



**Mwabili v Samruddha Resources (K) Limited (Cause E031 of 2023)
[2024] KEELRC 1958 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1958 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E031 OF 2023**

**M MBARŪ, J
JULY 25, 2024**

BETWEEN

BENEDICT MTOTO MWABILI CLAIMANT

AND

SAMRUDDHA RESOURCES (K) LIMITED RESPONDENT

JUDGMENT

1. The respondent employed the claimant on 1st March 2018 as the liaison and coordination manager earning Ksh.400, 000 per month. The claim is that the salary paid was basic without due allowances. The claim is that there was agreement between the parties that the salary paid would attract an annual increment of 20% for the first 5 years, 15% for the next 5 years and thereafter a constant 10%. The house allowance of 40% per month amounting to ksh.20, 000 would be paid.
2. The claim is that the respondent failed to make payments as agreed. There are salary arrears unpaid.
3. On 17 October 2022, the respondent unlawfully and unfairly terminated the claimant's employment without notice of justification. The matter was reported to the Taita Taveta County Labour Officer who invited the parties to a conciliation but the respondent intentionally refused to attend. This was with malice and meant to injure the claimant. The malice arose on the basis that there was no notice issued and the respondent is withholding payment of terminal dues. There was a failure to pay the accrued increments as agreed hence exposing the claimant to ridicule and economic hardship. The deliberate refusal to implement the letter of appointment as agreed was with malice.
4. The claim is that the respondent unfairly discriminated against the claimant by withholding his salary arrears for no justification. Failing to offer the claimant any reasonable reasons as to why his salary arrears were not paid was discriminatory, particularly by singling him out in the issuance of appointment letters while other employees got their letters. This violated the claimant's constitutional rights to fair labour practices and lawful expectations.



5. This resulted in loss and damage and the claimant is claiming the following:
 - a. Accumulated salary underpayments from March 2018 to October 2022 Ksh.25,480,274;
 - b. Accrued leave days for 5 years ksh.1,250,000;
 - c. Service pay for 5 years ksh.1,250,000;
6. The claimant is seeking payment of these damages.
7. The claimant is also seeking judgment against the respondent for unfair termination of employment and orders that;
 - a. A declaration that there was unfair termination of employment;
 - b. Damages for violation of constitutional rights;
 - c. An order directing the respondent to pay salary arrears;
 - d. Payment of pecuniary damages;
 - e. Costs of the suit.
8. The claimant testified in support of his case that upon employment by the respondent, it was agreed that his salary would be increased by 20% for the first 5 years of his employment and subsequently, an increase of 15% for the next 5 years with a further 10% yearly. Each increment was to be based on the previous year's annual increment effective every 1st day of March. However, the respondent refused to issue him with a letter of appointment while all other members of staff had written contracts. The issue of a written letter remained pending with the directors since the commencement of employment in the year 2018. The refusal to issue a letter of appointment was discriminatory and injurious to the claimant.
9. The claimant testified that he was issued with the letter of appointment which he signed and returned to the respondent to sign and return a copy to him. The head office is based in India and through text messages between the claimant and Vinay Patil, it was agreed that the letter would be signed and a copy issued to the claimant but he failed to address it.
10. The claimant testified that the message he got from Vinay regarding the non-issuance of a letter of appointment and the underpayment was that he would be visiting the country to settle the matter. This was not done. Frustrated, the claimant complained to the Labour Officer, Taita Taveta noting underpayment of his salary by the respondent. The Labour Officer discussed and directed that this matter concerning operations at the Kishushe Mining Site and that all the employees should be issued with letters of employment following Section 9 of the [Employment Act](#) but the respondent failed to address any appointment letter to the claimant.
11. The claimant testified that upon his employment by the respondent, he noted all other employees had been issued with letters of appointment save for him. He had a letter dated 1st March 2018 but it is not signed by the respondent. When the letter was drafted it was to be signed in India and to be delivered in Kenya. The claimant raised the matter with the respondent through phone messages as was the norm, he called the directors to have the letter signed but this was not done.
12. The respondent in response to the claim has confirmed the date employment commenced from 1st March 2018. Emails were shared relating to the execution of the employment letter but the respondent failed to issue one. The complaint to the Labour Officer was meant to address this legal lapse on the



part of the respondent. On 8 March 2021, the Labour Officer directed the respondent to issue a written letter of employment.

13. The non-issuance of a written letter of employment affected the payment of salary increments over the years leading to salary arrears from 1st March 2018. Based on the expected salary increments, the claimant applied for a loan facility with Barclays, his bank and he attached his letter of employment but there was a difference in the dates.
14. The claimant testified that his employment was terminated on 17 October 2022 without notice or justification. The respondent alleged that he had contested for the MCA seat without their knowledge but he had raised the matter with the respondent and a decision was taken to allow him to vie and allocate a budget for that purpose. There was communication between the claimant and the managing director to this effect on 8 October 2022. The respondent supported his campaigns but later abandoned him and also terminated his employment by alleging that he had neglected his duties. The allegations were not communicated early to allow the claimant to respond. The respondent also alleged that the claimant was inciting other employees at the mines but no particulars were shared to allow him to respond and give his responses. These allegations were false and malicious meant to unfairly terminate employment and no notice to show cause was issued to allow the claimant to address them.
15. The claimant testified that he was discriminated against by the respondent by failing to give him reasons for the termination of his employment. The agreement to have salary increments led to loss and damages and the claims made should be awarded.
16. Upon cross-examination, the claimant testified that his initial salary was agreed at ksh.150, 000 per month. Based on agreements between the parties, annual increments percentage would result in payment of ksh.400, 000 per month but the respondent failed to pay.
17. The letter to Barclays bank indicated that his salary was ksh.250, 000 per month. This letter was written by the respondent. He did not protest the reduced salary since it was meant to support his loan application. He opted to make his complaint to the Labour Office but the respondent refused to attend and address the matter as the bank did not process the application due to differences in the date of employment.
18. In response, the respondent admitted that the claimant was employed as its liaison and coordination manager in August 2019 at a gross salary of ksh.250, 000. There was no agreement to pay Ksh.400, 000 or any increment in salary as alleged. If any such claim for underpayment is due, it is time-barred for any period before 17 October 2021 under the provisions of Section 90 of the *Employment Act*.
19. There was no unfair termination of employment on 17 October 2022 as alleged. The claimant's employment was illegal and unlawful on account of his political steps and he cannot seek to take advantage of his own wrongful and illegal conduct.
20. The particulars of malice are denied and there was no discriminatory treatment and the claims made should be dismissed with costs.
21. In evidence, the respondent called Upendra Patel the accounts manager who testified that the claims for underpayments and accrued arrears from March 2018 to 2020, such are time-barred by application of Section 90 of the *Employment Act*. The claimant was not employed on a basic salary of ksh.400, 000 as alleged. Such a claim is unsupported by any evidence and only meant to extort money from the respondent.
22. The monthly salary agreed by the parties was ksh.250, 000 per month. The bundle of documents filed by the claimant including bank statement and transfer indicate his salary was ksh.250, 000 per month.



- Some documents are forgery and not issued by the respondent. The writings on these documents are in different formats and different and not signed by the respondent as genuine company records.
23. The claimant has no valid claims on salary arrears on account of alleged increments. There was no claim for a salary increment when due or when the letter was issued in January 2021.
 24. Upendra testified that there was no unfair termination of employment as alleged. The claimant did not serve his employment diligently as alleged. He neglected his responsibilities and engaged in politics which saw him contest for a seat (MCA) in the August 2022 general elections without resigning from his employment with the respondent or with approval from the company. The claimant's employment with the respondent was illegal and unlawful on account of his political steps and he cannot seek to take advantage of his own wrongful and illegal conduct.
 25. Upon cross-examination, Upendra testified that he joined the respondent company in the year August 2019. He found the claimant who had been employed earlier in the year 2018. He had no particulars as to when the claimant was employed. The letter of appointment dated 1st March 2018 is not signed by the respondent. It was not issued by the respondent. The letter to the bank was not signed by the respondent.
 26. There was no contract of employment between the parties. He was not aware that the claimant had been issued with a letter that was not signed. He is not aware that the Labour Officer addressed the matter on 8 March 2021 and directed the respondent to issue a letter of employment. The claim that there was discrimination against the claimant for not being issued with a letter of employment is not correct.
 27. Upendra testified that the claimant decided to seek a political position and the respondent decided to terminate his employment. The decision by the claimant to go for elections created problems for the respondent, it was against company policy to seek a political position. It is correct that through a letter dated 20 July 2020, the claimant noted he had not been issued with a written contract but the alleged emails between the claimant and Vinay are not true and are personally unrelated to the respondent.
 28. On 17 October 2022, the respondent dismissed the claimant from his employment for the reasons that he contested for elections as MCA on 9 August 2022 and had not resigned from his employment. No notice to show cause was issued or any investigations carried out. There was no hearing before the decision to terminate employment. The policy not to accommodate the claimant upon going into elections is not filed and the allegations that the claimant neglected his duties, the particulars thereof are not stated. The claimant started inciting other workers at the mining sites but there is no evidence in this regard. There was no communication between the claimant and the respondent until a letter dated 17 October 2022 was issued.
 29. Upendra testified that on 20 October 2022, the claimant wrote to the respondent seeking his terminal dues including non-payment of NHIF dues but the company is not liable for such matter. There is no statement on NSSF payments. From March to July 2021 there are no statutory remittances.
 30. At the close of the hearing, both parties filed written submissions. Only the claimant complied and filed written submissions. On 5 June 2024, the respondent was allowed until 12 June 2024 to file submissions but none are on record.

Determination.

31. From the pleadings, evidence and written submissions, the issues which emerge for determination can be summarized as follows; whether the claims for underpayment and salary arrears are time-



- barred; whether there was discrimination against the claimant; whether there was unfair termination of employment; and whether the remedies sought should issue.
32. In response, the respondent raised the issue that the claims for salary underpayments and arrears relating to the period of October 2020 back to March 2018 are time-barred and filed contrary to Section 90 of the *Employment Act*.
33. The respondent has admitted to the fact that the claimant's employment was terminated through notice dated 17 October 2022. There is also an admission that the claimant was employed since March 2018 even though the response is that employment was from March 2019 but the witness called Upendra confirmed employment commenced in March 2018.
34. The cause of action accrued with the notice terminating employment. See *Fred Mudave Gogo v G4S Security Services (K) Ltd* [2014] eKLR where the court held that;
- “It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8th August 2008, a period over 3 years from the date of filing this claim in the Industrial Court on 5th June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in preventing the claimant/applicant from filing the claim in good time.
35. The claims for alleged underpayments and accrued salary arrears were due monthly hence continuing injuries. Under Section 90 of the *Employment Act*, continuing injuries should be addressed within 12 months from the cessation of such employment relationship. In *Serah Wairimu Kibara v Nokia Solutions Branch Operations* [2021] eKLR the fact of cessation of employment consolidates all pending unpaid terminal dues.
36. In the case of *George Hiram Ndirangu v Equity Bank Limited* [2015] eKLR the court defined continuing injury to include payment of accrued dues at the end of employment unpaid. The claimant's case is that during the employment period, he was owed his accrued dues. In the case of *John Kiiru Njiiri v University of Nairobi* [2021] eKLR the court held that upon cessation of employment, any claim arising from the employment relationship accrued. This position was reiterated in the case of *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR.
37. Payment of terminal dues included all owing and unpaid at the end of employment as held in *Johnson Kazungu v Kenya Marine & Fisheries Research Institute* [2021] eKLR.
38. The core issue herein is that employment was terminated unfairly and that the due process of the law was not adhered to. The claimant's case is also that he was discriminated against by the respondent who refused to issue him with a written contract of employment.
39. Under the provision of Sections 7 and 10 of the *Employment Act*, the employer has the legal duty to issue the employee with a written contract of service. Where the employer fails in this regard and retains the employee on a contract not concomitant with the provisions of Section 10 of the *Act*, the employee becomes protected under the provisions of Section 37 of the *Act* thereof. The employee is essentially without written terms and conditions of employment but has rights and benefits secured under the *Act* as held in the case of *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR.
40. The Court of Appeal in the case of *Kenyatta University v Esther Njeri Kenyatta University v Maina* [2022] KECA held that where the employer maintains an employee on causal terms of employment and seeks to terminate employment after employment for a long time, such is engaging in unfair labour practices. The employee is protected by law.



41. In this case, the claimant worked for the respondent from March 2018 to October 2022. He was paid a monthly salary of ksh.250, 000 and applied all means through phone messages and emails to have the respondent execute his employment contract that addressed terms and conditions including annual increments without success. He was forced to report such a matter to the labour office made an effort to reconcile the parties and have the respondent execute the employment letter to no avail. Indeed, the respondent's witness Upendra admitted that the claimant was not issued with a written contract of employment save, his employment was not denied. Effectively, the claimant was denied the benefits accruing out of the contract he had signed and placed with the respondent to sign but failed to do so.
42. The failure by the respondent to issue the claimant with a written contract resulted in a fundamental breach of Section 10 of the Employment Act. This breach was addressed by the labour officer, Taita Taveta but the respondent was adamant and failed to comply as directed.
43. The claimant has addressed such breach as a matter of discrimination against him by the respondent. His basis is that other employees were issued with written contracts and the lapse by the respondent issuing him with a signed contract denied him the due benefits in salary increments annually. The claimant filed various letters by the Labour Officer the last 27 October 2022 on underpayments. This was soon after the termination of employment. The respondent did not respond or offer the signed letter of appointment.
44. Refusal to issue the employee with a written contract of service is unlawful. Such is a fundamental breach of the employment relationship. While in employment, the claimant put great effort into having the respondent directors issue him with a written contract to no avail. He cannot be blamed for the lapses on the part of the employer, the respondent.

Under Section 16(4) of the Employment Act,

- (4) A person who fails to give to an employee a statement as required by sections 10, 12, 13 or 20 commits an offence and shall, on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

45. An employer who fails to comply with the provisions of Section 10 of the Act commits an employment offence due to a sanction. Such should be initiated by the Labour officer. The court is not left without recourse particularly where such matter is addressed as a source for discriminatory treatment against the subject employee.
46. The respondent does not offer any explanation as to why it treated the claimant differently from other employees and refused to issue him with a written contract of employment. Upon his claim that there was discriminatory treatment, Section 5 (7) of the Employment Act placed the burden to disprove such claim upon the respondent;
 - (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged and that the discriminatory act or omission is not based on any of the grounds specified in this section.
47. Without any effort to demonstrate why the respondent could not issue the claimant with a written contract from 1st March 2018 to 17 October 2022, such breach is apparent, and the court finds the claim for payment of damages justly. The payment of ksh.100, 000 is based on the minimum which is hereby awarded.



48. The respondent's case is that the notice dated 17 October 2022 was issued terminating the claimant's employment because he had gone into elective politics without resigning his employment and without approval or authorization. Under the provisions of Section 44(3) and (4) of the [Employment Act](#), an employer is allowed to terminate employment through summary dismissal for breach of the employment relationship for gross misconduct. However, before such sanction can be issued, the employer must comply with the mandatory provisions of Section 41(2) of the [Act](#):
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
49. The employee must be issued with notice and invited to a hearing to make his representations before termination of employment. The case by the respondent that the claimant went against its policy and vied for an MCA position is left bare. No policy is filed in this respect. There is no letter or contract of employment for the claimant to any terms and conditions and stopping him from such engagement. To proceed and terminate employment suo motto and without notice denied the claimant his legal right to respond and make representations.
50. In the case of [Simon Gitau Gichuru v Package Insurance Brokers Ltd](#) [2021] eKLR the Supreme Court of Kenya held that termination of employment without compliance with Section 41(1) of the [Employment Act](#) which requires the employer to explain to an employee the considered reason for terminating employment is unfair, unjust and unlawful for want of due process. Such an employee is entitled to notice pay and compensation.
51. In the case of [Oyombe v Eco Bank Limited](#) [2022] KECA 540 (KLR) the Court of Appeal in analyzing the provisions of Section 41 of the [Employment Act](#) held that the mandatory provisions of Section 41 of the [Employment Act](#) must be addressed by the employer and where there is lapse, such amounts to unfair termination of employment. The court held that the employee ought to therefore have been compensated for the procedural unfairness although the reasons for his dismissal were justified and fair according to the employer. Such justification should not be applied to negate mandatory rights accruing to the employee secured under Section 41 of the Employment Act. The court held that the elements to be gone into should include the following;
- ... four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being: -
- a) An explanation of the grounds of termination in a language understood by the employee;
- b) The reason for which the employer is considering termination;
- c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
- d) Hearing and considering any representation made by the employee and the representative chosen by the employee.
52. These steps cannot be discerned in this case. The respondent terminated the claimant in his employment unlawfully and unfairly.
53. At the time, the claimant was earning a salary of ksh.250, 000 per month since his letter of employment was not signed by the employer which is addressed and redressed above. There is nothing to



demonstrate that the claimant did not perform his duties diligently from 1st March 2018 to 17 October 2022.

54. Under the provisions of Section 49 of the Employment Act, the court is allowed to make multiple awards as held by the Supreme Court in the case of *Kenfreight (E.A) Ltd v Benson K. Nguti* [2019] eKLR. Regarding the issue of non-issuance of a written contract and discrimination against the claimant addressed above, compensation due is hereby awarded at 10 months gross salary last earned at ksh.250, 000 per month all at ksh.2, 500,000.
55. Notice pay is due at ksh.250, 000.
56. On the claim for accrued leave days for 5 years, Section 28(4) of the *Employment Act* only allows the accumulation of annual leave for not more than 18 months and the employer should ensure that the employee's right to take annual leave is protected. There is no record filed that the claimant took his annual leave when due. For 18 months, he is entitled to 33 leave days protected in law all assessed at ksh.275, 000.
57. On the claim for service pay for 5 years, under Section 35(5) and (6) of the *Employment Act*, service pay is due where the employer fails to pay statutory dues. Despite being aware of these proceedings, the claim for service pay was apparent, the respondent's witness testified that he was not sure whether the respondent had filed statutory dues as required. The payment statement filed and dated 24 October 2022 is not under the letterhead or signed by any respondent officer.
58. The apparent lapse in issuing the claimant with written terms and conditions of employment extends to non-payment of due statutory remittances. Such lapses not only prejudice the claimant but also go to the core claim. The respondent did not apply fair labour practices in breach of the law. Such matter should be taken up by the Labour Officer and for the claimant, for the 5 full years worked, he is entitled to service pay at the minimum 15 days based on his last salary of ksh.250,000 per month all at ksh.625,000.
59. On costs, the claimant made the report to the labour office Taita Taveta seeking a conciliation to avoid these proceedings. The respondent failed to attend. Even as these proceedings were ongoing, the respondent offered to pay statutory dues but no record was filed in this regard. The claimant is entitled to his costs.
60. Accordingly, the court enters judgment for the claimant against the respondent in the following terms;
 - a. A declaration that employment was terminated unlawfully and unfairly;
 - b. There were breaches of the law and fair labour practices and discrimination against the claimant by the respondent;
 - c. Damages awarded at ksh.100,000;
 - d. Compensation ksh.2,500,000;
 - e. Notice pay ksh.250,000;
 - f. Leave pay ksh.275,000;
 - g. Service pay ksh.625,000;
 - h. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25 DAY OF JULY 2024.



M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

