



**Marete v Bernard Ondieki t/a Moseti and Company Advocates (Cause 873 of 2019) [2024] KEELRC 2105 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2105 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 873 OF 2019**  
**NZIOKI WA MAKAU, J**  
**AUGUST 2, 2024**

**BETWEEN**

**KENNEDY KOOME MARETE ..... CLAIMANT**

**AND**

**BERNARD ONDIEKI T/A MOSETI AND COMPANY  
ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. Being dissatisfied with the manner of termination from employment, the Claimant sued the Respondent. Despite efforts of the Court to broker a settlement, the parties opted to have the matter thrashed out in court. In order to ensure the amity between the two members of the legal profession, only the necessary parts of this sorry tale will be told. The Claimant averred that he was engaged as an Associate Advocate within the firm known as B. Moseti and Company Advocates. It is averred that the contract was oral and not reduced into writing despite requests by the Claimant to have it so reduced. The Claimant avers he was earning a gross salary of Kshs. 86,000/- a month though the Respondent used to pay Kshs. 70,000/- after deductions to meet tax obligations and statutory deductions – KRA, NHIF and NSSF as provided for in law. The Claimant avers that the Respondent later started paying a monthly airtime allowance of Kshs. 2,000/-. The Claimant avers the Respondent had promised to review the remuneration of the Claimant after completion of the 3 months probation. He averred that only a partial payment was made with the payments only being made for seven months after which the employer indicated there was a shortage of funds during the 2017 general elections period.
2. The Claimant averred that he worked for at least 8 hours per day with no pay for the overtime hours worked. The Claimant averred that he was neither allowed to proceed for the 21 days of annual leave nor paid his leave allowance during the course of employment. He averred that he worked for the Respondent with due diligence and faithfulness until 26<sup>th</sup> June 2018 when the employment was terminated informally, unfairly and without adherence to the legally stipulated procedure. The



Claimant avers he was not issued with any warning prior to his dismissal. The Claimant averred that the employer failed and/or refused to tabulate his terminal dues and did not pay the salary for the month of June. The Claimant thus sought payment of the salary for the month of June 2018 – Kshs. 96,000/-, one month's salary in lieu of notice – Kshs. 96,000/-, gratuity/service pay – Kshs. 136,363.64, payment of the balance of the increment – Kshs. 330,000/-, outstanding leave allowance – Kshs. 181,272.73, 12 months salary compensation – Kshs. 1,200,000/-, proof of payment of NHIF and NSSF dues as well as KRA PAYE remittance, a certificate of service, interest at court on the sums claimed, any other relief deemed suitable by the Court and lastly, costs of this suit.

3. The Respondent filed a response and counterclaim. In it, the firm averred that the Claimant's gross salary was not Kshs. 96,000/- but Kshs. 70,000/-. It was averred that the Claimant would then pay his statutory obligations. The Respondent avers that the Claimant had sought a starting salary of Kshs. 55,000/- which was a step up from the Kshs. 48,000/- he was earning at his previous employment where he had worked for 3 years. It was averred that the agreement was therefore that the Claimant gets Kshs. 70,000/- from which he would settle his statutory obligations. The Respondent averred that the Claimant was not entitled to any overtime payments. The Respondent avers that it helped kit the Claimant with four suits and several shirts. The Respondent averred that the Claimant would on occasion fail to appear for work and gave insomnia as a reason or passing through the court to collect rulings or judgments. The Respondent avers that the Claimant absconded work and was never terminated. The Respondent averred that he had many meetings with the Claimant and even trained him in practice to hone his skills. The Respondent averred that he introduced a reward-based system of remuneration and that the Claimant accepted to be on the retainer from April 2018 as March 2018 was the agreed cut-off. The Respondent averred that by the time of the expected switch, the Claimant had become unmanageable and the Respondent desired to recant the offer initially made. The Respondent averred that the Claimant managed to get a sum of Kshs. 240,000/- from him in two tranches of Kshs. 200,000/- and Mpesa of Kshs. 30,000/-. The Respondent averred that the loan was to be secured by way of a logbook for a motorbike but the Claimant did not prepare the loan agreement nor surrender the logbook. The Respondent averred that the Claimant left in a huff after an altercation. The Respondent averred that the Claimant with some files causing it loss. He averred that the certificate of service was ready for collection.
4. By way of counterclaim, the Respondent averred that the Claimant had caused loss of income amounting to Kshs. 7,385,000/-, the loaned amount of Kshs. 240,000/- as well as one month's salary as notice – Kshs. 70,000/- plus costs of the counterclaim. The Respondent urged the dismissal of the Claimant's claim and entry of judgment on the counterclaim.
5. In reply to the response and the counterclaim the Claimant stated that contrary to the allegation that the Claimant left the office in a huff, he averred that it was the Respondent who tricked him into giving the keys to a pupil on the evening of 27<sup>th</sup> June 2018 only to be locked out of the office on 28<sup>th</sup> June 2018. The Claimant averred that no serious work issues arose during his employ evident from the non-issuance of any formal complaints or warnings. He averred that contrary to the averments that the certificate of service was ready for collection, it was never indicated at the time he served the claim that the said certificate was ready for collection. The Claimant averred the counterclaim was unfounded and should be dismissed and judgment entered as prayed for in the memorandum of claim filed by the Claimant.
6. The Claimant and the Respondent were heard and both reiterated their respective cases. Thereafter the parties were to file submissions. However, as at the time of penning the decision, the Respondent had not filed any submissions. In his submissions, the Claimant averred that the issues for determination were:-



- a. Whether the Claimant was an employee of the Respondent.
  - b. Whether the Respondent followed due process in terminating the Claimant's employment.
  - c. The quantum of terminal dues payable to the Claimant.
  - d. Costs of this suit.
7. The Claimant submitted that the Respondent admitted the Claimant was his employee. On the issue of due process, the Claimant submitted that the Respondent did not follow or adhere to the procedure for termination of employment. He submitted that the Respondent had attached documents that were not supported by testimony. The Claimant submitted that he had proved his case and was entitled to the maximum compensation for the anguish and suffering he had as a result of the termination. The Claimant also sought costs of the suit. He relied on the cases of *Simon Munga Gachuhi v Kiru Tea Factory* [2016] eKLR and *Oire v The County Government of Machakos & another* (Cause 379 of 2020) [2022] KEELRC 47 (KLR) (26 April 2022) (Judgment). He urged the grant of maximum compensation as held in the two cases cited.
8. The Claimant's employ with the Respondent was replete with intrigues. The Claimant asserted he used to make errands for the Respondent due to the ease of using a motorbike. The Respondent asserts the Claimant was to secure an alleged loan of Kshs. 240,000/- or was it Kshs. 230,000/-? With the motorbike. The Respondent availed documents that were touching on its clients in an effort to demonstrate the Claimant mishandled them. It was unnecessary as some of the emails even had a disclaimer that the information contained in the emails may be privileged, confidential and protected from disclosure. There was no waiver filed for the production of the information that seemed privileged, confidential and protected from disclosure. The documents did not prove the Claimant was negligent. Instead they showed that he repeatedly followed up on matters between him, the clients and third party advocates and even in one occasion was informed that counsel was following up with her client noting the reminders made by the Claimant. In essence, the emails proved the Claimant was diligent, not the opposite which, it would seem was the intent. The Respondent additionally listed names of his clients and averred that there was loss of over 7 million in consequence of the Claimant's action. No evidence other than the list was availed. No connection was made between the sums listed, the clients named and the amounts thus were just hanging in the air like bad air.
9. The Claimant also was not blameless as he seemed to have an altercation with the Respondent when they last parted leading to the subterfuge in getting the office key from him. Nevertheless, the Respondent was required to hear the Claimant before terminating the contract whether the said contract was oral or not. As such, I find the Claimant was terminated contrary to procedure. From all accounts, the Claimant was having a thriving practice at the time of hearing. He thus did what is expected in the circumstances as he mitigated his losses. He therefore would not recover the full 12 month's compensation as he prayed. He was earning Kshs. 70,000/- and using this as the multiplier, a period of 8 months would suffice giving him Kshs. 560,000/-. He was not entitled to service pay nor was he entitled to any amount for overtime. A lawyer often works long hours beyond the 8 hours he worked per day. He was lucky he was not at a law firm where he was worked to the bone. This is not to suggest that the practice of sloughing or persistently causing associates to work extra hours without additional pay or reward is ok. At least, where such practices occur, the firm should give a token or even time off when an employee works over and above their usual allocation of a days work. As my pupil master used to say, 'another day, another dollar'. He was not averse to giving a tip for work done beyond office hours. That should be the gold standard. Granted the Claimant and Respondent were in a symbiotic relationship with exposure to high end clients, interesting and varied briefs as well as



an opportunity for growth, the Claimant did not end up the poorer for the 8 hours a day served at the Respondent.

10. The Claimant also sought confirmation of payments to KRA, NHIF and NSSF. These are things a person in the position of the Claimant can readily establish. He perhaps has been filing tax returns since he set up his practice. KRA are very keen to collect their pound of flesh and at times will even over tax. If the Claimant wanted to find out if he has met his obligations, it would be very easy to do using his PIN or ID number. As regards NHIF and NSSF, these entities provide statements and he can access them to establish if the payments were made (if the Respondent was bound to make them).
11. In the final analysis, nothing turns on the claim for KRA and other statutory deductions. The Claimant will also have the costs of this suit but note the sums awarded will significantly reduce the sum he can claim as costs coupled with the fact that he acted for himself and did not instruct counsel despite the name of another law firm appearing in his claim. The Claimant is thus entitled to the following:-
  - a. A declaration that his termination was unfair and unlawful.
  - b. Compensation – Kshs 560,000/-
  - c. One month's notice – Kshs. 70,000/-
  - d. Costs of the suit.
  - e. Certificate of service strictly in terms of section 51 of the *Employment Act*.
  - f. Interest at court rates on the sums in (b) and (c) above from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF AUGUST 2024**

**NZIOKI WA MAKAU**

**JUDGE**

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