



**Muasa v China Road And Bridge Corporation (K) (Cause 2115 of 2016) [2024] KEELRC 1742 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1742 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2115 OF 2016  
NJ ABUODHA, J  
JULY 5, 2024**

**BETWEEN**

**PAUL MUTIE MUASA ..... CLAIMANT**

**AND**

**CHINA ROAD AND BRIDGE CORPORATION (K) ..... RESPONDENT**

**JUDGMENT**

1. The Claimant through his amended statement of claim dated 1<sup>st</sup> March, 2023 pleaded inter alia as follows: -
  - a. The Claimant was employed by the Respondent on or about January 2015 at a gross salary of Kshs 28,000.00 per month.
  - b. The Claimant averred that on or about 23<sup>rd</sup> July, 2016 the Respondent terminated his employment without any notice and without paying his dues.
  - c. The Claimant averred that the Respondent contravened the provisions of sections 41 and 45 of the *Employment Act* as there was no reason for his termination and neither did the Respondent give him a hearing before termination.
  - d. The Claimant sought to be paid his terminal dues to the tune of Kshs 1,120,000/= including notice pay, severance pay and leave pay.
2. The Claimant prayed for the following against the Respondent;
  - a. Unpaid dues of Kshs 1,120,000/= as particularized above.
  - b. General damages
  - c. Damages for unlawful termination



- d. Costs of the suit and interests.
3. The Respondent filed its amended statement of response dated 7<sup>th</sup> August, 2023 and averred inter alia as follows;
- i. The Respondent denied the contents of the claim and averred that the Claimant was issued with a termination notice on 20<sup>th</sup> May, 2016 and was terminated on 24<sup>th</sup> July, 2016. That the Claimant was issued with sufficient notice, not entitled to notice pay hence he was lawfully and fairly terminated.
  - ii. The Respondent averred that the Claimant was not entitled to damages as his termination was lawful.
  - iii. The Respondent averred that the Claimant was paid all his terminal dues including service pay and he acknowledged payment thereof.
  - iv. The Respondent averred that the Claimant's suit was bad in law, misconceived, embarrassing and incompetent. The Respondent prayed for the same to be dismissed with costs.

### **Evidence**

4. Both the Claimant's and Respondent's cases were heard on 22<sup>nd</sup> November, 2023. CW 1, the Claimant herein, testified and adopted his statement and the documents filed before the court as his evidence in chief. In cross examination CW1 confirmed that he was terminated on 23<sup>rd</sup> July, 2016 and that he signed the contract of employment on 2<sup>nd</sup> June, 2015. He confirmed that the contract was for construction of Mombasa-Nairobi SGR and that he was a member of a union.
5. CW1 confirmed that he was paid leave days and that his salary was Kshs 28,000/- per month as per his attached pay slip. When he was asked about pay slip of Kshs 15,150/- in his bundle of documents he confirmed that that was basic pay. CW1 further stated that he prayed for service pay in his claim and that he was paid 19,122/- upon termination.
6. The Respondent's witness RW1 testified and adopted the Respondent's statement and the document's filed in court as the Respondent's evidence in chief.
7. In cross-examination RW1 confirmed that the Claimant was issued with termination notice and the union was informed and that the Notice was posted on the Notice Board which was for the whole team. It was further his evidence that they had over 500 employees and the Notice was not issued to individual employees.
8. RW1 confirmed that the Claimant was paid at the rate of 76.5 per hour for the period he worked and that it was either 2 or 8 hours per day. RW1 further confirmed that leave days were paid in February, 2016.

### **Claimants' Written Submissions**

9. The Claimant filed his written submissions dated 5<sup>th</sup> February, 2024. On the issue of whether the Claimant was unlawfully terminated he submitted that he was never accorded a hearing and given notice before termination. He contended that his termination was unlawful both in substance and procedure and that there was no reason for his termination.
10. On the issue of his termination being fair both in substance and procedure the Claimant relied on the case of *Catherine Muthoni Wairimu v Walter Reif (National Chairman of the Pubs, Entertainment and Restaurants Association of Kenya) & 2 others* (2015)eKLR.



11. It was the Claimants' submissions that the Respondent failed to prove reasons for his termination and that the same reasons were valid. The Claimant contended that the procedure adopted by the Respondent was also unfair and unlawful as he was never given documents in relation to his case before he appeared before disciplinary hearing and further that the composition of the committee was wanting.
12. It was the Claimant's submissions that he was not given technical advice before the disciplinary hearing contrary to paragraph 7 of the Respondent's code of conduct and that his appeal lasted for more than 4 years without any reason.
13. The Claimant relied on the above case of Catherine Muthoni Wairimu to submit that he was not given any charge sheet to respond to, he was not accompanied by workmate or trade union representative of his choice to the disciplinary hearing, he was not given any chance to respond or make his representations hence the termination was flawed. The Claimant in conclusion submitted that his claim be allowed as prayed.

### **Respondents' Written Submissions**

14. The Respondent filed its submissions dated 26<sup>th</sup> February, 2024 and on the issue of whether the Claimant was unfairly dismissed, submitted that in cross-examination, the Claimant testified that he was paid his terminal dues and that his claim was for a work injury and service pay. The Claimant having dropped his claim for a work injury by filing the amended claim dated 1<sup>st</sup> March 2023, this issue was moot.
15. It was the Respondent's submissions that in cross-examination, the Claimant admitted to signing the Employment Agreement on 2<sup>nd</sup> June 2015 and agreed to the terms therein, including the fact that the said employment would be for the period of the construction of the Mombasa – Nairobi section of the SGR.
16. The Respondent submitted that RW1 testified that the Claimant was dismissed upon completion of the Mombasa – Nairobi section of the SGR. That it was trite that when an employee was engaged for particular project such as construction, the employment terminated upon completion of the project. The Respondent relied on the cases of *Erick Kabangaba Wekesa & 4 others v Mavj Kaji & Brother Limited* [2022] eKLR and *Justin Mutunga David v China Road & Bridge Corporation (K) Limited* [2018] eKLR in this regard.
17. The Respondent submitted that it was clear from the employment contract between the parties herein that the Claimant was to be engaged for the period during the construction of the Mombasa – Nairobi section of the SGR. The claimant could not therefore claim that he was dismissed unfairly.
18. The Respondent submitted that as the courts have held in the above cited decisions, dismissal upon completion of the specific project for which the Claimant was employed was a valid reason for termination.
19. The Respondent further submitted that section 35 of the *Employment Act* required an employer to issue at least 28 days termination notice before dismissal of an employee who is paid on a monthly basis. The Respondent submitted that the Claimant was issued with a termination notice on 30<sup>th</sup> May 2016 and was dismissed on 24<sup>th</sup> July 2016.
20. The Respondent submitted that the Claimant was issued with sufficient notice before his dismissal. That the Claimant was dismissed for a valid and fair reason based on the terms of contract between the parties herein and upon being issued with sufficient notice in accordance with Section 35.



21. On the issue of whether the Claimant was entitled to the prayers sought, the respondent submitted concerning pay in lieu of notice Kshs. 56,000/- that the Claimant was issued with a termination notice on 30<sup>th</sup> May 2016 and was dismissed on 24<sup>th</sup> July 2016. He was therefore not entitled to pay in lieu of notice.
22. The Respondent further submitted that the Claimant at paragraph 8 of his Amended Claim pleaded that his salary was Kes. 28,000/- yet did not produce before the Honourable court the basis of this figure. On the other hand, exhibit 4(d) of the Respondent's bundle was the payslip for July 2016, which indicated that the Claimant was earning a monthly gross salary of Kes. 17,962.
23. The Respondent submitted that if this Honourable Court finds that the Claimant was entitled to pay in lieu of notice, the amount payable is Kshs. 17,962.
24. On the issue of severance pay, it was submitted that this was provided for under Section 40 of the *Employment Act* and was only payable to employees who were dismissed on account of redundancy. The Respondent relied on the cases of *Gas Kenya Limited v Odhiambo (Appeal E006 of 2022)* [2022] and *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR .
25. The Respondent submitted that the Claimant in his pleadings had not alleged that he was terminated on grounds of redundancy neither did the Respondent declare him redundant. The Respondent dismissed the Claimant upon issuing sufficient notice and for the reason that the construction of the SGR from Mombasa – Nairobi was complete. That the Claimant was therefore not entitled to severance pay as claimed or at all.
26. On the prayer for Leave for 2 years- Kshs. 56,000/- the Respondent submitted that during cross-examination, the Claimant admitted that he had been paid for pending leave days and further stated that his claim was for work injury.
27. That the Respondent produced exhibit 5 being the list of last payments which showed that the Claimant received his terminal dues including pending leave days. This evidence was uncontroverted. Consequently, the Claimant was not entitled to an award under this head.
28. On the prayer for general damages the Respondent submitted that it was trite law that general damages were not ordinarily awarded in cases of unfair termination, except where the peculiar circumstances of the case merit such an award. The Respondent relied on the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR on the issue and contended that this was not a fit case for the award of general damages. That upon termination he was paid his terminal dues. The Respondent further submitted that the Claimant in his pleadings, other than the prayer for general damages did not make any attempt to show any special circumstances that would warrant court to award the same.
29. On the prayer for Damages for unlawful termination the Respondent submitted that the Claimant was dismissed upon the completion of the project being the construction of the SGR between Mombasa and Nairobi as per the employment contract between the parties herein. The Claimant was therefore not entitled to the damages for unlawful termination. The Respondent further relied on Section 49 (4) of the *Employment Act* on the reasons the court should take in account when determining the remedies due to the Claimant and submitted that the reasons relevant to the case herein were provided for under sections 49 (4) (e), (f) and (m) of the *Employment Act*. That the Claimant only served for a period of 1 year. That as per the employment agreement between the parties herein, no promise was given to the Claimant for further employment after the end of the project and there was no indication that the Claimant was continuously serving the Respondent on any other project.



30. The Respondent submitted that the Claimant did not have any reasonable expectation to continue working for the Respondent after the completion of the project.
31. The Respondent submitted that it paid the Claimant his terminal dues including 4 days worked in July 2016, service pay for 1 (one) year and pending leave days upon termination and he acknowledged receipt. Respondent relied on the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR where the court awarded the claimant 1 (one) month salary as compensation while noting that that the Claimant had only served for one year.
32. The Respondent also relied on the case of *Matsusho v Newton* (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) (29 July 2022) where the court awarded 2 months' salary as compensation for unfair termination where the Claimant had served for 6 years.
33. The Respondent therefore urged this court in light of the above cited decisions to find that if the Claimant was entitled to damages for unfair termination, he should be awarded a maximum of 1 month of his gross-salary being Kes. 17,962/-
34. The Respondent in conclusion submitted that the Claimant failed to prove his case on balance of probabilities and the same ought to be dismissed with costs.

#### **Determination.**

35. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. I have also considered authorities relied on by Counsels.
36. I have The Court has as a consequence come up with two main issues namely:
  - a. Aa. aa. Whether the termination of the Claimant's employment was unlawful.
  - b. Whether Whether the Claimant is entitled to the reliefs sought.

#### **Whether the termination of the Claimant's employment was unlawful**

37. In this case, the Respondent alleged that they terminated the services of the Claimant upon completion of the construction of a section of the Mombasa-Nairobi SGR. That they gave the Claimant notice of the termination on 30<sup>th</sup> May, 2016.
38. The Court notes from the file two letters dated 24<sup>th</sup> July, 2016 from the Respondent concerning the Claimant herein. One is titled redundancy where the reasons given as reduced production in the department while the other letter is titled termination on account of redundancy.
39. Whereas the notice dated 20<sup>th</sup> May, 2016 which allegedly gave the reason for termination as reduction of workload, was said to have been displayed on the notice board, there is some lack of clarity on when the said notice was actually given since in the Respondent's pleadings it alleges 30<sup>th</sup> of May, 2016 yet the documents state 20<sup>th</sup> May, 2016. In addition, the letter dated 6<sup>th</sup> June, 2016 to the Claimant's union states the reasons for termination as planned redundancy. Further, it was not the Claimant only who was terminated on those grounds as during the hearing it came out clearly that around 500 employees were affected.
40. In the upshot even though the Respondent seems to avoid the word redundancy as the reason for the termination of the Claimant's service, that seems to be the case. The court will therefore proceed to regard the matter as a termination on account of redundancy.



41. Redundancy has been defined under section 2 of the *Employment Act* as;

“means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

42. This court has stated severally that even in cases of termination on account of redundancy, the reason ought to be valid under section 43 of the *Employment Act* and the employee given a right to be heard under section 41 of the *Employment Act*. In *Kenya Airways Limited v. Aviation and Allied Workers Union of Kenya and 3 Others* (2014) eKLR, the Court of Appeal pronounced itself as follows:

“...redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

43. From the above it is clear that the reason has to be valid and a fair procedure has to be followed. In this case a closer look at the Respondent’s documents shows that they terminated the Claimant and his colleagues on account of reduced workload since the project was nearing completion. There was no report filed before this court to show that the project as whole was complete or even a section thereof. This leads to the conclusion that the reason given by the Respondent that the section upon which the claimant and his colleagues were hired to work was complete, was not a fair and valid reason as per provisions of section 43 of the *Employment Act*.

44. Regarding the process of termination and as observed earlier and in several decisions by the Court, even in redundancy, the procedure under section 41 of the *Employment Act* on the right to be heard has to be followed. The court therefore faults the Respondent in stating that the notice dated 20<sup>th</sup> May, 2016 was posted on the Notice Board without more. The Respondent’s witness acknowledged that they did not serve the notices on individual employees. This meant that there was no guarantee that the Claimant saw the said redundancy notice. The Claimant refuted during the hearing that there was any such notice and that he saw any.

45. Whereas it may be true, though not reasonably proven, that the Respondent through their letter dated 6<sup>th</sup> June, 2016 notified the trade union of the planned redundancy, they however did not adhere to the stipulations set out under section 40 of the *Employment Act* such as one month prior notice of the planned redundancy to the employee and or his union and a corresponding notice to the Labour Office. Further, upon termination, there was no clear evidence that the claimant was paid one month’s wage in lieu of notice as well as severance pay as provided in the *Act*.

46. In conclusion the Court is of the view that the Claimant’s termination was not for a fair and valid reason and was procedurally flawed hence unlawful and unfair termination under section 45 of the *Employment Act*.



**Whether the Claimant is entitled to reliefs sought.**

47. There was discrepancy between the parties on what the claimant's monthly salary was. The Employment contract did not stipulate the same. The court will therefore rely on the pay slips and documents attached by the parties where it could be seen that the basic pay was Kshs 15,912/- plus house allowance of around Kshs 3,181/- which comes to Kshs 19,093/-The other amounts were overtime and would not be considered as part of regular pay herein.
48. Having found that the Claimant was unfairly terminated therefore proceed to find that he was entitled to compensation for unfair termination as provided for under section 49 of the *Employment Act* but proceed to consider that the Claimant had only worked with the Respondent for around one year and two months and the fact that the Respondent had illustrated paying the Claimant part of his terminal dues which was the service and leave pay I award him compensation for unfair termination of two months.
49. The Claimant is also entitled to one month's salary pay in lieu of notice as per provisions of the Act.
50. On the prayer for severance pay since the Claimant had only one completed year of service, he is entitled to 15% of his salary for one year which is Kshs 2,863/- as provided under the Act.
51. On the prayer for leave pay the Claimant acknowledged that the same was paid to him in February 2016 as well as the last pay which was confirmed before this court.
52. On the prayer for General damages this court is guided by section 49 of the *Employment Act* on what to award the Claimant upon unfair termination. This is not one of the awards and the courts have established that this award of general damages will only be given to the Claimant upon special circumstances which the Claimant must prove. The Claimant has not proved any such special circumstances to warrant the said damages hence the claim will be rejected. This was held in the case of D *K Njagi Marete v Teachers Service Commission* [2020] eKLR where the Court of Appeal observed;
- “...with the prior decision of this Court in *Hema Hospital v Wilson Makongo Marwa* (supra), that in certain cases, the court may make an additional award where the circumstances so merit, we find no such special circumstances herein that would warrant additional compensation in the manner claimed for by the appellant.
32. We have considered whether the appellant was entitled to an award of general damages and we find that he did not sufficiently lay out a basis for the same.
53. In conclusion the Claimant's claim is allowed with costs as follows.
- a. One month salary in lieu of Notice Kshs 19,093/=
  - b. Severance pay Kshs 2,863/=
  - c. Two Compensation for unfair termination-Kshs  
38,186/=
- Total.....KSHS 60,142/=
- d. Costs of the suit.
54. It is so ordered

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY, 2024**



**DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JULY, 2024**

**ABUODHA JORUM NELSON**

**JUDGE**

