

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT CAUSE NO. E721 OF 2021

GABRIEL SILA JUMA.....CLAIMANT

VERSUS

PAMOJA TRUST.....RESPONDENT

Coram

Before Lady Justice J. W. Keli

C/A Otieno

JUDGMENT

1. By a Statement of Claim dated 20^h August 2021, which was amended and dated 26th October 2022, the Claimant seeks:-

a) A declaration that the Respondent's action in terminating the Claimant's employment was unlawful and unfair.

b) The Respondent be and is hereby ordered and directed to pay the Claimant as follows:

- | | |
|--|--------------------|
| i. Compensation for unfair termination | Kshs. 1,137,802.08 |
| ii. One (1) months' salary in lieu of notice | Kshs. 94,816.84 |
| iii. Severance Pay | Kshs. 382,914.16 |
| iv. Salary in lieu of leave | Kshs. 61,995.63 |
| v. Unpaid salary for six(6) days in Jan 2021 | Kshs. 21,880.81 |

vi. Unpaid pension deductions	Kshs. 35,926.72
vii. Unpaid acting allowance	Kshs. 916,934.27
viii. Medical Insurance	Kshs. 231,270.00
Total	Kshs. 2,883,270.51

- c) The Respondent be and is hereby ordered and directed to pay the Claimant costs of this suit.
- d) The Respondent be and is hereby ordered and directed to pay the Claimant interest on (b) and (c) above at court rates from the date of filing suit until payment in full.
- e) The Respondent be and is hereby ordered and directed to furnish the Claimant with an amended Certificate of Service.

2. The Statement of Claim was accompanied by the Claimant's Verifying Affidavit sworn on 20th August 2021; List of Witnesses dated 20th August 2021; Witness Statement of Gabriel Sila Juma dated 20th August 2021; and List and Bundle of Documents dated 20th August 2021.

3. In response to the said Statement of Claim, the Respondent filed a Statement of Response dated 1st December 2021, together with a List of Witnesses dated 1st December 2021; Witness Statement of OLANDO SAMUEL OUKO dated 2nd June 2022; and List of Documents dated 1st December 2021.

Claimant's case

4. The Claimant's case is that he was employed by the Respondent as a Finance Officer on renewable fixed-term contracts. The first contract was from May 2014 to December 2014 at a gross salary of Kshs. 65,000/-. This amount was increased to Kshs. 71,789.00 from 1st October 2014. The second contract was from January 2015 for a three (3) year term running

until December 2017 at a gross monthly salary of Kshs. 71,789.00. The third contract was from January 2018 to December 2018 at a gross monthly salary of Kshs. 81,337.00. The fourth contract was from January 2019 to December 2019 at a gross monthly salary of Kshs. 89,877.00. The fifth contract was from January 2020 to December 2020 at a gross monthly salary of Kshs. 94,816.84.

5. The Claimant avers that from June 2014, he was appointed as the acting Head of Finance and Administration, which appointment lasted throughout the remainder of his employment, as the substantive position was never filled. The Claimant performed the duties of the acting Head of Finance and Administration in addition to those of a Finance Officer. Per the Respondent's Human Resource Policy, the Claimant was entitled to an increment of his salary by 25% of his gross salary, but the same was never paid to him.
6. Per the 5th Contract between the Claimant and the Respondent, the Claimant was entitled to a comprehensive medical insurance, Provident Fund and airtime worth Kshs. 2,000/- per month; was entitled to annual leave for thirty (30) working days; and the Respondent would issue him with one (1) month's notice of renewal or non-renewal of the contract. It was an implied term of the same contract that the Respondent would adhere to the law prior to terminating the contract.
7. The Claimant contends that in December 2020, his 5th contract expired without any notice being furnished to the Claimant. Following the expiry of the contract on 30th December 2020, the Claimant continued working for the Respondent as per the norm and on the express instructions of the Respondent's Directors, thereby activating a month to month contract terminable by giving one month's notice under Section 35 (1) (c) of the Employment Act.

8. Under the new month to month contract, the Respondent was mandated to comply with the provisions of the Employment Act 2007 on substantive justification and procedural fairness by: giving the Claimant prior and adequate notice of any charges brought against him; according him enough opportunity to prepare and adduce his defence; informing him that he was entitled to have a another employee or a shop floor union representative present during the explanation and hearing; considering the representations of the accompanying employee or shop floor union representative; and by ensuring that the charges against the Claimant had merit. The Claimant was issued with a letter terminating his contract on 6th January 2021, without the Respondent adhering to the provisions aforesaid on substantive justification and procedural fairness.
9. Further to the foregoing, the Respondent neglected to pay the Claimant's medical insurance, and to remit his pension dues for September to December 2020. The Claimant also had 17 days pending leave days, which he claims payment for.
10. The Claimant takes issue with the Certificate of Service issued to him as it bears an incorrect ID Number and omits details of his role as acting Finance and Administration Manager. He states that as a result of the unlawful termination of is employment, the Claimant suffered loss and damage.

Respondent's case

11. In response to the Claimant's case, the Respondent admits that the Claimant was employed by it around November 2013 and retained as a Finance Officer on fixed-term contract basis, per his narration. They also admit that the Claimant was requested to perform the duties of

the Head of Finance and Administration in an acting capacity from June 2014 vide a letter dated 19th December 2014. He was to perform these duties for 3 months' only, and was paid his acting allowance for this period. For the subsequent fixed-term contracts especially in the years 2018, 2019 and 2020, the Claimant did not perform any duties of the Head of Finance and Administration. The absence of a letter, addendum to his contracts, or a fresh contract allocating him such responsibilities evidences the foregoing.

12. On the claim for unpaid medical insurance, and unpaid pension, the Respondent postulates that the Claimant was enrolled to a suitable medical scheme and was a member of a lawful provident fund, Liberty Life Assurance Kenya Limited and NSSF, to which the employer made monthly contributions without fail. Owing to the effects of the Covid 19 pandemic, the Respondent organization which was dependent on donor funds which had dried up, was forced to discontinue payments to Liberty Life Assurance Kenya Limited in September 2020, but continued contributing to NSSF and NHIF. It is therefore not true that the Respondent neglected to make pension contributions between September and December 2020.

13. On the issue of unpaid leave days, the Respondent takes the position that the Claimant applied for and utilized all his leave days. During his clearance process, the Claimant affirmed that no leave days were pending. He was paid his full terminal benefits.

14. The Respondent denies declaring the Claimant redundant. They explain that the Claimant's contract of employment was terminated by effluxion of time, after the Claimant neglected to issue the Respondent with a notice of intention to remain in the Respondent's employ under Clause XII of the 5th Contract. The Respondent cites the negative effects of the Covid 19 pandemic, the Claimant's abrasiveness and poor performance, and his serious violations of

the Respondent's Human Resource Manual as the reasons for the non-renewal of the contract.

DETERMINATION

15. The court issued directions on the filing of written submissions after the close of the respondent's case. Both parties filed.

16. The court having heard the parties discerned the issues for determination in the claim were –
 - a. Whether the termination of the services of the claimant was fair.
 - b. Whether the claimant was entitled to relief sought

Whether the termination of the services of the claimant was fair.

17. The termination of the employment was vide letter dated 6th January 2021 by the employer which stated as follows- *'Re: NOTICE ON NON-RENEWAL OF CONTRACT FOR THE YEAR 2021.*

The subject refers.

I write to inform you of the Board of Trustees decision to review the organisation staffing and the decision to do away with the position of Finance Officer and realign to the Human Resource and Finance Manager. This has been necessitated by Covid 19 effects and the irregular donor funding the organisation has found it-self into, thus the need for efficiency with the minimum available resources. By virtue of the above, the Trust shall not renew your contract for the year 2021.

I take this opportunity to thank you for your offering your services to Pamoja Trust and wish you the very best in your endeavors.

In case of any clarification, kindly do not hesitate to contact the Office of the Executive Director and/or that of the Chairperson of the Board of Trustees. Kindly also purpose to clear with the organisation at the earliest opportunity possible.’’

18. The obligation to justify the reasons for the termination of the employment lies with the employer under section 43 of the Employment Act :- *‘43. Proof of reason for termination*

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’’

19. In the instant case, the reason for the termination was that the employer had made a decision to do away with the position of finance manager, which the claimant was holding. The contract ended 31st December 2021. The letter was dated 6th January 2021 which was 6 days after the expiry and the employee continued to work. The Court deemed that the contract was renewed automatically as the employer did not stop the claimant from working on the last day of the contract. The renewal was for the same period of the last contract ending 2020 thus the Court deemed contract automatically renewed in 2021 for one year. The court finds that the respondent having failed to end work by the claimant on the 31st December 2021, the contract was deemed renewed and that the reason for termination was not effluxion of time but as stated in the letter of 6th January 2021 that the employer had done away with the position of finance officer held by the claimant, thus redundancy. That act of doing away pf position is called redundancy as defined in section 2 of the

Employment Act to wit- *“redundancy” 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;* “The claimant’s position was thus declared redundancy and the termination ought to have been under section 40 of the Employment Act which was not the complied with to wit –‘40. *Termination on account of redundancy*

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.’’ The process was not complied with. There was no evidence of the validity of the redundancy reason. The court holds the termination was unfair.

Whether the claimant is entitled to relief sought

20. The claimant sought for the following reliefs-

a. A declaration that the Respondent’s action in terminating the Claimant’s employment was unlawful and unfair.

b. The Respondent be and is hereby ordered and directed to pay the Claimant as follows:

i. Compensation for unfair termination	Kshs. 1,137,802.08
ii. One (1) months’ salary in lieu of notice	Kshs. 94,816.84
iii. Severance Pay	Kshs. 382,914.16
iv. Salary in lieu of leave	Kshs. 61,995.63
v. Unpaid salary for six(6) days in Jan 2021	Kshs. 21,880.81
vi. Unpaid pension deductions	Kshs. 35,926.72
vii. Unpaid acting allowance	Kshs. 916,934.27
viii. Medical Insurance	Kshs. 231,270.00
Total	Kshs. 2,883,270.51

f) The Respondent be and is hereby ordered and directed to pay the Claimant costs of this suit.

g) The Respondent be and is hereby ordered and directed to pay the Claimant interest on (b) and (c) above at court rates from the date of filing suit until payment in full.

- h) The Respondent be and is hereby ordered and directed to furnish the Claimant with an amended Certificate of Service.

21. On relief of a declaration that the Respondent's action in terminating the Claimant's employment was unlawful and unfair. -The court, having held the termination was unfair has to consider the factors in section 49(4) of the Employment Act as relates to compensation to wit –(4) A labour officer shall, in deciding whether to recommend the remedies

specified in subsections (1) and (3), take into account any or all of the following—

- (a) the wishes of the employee;
- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- (c) the practicability of recommending reinstatement or re-engagement;
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- (e) the employee's length of service with the employer;
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other

claims owing to the employee;

(j) any expenses reasonably incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses

attributable to the unjustified termination; and(m) any compensation, including *ex gratia* payment, in respect of

termination of employment paid by the employer and received by the employee.’’

22. The court held that the claimant’s service was terminated on basis of redundancy hence he did not contribute to their termination. Further, the claimant had served from the date of employment of May 2014 continuously on extended contracts without a break to the date of termination of 6th January 2021, thus approximately 7 years of service. The claimant is further entitled to severance pay at minimum rate of 15 days per each complete year worked (section 40 (1)(g) of the Employment Act) and notice payment. Taking the foregoing into account the court finds that the award of compensation equivalent of 5 months gross salary is fair. The claimant is further awarded Notice payment equivalent of 1 month notice.

23. The claim for severance pay – the same was due under section 40(1)(g) of the Employment Act – ‘ *the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service*’’. The

court found the claimant had only served for 6 complete years of service. Thus Kshs. 94816.84x15/30x 6 years =Kshs. 284,450.52.

24. Payment in lieu of leave – The claimant confirmed on clearance that he stated he had no pending leave days. That was the form he used to clear. The court finds that the claim for leave was an afterthought.
25. Unpaid salary for six(6) days in Jan 2021 of Kshs. 21,880.81- the same is awarded as the termination letter was dated 6th January 2021 and it was not in dispute that the claimant was not paid for the 6 days worked.
26. Unpaid pension deductions of Kshs. 35,926.72- The claimant admitted there was communication of suspension of the provident fund due to COVID-19 challenges and that the employer continued to pay NSSF, which is the minimum statutory social security. I find no basis of the claim. This also applies to the claim for medical insurance. The claim for medical insurance further has no basis as the employer is only obliged to provide medical when an employee is sick as stated in section 34 of the Employment Act to wit- *‘34(1)Subject to subsection (2), an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.(2)An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.’* No unpaid medical bills incurred by the claimant were placed before the court. The employee was also on NHIF, hence the claim has no basis.
27. Claim for unpaid acting allowance of Kshs. 916,934.27- The claimant admitted that he had an acting letter of appointment limited to 3 months and he was paid. He relied on the audited accounts

statement of the respondent as evidence of the claim of acting. There was no further extension of the acting period. A contract is superior to any external documents. The contract stated he acted for 3 months in 2014. There was no demand by the claimant for the allowance on lapse of the 3 months. The cause of action was continuing injury and lapsed for 1 year on the end of the contract. The court found no merit in the claim as the audit report was not by the employer, and further, the contract before the court was for a period of 3 months. The claim for acting was not proved on a balance of probabilities

Conclusion

28. Judgment is entered for the claimant against the respondent as follows-

- a. A declaration that the Respondent's action in terminating the Claimant's employment was unlawful and unfair.
- b. Notice payment of 1 month salary Kshs 94,816.84
- c. Compensation for unfair termination equivalent of 5 months gross salary Kshs. 474,084.20
- d. 6 days unpaid salary in month of January 2021-Kshs. 21,880.81
- e. Severance pay $-94816.84 \times 15/30 \times 6$ years thus Kshs, 284,450.52
- f. Interest at court rate on the above from judgment date.
- g. Costs of the suit

29. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

J.W. KELI,
JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

claimant : Namarome h/b Muthoni

Respondents: Wakhu h/b Masaviru