LONG-TERM CASUAL EMPLOYEES MAY ACQUIRE STATUTORY EMPLOYMENT RIGHTS BY OPERATION OF LAW

Mistry V. Naran Mulji & Co v Ali [2026] KECA 497 (KLR)

1. Background

1.1. The Respondent was employed by the claimant as a casual labourer and security officer from 2009 until 2019 when his services were terminated on account of redundancy. Following the termination, he filed a claim in the Chief Magistrate's Court claiming that the termination was unfair and unlawful. In particular, he contended that the Appellant:

- failed and/or neglected to issue requisite notices of the intended redundancies
- failed to inform the respondent on the selection criteria adopted to declare him redundant
- there was no regard to seniority in time, skill, ability and reliability of the Respondent as set out in section 40 (1) of the Employment Act.
- failed to pay the respondent all his terminal and contractual dues prior to termination on account of redundancy
- had no genuine reason to declare the respondent redundant
- had no evidence to show that work had reduced in order to downsize on the work force
- failed to follow due process

1.2. In response, the Appellant employer maintained that it operated as a construction company whose business depended largely on contracts and tenders. It argued that, owing to the nature of its operations, it engaged workers on a casual basis as and when work was available. The Respondent was one such casual employee who provided security services and was paid on a weekly basis.

1.3. The Trial Court found that the Respondent had continuously worked for the Appellant for a period exceeding two years. Consequently, pursuant to Section 37 of the Employment Act, his employment had converted by operation of law into a contract payable on a monthly basis. The Court therefore held that Section

35(1)(c) of the Employment Act was applicable.

1.4. The Court further found that the Appellant had failed to demonstrate that the termination of the Respondent's employment was substantively justified and procedurally fair. Accordingly, the termination was declared unlawful, and the Respondent was awarded a total sum of Kes. 37,750, comprising one month's salary in lieu of notice, unpaid leave pay and severance pay calculated at KES 6,500 for one and a half years of service.

1.5. Aggrieved by the decision of the Trial Court, the Respondent appealed to the Employment and Labour Relations Court, on the grounds that the Trial Court erred by:

- failing to award compensation for unfair termination
- finding that he had failed to prove that he was not paid salary for 210 days worked prior to termination
- disregarding evidence demonstrating that he had been employed since 2009 thereby erroneously awarding severance pay for only one and a half years;
- he had not laid a sufficient basis for his claims relating to underpayment of wages and other reliefs

1.6. On appeal, the Employment and Labour Relations Court found that:

1.6.1. it was proved that the Respondent was employed by the Appellant as a security guard on a casual basis from 4 April 2009 and that the validity of the documents produced by the Respondent was not challenged, neither was the evidence of PW2;

1.6.2. the Trial Court correctly found that, by virtue of Section 37 of the Employment Act, the Respondent's employment status had converted from casual employment to a term contract and that Section 35(1)(c) of the Act was therefore applicable;

1.6.3. the Respondent could not be said to have worked for the Appellant for only two years when the uncontroverted evidence showed that he had been in employment since 4 April 2009 and, therefore, he was not a casual employee at the time of termination in July 2019;

1.6.4. having found that Section 35(1)(c) of the Employment Act applied to the Respondent, the Appellant failed to comply with Section 40 of the Employment Act and, consequently, the termination of the Respondent's employment was unfair;

1.6.5. the Respondent was entitled to a monthly salary of KES 15,141.95, being the monthly wage payable to a night watchman rendering services in Nairobi, Mombasa and Kisumu as provided under the Regulation of Wages (General) (Amendment) Order, 2018;

1.6.6. the claim for severance pay could not succeed as termination of the Respondent's employment had not been proved to be on account of redundancy;

1.6.7. the claims relating to unremitted NSSF and NHIF deductions could not succeed since, once statutory deductions are effected from an employee's salary or earnings, the money deducted ceases to be the employee's entitlement and any complaint regarding non-remittance ought to be directed to the relevant statutory bodies; and

1.6.8. the claims for overtime pay, unpaid rest days and public holidays were not proved and were therefore declined.

1.6.9. Consequently, the Employment and Labour Relations Court partially allowed the appeal, set aside the judgment of the Trial Court and entered judgment in favour of the Respondent in the same of Kes. 911,695.60.

1.7. Aggrieved by the judgment of the Employment and Labour Relations Court, the Appellant lodged an appeal before the Court of Appeal, faulting the learned Judge for:

1.7.1. finding that the Respondent was employed as a security guard on a casual basis from 4 April 2009;

1.7.2. concurring with the Trial Court on the conversion of the Respondent's employment status from casual employment to a term contract and finding that the Respondent had been unfairly terminated; and

1.7.3. awarding the Respondent compensation for unfair termination, despite him being a casual employee.

2. Court of Appeal's Determination

The Court of Appeal held as follows:

2.1. A casual employee is defined under Section 2 of the Employment Act as follows:

> *…an individual the terms of whose engagement provide for his payment at the end of each*
> *day and who is not engaged for a longer period than twenty-four hours at a time.*

2.2. Section 37 of the Act provides as follows:

> *(1) Notwithstanding any provisions of this Act, where a casual employee – (a)works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or(b)performs work which cannot reasonably be expected to be completed within a period, or a number of working days 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.*

(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.*

(3) *An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.*

(4) *Notwithstanding any provisions of this Act, in any dispute before the Employment and Labour Relations Court on the terms and conditions of service of a casual employee, the Employment and Labour Relations Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.*

(5) *A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 86 of this Act shall apply.*

2.3. In as much as the respondent is purported to have been the appellant' s employee from 4th April 2009, there was no evidence on record to confirm whether he worked continuously during that period.

2.4. The payment vouchers covering the period between 8th October 2015 and 11th February 2016 demonstrated that the Respondent was a casual labourer as he was being paid a daily wage of Kshs.400/-

2.5. It cannot be said that the Respondent has been a permanent employee from 4th April 2009 until 7th July 2019 when he was allegedly terminated on account of redundancy.

2.6. However, the appellant's argument that it only engaged the respondent in February 2017, that the Respondent did not work continuously for one month at any one time, and that he only resurfaced in the month of June 2019 was not tenable.

2.7. The Court noted that the Appellant started remitting the Respondent's statutory due to the NSSF on 8 February 2016. For this reason, and by dint of Section 37(1)(a) and (b) of the Employment Act, the Respondent's contract of service was deemed to have been converted from casual employment to permanent employment or employment under a term contract.

2.8. The Respondent testified as follows:

> ***" I was terminated via telephone call. It is on 6/7/2019 from a superior by the name Peter.***

2.9. An unfair dismissal or termination occurs when an employer terminates an employee s contract without valid reason (substantive fairness) or fails to follow proper legal procedures (procedural fairness). It constitutes termination without good reason or by way of a fair procedure or both.

2.10. The sudden termination by telephone call constituted summary dismissal as contemplated under Section 44(1) of the Employment Act. Nonetheless, the reasons for termination ought to have been communicated in writing, and the Respondent should thereafter have been accorded an opportunity to make representations before the termination was effected. The Court therefore found that the Respondent was unfairly and unlawfully terminated contrary to Section 45(2) of the Employment Act.

2.11. The Court has repeatedly held that an employee is entitled to a fair and lawful procedure before termination. In order for termination to be fair in the eyes of the law, it has to be both substantively and procedurally fair. Apart from a valid reason of termination, the employer must follow fair procedures for termination in accordance with the Act. In any form of termination, the employer is required to prove the reasons for the termination otherwise, it will be termed as unfair. Every employee has the right not to be unfairly dismissed

2.12. Section 28(1)(a) of the Employment Act provides that an employee is entitled to twenty-one (21) days of annual leave with full pay after every twelve consecutive months of service. The period between 8 February 2016 and 7 July 2019 amounts to three calendar years, being the period during which the Respondent was deemed to be in permanent employment. The Respondent was therefore entitled to leave pay in respect of the three-year period.

2.13. Regarding the salary the Respondent earned from 8th February 2016, the respondent pleaded that, at the time when he was allegedly declared redundant, he was being paid a daily wage of Kshs.500. However, no evidence was adduced in support of this assertion. Consequently, the Court held that most appropriate guide in determining the applicable basic minimum monthly wage was The Regulations of W ages (General) (Amendment) Order, 2018 which was in force as at the time of termination.

2.14. With respect to compensation, the learned Judge had awarded the Respondent compensation equivalent to six (6) months' salary amounting to Kshs. 90,851.70. The Court of Appeal, however, considered that, given that the Respondent had worked for the Appellant for four (4) years, compensation equivalent to four (4) months' salary would be appropriate in the circumstances.

2.15. Consequently, judgment was entered in favour of the Respondent as follows

a) The award of six (6) months' salary as compensation for unfair termination in the sum of Kshs. 90,851.70 was set aside and substituted with an award of Kshs. 60,567.80.

b) The award of one (1) month's salary in lieu of notice in the sum of Kshs. 15,141.95 was upheld.

c) The award of unpaid leave in the sum of Kshs. 105,000.00 was set aside and substituted with an award of Kshs. 45,425.85.

d) The award for salary underpayment in the sum of Kshs. 700,701.95 was set aside and substituted with an award of Kshs. 195,071.95.

e) The total amount payable to the Respondent was Kshs. 346,491.45.

2.16. Since the appeal partially succeeded, the Court awarded the Respondent half the costs of the appeal

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