



**Moi v Windmill Limited (Cause 1073 of 2017)
[2024] KEELRC 306 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 306 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1073 OF 2017
JK GAKERI, J
FEBRUARY 21, 2024**

BETWEEN

PROTUS MOI CLAIMANT

AND

THE WINDMILL LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 12th June, 2017 alleging wrongful dismissal from employment and refusal by the Respondent to pay terminal dues.
2. It is the Claimant's case that he was employed by the Respondent in June 2014 as a Handbaker at a monthly salary of Kshs.16,250/= and the agreement was verbal.
3. The Claimant avers that he worked from 7.00 am to 5.00 pm daily including public holidays at no pay and the Respondent neither remitted National Health Insurance Fund nor National Social Security Fund deductions.
4. That he did not proceed on leave for the duration of employment, 22 months and 25 days.
5. It is the Claimant's case that his employment was terminated by word of mouth on 19th October, 2016 without notice.
6. The Claimant prays for:
 - a. A declaration that the Claimant's dismissal was wrongful and unfair.
 - b. The sum of Kshs.493,840/= as terminal benefits comprising:
 - i. 25 days worked in April 2016.
 - ii. One month's salary in lieu of notice.



- iii. 8 months' salary.
 - iv. House allowance.
 - v. Service pay.
 - vi. 12 months compensation.
- c. Costs and interest.

Respondent's case

7. The Respondent filed its response on 3rd July, 2017.
8. It admits having employed the Claimant as a cook in June 2014 on a casual probationary basis up to 31st December, 2015 and from 1st January, 2016 under a one (1) year contract scheduled to lapse on 31st December, 2016 and all his previous benefits were paid including service pay.
9. It is the Respondent's case that the Claimant's salary was consolidated and the only leave outstanding was for 4 months and 7 days from January to April 2016.
10. The Respondent avers that the Claimant had been notified that he would be declared redundant but refused to accept terminal dues as he had a loan of Kshs.36,000/= owed to the employer and refused to negotiate a settlement.
11. It is the Respondent's case that the total amount due to the Claimant is Kshs.32,228/= less its loan of Kshs.36,000/= and the Claimant owes the Respondent Kshs.3,772/= and prays for dismissal of the suit with costs.

Evidence

12. On the date of hearing on 28th November, 2023, counsel for the Respondent suggested that the matter should proceed by way of documents and submissions as opposed to a viva voce hearing under Rule 21 of the Employment and Labour Relation Court (Procedure) Rules, 2016 and the Claimant's counsel was in agreement and directions on the filing of submissions were given.
13. Whereas the Claimant filed a single document, a demand letter from its counsel dated 30th April 2017, the Respondent filed numerous documents including a copy of a letter to the County Labour Officer on termination of the Claimant's employment on 24th April, 2016 on account of redundancy whose effective date was 30th April, 2016.
14. It also provided a written contract of employment signed by the Claimant, petty cash voucher dated 31st December, 2015 and evidence of receipt of monies by the Claimant and acknowledgement of the loan of Kshs.36,000/= and salary vouchers/payslip.

Claimant's submissions

15. Counsel submitted on whether termination of the Claimant's employment was fair, entitlement to reliefs and costs.
16. On termination, counsel submitted on the provisions of Section 35(1)(c) of the *Employment Act*, 2007 to urge that the Respondent did not notify the Claimant of the termination of employment.
17. Reliance was further made on the provisions of Section 41 and 43 of the *Employment Act*, 2007 to urge that the employer is required to prove that it had a substantive justification for the termination



of employment and procedural fairness and in this case, the Respondent had failed to do so, rendering the termination unfair.

18. On the reliefs sought, counsel urged that the Claimant was entitled to notice pay, leave for 22 months, house allowance and costs.
19. Reliance was made on the decisions in *Grain Pro Kenya Inc. Ltd V Andrew Waithaka Kiragu* (2019) eKLR, on 15% housing allowance as was the decisions in *Milkah Khakayi Kulati V Sandratorm Africa Ltd* (2014) eKLR and *KUDHEIHA Workers V B.O.G Maseno School for the Deaf* (2013) eKLR.

Respondent's submissions

20. The Respondent's counsel submitted on whether termination of the Claimant's employment was unfair and entitlement to the reliefs sought.
21. On termination, counsel cited the provisions of Section 40 of the *Employment Act*, 2007 to urge that the Respondent complied with the law as the Claimant had been notified of the redundancy and was paid a salary in lieu of notice.
22. As regards the reliefs sought, counsel submitted that the Claimant did not merit a declaration as the redundancy was in accordance with the law and the amount due to him as terminal dues was Kshs.250/= after deducting the loan of Kshs.36,000/=, which he did not deny.
23. Relying on the decisions in *Elizabeth Wakanyi Kibe V Telkom Kenya Ltd* (2014) eKLR, *D. K. Njagi Marete V Teachers Service Commission* (2020) eKLR and *Kirigo V World Vision International* (2022) eKLR, counsel submitted that the claim for 8 months' lost salary was irrecoverable as it was an anticipatory benefit.
24. On house allowance, counsel submitted that the Claimant's salary was consolidated as per the contract of employment on record.
25. As regards 12 months' compensation, counsel relied on the provisions of Section 49(4) of the *Employment Act*, 2007 to submit that since the Claimant separated from the Respondent on account of low business in the department and had served for only 4 months under the contract on record, the equivalent of 2 months' salary would be sufficient as the circumstances were unforeseeable by the Respondent.

Determination

26. It is common ground that the Claimant joined the Respondent in June 2014 but did not sign a written contract until 2nd January, 2016. The contract was for a period of one (1) year renewable based on performance.
27. The Claimant's undisputed salary was Kshs.16,250/= per month and was engaged as a cook.
28. The Claimant contests the termination and prays for various reliefs.
29. The issues for determination are:
 - i. Whether termination of the Claimant's employment on account of redundancy was unfair or unlawful.
 - ii. Whether the Claimant is entitled to the reliefs prayed for.



30. On termination, the Claimant merely states that on 19th October, 2016 he was verbally informed to go back home as his services had been terminated. The Statement of Claim has a different date, namely 25th April, 2016 which the Respondent appears to acknowledge in its undated response filed on 3rd July, 2017.
31. Documents on record reveal that the Respondent informed the Labour Office its decision to declare the Claimant redundant owing to low business and the letter dated 25th April, 2016 was acknowledged by the Labour Office on the same date.
32. The hand written letter stated that the redundancy would be effective from 30th April, 2016.
33. The notice makes no reference as to how the Respondent arrived at the decision to declare the Claimant redundant.
34. Did the low business affect the Claimant only? Was he working alone in his department?
35. Equally, the Respondent tendered no evidence that it gave the Labour Officer or the Claimant the requisite one month's notice of the redundancy.
36. By making reference to low business, the Respondent was making a redundancy statement and was accordingly obligated to comply with the mandatory conditions set out in Section 40(1) of the [Employment Act](#), 2007, highlighted by the Respondent's counsel.
37. These conditions include one month's notice to the employee or the trade union, if the employee is a member setting out the reasons for and extent of the redundancy, selection criteria based on seniority in time, skill, ability and reliability of each employee affected, fairness to all affected employees whether or not members of a union, in case of a CBA in force, payment of leave in cash, one months notice or pay in lieu of notice and severance pay of not less than 15 days for each completed year of service.
38. Evidently, the Respondent did not comply with the requirements of Section 40(1) of the [Employment Act](#) as regards notice of the redundancy as Section 40(1)(b) of the Act is unambiguous that where an employee is not a member of a trade union (as was the case in this case), the employer notifies the employee personally in writing.
39. The Respondent tendered no evidence of the written notice to the Claimant.
40. Second, it did not avail evidence of a selection criteria, evidence of consultations on the impending redundancy or payment of severance pay.
41. In *Freight In Time V Rosebell Wambui Munene* (2018) eKLR, the Court of Appeal was unequivocal that provisions of Section 40(1) of the [Employment Act](#) are mandatory.
42. (See also *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others* (2018) eKLR.)
43. Needless to belabour, the provisions of Section 45 of the [Employment Act](#), 2007 apply redundancies and the employer must demonstrate that it had a substantive justification for the redundancy and conducted it fairly. (See *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others* (Supra).
44. In the instant case, the Respondent has not evidentially demonstrated how low the business was to justify declaring the Claimant redundant without the requisite notice.
45. It has failed to demonstrate that it conducted the process fairly and the Claimant was involved.



46. In sum, since the Respondent did not comply with the mandatory requirements of Section 40(1) of the Employment Act, 2007, the purported redundancy did not pass muster and transitioned to an unfair termination of the Claimant's employment.
47. To the question whether termination of the Claimant's employment was unfair, the court returns that it was for want of a substantive justification and fair procedure.
48. Whether the Claimant is entitled to the reliefs sought.

Declaration

49. Having found that termination of the Claimant's employment on account of redundancy was unfair, a declaration that it was an unfair dismissal is merited.

Terminal benefits Kshs.493,840.0

(i) 25 days worked in April 2016

50. The uncontroverted evidence of the Claimant is that his employment was terminated on 25th April, 2016 and the Respondent's letter to the County Labour Office has an even date.
51. To its credit, documents on record reveal that the Respondent had agreed to pay the Claimant's salary for the entire month of April.
52. The Claimant, thus qualified for salary for 25 days and the same is awarded.

One month's salary in lieu of notice.

53. This is an entitlement of the Claimant in a redundancy as no notice was given by the Respondent and the Respondent had factored it in its computation of the Claimant's dues and it is awarded Kshs.16,250/=.

8 months' lost salary

54. The Claimant tendered no evidence of entitlement to the salary claimed under this head and had not earned it. It is an anticipatory benefit.
55. As his one (1) year contract of employment was terminable by notice, there was no representation that he would serve for the entire duration.
56. More significantly, a claim for anticipatory earnings or benefits generally lacks legal anchorage as held in D.K. Njagi Marete V Teachers Service Commission (Supra) and Elizabeth Wakanyi Kibe V Telkom Kenya Ltd (Supra).
57. The prayer lacks justification and is declined.

House allowance Kshs.53,625/=

58. Although the Claimant's written statement stated that he was not paid any house allowance, and was not housed by the Respondent and the Claimant's counsel submitted as much stating that he was entitled to at least 15% of the basic salary as housing allowance. However, the Claimant did not contest the contents of the agreement he signed on 2nd January, 2016 whose Clause I is emphatic that;

“Your salary will be Kshs.16,250/= per month including 15% house allowance”.



59. According to counsel, since the clause is referenced as “Basic Salary” the sum of Kshs.16,250/= was basic pay.
60. However, the explanatory sentence is explicit as to what the intentions of the parties were.
61. The court is in agreement with the Respondent’s counsel’s submissions that the Claimant’s salary was consolidated as Clause I of the contract of employment was not ambiguous for the Contra Preferentem rule of construction to apply.

The prayer is unsustainable and is declined.

Pro rata leave for 4 months’

62. The Respondent did not contest this claim and had included it in its computation of the Claimant’s terminal dues and the same is awarded.

Service Kshs.8,125/=

63. The Claimant tendered no evidence of entitlement to service pay.
64. More significantly, copies of the payslip on record shows that the Respondent was deducting NSSF dues from the Claimant’s salary in accordance with Clause 14 of the contract of employment.

The prayer is declined.

12 months compensation

65. Having found termination of the Claimant’s employment was unfair for non-compliance with provisions of the Employment Act, 2007, the Claimant is entitled to the discretionary relief under Section 49(1)(c) of the Act.
66. In arriving at the level of compensation, the court has considered the fact that;The Claimant was an employee of the Respondent for about 2 years in total, which is fairly short time.The Claimant did not contribute to the termination of his employment.The Claimant had no recorded warning or misconduct.The Claimant did not express his wish to remain in the employment of the Respondent or appeal the decision.
67. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair.
68. It is noteworthy that the Respondent’s uncontroverted evidence is that the Claimant owed it Kshs.36,000/=, a loan he had taken from the employer, a fact the Claimant did not contest and according to the Respondent may have been the reason why the Claimant refused to collect his dues as the amount due to him was negative.
69. The amount is recoverable from his dues as pleaded, Kshs.36,000/=.
70. In the upshot, judgement is entered in favour of the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant’s employment was unfair.
 - b. Salary for 25 days worked in April 2016.
 - c. One month’s salary in *lieu* of notice.
 - d. Equivalent of 3 months gross salary.



- e. Costs of this suit.
- f. Interest at court rates from date hereof till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

