



Wangari v Simba Fresh Produce Limited (Employment and Labour Relations Cause E036 of 2023) [2024] KEELRC 2074 (KLR) (5 August 2024) (Judgment)

Neutral citation: [2024] KEELRC 2074 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E036 OF 2023
ON MAKAU, J
AUGUST 5, 2024**

BETWEEN

MATHEW GATHII WANGARI CLAIMANT

AND

SIMBA FRESH PRODUCE LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a memorandum of Claim dated 8th November 2023, the claimant accused the respondent of terminating his employment contract without any reason and without serving prior notice or payment of salary in lieu of notice. Therefore, he prayed for the following reliefs:
 - a. Notice pay Kshs. 150,000.00
 - b. Unpaid salary June and 3 days July 2023 Kshs. 165,000.00
 - c. Unpaid leave $(150,000/30 \times 30.84)$ Kshs. 154,200.00
 - d. Damages for unfair termination $(150,000/= \times 12)$ Kshs.1,800,000.00TOTAL Kshs. 2,269,200.00
 - e. Issuance of certificate of service
 - f. Costs and interest.
2. The Respondent denied the entire claim and averred that the Claimant was employed as Human Resource Supervisor on 1st July 2021 under a fixed term contract which ended by effluxion of time.
3. The Claimant testified as CW1. He adopted his written statement dated 8th November 2023 as part of his evidence and produced as exhibits 7 documents in his list of documents dated 8th October 2023.



- His evidence was that he was employed by the Respondent in its Narumoru Farm as Human Resource Supervisor on 1st July 2021. He was issued with a contract dated the same date. His salary was Kshs. 20,000 per month but in November it was reviewed to Kshs. 25,000.
4. In January 2022, he was appointed Chief Operations Officer after successful application and interview. The salary for the new office was Kshs. 80,000 but later it was increased to Kshs. 150,000. He worked diligently until 4th July 2023 when he was terminated verbally and asked to clear with the company via WhatsApp text. The termination was without prior notice or payment of salary in lieu of notice and no reason was given for the termination.
 5. He completed clearance as directed and he was promised that his dues would be paid. He then followed up with the respondent but instead of his pay he received insults. He served demand notice but the respondent did not pay the dues. Therefore, he prayed for the reliefs sought in the suit.
 6. On cross examination, he stated that the Respondent's HR Manager Brenda, sent him a WhatsApp text asking him to clear with the company. He confirmed that he signed a 1-year fixed contract on 1 July 2021 as HR Supervisor but thereafter he was promoted to Chief Operations Officer. He stated that he passed the interview, and then he was given a letter of appointment. He noted mistakes on the letter, and returned for corrections but he never got it back. However, all his pay slips were changed to Chief Operation Officer. His salary was also increased to Kshs. 80,000 and was paid through Equity Bank.
 7. He admitted that his bank statement indicated that he was receiving Kshs. 21,000 after deductions. He also admitted that he had not filed a bank statement corresponding with the pay slip marked exhibit 6.
 8. He stated that his contract ended through unfair termination after serving for 2 years. He admitted that his dues were computed by HR Officer after his clearance and he acknowledged the computation to be correct but they were never approved by the General Manager.
 9. In re exam, he stated that the computation was for Chief Operations Officer and it was signed by the HR. Officer and the General Manager. He reiterated that the contract he was given for Chief Operations Officer had an error on the salary payable as he was entitled to Kshs. 80,000 but it indicated Kshs. 25,000. He stated that from the time of promotion he received the salary of a Chief Operations Officer. He concluded by stating that he was removed from the WhatsApp group after the termination.
 10. The Respondent closed its case without calling any witnesses.

Claimant's submissions

11. The following issues were raised for determination:
 - a. Whether the Claimant was employed by the Respondent and what his designation was at the time he was terminated.
 - b. Whether the Claimant's employment was wrongfully and unfairly terminated by the Respondent.
 - c. Whether the Claimant is entitled to the reliefs sought.
 - d. Who bears the costs of the claim.
12. On the first issue, it was submitted that the claimant was initially employed as HR Supervisor in July 2021 under a written contract but in January 2022 he was employed as the Chief Operations Officer after a successful application and interview. It was further argued that, even though the Claimant was not issued with a contract for his second engagement, his duties and salary changed as demonstrated by



his pay slips for the months of November and December 2022 and January 2023, the clearance form and the computation of dues.

13. It was submitted that, though the respondent denied that the claimant was employed as a Chief Operations Officer, no evidence was adduced during the hearing to support that pleading. Consequently, it urged that the Respondent's denial was a mere statement in the absence of evidence. For emphasis, reliance was placed on the case of *Trust Bank Limited vs Nakuru Paramount Universal Bank Limited and 2 others* [2009] eKLR.
14. It was further submitted that under section 10 of the *Employment Act*, the employer bore the duty of issuing a contract, including a revised contract where the terms of employment change. It was submitted that the Claimant produced his previous contract that was to end on 1 July 2022 but he worked until 4th July 2023 when the same was terminated.
15. It was further submitted that under section 10(7) of the *Employment Act*, in any legal proceedings, the employer has the obligation to produce written contract to prove or disprove an alleged term of employment. It was argued that the respondent herein did not discharge the foregoing burden with respect to the claimants' second contract as a Chief operations Officer which was terminated verbally on 4th July 2023.
16. On the second issue, it was submitted that the termination would only have been lawful if it adhered to the provisions of section 43 of the *Employment Act* which requires that the employer must prove a valid reason for terminating employment. It was further submitted that despite the Claimant contending that he was terminated verbally without notice and without any reason, the respondent adduced no evidence to prove the reason for the termination and that fair procedure was followed. Consequently, the termination was deemed as unfair in terms the decision in the case of *Naima Khamis vs Oxford University Press (EA) Limited* [2017] eKLR.
17. On the third issue, it was submitted that the claimant is entitled to all the reliefs sought. Reliance was placed on section 35 of the *Employment Act* which provides for a termination notice proportionate to wage intervals which in this case was one month.
18. The other claims include unpaid salary for June 2023 plus 3 days worked in July, 30.84 leave days which were acknowledged as dues payable to him in the tabulation done by the HR Manager.
19. It was further submitted that the Claimant is entitled to maximum compensation for the unfair termination since he did not contribute to the same. Reliance was placed on the case of *Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023)* KESC 112 (KLR) (CIV) 28 December 2023 (Judgement).
20. Finally, it was submitted that under section 51 (1) of the *Employment Act*, the Claimant is entitled to a certificate of service since he served for 2 years. The Court was also urged to award costs of the suit to the claimant.

Respondent's submissions

21. It was submitted that the Claimant produced a contract that showed that he was employed for a 1-year fixed term contract with effect from 1st July 2021 and confirmed that the contract came to an end exactly a year after its renewal. It was further submitted that the Claimant has failed to prove that he was employed on other terms which were otherwise than fixed term contract. It was pointed out that the Claimant did not demonstrate by bank statements that he received the salary indicated in the pay slips produced as exhibits or Kshs. 80000 as at November 2022, and Kshs 120,000 as at December 2022.



22. As regards the alleged unfair termination, it was submitted that the claimant did not adduce any WhatsApp texts as evidence before this Court to prove that he was dismissed from employment as alleged. Consequently, it was argued that the claimant's fixed term contract of employment came to an end by effluxion of time which is recognized under section 10(3)(c) of the *Employment Act*.
23. To buttress the foregoing submission, it was argued that the Claimant's contract contained a provision that the claimant would be engaged a fresh on permanent contract basis upon expiry of the same. Consequently, it was argued that the tenets of fair termination of employment enacted under sections 41 & 43 of the *Employment Act* do not apply to this case. Reliance was placed on the cases of Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR, Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR, Francis Chire Chichi vs Amatsi Water Services Company Limited [2012] eKLR, and the Court of Appeal case Civil Appeal No. 81 of 2018 Transparency International Kenya vs Teresa Carlo Omondi in support of the argument that the contract came to an end by operation of law.
24. As regards the reliefs sought, reliance was placed on section 18 of the *Employment Act* which provides that the employer has the duty of ensuring that an employee is paid terminal dues after lapse of the contract of employment. It was further submitted that the respondent complied with the said law by tabulating the claimant's dues under exhibit 3 including salary in lieu of notice, 3 days worked in July, and 30.8 leave days. However, it was submitted that the respondent's General Manager declined to approve the said tabulation because Claimant was not entitled to salary in lieu of notice as the contract was not terminated, but lapsed automatically. Therefore, urged to dismiss the claim with costs as it was baseless and unfounded.

Analysis

25. Having considered the Claim, the Response, the Evidence on record and the rival submissions, the issues that arise for determination are as follows:
 - a. Whether the Claimant's employment was fixed term or contract of indefinite period.
 - b. Whether there was unfair and unlawful termination.
 - c. Whether the Claimant is entitled to the reliefs sought.

Fixed term contract vs permanent employment

26. There is no dispute that the claimant was initially employed under a fixed term contract of one year. The Contract was dated 1st July 2021 stated under clause 2.4 as follows:

“If not previously terminated in accordance with the provisions of this contract the Employee's appointment hereunder shall automatically terminate on 1st July 2021. If the company decides to retain the employee, the employee will then be engaged a fresh on a permanent contract basis.”
27. The claimant served as HR Supervisor until January 2022 when a higher position of Chief Operations Officer arose and he was competitively appointed. The appointment letter given indicated a salary of Kshs. 25,000 instead of the agreed Kshs 80,000 but when he returned for correction of the said mistake, he never received it back. However, his employment records were changed to reflect his new position as evident on the Pay Slips, Clearance forms and the Terminal dues computation.



28. The above evidence has not been rebutted since the respondent did not call any witness to give evidence during the hearing. As such the inference to draw from the said analysis is that the parties mutually terminated the initial fixed term contract of service and entered into a new one in January 2022 in which the claimant was appointed to serve as Chief Operations Officer.
29. Going by clause 2.4 of the initial contract dated 1st July 2021, the new appointment was for an indefinite term. I say so because the parties made their intention clear under the said clause that, after end of the initial contract, the claimant would be engaged afresh on a permanent contract basis. Consequently, I find and hold that the claimant was engaged afresh as Chief Operations Officer on permanent basis (for indefinite period) as mutually agreed under clause 2.4 of the contract of employment dated 1st July 2021 and not for the remaining term of the said contract as submitted by the defense counsel.

Unfair and unlawful termination

30. The Claimant's case is that his dismissal was unfair and unlawful. Section 45 (1) & (2) of the [Employment Act](#) provides as follows:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

31. In *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR stated that:

- “14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the [Employment Act](#) or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”



32. Again, in the case of Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR where the Court of Appeal held thus:

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination / dismissal (Section 43); prove reasons are valid and fair (Section 45) ... among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”

33. Flowing from the foregoing provision and the judicial precedent, it is clear that unfair termination of employment has two ingredients, namely, a valid reason and fair procedure. The said provision basically codifies the rules of natural justice and principles of fair administrative action as envisaged under Article 47 of *the Constitution* and magnified by the *Fair Administrative Action Act*. In this case, the Claimant’s case is that he was summarily dismissed via phone without any valid reasons and without prior notice or payment of salary in lieu of notice. The respondent denied the alleged dismissal and averred that the claimant was engaged under a fixed term contract which expired by effluxion of time.

34. I have already made a finding of fact the claimant was employed for an indefinite term and such the tenets of fair termination of employment contract applied to him. These included serving him with a prior written notice or payment of commensurate salary in lieu of the notice; valid reason or reasons before termination; a fair hearing before the termination; fair communication of the decision of the termination; issuance with a certificate of service; and finally, payment of any benefits accruing from his employment before the termination. All these tenets are codified under section 41, 43, 45 and 47 (5) of the *Employment Act*.

35. There is evidence that the respondent offered to pay the claimant one-month salary in lieu of notice after the termination. However, in the case of Kenfreight EA Limited v Benson K. Nguti [2016] eKLR, the Court of Appeal held that:

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

36. Guided by the above binding authority, I find and hold that the claimant’s employment contract was terminated for no valid reason and without following a fair procedure and as such the dismissal was unfair and unlawful within the meaning of section 45 of the *Employment Act*.

Reliefs

37. In view of the foregoing conclusion, I find that the claimant is entitled to the remedies provided under section 49 of the said Act. He has prayed for salary in lieu of notice plus compensation for the unfair termination. He is awarded one salary in lieu of notice plus two months’ salary as compensation for the unfair termination. In making the said award, I have considered that his salary was paid on monthly basis and therefore by dint of section 35(1)(c) of the Act, a termination notice of 28 days in writing was required. I have also considered that the claimant served for only two years and he did not contribute to the termination through misconduct.



38. The claimant is also entitled to payment of salary for 30 days worked in June 2022 plus 3 days worked in July 2022 plus 30.84 leave days. The un rebutted evidence by the claimant is that the above dues were acknowledged as payable to him but the respondent’s General Manager declined to approve. The respondent has further admitted the that the General Manager declined to approve the payment as computed by the respondent’s HR Manager because the claimant was not entitled to salary in lieu of notice. According to the respondent, the only dues payable to the claimant were salary for 3 days worked in July and 30.84 leave days based on a salary of Kshs. 25,000.
39. Two issues emerge from the respondent’s submissions, that is, whether salary for June was paid to the claimant, and whether his monthly salary as at the time of exit was Kshs.25,000. The answer to the first issue is quite straight forward because the respondent did not adduce any evidence to prove that after the General Manager declined to sign the computation by the HR Manager, the June salary was paid. By the said computation, the respondent acknowledged that June salary had not been paid.
40. As regards the second issue, the answer lies under section 10(7) of the Employment Act which provides that:
- “If in any legal proceedings an employer fails to produce a written contract or particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment shall be on the employer”
41. In this case, the claimant stated that he was not given a new contract after his appointment as Chief Operations Officer. He further stated that he was give appointment letter which had a mistake on the amount of salary and upon returning it for corrections, it was never given back to him. It follows that the only party to produce it in court was the respondent but it did not adduce any evidence including the said appointment letter during the hearing, to disprove the allegation that his monthly salary as Chief Operations Officer was agreed at Kshs. 80,000 and later increased to Kshs.150,000.
42. The Claimant produced pay slips for November 2022 to January 2023 and computation of his terminal dues prepared by the respondent’s HR Manager on 5th July 2023 after the termination which indicated the monthly salary was kshs.150,000. The said documents emanated from the respondent company and no evidence was adduced to discredit the same. Consequently, I find and hold that the claimant’s monthly salary as at the date of exiting the respondent, was Kshs.150,000 and I will base the aforesaid awards on the same.

Conclusion

43. I have found that the claimant was engaged as a chief Operations Officer for an indefinite period from January 2022. I have further found that the contract was unfairly and unlawfully terminated within the meaning of section 45 of the Employment Act. I have further found that the claimant is entitled to the remedies sought in his suit. Consequently, I enter judgment for him as follows: -
- a. Notice.....Kshs. 150,000.00
 - b. Unpaid salary June and 3 days July 2023.....Kshs. 165,000.00
 - c. Unpaid leave (150,000/30 x 30.84).....Kshs. 154,200.00
 - d. Compensation for unfair termination
(150,000/= x 2).....Kshs. 300,000.00
- TOTAL Kshs. 769,200.00



- e. Certificate of service.
- f. Costs and interest at court rate from the date of this judgment.
- g. The award of damages is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 5TH DAY OF AUGUST, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

