



**Mjomba v Central Electrical International Limited (Cause 720 of 2017)
[2024] KEELRC 447 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 447 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 720 OF 2017
AK NZEI, J
FEBRUARY 29, 2024**

BETWEEN

MICHAEL MWAWAI MJOMBA CLAIMANT

AND

CENTRAL ELECTRICAL INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 4/9/2017 and filed in Court on 5/9/2017 and pleaded that he was on 24/10/2008 employed by the Respondent as an electrician, earning a monthly salary of Kshs. 24,000 and that on 6/8/2014, the Respondent terminated his employment without any notice and without following the procedure set out in the Employment Act. That the termination was unlawful and unfair. The Claimant further pleaded that the Respondent never remitted his NHIF and NSSF contributions, though the same were deducted every month.
2. The Claimant set out his claim against the Respondent as follows:-
 - a. Gratuity for 6 years worked @ 24,000 x 1/2 x 5..Ksh. 72,000
 - b. 6 days worked in September.....Ksh. 4,800
 - c. 5 years unpaid leave @ 24,000x6.....Ksh. 144,000
 - d. One month pay in lieu of notice.....Ksh. 24,000
 - e. Deducted and not remitted to NSSF from October 2008 to June 2013 @400x12x6 yearsKsh. 28,800
 - f. Deducted and not remitted NHIF from July 2009 to August 2014@400 per month X72 months.....Ksh.28,800



- g. 12 months (salary compensation for unfair termination @Kshs.30,00 x12Ksh.288,000
 - h. A declaration that the Claimant was employed by the Respondent on permanent basis.
 - i. An order directing the respondent to issue the Claimant with a certificate of service.
 - j. Payment of overtime
 - k. Costs and interest.
3. Documents filed by the Claimant alongside the memorandum of claim were the Claimant's written witness statement dated 4th September 2017 and a list of documents (dated 4/9/2017) listing 6 documents. The listed documents included an NSSF statement and a dismissal letter, among others.
 4. The Respondent entered appearance on 29/9/2017 and subsequently filed a memorandum of response. The respondent denied the Claimant's claim and further pleaded:-
 - a. that the Respondent admitted having engaged the services of the Claimant verbally as an electrician, at a wage payable every week end.
 - b. that the Claimant was summarily dismissed from employment for poor performance by willfully neglecting to perform his duties and absconding duty without leave.
 - c. that the Respondent invited the Claimant to show cause why disciplinary action could not be taken against him, and that his services were lawfully terminated in accordance with the law and for valid reasons; these being poor performance and absconding duty.
 5. On 27/1/2023, the Respondent filed a witness statement of one Mohammed Hamza dated 25/1/2021 and an evenly dated list of documents, listing 6 documents. The listed documents included a notice to report to work dated 3/9/2014, notice to show cause dated 4/9/2014, letters to County Labour Officer dated 3/9/2014 and 4/9/2014 respectively, a letter from the County Labour Officer dated 4/9/2014 and a letter to the County Labour Officer dated 10/9/2014.
 6. Trial opened before me on 20/9/2022 when the Claimant testified that he was employed as an electrician by the Respondent in October 2008, and was not given a written contract, that he worked from 7.00a.m. to 5.30 p.m. without being paid overtime. That he was being paid Ksh. 24,000 per month, and was being paid in cash upon which he could sign a petty cash voucher, of which he was not being given copies. That remittance of NSSF and NHIF stopped after 3 years.
 7. The Claimant further testified that he was not being paid house allowance and was not being allowed to take leave. The Claimant further testified that on 6/9/2014, the Respondent gave him 2 weeks off and told him to report back to work after the 2 weeks; that on return, the Respondent's branch manager told him that business was down, and that he should go back home and would be called back. That he was never called. The Claimant denied absconding duty from 2/9/2014 to 4/9/2014 as alleged by the Respondent. The Claimant adopted his filed witness statement as his testimony, and produced in evidence only 2 documents out of those listed on his filed list of documents (a Dosh Form and a demand letter). The Claimant was cross-examined and re-examined, and he admitted that he had nothing to show that he reported to work at 7.00am and had nothing to show that NSSF and NHIF deductions were not being remitted by the respondent.
 8. The Respondent called one witness, Mr. Mohamed Hamza (RW-1), who adopted his filed witness statement as his testimony, and produced in evidence the documents listed on the Respondent's list of documents referred in paragraph 5 of this judgment. The witness further testified:-



- a. that on 2/9/2014, the Respondent's workers (including the Claimant) took part in an illegal strike and that on 3/9/2014, the Respondent wrote to the County Labour Officer and reported the matter. That the Respondent also forwarded to the Labour Officer a list of the striking workers.
 - b. that the labour officer called a meeting that afternoon, and that the strike was found to be illegal and workers were told, vide a letter dated 4/9/2019, to go back to work.
 - c. that the workers did not report back to work on 4/9/2014, and that the Respondent wrote to the Labour Officer in that regard on the same date (4/9/2014).
 - d. that the Respondent subsequently wrote letters to individual strike participants to show cause, but they never responded to the show cause letters.
 - e. that the Respondent calculated the striking workers' dues and send a cheque to the labour officer for the striking workers to collect. That the letter in that regard to the Labour Officer, dated 10/9/2014, also annexed a list of employees and dues payable. That the Claimant was one of those listed, and was listed as no. 12.
 - f. that the Claimant took part in an illegal strike and failed to respond to a show cause letter.
 - g. that there was no contractual clause that the Claimant would be paid gratuity, and that although he did not take leave due to work load, he was paid in lieu thereof.
9. Cross-examined, RW-1 testified that the Claimant worked as an electrician and had not been given a letter of appointment. The witness further admitted that none of the letters written/exhibited by the Respondent had been addressed to the Claimant or served on him. That the Claimant signed vouchers on receiving his salary, and that the vouchers had no indication of house allowance, NSSF, NHIF and others. That the Respondent deducted and remitted the Claimant's NSSF and NHIF, though there was no evidence in that regard. That the Claimant was not subjected to disciplinary process (action). RW-1 further admitted that the Respondent had nothing to show that the Claimant absconded his duties or that he was paid his dues.
10. Having considered the pleadings filed and evidence presented by both parties, issued that fall for determination, in my view, are as follows:-
- a. Whether termination of the Claimant's employment was unfair.
 - b. Whether the Claimant is entitled to the reliefs sought.
11. On the first issue, it was a common ground that the Claimant was an employee of the Respondent, and that the Claimant had not been issued with an employment contract. The Claimant pleaded and testified that his employment was unfairly terminated by the Respondent without following the laid down procedure. On its part, the Respondent pleaded that it summarily dismissed the Claimant on account of poor performance, willful neglect of duties and absconding duty. The Respondent admitted in evidence that the Claimant was not subjected to disciplinary proceedings before termination.
12. Section 41 of the *Employment Act* sets out a mandatory procedure which must be adhered to by any employer intending to terminate an employee's employment on account of misconduct, poor performance and physical incapacity. The Section states as follows:-
- “(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor



performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

13. Failure to comply with the foregoing procedure renders a termination process procedurally unfair. On substantive fairness, Section 45(2) (a) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid. It was held as follows in the case of *Walter Ogal Anuro -vs Teachers Service Commission* [2013] eKLR:-

“...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

14. In the present case, the Respondent never demonstrated the validity of the reasons that it alleged caused it to terminate the Claimant’s employment. The allegations of willful neglect of duty, absenteeism and absconding of duty were never proved against the Claimant. No job attendance register or clocking in records of the respondent were exhibited to demonstrate absenteeism or absconding of duty on the part of the Claimant. Similarly, the allegations of poor performance and willful neglect of duty were not proved.
15. Further, Section 35(1) (c) of the *Employment Act* was not complied with as the Claimant was not shown to have been issued with a termination notice. It is my finding that termination of the Claimant’s employment was substantively and procedurally unfair.
16. On the second issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of seven months’ salary being compensation for unfair termination of employment, which is Ksh. 168,000; considering the circumstances of the case. I also award the Claimant Kshs. 24,000 being one month salary in lieu of notice pursuant to Section 35(1) (c) of the *Employment Act*.
17. The claim for gratuity cannot be allowed as the Claimant never demonstrated that payment of the same was a term of his contract or was provided for in a collective bargaining agreement whose terms were applicable to the terms of his employment.
18. The claim for Kshs. 4,800 being salary for 6 days worked in September (2014) cannot be allowed as the Claimant pleaded that his employment was terminated on or about 6th August 2014. Parties are bound by their pleadings.
19. On the claim for unpaid leave for 6 years, it was never denied that the Claimant worked for 5 complete years and that he never took leave. Under Section 28(a) of the *Employment Act*, the Claimant was entitled to a minimum of 21 days paid leave for each complete year served. Section 74(f) of the *Employment Act* obligates an employer to keep records on each employees leave entitlement, days taken and days due. No such records were produced by the Respondent herein. Further, it was never denied that the Claimant was earning Kshs. 24,000 per month. I award the Claimant Kshs. 84,000 for unpaid



leave days. For record purposes, it is important to note that an employer's continued failure to pay an employee for leave days earned but not taken during the period of employment is a continuing injury as contemplated in Section 90 of the Employment Act.

20. The claim for deducted NSSF and NHIF contributions which the employer allegedly never remitted is disallowed. Once deducted, such deductions cease being an employee's entitlement, and become the entitlement of the Government Agency for which the deductions were made. Such governmental agencies, i.e. NHIF, NSSF and KRA, have elaborate statutory mechanisms of recovering deductions unlawfully withheld by employers.
21. The claim for issuance of a certificate of service is allowed under Section 51(1) of the Employment Act.
22. In sum, and having considered written submissions filed on behalf of both parties, judgment is hereby entered for the Claimant against the Respondent for:-
 - a. Compensation for unfair termination of employmentKsh. 168,000
 - b. Payment in lieu of noticeKsh. 24,000
 - c. Unpaid leaveKshs. 84,000Total Ksh. 276,000
23. The awarded sum will be subjected to the applicable statutory deductions pursuant to Section 49(2) of the Employment Act.
24. The Respondent shall issue the Claimant with a certificate of service pursuant to Section 51(1) of the Employment Act, within 30 days of this judgment.
25. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

