



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E055 OF 2023

WILLIAM

OTIENO

OKUDHO.....**CLAIMANT**

VERSUS

SS MEHTA & SONS LIMITED.....

RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 11th July 2023 the Claimant filed this suit identifying the issues as: whether the termination of his employment on account of redundancy was unfair and unlawful and what remedies were available to him. The Claimant contended that he was employed by the

Respondent as an Environmental Health and Safety Officer under a contract dated 13th August 2012 at a monthly salary of Kshs. 25,000/-. He averred that he served diligently and received periodic salary increments to Kshs. 29,000/- and later Kshs. 35,000/-. He further asserted that, in breach of contract, the Respondent assigned him additional responsibilities as a storekeeper without any corresponding salary increase. He maintained that his role as Environmental Health and Safety Officer was critical in ensuring the Respondent's compliance with the Environmental Management and Co-ordination Act, yet he continued to receive what he described as a "paltry" salary of Kshs. 35,000/-. He also stated that he was frequently transferred without notice or allowances. The Claimant asserted that later on 9th June 2023, he was summoned to a meeting and handed a termination letter citing redundancy. The Claimant contended that the termination violated section 40 of the Employment Act and was actuated by malice, since the Gilgil-Machinery Project was still ongoing.

2. Consequently, the Claimant sought the following reliefs:

- (a) Unpaid salary as a materials store keeper Kshs.
777,780/-
- (b) 1 months' salary in lieu of notice Kshs.
94,520/-
- (c) Severance pay Kshs.
47,260/-
- (d) 12 months compensation for unfair termination
Kshs. 1,134,240/-
- (e) Payment in lieu of 7 days (company policy)
leave before termination Kshs. 25,448/-
- (f) Payment in lieu of pending statutory leave days
(17.5 days) Kshs. 63,619/-
- TOTAL Kshs. 2,688,176/-.

He also prayed for costs and interest of the suit as well as a certificate of service.

3. In its Memorandum of Response dated 2nd October 2023, the Respondent admitted the Claimant's employment but stated that his duties were limited to record keeping and handling minor safety issues at the work site. It denied that he was responsible for NEMA related matters, asserting that he was

not qualified for such work. The Respondent explained that salary increments were based on gazetted minimum wages rather than performance. It added that transfers between sites were provided for in the appointment letter and that the Claimant was adequately facilitated and paid all due allowances. The Respondent further maintained that the Claimant's redundancy arose from non-payment by the Kenya Rural Roads Authority (KeRRA), which had been communicated to him.

4. Both parties called one witness each in support of their respective cases. The Claimant (CW1) testified that his responsibilities as Environmental Health and Safety Officer included ensuring compliance with the Occupational Safety and Health Act 2007 and the Environmental Management and Co-ordination Act Regulations 2006. He stated that he served for 10 years and 9 months, working on notable projects such as Tatu City, Golden Africa Ltd, Muratina Road, and Gilgil Machinery Road. He testified that on 13th June 2022, he was assigned additional storekeeper duties without extra pay. He claimed that the additional responsibilities

entitled him to a combined salary of Kshs. 64,816/-, comprising Kshs. 30,610/- for a clerk and Kshs. 34,208/- for a storekeeper.

5. He further testified that the Respondent's failure to adjust his pay despite the added responsibilities amounted to discrimination. Regarding the termination, he stated that he was summoned on 9th June 2023 and issued with an immediate termination letter without any notice to the Labour Officer or explanation. He maintained that work was still ongoing at Gilgil-Machinery Road at the time. Upon cross-examination, he acknowledged that he was trained by the Respondent, that a colleague named Andrew was responsible for dispensing fuel and spares, and that a consultancy firm handled NEMA issues.

6. The Respondent's witness Mr. Arif Yasin Khan (RW1), the Human Resource Manager, testified that the Claimant was initially employed as a casual before being trained on OSHA regulations. He produced the Claimant's appointment letter as REXH 1 and his payslip as REXH 2. He stated that the Claimant's job was limited to issuing and recording personal

protective equipment given to employees. RWI explained that NEMA compliance was handled by Greenshield Associates. He produced a bundle of licenses and engagement letter as REXHs 3 to 8. He testified that the Claimant was always adequately remunerated for site transfers and that the redundancy was necessitated by KeRRA's failure to pay. RWI stated that the Claimant was informed of the reasons for termination and invited to collect his final dues, but he declined. He produced a payment schedule and proof of movement allowance as REXH 9-10, a notice to suspend works as REXH 11, correspondence between the Respondent and KeRRA over unpaid dues as REXH 12 and a cheque in the Claimant's favour as REXH 13. The Respondent closed its case and parties were to file written submissions.

Claimant's Submissions

7. In support of his case the Claimant identified the following issues for determination:
 - a) Whether he was engaged as an Environmental and Health and Safety Officer.

- b) Whether the Respondent lawfully engaged and compensated him for responsibilities outside his contract.
- c) Whether the Respondent adequately compensated him at the point of termination his employment.
- d) What are the available remedies in lieu of the court's findings on (a) to (d) above?

8. On the first issue the Claimant submitted that the Memorandum of Response proved that he was indeed employed as an Environmental Health and Safety Officer. He drew attention to paragraphs 2 and 3 of the response as well as paragraphs 1 and 2 of the Respondent's witness statement. The Claimant also highlighted his appointment letter asserting that parties are bound by their pleadings and cannot approbate and reprobate.

9. On the second issue the Claimant maintained that the Respondent gave him additional storekeeping duties without corresponding pay, which the Respondent itself acknowledged in paragraph 15 of its response. He cited

clause 8(iv) of his contract, which required him to perform “any other lawful duties,” asserting that storekeeping did not fall within this category, especially given that it was assigned after 10 years of service. He further drew the Court’s attention to the fact that he handled cement, PVC pipes and BRC wires in the stores for up to nine months as evinced by the copy of records produced in evidence.

10. On the third issue, the Claimant submitted that redundancy had not been proven. He submitted that REXH 11, the notice to suspend works referred only to a suspension of works, not stoppage, and therefore could not justify redundancy. Additionally, the Claimant submitted that the termination notice taking effect immediately did not meet the 28-day notice period stipulated in section 35(1)(c) of the Employment Act. He pointed out that the notice to suspend works was at variance with his letter of termination which stated the reason for termination as completion of project. To further fortify his position the Claimant asserted that the Labour Office was not notified and no consultations were carried out as required by section 40 of the Employment Act.

11. The Claimant relied on the case of **Van Kappel Kenya Ltd v Wanjohi (Appeal E015 of 2023) [2024] KEELRC 2193 (KLR)**, in which the Court mandated at least one month's notice to an employee and labour officer, fair selection before redundancy and payment of salary in lieu of notice, severance pay and other accrued dues. He also cited the decision in **Lugose v Tom Mboya Labour College (Appeal E059 of 2023) [2024] KEELRC 730 (KLR)**, in which the Court underscored the importance of consultations, stating that it was implicit in the principle of fair play under section 40 of the Employment Act. The Court further stated that the provision was not merely for information but an imperative requirement in law.

12. Concerning the requisite compensation the Claimant maintained that the compensation sought in the Memorandum of Claim reflected his lawful entitlements. He asserted that the Respondent's cheque did not reflect the proper terminal dues. He maintained that he was entitled to 12 months' compensation as redundancy had not been proven. Additionally, he asserted that he was entitled to the

unpaid salary sought in line with the Labour Institutions (Building and Construction Industry) (Wages) Order Legal Notice 20 of 2013 on the minimum wages for a storekeeping clerk and storekeeper.

Respondent's Submissions

13. On its part the Respondent identified the following issues for determination:

- (i) Whether the Claimant's duties exceeded his contractual role;
- (ii) Whether the Claimant's termination was unfair; and
- (iii) Whether the Claimant is entitled to any remedies.

14. On the first issue, the Respondent submitted that all duties performed by the Claimant were within his contract and section 6 of the Occupational Health and Safety Act. It denied that he ever worked as a full-time storekeeper, asserting that there was no formal communication modifying his role. In support of its position the Respondent cited section 97 of the Evidence Act, which bars oral evidence from varying terms of written agreements. It also relied on

section 10(5) of the Employment Act which requires consultation and written notification for job description changes. To further support its position the Respondent submitted that it was incumbent upon the Claimant to prove modification of contract. It made reference to **Halsbury's Laws of England, 4th edition, Volume 17 paragraphs 13 and 14** in the following terms:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case."

15. The Respondent submitted that in the absence of evidence of contract amendment, the claim for double pay was untenable. Regarding termination, the Respondent maintained that it was substantively and procedurally fair in line with section 40 of the Employment Act and the principles in the cases of **Walter Anuro v Teachers Service Commission [2013] eKLR** and **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR**. It asserted that redundancy was necessitated by KeRRA's non-payment of contract monies, and that it acted in good faith by calculating and offering the Claimant his final dues. Finally, in respect of the Claimant's entitlement to remedies sought, the Respondent reiterated that the Claimant had failed to prove unfair termination under section 45(2) of the Employment Act. Consequently, it urged the Court to dismiss the suit with costs.

Determination

16. The Court has considered the rival positions of the parties and notes the pleadings do not match the evidence tendered. The Claimant asserts he was unfairly terminated

by way of redundancy. The evidence which is the termination letter indicated the contract the Claimant had was terminated effective 9th June 2023 on account of the completion of the project he had been working on. On the letter it was indicated that the termination was as “mutually agreed” and the final dues computation was annexed. This is not a redundancy and despite the Claimant trying to read into the letter the requirements of section 40 of the Employment Act, that section was not applicable to his termination. By all accounts the termination was as mutually agreed.

17. The Claimant declined to take the payment offered by the Respondent hence the suit herein. In as far as the Court discerns, the issue of termination is resolved in favour of the Respondent. The termination was regular and not one deserving of censure from the Court.

18. That leaves the Court with the issue of designation and remuneration. Whereas the Claimant seeks recompense for a period spanning from 10 years and some months from 2012 to 2023. As everyone knows, employment disputes have a

ceiling. Where a cause of action accrues, it is limited to 3 years for ordinary matters and for continuing wrongs (payment of salary being one of them) to one year. The Court is not persuaded that the Claimant suffered non-payment of wages for 10 years and he quietly sat through a decade without ever asking for his pay. Having said that, it however is apparent that in the latter part of his service, the Claimant combined two roles. He had a role as a safety officer and was a store keeper. In the pleadings he did not attach the applicable Regulation of Wages (General) Order and a reading of the applicable regulation he was entitled to Kshs. 16,591.44 as he worked in Gilgil which is not a municipality and qualifies as other areas as far as the Regulation of Wages is concerned. For a year it would amount to Kshs. 199,097.28. The Claimant was not given a notice at the time of termination as his termination took effect immediately. For that he would be entitled to recompense by way of payment in lieu of notice equivalent to a monthly wage. He would be entitled to Kshs. 51,591.44 on this score.

19. The Claimant was not entitled to gratuity as there was no evidence adduced in terms of a CBA or contract of employment that made such a provision. The claim for gratuity is dismissed. The Claimant did not prove he was entitled to the 7 days leave which he asserted are as per company policy. He did not avail evidence of the said policy. He did not prove he was entitled to the statutory leave which he pegged at 17.5 days.

20. He therefore only succeeds to the extent that he gets the following reliefs:-

- i. Unpaid wages - Kshs. 199,097.28.
- ii. Notice pay - Kshs. 51,591.44
- iii. Costs of the suit limited to the sums in (i) and (ii) above.
- iv. Interest at Court rates on the sums in (i) and (ii) above from the date of judgment till payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of October

2025

**Nzioki wa Makau, MCI Arb.
JUDGE**

Original. Do not remove from the file.