



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1386 OF 2014**

**(Before D. K. N. Marete)**

**CHARLES KIPKORIR MISIK & 11 OTHERS.....CLAIMANTS**

**VERSUS**

**EXPORT PROCESSING ZONE AUTHORITY.....RESPONDENT**

**JUDGEMENT**

This matter was originated by an Amended Memorandum of Claim dated 1st August, 2016. The issue in dispute is therein cited as;

Damages for unlawful termination of employment & terminal benefits

The respondent in a Memorandum of Response dated 2nd December, 2014 denies the claim and prays that this be dismissed with costs.

The claimants' case is that they are all employees of the respondent and were differently attached to the various departments of the respondent such as Sewerage Plant, Eucalyptus Plant, Incinerator Plant and Zone Office cleaners performing various duties. This is as follows;

3. The 5<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Claimants are all employees of the Respondent while the rest of the Claimant's are former employees of the Respondent and differently employed and/or previously attached to the various departments of the Respondent such as the Sewerage plant, Eucalyptus Plant, Incinerator Plant and Zone Office cleaners performing various duties.

4. The First Claimant who is employed as a Sewerage Attendant and driver and was first employed as a casual in February, 2005 earning a salary of kshs.300/= per day and had continuously worked for the Respondent since then was at the time of the termination of his services earning a salary of Kshs.400/= per day and was still employed and paid as a casual employee despite having continuously worked for the Respondent since February, 2005.

5. The Second Claimant was employed as an incinerator and a dumping site attendant and was first employed as a casual in February, 2005 and had continuously worked for the Respondent since then and was at the time of his dismissal on 4<sup>th</sup> November, 2014 earning a salary of Kshs.400/= per day and was at the time still employed regarded and paid as casual employee despite having continuously worked for the Respondent since February, 2005.

6. The Third Claimant was employed as a Sewerage attendant and had been working for the Respondent since June, 2005 and was at the time of the termination of his services on 22<sup>nd</sup> November, 2014 earning s salary of Kshs.400/= per day and was at the time still employed as a casual employee.

7. The Fourth Claimant was employed as a Sewerage attendant and had been working for the Respondent since 2003 and was at the time of his dismissal from employment on 22<sup>nd</sup> November,2014 earning a salary of Kshs.400/= per day and was at the time to-date still employed as a casual.

8. The Fifth Claimant is employed as a Sewerage attendant and driver and was first employed by the Respondent in July, 2005 and currently earns a salary of Kshs.18,000/= per month and despite having continuously worked for the Respondent for more than nine [9] years, the Claimant's employment has never been made permanent.

9. The sixth Claimant was employed as a security guard and had continuously worked for the Respondent since 2008 and his

employment status up to the time of his dismissal in November, 2015 remained on casual basis and was earning a salary of Kshs.18,000/= per month at the time of his dismissal.

10. The Seventh Claimant was employed as a security guard and had been working for the Respondent since May, 2007 earning a salary of Kshs.400/= per day and despite having continuously worked for the Respondent for the last 7 years, the Respondent has refused to make his employment permanent and unlawfully, terminated his services in November, 2014.

11. The Eighth Claimant was employed as a security guard and had continuously worked for the Respondent since 2003 and was earning a salary of Kshs.18,000/= per month at the time his services were terminated in November, 2015 and had remained a casual employee despite his long years of service.

*12. The Ninth Claimant was as a Sewerage attendant and had continuously worked for the Respondent since 2008 and was earning a salary of Kshs.18,000/= per month at the time his services were terminated in November, 2015 and was still employed on casual terms.*

13. The Tenth Claimant is employed as a Sewerage attendant and has continuously worked for the Respondent since July, 2005 and currently earns a salary of Kshs.18,000/= per month as a casual despite having worked for the Respondent for over 9 years.

14. The Eleventh Claimant is employed as a water kiosk attendant and salesman and has continuously worked for the Respondent since May, 2005 and currently earns a salary of Kshs.18,000/= per month and still under casual employment.

15. The Twelve Claimant was employed as an incinerator operator and dumping site attendant and had been in continuous employment for the Respondent since the year 2000 and was earning a salary of kshs.400/= per day at the time of his services were terminated on 4<sup>th</sup> November, 2014 despite his long period of service, the Claimant still remains a casual employee.

The claimants' further case is that despite their long stint of service ranging between 6 and 14 years, the respondent has refused and/or neglected to confirm them as permanent employees with the antecedent benefits associated with permanent employment such as house allowances and medical insurance. The claimants' have neither been promoted despite having regularly applied for the various job positions/vacancies which have been advertised by the respondent. This is despite some of the claimants' possessing the prerequisite qualifications for such jobs. The claimants have, as a result, been unduly prejudiced and discriminated against.

Their case also comes out as follows;

17. The Claimants aver that they have for many years worked under very poor and unhygienic conditions especially in the Sewerage and incinerators Sections where the Claimants are exposed to industrial raw waste especially since the Respondent has failed and/or neglected to provide the Claimants with protective work-garments such as gloves, masks and gum-bots while the ones available are completely worn-out and the Claimants are at a high risk of being infected with life-threatening diseases.

18. The Claimants who are employed in the security section are ill-equipped, have no proper security gear such as overcoats, uniform or gum-boots and work for longer period of hours with no over-timer pay.

19. The Claimants who are employed in the Incinerator section work with no protective gear and are exposed to inflammable and very dangerous chemicals such as expired industrial paint and other chemicals that are disposed of by being burnt in the hot furnace.

The claimants' other case is that they were at the onset employed under short term contract of three (3) months each but even after these expired, no renewal was executed. They continued to work under the terms of expired contracts, had no job security and worked at the mercy of the respondent who could terminate their services on beckon.

The claimants' aver that the respondent has failed to provide them with basic minimum condition of employment provided for under part V of the Employment Act, 2007. The respondent also underpaid them comparative to the long years of service. She has refused to respond to these unfair labour practices despite request by the claimants. They pray for better terms of service including improved pay at Kshs.35,000.00 per month calculated from time they attained the status of permanent employees.

They pray as follows;

1. Binding Contracts of employment for the 5<sup>th</sup>, 10, and 11<sup>th</sup> claimants stipulating the terms of service from the date of the claimants respective employment as provided for under the Employment Act.
2. Improved conditions and terms of employment as enumerated in Section 26 to 34 of the Employment Act, 2007.
3. Monthly salary of Kshs.35,000/= for each of the Claimant calculated from the date of their respective employment as enumerated in paragraph 4 to 15 herein-above.
4. General damages for breach of the employment terms as stipulated in the Employment Act, 2007.
5. Damages for unfair and unlawful termination for the claimants whose services were terminated.

6. Terminal benefits for the dismissed claimants.

7. Costs of the suit.

The respondent's case is a denial of the claim. She moves on to state her case as follows;

- The 1st claimant is assigned duties in the Eucalyptus project and also operates as a sewer attendant and employed as driver

The respondent further avers as follows;

- That she had provided the claimants with housing facilities at the ponds.
- The claimants are insured under WIBA
- Promotion is not assured as one has to have the required qualifications and also go through a vetting process.
- The Employment Act, 2007 commenced on 2nd June, 2008 and any issues of permanent jobs for casuals working on or indefinite period can only be raised after the commencement of the Act,
- No prejudice or discrimination has been meted or visited onto the claimants whatsoever regardless of their job cadres.
- The claimants worked under good condition and given the nature of their work, issues them with protective gear on or annual basis.
- All casual employees are issued with the right attire, particularly those in security, the incinerator and ponds. This includes masks, gumboots, overall coats, goggles and gloves. They are also provided with antiseptic soap on a daily basis to sufficiently wash industrial waste.
- Working hours are well articulated in the claimants expired contract, which have continued. The Employment Act, 2007 mandates the employer to regulate working hours.
- No exposure to flames at the incinerator unless they are outrightly unprocedural. Gear of gumboots, goggles, overcoats and gloves refer.
- Their three (3) months contracts have not been reviewed.

The matter came to court variously until the 17th October, 2018 when it was heard *inter partes*.

The issues for determination therefore are;

1. Whether the claimants became permanent employees on the basis of their long continued service?
2. Whether the termination of the employment of the claimants by the respondent was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimants became permanent employees on the basis of their long continued service. The claimants in their written submissions dated 24th October, 2018 raise and submit a case of having acquired the status of permanent employees by virtue and application of section 37 of the Employment Act, 2007. They submit as follows;

... pursuant to the provisions of Section 37 of the Employment Act, 2007, where a casual employee works for a period of continuous working days which amount in the aggregate to the equivalent of not less than one month or performs work which cannot reasonably be expected to be completed with a period...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. This is the position of the claimants case herein.

This is a condensed form of section 37 (1) (a), (b) and (c) which provides for the conversion of casual employment to term contract.

The respondent in her written submissions dated 1st November, 2018 submits a case of the claimants' being casual employees as they worked on an on-and-off basis and were paid at the end of the week. They were called to assist when need arose and never worked for a full month or continuously throughout the year.

From the onset, the claimants present and submit a case of having worked for a period ranging between six and fourteen years. Despite this, the respondent had refused to confirm them to permanent employment therefore denying them the benefits associated with such permanent employment.

It is the claimant's case that they were previously employed on short term contracts of three months each but even on expiry of the said short term contracts, the same were never renewed and the claimants have continued to work under the terms of such expired contract with no jobs security and always at the mercy of the respondent who would terminate their services at will.

The claimants' case takes sway on a balance of probability and preponderance of evidence. Even at the hearing, one finds that the evidence

of CW1 – Collins Obonyo Wasike comes out brighter and more compelling than that of DW1 – Thomas Ombayo Mongare, the respondent’s witness and Human Resource Manager. The case of the respondent sounds like a concerted efforts to deny the case of the claimants which case is all telling. I therefore find that by operation of the law and the reality on the ground, the claimants became permanent employees by virtue of their long continued service with the respondent.

The 2nd issue for determination is whether the termination of the employment of the claimants by the respondent was wrongful, unfair and unlawful. The claimants’ case is that at the time of filing the suit, they had not been terminated from employment. However, in November, 2014, most likely as a consequence of filing this suit in August of the same year, their services and employment was terminated by the respondent.

The claimants submit that the termination of employment was unfair and unlawful and in breach of the provisions section 45 of the Employment Act, 2007 in that the respondent in such termination did not act in accordance to justice and equity in terminating the employment of the 1st, 2nd, 3rd, 4th, 7th and 12th claimants. I agree. The respondent’s written submissions do not address or seek to controvert the issue of unfair and unlawful termination of employment. Why? I do not understand. That the claimants’ worked for such long periods and earned a termination of employment only for agitating for their rights and filing a suit in a claim to the same. This, undoubtedly, is wrongful, unfair and unlawful termination of employment and I find as such.

The 3rd issue is whether the claimant’s are entitled to the relief sought. They are. Having won a case of unlawful termination of employment, they become entitled to the relief sought.

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

1. Charles Kipkorir Misik

- i. One (1) months salary in lieu of notice.....Kshs.12,000.00
  - ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=... Kshs.144,000.00
- Total of claim.....Kshs.156,000.00**

2. Alex Wathome Mambo

- i. One (1) months salary in lieu of notice.....Kshs.12,000.00
  - ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=... Kshs.144,000.00
- Total of claim.....Kshs.156,000.00**

3. Boniface Ndoro Njiru

- i. One (1) months salary in lieu of notice.....Kshs.12,000.00
  - ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=... Kshs.144,000.00
- Total of claim.....Kshs.156,000.00**

4. Collins Obongyo Masike

- i. One (1) months salary in lieu of notice.....Kshs.12,000.00
  - ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=... Kshs.144,000.00
- Total of claim.....Kshs.156,000.00**

5. Charles Rotich

- i. One (1) months salary in lieu of notice.....Kshs.12,000.00
- ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=... Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

6. Isika Mwanzia

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=...  
Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

7. Sila Mulwa

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=...  
Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

8. Bernard Elijah Kioko

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=...  
Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

9. Boniface Mutua Musyoka

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=...  
Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

10. Vincent Christopher Lupalo

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=...  
Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

11. Ernest Kemboi Koech

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=...  
Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

12. Charles Barkinyo Karani

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. Twelve (12) months salary as compensation for unlawful termination of employment Kshs.12,000.00 x 12=...

Kshs.144,000.00

**Total of claim.....Kshs.156,000.00**

**Total of claims.....Kshs.1,872,000.00**

iii. The respondent be and is hereby ordered to meet and pay Kshs.500,000.00 to each of the claimants' being general damages for involving in an arbitrary contract of service and also breach of the same.

iv. The cost of the claims shall be borne by the respondent.

Dated and signed this day of 2018.

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 20th day of December, 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Okoth Instructed by Ataki Kimori & Okoth Advocate for the claimant.
2. Mr. Chege Instructed by Muchoki, Kang'ata, Njenga & Company Advocates for the respondent.