



Opande v Liverpool Voluntary Counselling & Testing (LVCT) (Cause E037 of 2022) [2024] KEELRC 318 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 318 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E037 OF 2022
CN BAARI, J
FEBRUARY 22, 2024**

BETWEEN

DEOGRATEOUS OKOTH OPANDE CLAIMANT

AND

**LIVERPOOL VOLUNTARY COUNSELLING & TESTING
(LVCT) RESPONDENT**

JUDGMENT

Introduction

1. Before Court is the Claimant's Memorandum of Claim dated 19th May, 2022, and filed on 29th August, 2022. Under the claim, the Claimant seeks the following reliefs:
 - a) A determination of whether the termination of the Claimant from employment was unlawful and unprocedural.
 - b) Payment of a sum of Kshs. 1,672,465.50, being salary for the remainder of contract, unpaid salary for the month of September, 2019, gratuity, and two months of ex-gratia.
 - c) Issuance of a certificate of service, costs of the suit and interest.
2. The Respondent entered appearance on 14th October, 2022, and proceeded to lodge a memorandum of response to the claim on 20th October, 2022.
3. A Preliminary objection filed by the Respondent on 22nd February, 2023 on the ground that the suit offends the sub judice rule was heard and a ruling dismissing the same delivered on 6th July, 2023.
4. The Claimant's case was heard on 17th October, 2023. He testified in support of his case, adopted his statement and produced the list of documents filed as exhibits in support of his case.



5. The Respondent's case was heard on the same day, with one Catherine Nanjala testifying in support of the Respondent's case. She adopted her statement and produced documents filed in support of the Respondent's case.
6. Both parties closed their respective cases on 17th October, 2023, paving way for filing of written submissions.
7. Submissions were filed for both parties.

The Claimant's Case

8. The Claimant, a licensed Clinical Officer was employed by the Respondent on two year contract commencing, on 1st January, 2019. His gross monthly salary was Kshs. 107,901/-.
9. The Claimant states that 9 months into his contract, the Respondent terminated his services wrongfully and unlawfully. He states further that he was terminated without reason and another employee recruited to fill his position.
10. It is the Claimant's case that his demand to be paid his dues was neglected, and has to date not been paid any of his dues. He further states that his termination is unprocedural and unlawfull contrary to Sections 35, 41, 43, 45, 49, 28 and 51 of the *Employment Act, 2007*.
11. It is his position that he is entitled to be paid for the remainder of his contract together with the other reliefs forming part of his claim.
12. The Claimant states that he declined a cheque issued by the Respondent upon his termination, on the basis that he was not entitled to make further claim upon receiving the payment.
13. On cross-examination, the Claimant confirmed that he was aware that his contract was subject to availability of funds. He further confirmed that he was aware that the Respondent faced budget cuts from its donors.
14. The Claimant further confirmed on cross-examination that his net salary was Kshs. 70,964/-. It is his further testimony that his contract did not carry a provision for payment of ex-gratia, service/gratuity.
15. It is his prayer that he be awarded the reliefs listed in his statement of claim.

The Respondent's Case

16. The Respondent's case is that the Claimant was her employee, employed on a two year contract as he correctly states in his claim.
17. The Respondent's further case is that the Claimant was procedurally and lawfully terminated due to budget cuts by donors. It is the Respondent's case that the Claimant was issued one month notice and/ or paid in lieu of the notice.
18. The Respondent further states that through several correspondences from the office of Executive Director, the Claimant was given reasons for the termination of contract, and further avers that no employee was recruited to fill the Claimant's position.
19. It is the Respondent's case that it complied with the law in terminating the Claimant and that it did so for justifiable cause. It further states that it paid the Claimant a sum of Kshs. 160,130/- vide a cheque issued on 7th October, 2019.



20. The Respondent denies owing the Claimant any salary arrears, and further states that he is not entitled to gratuity/service pay. The Respondent further states that the remainder of contract is not payable as the Claimant did not render service.
21. Catherine Nanjala, (RW1) testifying for the Respondent, told the court that lay offs became inevitable due to funding cuts from the Respondent's donors. It is her testimony that a total of 35 employees were laid-off and who were all paid their final dues and that only the Claimant filed suit.
22. RW1's further evidence is that the Claimant declined to pick a cheque drawn for his final dues. She further testified that the Respondent does not pay ex-gratia.
23. On cross-examination, RW1 confirmed that the termination letter issued to the Claimant, did not provide reasons for the termination.
24. The Respondent prays that the court dismisses the Claimant's case.

The Claimant's Submissions

25. It is the Claimant's submission that without proffering reason for termination, the Claimant's termination of employment was unlawful and unprocedural. The Claimant sought to rely in *Joseph Ogaro Otuori Versus Dimamu Agencies Limited* (2012) eKLR, to buttress this position.
26. It is submitted for the Claimant that the evidence of the Respondent that the Claimant's position was declared redundant is not true as there ought to have been a communication personally to the Claimant. It is his submission that the termination offends Section 40(1) of the *Employment Act*.
27. It is the Claimant's submission that he could not have been terminated for reason of redundancy when the termination letter did not specify so, and this reason by the Respondent other than violating the provisions of the *Employment Act* has no basis.
28. It is the Claimant's final submission that he is entitled to the relief sought.

The Respondent's Submissions

29. It is submitted for the Respondent that the employment contract was a conditional one, dependent on availability of funds, hence it was clear that the funds were not available to continue sustaining the project, and the contract therefore could not be performed to completion. It is its submission that the Claimant is not entitled to payment of the balance of the contract.
30. It is the Respondent's submission that the Claimant was contributing to NSSF and the employer provided a pension scheme, and he is therefore not entitled to gratuity or service pay as claimed.
31. The Respondent further submits that there is no basis laid for *Ex-gratia* pay as it is not provided for in the contract, and the Claimant clarified that such payment is not in their policy.

Analysis and Determination

32. Having carefully considered the pleadings together with the witnesses' oral testimonies, and the parties' submissions, the issues that arise for determination are: -
 - i. Whether the Claimant was unfairly terminated
 - ii. Whether the Claimant is entitled to the prayers sought



Whether the Claimant was unfairly terminated

33. The Claimant's position is that his termination was unprocedural and unlawful on the premise that he was not given reasons for termination. The Respondent confirmed through their witness that the Claimant's contract was still valid as at the time he was issued with termination notice, and further that the termination was informed by reduced donor funding.
34. The Respondent issued various correspondences to her employees touching on the subject of reduced funding for various programs that it was running. The Court however notes that the correspondences were sent to all employees and were not specific to the employees intended to be laid-off.
35. A termination is unfair where the employer fails to adhere to the tenets of fair process provided for under Section 41 of the *Employment Act*, 2007, and the requirement that an employer proves that the reason(s) for terminating an employee are valid, fair and justified as clearly set out under Sections 43, 45 and 47(5) of the *Employment Act*, 2007.
36. The Claimant's termination was not based on misconduct of any kind or poor performance. The termination was at the initiative of the employer arising from limited/reduced funding. The Respondent would thus in my view have been justified to terminate the Claimant through a declaration of redundancy.
37. It is settled that redundancy is a fair reason to terminate/dismiss for as long as the employer proves the reasons and adhere to the provisions of Section 40 of the *Employment Act*. (See *Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and allied Workers (Kudheiba) v Nairobi Hospital*).
38. In this case, it is clear that the Respondent did not at all invoke Section 40 and cannot therefore be said to have terminated the Claimant through redundancy. The Respondent simply issued notice of termination, and which notice did not include reasons that informed the need to terminate the Claimant's contract and the issue of funding only came up when this case was filed.
39. It is no longer tenable to terminate an employee simply by giving notice or pay in lieu of the notice. Both the *Employment Act* and the *Constitution* require that an employer gives an employee fair process and fair, valid and justified reasons for termination. The Supreme Court in the case of *Kenfreight (EA) Limited v Benson K. Nguti* (2016) eKLR, held that it is not enough to terminate employment by notice or payment in lieu thereof; termination should be based on valid reasons and fair procedure.
40. Although unavailability/reduced funding would be a fair reason to terminate, the Respondent did not notify the Claimant that he was being considered for termination premised on reduced donor funding.
41. In the circumstances I find the Claimant's termination unfair.

Whether the Claimant is entitled to the reliefs sought

42. The Claimant's claim is for payment of salary for the remainder of contract, unpaid salary for the month of September, 2019, gratuity, and two months of ex-gratia, issuance of a certificate of service, costs of the suit and interest.
43. As correctly submitted by the Respondent, the Claimant did not seek compensation for the unfair termination. It is also settled that parties are bound by their pleadings. I will therefore not venture into matters that are not an issue before me, and choose instead, to let sleeping dogs lie.



44. On the claim for salary for the remainder of contract, it is generally settled that this is not an available remedy, informed by reason that the employee did not render service during the period, and to award, would amount to an unjust enrichment. Rika J in the case of *David Mwangi Gioko & 51 Others v. Nairobi City Water & Sewerage Company Limited*, held that employees are paid salaries for contributing labour, and when there is no contribution, there is no compensation.
45. Further, this court has variously held that Section 49(4)(f) of the *Employment Act*, did not open an avenue for the court to award damages equivalent to the remaining term of contract for reason of unfair termination.
46. In the premise, the claim fails and is dismissed.
47. The Claimant confirmed that his contract neither provided for payment of ex-gratia, service pay or gratuity. In *John Karanja Mbogo v Leah Wangui t/a Gilgil Distributors Limited* [2020] eKLR the court in dismissing a prayer for gratuity stated that: -
- “The claim for gratuity is not due. The Claimant had no written contract giving him such benefit. The Respondent was paying statutory dues and even where a service pay was claimed, with such payment of PAYE, NSSF no service pay is due.”
48. I therefore find the claim devoid of merit and is dismissed.
49. The Claimant was given termination notice but nothing shows that he was paid salary for the notice period. He is entitled to payment.
50. In whole, the court makes orders as follows: -
- i. A declaration that the Claimant’s termination is unfair.
 - ii. Payment of one-month salary in lieu of notice at Kshs. 107,000/-
 - iii. The Respondent shall bear half the costs of the suit.
51. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF FEBRUARY, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Alego present for the Claimant

Mr. Achillah present for the Respondent

Arwin Ongor- C/A

