Case Number:	Cause 178 & 280 of 2013 (consolidated)
Date Delivered:	21 Mar 2014
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nakuru
Case Action:	Judgment
Judge:	Byram Ongaya
Citation:	Nelson Ogeto Mogaka & 15 others v Geothermal Development Company Limited [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Industrial Court
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Awarded
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 178 OF 2013

CONSOLIDATED WITH CAUSE NO. 280 OF 2013

NELSON OGETO MOGAKA.....1ST CLAIMANT

SOLOMON NJANGILO MBUGUA.....2ND CLAIMANT

JAMES GICHINGIRI KARANJA.....3RD CLAIMANT

ALEXANDER SESA OCHI.....4TH CLAIMANT

JOEL KIHARA BORO.....5TH CLAIMANT

PETER KAMAU KAHORO.....6TH CLAIMANT

JOEL SHILIBWA ABINAYI.....7TH CLAIMANT

ERIC ONYANGO ONEGE.....8TH CLAIMANT

AND

EDWARD MWANGI WANGUI.....1ST CLAIMANT

SIMON CHARAGU MWANGI.....2ND CLAIMANT

ROBERT KABATI NJAU.....3RD CLAIMANT

ROBERT MAINA GUANDARU.....4TH CLAIMANT

JOHN KAMAU MURIUKI.....5TH CLAIMANT

DAVID KAMATHI.....6TH CLAIMANT

STEPHEN NDICHU MURIITHI.....7TH CLAIMANT

SAMWEL KAMAU MUKAMI.....8TH CLAIMANT

-VERSUS-

GEOTHERMAL DEVELOPMENT COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 21st March, 2014)

JUDGMENT

The claimants in the two cases as consolidated were employees of the respondent. They filed their respective statements of claim in the two cases through Kiplenge & Kurgut Advocates and prayed for judgment against the respondent for:

a. **A declaration that the temporary contracts of employment dated 4th April, 2011 are illegal, null and void.**

b. **The respondent to pay the claimants all their full and final terminal dues including:**

i. **salary in lieu of notice;**

ii. **leave days;**

iii. **rest days;**

iv. **public holidays;**

v. **overtime;**

vi. **house allowance;**

vii. **tools allowance;**

viii. **certificate of service;**

ix. **severance pay; and**

x. **compensation.**

c. **The respondent to bear costs of the cause.**

d. **Interest on (b) and (c).**

e. **Any other relief that the honourable court shall deem fit to grant.**

The respondent filed a reply to the memorandum of claim in each case through Waruhiu, K'owade & Ng'ang'a Advocates. The respondent prayed that the claimants' claims be dismissed with costs.

The cases were heard on 11.2.2014 and on 26.2.2014. Nelson Ogeto Mogaka **(CW1)** and Edward Mwangi Wangui **(CW2)** testified on behalf of the claimants. The respondent's witness was Robert Kimondo Chege.

The claimants were employed by the respondent as either skilled or unskilled labourers. The status of each claimant as skilled or not skilled is not in dispute as is also verifiable from the fixed term contracts that each claimant filed in court. It is not in dispute that the skilled claimants earned Kshs.90.00 per hour making Kshs.720.00 per 8 hours of a normal day's work. The unskilled claimants earned Kshs.42.00 per hour making Kshs.336.00 per 8 hours of a normal working day.

The evidence is that the claimants were terminated under the same circumstances. On 26.04.2011, the respondent introduced a written fixed term contract. It was dated 4.04.2011 but delivered to the claimants for acceptance on 26.04.2011. The claimants were asked to backdate the contract by indicating that they had signed it on 31.01.2011. RW testified that the backdating was a human resource exercise for good housekeeping and it was not meant to prejudice the claimants' interests. RW further testified that the contract did not change the claimants' terms and conditions of service. The fixed term contract stated thus, **"This contract of employment will be on Temporary Terms effective from 31st January to 29th April 2011, however the management reserves the right to terminate the contract permanently depending on your performance."**

After signing the contracts pretending that the signing was on 31.1. 2011 and as directed by the respondent's management, the claimants were called to a meeting on 4.07.2011 and told that the materials had run out and they were to go home to be recalled when the materials became available. The claimants' evidence was that they were never recalled by the respondent hence the dispute leading to the filing of this cause. The three months in the contract that was signed were to lapse on 29.04.2011 whereas the claimants' termination was on 4.07.2011, long after lapsing of the contract period.

The court has considered the submissions, the pleadings, the evidence and the following are the issues for determination:

1. **Whether the evidence by the two claimants' witnesses was sufficient in the circumstances of this case.**

2. **Whether claimants were casual employees or their service converted to that of permanent employees under section 37 of the Employment Act, 2007.**

3. **Whether the termination was fair or unfair.**

4. **Whether the claimants are entitled to the remedies as prayed.**

The 1st issue is whether the evidence by the two claimants' witnesses was sufficient in the circumstances of this case. For the respondents, the learned Counsel Mr. Thangei submitted that our adversarial system of litigation required that a claimant present their case before the court. The judge is a neutral arbiter and the court cannot make up evidence for a litigant. Counsel cited **Barka Saidi –Versus- Mohemaedi Saidi Civil Appeal No. 181 of 1969 [1970]THCD N95**, where it was held that it is for a party to present his case to the court and not for the court to make a case for the litigant. Counsel also referred the court to **The Standard Limited –Versus- Joseph Leo Ochieng Civil Appeal No. 189 of 2004 at Nairobi**, where the court held that the learned trial Judge fell into an error when he applied evidence of the 4th respondent across the board in favour of all the plaintiffs to establish liability for libel or slander against the appellant as no liability had been established in favour of the plaintiffs as they gave no evidence. The respondent further pleaded that the claimants had not specifically pleaded the special damages and only two of the claimants had testified. The respondent relied on the Court of Appeal in **Nizar Virani T/A Kisumu Beach Resort –Versus- Phoenix of East Africa Assurance Company Limited [2004]eKLR.** where the court upheld that a claim for special damages should not only be pleaded but strictly proved. The Court of Appeal in that case further stated that the character of the acts themselves which produce the damage and the circumstances under which those acts are done must regulate the degree of certainty and particularity that must be insisted on both in pleading and proof of damage as is reasonable, having regard on the circumstances and to the nature of the acts themselves by which the damage is done. The court in that case, further stated that to insist upon less would be to relax old and intelligible principles and to insist upon more would be the vainest pedantry.

The court has considered the authorities and measured the principles against the pleadings and the circumstances of the present case. First, the claimants have pleaded that they were employed by the respondent under terms of payment that were not in dispute. The second major pleading and which is not in dispute is that the claimants signed a backdated fixed term contract. Each claimant at filing the suit swore an affidavit to verify the facts. The court finds that no material particulars in this case were not pleaded and the court further finds that whereas the two claimants' witnesses gave evidence, their evidence was sufficient to cover for the respective cases of the claimants because the character of the respondent's acts which produced the damage and the circumstances were clear with certainty and particularity from the oral evidence, documents filed and the pleadings. Thus, in the circumstances of this case, the court finds that the evidence as presented and in view of the pleadings and documents filed for the claimants, it was sufficient that the evidence of the two claimants was taken on behalf of all the claimants. In making the finding, the court is also guided by provisions of section 20(1) of the Industrial Court Act, 2011 which provides thus:

"20. (1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities and shall not be strictly bound by rules of evidence except in criminal matters:

Provided that the Court may inform itself on any matter as it considers just and may take into

account opinion evidence and such facts as it considers relevant and material to the proceedings."

In this case relating to the claimants' contracts of service, the court has considered the character of the transactions, the evidence on record and the issues in dispute and finds that it was sufficient that the two witnesses testified on behalf of the claimants. The court considers that it was for the claimants to decide the manner of urging their case in the most efficient and effective manner. It was not for the court to insist on any specific claimants' manner of presenting their evidence and the number or type of witnesses. The weight, relevance and materiality of the evidence as presented remains subject to the court's evaluation in this judgment.

The 2nd issue for determination is whether the claimants were casual employees or their service converted to that of permanent employees under section 37 of the Employment Act, 2007. For the respondent, it was submitted that the claimants were not in a continuous engagement. Even if it is found that they were in continuous engagement, section 37 of the Employment Act, 2007 does not operate where there is a specific contract of service setting out the terms of engagement as it was in the present case. Thus, there was no casual employment to be converted because the claimants were already in a term contract.

For the claimants, it was submitted that the claimants were employed by the respondent on diverse dates and worked until their termination on 4.07.2011. They were paid their salaries every after two weeks and those facts were not disputed. Thus, under section 37(1) and (3) of the Act, the terms of service of the claimants was converted from casual employment by operation of section 37(1) (b) of the Act. Section 37 of the Act provides as follows:

"37. (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 Industrial Court on the terms and conditions of service of a casual employee, the Industrial 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 88 of this Act shall apply."

A casual employee is defined under **section 2 of the Employment Act, 2007** to mean a person 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. It is clear that the claimants were employed on hourly rate to be paid at end of day but in practice paid after every two weeks. Their initial engagement would therefore pass for a casual employment to the extent that there was provision for daily payment.

For the claimants' employment to have converted under section 37(1), it must be established that either the claimants worked for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month; or that the claimants performed 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.

For the first ground, the claimants testified that they worked without break for more than a month and throughout their service during which they signed a check-in and check-out register. RW testified that the data he compiled from the check-in and check-out register showed that the claimants had breaks in their service. The court finds that the check-in and check-out register was the primary documentary evidence but was not produced in court by the respondent. The court further finds that on a balance of probability, the claimants who were otherwise jobless and in real need of employment must have worked continuously without a break throughout their engagement period. The court finds the data compiled by the RW unilaterally was not sufficiently credible in that regard.

Even if the claimants did not work without a break for a month or more, the court has considered the intensive inception works the respondent was involved in. It is obvious that for all the claimants, if they wished, and no reason has been shown that they did not so wish, the works were such that they would be and were accorded work for more than three months; that is, the claimants performed work which could not 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. Thus, the court finds that the claimants' casual employment converted under the second limb of section 37(1) of the Act.

The court holds that the second limb of the section serves to defeat the possible mischief that an employer may vigorously break employment of the casual worker so that the aggregate month in the first limb of the section is vanquished. In such circumstances, the second limb of the section becomes handy so that all the casual worker needs to establish is that, though there may have been a forced break to sustain casual status by there being no aggregate continuous one month service, there was available work to be performed beyond three months. Thus, the court holds that section 37 protects workers from continued casual employment in all circumstances where the nature of work is permanent spanning over at least three months.

The respondent submitted that there was no casual employment to convert in view of the backdated three months fixed term contract. The three months in the contract that was signed were to lapse on 29.04.2011 whereas the claimants' termination was on 4.07.2011, long after lapsing of the contract period. Accordingly, the court finds that at the time of the termination on 4.07.2011, the purported term contract had lapsed by effluxion of time and at termination the claimants were essentially casual workers

but for the protection of the cited section 37 of the Act.

To answer the 2nd issue for determination, the court finds that the claimants' otherwise casual service converted to protection under the minimum terms and conditions of service as provided for in section 37 of the Act.

The 3rd issue for determination is whether the termination was fair or unfair. The respondent submitted that section 45(3) of the Employment Act provides that an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. It was submitted that in **Cause No. 178 of 2013**, claims by claimants 3,4,5,7 and 8 must fail because they had served for less than 13 months at the time of termination. Further, it was submitted that claimants were fairly terminated because the reason that materials ran out was valid, that the claimants were paid all their dues and the respondent reserved the right to terminate.

For the claimants, it was submitted that the claimants' termination was unfair because they were not accorded a hearing and no valid reasons were advanced; they were not accorded a fair legal process in contravention of the provisions of Articles 41 and 47 of the Constitution; the certificate of service was not issued to each claimant as required under section 51 of the Act; and the term contract had no effect because after the lapsing of the contract, the claimants continued in employment.

The court has considered the submissions. First, the court upholds previous holdings of the court that section 45(3) of the Employment Act that an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated is unconstitutional as per **Linus Barasa Odhiambo-Versus- Wells Fargo Limited, Industrial Cause No. 275 of 2012 at Nairobi**, where this court stated as follows:

"Under that Subsection, one may take the view that employees for less than thirteen months like the claimant cannot have a right to complain that they have been unfairly terminated. However, this court upholds the findings of the High Court that the subsection is unconstitutional as per the Judgment by the Honourable Justice Isaac Lenaola in Samuel G. Momanyi – Versus – The Honourable Attorney General and SDV Transami Kenya Ltd, High Court Petition No. 341 of 2011. The High Court in that petition held that subsection 45(3) is unreasonable and inconsistent with the provisions of the Constitution of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1) as the said section purported to deny the petitioner the rights and freedoms enshrined in the said Articles of the Constitution. Of subsection 45(3) of the Act, the learned Honourable Judge stated as follows;-

'22. I have held as above because I am in agreement with the Petitioner that there is no explanation offered by either the 2nd respondent and the Attorney General why a person who has worked for one (1) year and one (1) month is the only one who can claim that his employment has been unfairly terminated and that one who has worked for less than that period cannot have the benefit of that claim. I have attempted on my own and without assistance from Counsel to get the justification for such a provision but my efforts have come to naught. I have elsewhere above reproduced Section 36 of the South African Act and it is easy to see that a person who works for less than 24 hours a month may genuinely have no claim for unfair termination but how can one explain that a person who has worked for a full year and more can be unfairly terminated and have no recourse to the protection of the law" Why discriminate in such a blatant manner and why close the doors of justice to an otherwise deserving litigant on account of period served

which is not legitimately too short to have any lawful meaning"'

This court wholly agrees with the findings, holding and reasoning of the learned Judge. Subsection 5(2) of the Employment Act provides that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy practice. It cannot be that the law gives with one hand and takes away with the other especially in circumstances where such derogation would be inconsistent with a clear constitutional provision."

Secondly, the court has considered the circumstances and reason advanced for the termination. The court finds that the conduct by the respondent requiring the claimants to sign a backdated fixed term contract of three months, allowing the claimants to continue in employment beyond the contractual period, and suddenly terminating their employment without any notice was manifest bad faith inconsistent with the high trust and cooperation expected of the parties in the employment relationship. The court further finds that the reason advanced, namely that the materials ran out, was not established to have existed at the time of the termination. It is obvious that the claimants continued in business and it was not shown that subsequent to the claimants' termination, the respondent did not need the kind of services the claimants had been engaged to provide. The claimants' evidence, and which was not refuted by the respondent, was that they were to be recalled once materials became available. The court finds that the respondent remained silent on the recall arrangement. Section 43 of the Act required the respondent to prove the reason for termination failing which the termination would be found to have been unfair.

The court finds that the respondent failed to prove the reason for the termination and the court further finds that the termination was unfair under section 43 of the Act.

The 4th and final issue for determination is whether the claimants are entitled to the remedies as prayed for. The court makes the following findings:

1. As submitted for the respondent, the court finds that the claimants did not strictly establish the claims and prayers for overtime, rest days, public holidays, and tools allowance. The claims and prayers will therefore fail. The court further finds that this was not a case for redundancy and the claimants are not entitled to severance pay as claimed and as envisaged in section 40 of the Act.

2. The claimants were entitled to reasonable housing accommodation or sufficient pay as rent in addition to the wages and as provided for in section 31 of the Employment Act, 2007. The court finds that the claimant did not pay the claimants a consolidated salary that was adequate to cater for housing as envisaged in section 31(2) (a) of the Act. The court finds that the claimants are entitled to house allowance as set out in their respective statements of claim and as prayed for.

3. As submitted for the claimants, they are entitled to one month's pay in lieu of the termination notice that they were entitled to and in view of the provisions of sections 35(1), 37, and 36 of the Employment

Act, 2007 and at the rate of the last hourly rate of payment of each claimant for 28 days for a maximum of 8 hours per day.

4. The claimants are entitled to a certificate of service as submitted by their Advocates.

5. The court finds that the claimants were entitled to annual leave under section 28 (1) of the Act. Under the section, the court finds that each claimant was entitled to one and three-quarter days of leave with full pay in respect of each completed month of service. The court finds that the paid leave was not given or paid for and the court finds that the claimants are entitled to two and half days pay in respect of each completed month of service at the rate of a day's pay being 8 hours times the last agreed hourly rate (being the statutory pay for the rest and the full pay during the due rest but found was not accorded).

6. The court has considered the periods the claimants had so far worked, the wishes of the claimants to remain in employment and respondent's promise they would be recalled, and that the claimants did not engage in any conduct that may have contributed to their termination and finds that a pay of 9 months salaries at the rate of the last hourly rate of payment of each claimant for 28 days per month per maximum 8 hours per day will meet the ends of justice for the unfair termination.

7. The court finds that the claimants are each entitled to the certificate of service as provided for in section 51 of the Act.

In conclusion, judgment is entered for the claimants against the respondent for:

1. **A declaration that the termination of the claimants' respective employment by the respondent was unfair.**

2. **The respondent to deliver to each of the claimants a certificate of service by 1.05.2014.**

3. **The respondent to pay each claimant:**

a. **a pay of 9 months at the rate of the last hourly rate of pay times eight hours per day for 28 days per month for the unfair termination;**

b. **house allowance as set out in the respective statements of claim and as prayed for;**

c. **pay for leave at two and half days pay in respect of each completed month of service at the rate of a day's pay being 8 hours times the last agreed hourly rate;**

d. **pay in lieu of termination notice at the rate of the last hourly rate of payment of each claimant for 28 days for a maximum of 8 hours per day.**

4. **The respondent to pay the amount in (3) above by 1.5.2014, failing, interest to run at court rates from the date of the suit till full payment.**

5. **The claimants to compute, file in court and serve the respondent the amount in (3) above by 28.3.2014 for recording the quantum in court at a date convenient to both parties.**

6. **The respondent to pay the costs of the suit.**

Signed, dated and **delivered** in court at **Nakuru** this **Friday, 21st March, 2014.**

BYRAM ONGAYA

JUDGE