04.2009 as a production clerk. It is his case that he worked until 31.12.2015 when he received a letter stating that his contract had lapsed on account that he was a casual employee. The claimant's case is that the dismissal was unfair because he served continuously without a break and his service converted from casual service to service subject to minimum terms and conditions of service under the Employment Act, 2007 and the conversion being as per section 37(1) of the Act. The claimant prays for judgment against the respondent for reinstatement, payment of his salary consequential to the reinstatement and costs of the suit.

The respondent filed the statement of claim on 16.11.2016 through Mwenda Mwarania, Akwalu & Company Advocates. The respondent prayed for dismissal of the suit with costs.

It is the respondent's case that it engaged the claimant on ad hoc basis as a casual labourer to clean the milk reception area starting 28.04.2009 to 31.05.2015 and wages were paid on daily basis. It is the respondent's case that from 01.06.2015 to 31.12.2015 the claimant was engaged as a production store clerk to relieve the regular clerk who had proceeded on leave from 01.06.2015 to 31.12.2015. The contract lapsed on 31.12.2015 as it was not renewed, the claimant was informed as much and 7 days' salary was paid in lieu of notice. It is the respondent's further case that prior to 01.06.2015 it engaged the claimant for not more than 8 hours per week as cleaning was on Saturdays from 11.00am to 4.00am and would pay him the agreed wage for the day before he left at the end of the particular day. The respondent's further case is that the only time the claimant worked continuously was for the period of the fixed term contract from 01.06.2015 to 31.12.2015.

The **1st issue** for determination is whether the claimant was in continuous service of the respondent from 28.04.2009 to 31.05.2015. The respondent has confirmed in the certificate of service that the claimant was its employee on casual basis from 28.04.2009 to 31.05.2015. The claimant's case is that he was employed as a store clerk from 28.04.2009 and he was not issued with a letter of appointment. He was not given pay slips and was registered with NSSF and NHIF and relevant statutory deductions were made. His further evidence was that on 01.06.2015 to 31.12.2015 he was given a contract at Kshs.15, 454.00 per month. The respondent's witness (RW) confirmed that she knew the claimant as a store clerk. That he was employed as a store clerk since 28.04.2009 until the contract of 01.06.2015 and which was ending on 31.12.2015 as a production clerk.

The court has considered the evidence. It is clear that by the evidence of the claimant and RW the claimant was employed in continuous service from 28.04.2009 to 01.06.2015 as a store clerk and then as a production clerk from 01.06.2015 to 31.12.2015.

To answer the **2nd issue** for determination the court returns that the alleged claimant's casual service from

28.04.2009 to 01.06.2015 converted to a service subject to the minimum terms and conditions as provided under the Employment Act, 2007 and as per section 37 of the Act.

The **3rd issue** for determination is whether the contract as production clerk of 01.06.2015 to 31.12.2015 terminated or extinguished the subsisting service as a store clerk. The court returns that it did not. By the respondent's own evidence, the claimant was given the 6 months' contract to relieve a worker who had gone on leave. The 6 months' contract did not state that it was terminating the claimant's previous long service as a store clerk. Accordingly, the court returns that at the end of the 6 months on 31.12.2015, the claimant reverted back to his substantive position of store clerk as a service under the terms in the Employment Act, 2007 as having already so converted per section 37 of the Act. The court returns that it would be deceptive and unfair labour practice for the employer to emplace a long serving employee on a purported short fixed term contract upon whose expiry the employment would end without the employee being consulted and consenting to such termination of the long service as envisaged in section 10(5) of the Act. The court returns that in this case the fixed term contract did not address the termination of the claimant's otherwise long service so that the long term service had not been terminated at all and at the end of the 6 months' contract on 31.12.2015, the claimant was entitled to reversion to his position as a store clerk. The court returns as much.

To answer the **4th issue** for determination, the court returns that the purported termination of the claimant's employment with the respondent on account of effluxion of time as per purported fixed term contract as a production clerk was an invalid reason for termination under section 43 of the Act. The court returns that the termination was unfair.

To answer the **5th and last issue** for determination, the court returns that the claimant is therefore entitled to reinstatement in the employment of the respondent's establishment as a store clerk effective 01.01.2016 with continuous service from initial appointment on 28.04.2009 and with full benefits. While making that finding the court returns that there was no established bar to such reinstatement and the claimant is willing to continue in the respondent's employment. The last pay was Kshs. 15,454.00 and the pay back consequential to the reinstatement for 19 months from 01.01.2016 to the date of resumption of duty on 01.08.2017 is awarded at **Kshs.293, 626.00**. The claimant is awarded costs of the suit fixed at **Kshs.30, 000.00**.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) Reinstatement of the claimant in the employment of the respondent's establishment as a store clerk effective 01.01.2016 with continuous service from initial appointment on 28.04.2009 and with full benefits; and for that purpose the claimant to report to the respondent's chief executive officer on 01.08.2017 at 8.00am for assignment of duty as a store clerk at prevailing terms and conditions of service.
- b) The respondent to pay the claimant **Kshs.323, 626.00** by 01.10.2017 failing interest to be payable at court rates from the date of this judgment till full payment.

Signed, dated and delivered in court at **Meru** this **Friday, 28th July, 2017**.

BYRAM ONGAYA

JUDGE