



**Kariuki v Widrups Groups Limited & another (Cause E710 of 2023)
[2024] KEELRC 1832 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1832 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E710 OF 2023**

JK GAKERI, J

JULY 4, 2024

BETWEEN

IVY WANJIRU KARIUKI CLAIMANT

AND

WIDRUPS GROUPS LIMITED 1ST RESPONDENT

JAMES MUSUNGU RAPANDO 2ND RESPONDENT

JUDGMENT

1. The Claimant avers that she was employed by the Respondent on 5th April, 2022 as a Resident Engineer at a gross salary of Kshs.92,142/= and a net of Kshs.70,000/= and served diligently until 17th January, 2023 when her employment was unfairly terminated by the Respondent.
2. That in October 2022, the Respondent stopped paying the Claimant's salary for services rendered.
3. That on 17th January, 2023, the Respondent's Senior Technician informed the Claimant that her employment had been terminated with immediate effect and should hand over.
4. That the 2nd Respondent's promise to pay salary arrears and terminal dues was not honoured and there was no further communication from the Respondent.
5. It is the Claimant's case that no reason for termination was given, no notice to show cause was issued and no disciplinary hearing was conducted. However, the dispute was reported to the Labour Office in January 2023.
6. The Claimant prays for;
 - a. Declaration that termination of employment was unprocedural and unfair.
 - b. Kshs.1,659,169.00 comprising –



- i. Notice pay Kshs.92,142/=
- ii. Salary arrears October to December 2022 and January 2023 Kshs.328,639.00
- iii. House allowance Kshs.132,684.00
- iv. Unfair termination Kshs.1,105,704.00
- v. Certificate of service
- c. Costs of the suit
- d. Interest on (ii) and (iii) above.
- e. Such further or other relief as this Honourable Court may deem fit.

Respondent's case

- 7. In its response to claim and counter-claim, the 2nd Respondent avers that he was introduced to the Claimant by his long time friend Engineer Dominic Mwaniki, the Claimant's father who sought attachment for her at the 2nd Respondent's company, and the 2nd Respondent agreed and was paying her Kshs.75,000/= per month due to the good relationship between Engineer Mwaniki and the 2nd Respondent.
- 8. The 2nd Respondent avers that the Claimant was an intern and was not taken through the formalities of employment and was thus not an employee.
- 9. In their Counter-claim, the Respondents aver that the Claimant reported and left the work place as she wished and in November 2022 she was present for 9 days, 3 days in December 2022 and 2 in January 2023 and discontinued the internship.
- 10. The Respondents admit that they owe the Claimant Kshs.175,000/= being the outstanding balance for her internship.

Claimant's evidence

- 11. On cross-examination, the Claimant admitted that she was introduced to the 2nd Respondent by one Engineer Mwaniki, a mutual friend.
- 12. It was her evidence that she graduated in July 2018 and had no evidence to prove that she was an Engineer and had completed attachment with three different firms by the time she joined the Respondent, but had no corroborative evidence.
- 13. The Claimant testified that she was employed as a resident engineer and did an interview but was not given a letter of appointment.

Respondent's evidence

- 14. The 2nd Respondent, Engineer Rapando confirmed that he had not provided the 1st Respondent's policy documents on employment or attendance sheets for November 2022.
- 15. The witness testified that he was present when the Claimant quit by word of mouth.
- 16. He admitted that he owed the Claimant Kshs.175,000/=.
- 17. The witness testified that the Claimant called one Mr. Mumo, the Senior Technician.



18. The Claimant responded to the Respondents response and Counter-claim denying the averments and the Counter-claim.

Claimant's submissions

19. As to whether the Claimant was an employee, the Claimant submits that the Respondent did not produce its policy on employment and the Claimant was an employee and relies on the decision in *Pauline Nyokabi Mwangi V Valley Hospital Ltd (2017) eKLR* to reinforce the submission.
20. On termination of employment, the Claimant submits that it was unfair as there was no valid reason for the termination and Mr. Mumo was not invited as a witness.
21. The Claimant submits that the prescribed termination process was not followed.
22. Reliance was made on the sentiments of Ndolo J in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*.
23. Concerning the reliefs, the Claimant submits that she is entitled to all of them for the unfair termination of employment.

Respondent's submissions

24. On the employment status of the Claimant, the Respondents submit that the Claimant provided no evidence to show that she was employed as a Resident Engineer or that she was an Engineer at all.
25. Reliance was made on *Linus Songwa Musamali V Bamco Construction Company (2020) eKLR* as well as *Everret Aviation Ltd V Kenya Revenue Authority (2013) eKLR* on the test of an employment relationship.
26. Reliance was further made on *Peter Ngunjiri Kariuki V Board of Management Magomano Secondary School (2022) eKLR* to urge that the Claimant had not proved that she was an employee of the 1st Respondent.
27. On termination, the Respondent submits that the Claimant was not an employee and failed to prove that there was an unfair termination of employment as required by the Provisions of Section 47(5) of the *Employment Act, 2007*.
28. On the reliefs sought, the Respondents submits that the Claimant was not entitled to notice pay, house allowance, compensation or certificate of service as she was not an employee but undertaking attachment and had not proved that termination was unfair.

Analysis and determination

29. The issues that commend themselves for determination are;
- i. Whether the Claimant was an employee of the Respondents.
Depending on the findings in (i) above;
 - ii. Whether termination of employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
30. Concerning the engagement status of the Claimant, parties have adopted opposing positions with the Claimant maintaining that she was employed on 5th April, 2022 as the Respondents' Resident Engineer



- but was not given an appointment letter, employment card or indeed anything. The Respondents on the other hand argue that the Claimant was an intern at an allowance of Kshs.75,000/= per month.
31. It is common ground that the Claimant joined the Respondent on 5th May, 2022 and left sometime in January or February 2023, a duration of about 8 months.
 32. Other than the Claimant's Investment & Mortgage Bank Statements for the period 11th May, 2022 to September 2022, there is no other verifiable evidence to connect the Claimant to the Respondent.
 33. The Claimant's bank statement show that she received monies from the Respondents 5 times on 11th May, 2022 Kshs.70,000/=, 10th June, 2022 Kshs.70,000/=, 18th July 2022 Kshs.70,000/=, 17th August, 2022 Kshs.50,000/= and 8th September, 2022 Kshs.70,000/=.
 34. The bank statement leaves no doubt that the Claimant and the Respondent had a relationship with a monetary consideration paid regularly. The parties however disagree on the nature of the relationship.
 35. RWI testified that the Claimant was not taken through employment procedures as she was not being employed but adduced no evidence of those procedures.
 36. Strangely, the Claimant did not avail evidence of her qualifications as an Engineer notwithstanding the allegation that she graduated in 2018 from an undisclosed institution.
 37. It need not be gainsaid that Engineering is a specialized field and it takes not less than five (5) years to qualify as an Engineer and it is unclear how the Claimant was employed by the Respondent without availment of the documentation on qualification, the relations between the 2nd Respondent and Engineering Mwaniki notwithstanding.
 38. In the court's view, the Claimant's testimony that she was employed as a Resident Engineering lacks supportive and verifiable evidence.
 39. Intriguingly, the Claimant tendered no evidence as to what his duties were, which projects she was handling or who the supervisor was. The allegation that one Mr. Mumo communicated the dismissal, if true, reveals that the Claimant may not have been an Engineer.
 40. Was the Claimant an employee of the Respondent?
 41. Section 2(1) of the *Employment Act*, 2007 defines an employee as;

“ A person employed for wages or a salary and includes an apprentice and indentured learner”.
 42. Section 2 of the *Industrial Training Act*, 1960 defines an Apprentice as;

A person who is bound by a written contract to serve an employer for such period as the Board shall determine with a view to acquiring knowledge including theory and practice of a trade in which the employer is reciprocally bound to instruct that person.
 43. On the other hand, an indentured learner is defined as;

A person, other than an apprentice, who is bound by a written contract to serve an employer for a determined period of not more than 2 years with a view to acquiring knowledge of a trade in which the employer is reciprocally bound to instruct that person.
 44. Evidently apprenticeship and indentured learnership are practical training positions.



45. With no evidence to show that she had a degree in Engineering from a recognized university in Kenya or anywhere else in the world or engagement as a Resident Engineer, the Respondent's evidence that the Claimant joined the Respondent as an intern at the instigation of Engineer Dominic Mwaniki, known to the Claimant and RWI is more credible and thus reliable.
46. The court is satisfied and finds that the Claimant was an indentured learner and thus an employee of the Respondent as held in *Pauline Nyokabi Mwangi V Valley Hospital Ltd (2017) eKLR*.
47. Concerning termination of employment, it is common ground that under the provisions of the *Employment Act, 2007*, for a termination of employment to pass the fairness test, it must be shown that the employer had a valid and fair reason to terminate the services of the employee and did so in accordance with a fair procedure.
48. There must have been a substantive justification and procedural fairness as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (Supra)* and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*.
49. While the Claimant alleges that she was notified of the dismissal by one Mr. Mumo, a Senior Technician on 17th January, 2023, the Respondent testified that the Claimant left on her own accord and her attendance in November, December and January was erratic.
50. The Respondent, however, did not avail evidence of the Claimant's attendance and its evidence is unverifiable.
51. If the Claimant's attendance from November 2022 to the end of January 2023 was wanting, did the Respondent express its displeasure with the Claimant's attendance in writing and warn her of the ensuing consequences? Did the Respondent call her to ascertain where she was?
52. Verifiable evidence of the Claimant's attendance record would have demonstrated that the Respondent was aware of and was concerned about it and corrective action was necessary. The Respondent did not adduce such evidence.
53. Similarly, the Claimant's allegation that Mr. Mumo informed her that employment had been terminated immediately is in the court's view unconvincing as Mr. Mumo was not her employer and did not corroborate the Claimant's testimony.
54. Equally, the Claimant adduced no evidence of what she did after the information was communicated.
55. Did she confirm with RWI, the employer?
56. Puzzlingly, the Claimant's letter to the Ministry of Labour and Social Protection dated 24th January, 2023, states that the termination was on 19th January, 2023 while the written statement dated 28th August, 2023 cites 17th January, 2024.
57. Relatedly, the letter to the Cabinet Secretary states that on the material day, she was requested to hand over all the projects she was handling and asked to resign.
58. The written statement makes no reference to the request to resign or Mr. Mumo yet it was written 5 days after the alleged event.
59. It is evident that the Claimant reported the matter to the Ministry and a demand was made to the Respondent but it did not attend a meetings scheduled for 17th February, 2023 and 16th March, 2023.
60. In light of the foregoing, the salient issue for determination is whether the Claimant has demonstrated that the Respondent terminated her employment unfairly as submitted.



61. Section 47 (5) of the *Employment Act*, 2007 provides;

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

62. The foregoing is exemplified by the sentiments of Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards* (2016) eKLR, where the Judge stated as follows:

“The burden does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour”

63. In the instant case, the Claimant has provided two versions of how she separated from the Respondent. First, that on 19th January 2023, she was instructed to hand over projects she had been assigned to and resign. She provided no evidence as to what she did.

64. Second, that on 17th January, 2023, Mr. Mumo told her that the 2nd Respondent had ordered her termination. Again the Claimant tendered no evidence on what she did as Mr. Mumo could not have been the supervisor or employer. Was it the resignation or the orders by Mr. Mumo?

65. RWI denied having terminated the Claimant’s employment. He maintained that the Claimant left on her own accord.

66. The totality of the evidence before the court is that the Claimant has failed to prove that her employment was terminated by the Respondent on 17th or 19th January, 2023 and that it was unfair within the meaning of Section 45 of the *Employment Act*, 2007.

Whether the Claimant is entitled to the reliefs sought

i. Declaration

67. Having found that the Claimant has failed to discharge the burden of proof as by law required, the declaration sought is unmerited and is declined.

ii. Salary arrears

68. The Claimant’s written statement states that the Respondent did not pay her for October 2022, November 2022, December 2022 and 17 days in January 2023, evidence the Respondent did not controvert.

69. The Claimant is awarded salary for October 2022, November 2022 and December 2022 and 17 days in January 2023 at Kshs.70,000/= per month net deduction.

iii. House allowance

70. In her witness statement, the Claimant states that the sum of Kshs.92,142/= was her gross salary, which is typically inclusive of the basic salary and allowances.

71. The Claimant adduced no evidence to prove that the Respondent did not pay her house allowance.



72. The claim for house allowance is unsustainable and is declined.

iv. Compensation for unfair termination

73. Having found that the Claimant has failed to demonstrate that her contract of employment was terminated or that the termination was unfair, the prayer for compensation is unsustainable and is declined.

v. Certificate of service

74. The Claimant is entitled to certificate of service by dint of Section 51 of the *Employment Act*, 2007.

vi. Cost of the suit

75. Under Section 12(4) of the *Employment and Labour Relations Court Act*, 2011, costs are discretionary. The discretion, however, must be exercised judiciously not capriciously.

76. Having regard to the circumstances enumerated in Cecilia Karuru Ngayu V Barclays Bank of Kenya & another (2016) eKLR, the court is persuaded that it is only fair that parties bear their own costs.

77. In the upshot, the Claimant's suit against the Respondent is for dismissal and it is accordingly dismissed save for the claims for;

- a. Unpaid salary for October, November and December Kshs.(70,000x3)= Kshs.210,000/=.
- b. Salary for 17 days worked in January 2023, Kshs.38,387.1.
Total Kshs.248,387.1
- c. Certificate of service to be issued within 30 days.

78. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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