



**Ngatia v Wonder Feeds Limited (Cause 331 of 2015)
[2024] KEELRC 295 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 295 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 331 OF 2015
DN NDERITU, J
FEBRUARY 15, 2024**

BETWEEN

JOSEPH MWANGI NGATIA CLAIMANT

AND

WONDER FEEDS LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 30th October, 2015 filed on the same date through Maragia Ogaro & Co. Advocates. As expected, the memorandum of claim is accompanied with a verifying affidavit, a list of witnesses, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking the following reliefs -
 - a. Underpayments Kshs.58,566.00/=
 - b. Leave Kshs.23,271.00/=
 - c. Gratuity Kshs.52,303.00/=
 - d. Compensation Kshs.139,303.00/=Total Kshs. 273,443.00/=
3. The respondent entered appearance on 25th January, 2016 through Wamaasa, Masese, Nyamwange & Co. Advocates. A list of documents was filed on 25th January, 2016 alongside a bundle of copies of the listed documents. A witness statement by Edwin Wekesa was filed on 26th February, 2021 but no response to the claim or defence was filed as there is none on record.



4. An application dated 22nd October, 2022 was filed on behalf of the claimant seeking that his sister SUSAN WAIRIMU be allowed to adduce evidence and testify for on behalf of the claimant who was involved in a road accident and consequently suffered memory loss. Susan is a sister and guardian of the claimant having obtained letters of guardian ad litem. The application was not opposed and the same was, by consent, allowed as prayed on 15th December, 2022. Her witness statement dated 28th December, 2022 was filed on 11th January, 2023 and she testified as CW1.
5. This cause came up for hearing on 13th March, 2023 when CW1 testified and the claimant's case was closed. On 16th March, 2023, the respondent's case was closed without their witness testifying as he failed to appear in court after the matter had been adjourned severally.
6. Counsel for both parties summed up the case for their respective parties by way of written submissions. Mr. Maragia, counsel for the claimant, filed his submissions on 22nd March, 2023, followed with supplementary submissions filed on 26th April, 2023. Miss Cheloti, counsel for the respondent, filed her written submissions on 24th April, 2023.

II. The Claimant's Case

7. The claimant's case is expressed in the memorandum of claim, oral and documentary evidence adduced through CW1, and the written submissions by his counsel. The same is summed up hereunder.
8. In the memorandum of claim, the claimant pleads that he was employed by the respondent on 4th March, 2006 as a general worker earning Kshs.205/= per day. He, however, pleads that he was unfairly and unlawfully terminated on 1st September, 2015.
9. The claimant states that from 4th March, 2006 to 2nd April, 2007 he was earning Kshs.205/=; from 3rd April, 2007 to 3rd June he was earning Kshs.230/=; and, from 4th June, 2008 to 5th February 2009, the claimant still earned Kshs.230/= per day. Later on, the claimant was offered permanent and pensionable terms earning a gross salary of Kshs.9,104/= which was later increased to Kshs.12,500/= in January 2015, subject to statutory deductions, as per the letters of appointment dated 29th February, 2012 and 1st July, 2013, respectively.
10. The claimant avers that he did not take leave from 4th March, 2006 to 1st July 2013. He alleges that he was underpaid from 4th March, 2006 to 1st September, 2015 when he was allegedly terminated unfairly and unlawfully.
11. The claimant contends that he was terminated from his position based on an unfounded suspicion that he was responsible for the loss of bags and scrap metal. The claimant alleges that he was harassed and tormented by the respondent and on 30th August, 2015, he reported the respondent's actions towards him at the Nakuru Central Police Station. As a result, the respondent's administration was summoned to the police station. On 31st August, 2015, the respondent admitted to mistreating the claimant by falsely accusing him of theft and performing wrongful prayers and/or sorcery upon him. In compensation for the mistreatment, the claimant was awarded Kshs.40,000/= to which the respondent obliged and settled promptly.
12. The claimant states that the respondent subsequently withdrew the theft case and other accusations mentioned in a letter dated 24th August, 2015. The claimant was terminated on 1st September, 2015, even though the accusations of theft were unfounded and yet no new offence was mentioned in the letter of termination.



13. The claimant avers that his dismissal was not proceeded by any letter of warning and that he was not invited to any disciplinary hearing or process wherein he could have defended himself. It is pleaded that the resultant termination was unfair and unlawful.
14. The claimant initiated a claim with the county labour office, Nakuru, vide a letter dated 28th September, 2015 and the respondent was invited to appear in the labour offices on 16th October, 2015 but it declined to honour the summons.
15. It is pleaded that despite the demand made and notice of intention to sue issued, the respondent failed and or refused to heed the calls for an out-of-court settlement leading to the filing of this cause in court.
16. In her testimony in court, CW1 reiterated the foregoing pleadings and adopted her witness statement dated 28th December, 2022 that was filed in court on 11th January, 2023 as her evidence in-chief. She produced the listed documents as exhibits 1 to 13.
17. She stated that the claimant is in poor health, having lost his memory as a result of a road accident, and as such he could not testify in court.
18. In cross-examination, CW1 confirmed that the dispute was not settled in the labour office as alleged by the respondent. She stated that the claimant did not receive the cheque for Kshs.28,405/= dated 13th November 2015, which was allegedly issued by the respondent in settlement of the claimant's terminal dues.
19. It is the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment that is dedicated to the same.

III. The Respondent's Case

20. On 16th March, 2023, the cause came up in court for defence hearing. Counsel for the respondent applied for adjournment but the application was denied for lack of merits as the defence had made similar applications earlier on. However, by consent of counsel for both parties, the witness statement by Edwin Wekesa dated 25th February, 2021, was admitted in evidence, and the documents in a list dated 25th January, 2016 were admitted in evidence and marked exhibits 1, 2, and 3.
21. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs. The submissions by the counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions By Counsel for the Claimant

22. The claimant's counsel identified the following three broad issues for determination - Whether there was an employment relationship between the claimant and the respondent and the nature thereof; Whether the claimant was unfairly and unlawfully terminated; and, whether the claimant is entitled to the reliefs prayed for.
23. On the first issue, it is submitted that there was an employer-employee relationship between the respondent and the claimant based on the evidence on record. It is submitted that the claimant was engaged as a general worker, first as a casual in 2006 but by 2013 he was a permanent and pensionable employee but still as a general worker.



24. On the second issue, it is submitted that the claimant was unfairly terminated on 1st September, 2015 as he was not given a hearing to defend himself against the allegations of theft or any other allegations or charges.
25. Counsel submits that sections 35(1)(c) & (5), 36, 41(1) & (2), 43(1) & (2), 45(1), (2) & (5) of the *Employment Act* (hereinafter “the Act”) were breached and violated by the respondent in the termination of the claimant. Counsel submits that while the claimant received two payments of Kshs. 40,000/= and Kshs.16,174/= respectively, the same were not paid in compensation for the unfair and unlawful termination.
26. On the third issue, it is submitted that the claimant is entitled to house allowance as it is a statutory right as provided for in section 31 of the Act and counsel has cited the case of Grain Pro Kenya Limited V Andrew Waithaka Kiragu (2019) eKLR wherein the court tackled the issue of payment of house allowance.
27. In the supplementary submissions filed on 29th April, 2023, counsel urges that the claimant was summarily dismissed without prior communication from the respondent. The only evidence of dismissal is a letter of termination that states that the reason for the termination was known to the claimant. It is submitted that there was no proof of theft against the claimant or prima facie evidence thereof. The decision in Kenya Plantation & Agriculture Worker Union V Sotik Highlands Tea Estate Limited (2016) eKLR is cited in support of the argument that an employee ought to be made aware of the reason of termination and the evidence gathered besides being afforded an opportunity to defend himself.
28. In conclusion, counsel submits that the claimant has proved his case to the required standard rendering him deserving of the reliefs sought.

V. Submissions by Counsel for the Respondent

29. The respondent’s counsel identified two issues for determination - Whether the summary dismissal was unfair, and, if the answer is in the affirmative; What the appropriate relief is, and/or; Whether the claimant should be granted the reliefs sought.
30. On the first issue, counsel submits that section 41 of the Act provides for procedural fairness in employment before dismissal or termination. It is argued and submitted that the letter of termination availed and produced in court explained the claimant’s misconduct thus allegedly complying with section 41 of the Act. Counsel urges that there was an exchange of correspondence between the claimant and the respondent thus the respondent had complied with procedural fairness as stipulated under section 41 of the Act.
31. On substantive fairness, counsel has cited sections 43, 45 and 47 of the Act which imposes a statutory duty on the employer to justify reasons for terminating the services of an employee which reasons should be valid and fair. Counsel has cited Kenya Plantation & Agricultural Workers Union V Sotik Highlands Tea Estate Limited (2016) eKLR and section 47(5) of the Act. Counsel submits that the claimant was terminated on sound substantive grounds and that the procedural steps taken complied with the law. Counsel has also cited Samuel Chacha Mwita V Kenya Medical Research Institute (2014) eKLR and Margaret A. Ochieng V National Water & Pipeline Corporation (2016) eKLR in support the arguments in this regard.
32. On reliefs, counsel submits that the claimant was not underpaid and as per the evidence adduced the claimant was allegedly paid within the terms of his employment contract which he signed for. Counsel urges that the claimant was paid within the scales of engagement and his claim for underpayments is



dismissed as without legal basis or justification. Counsel has relied on Mombasa Civil Appeal No. 82 of 2005, Central Bank of Kenya V Davies Kivieko Muteti (2009) eKLR and Duke Onchiri Mose V Rosoga Investments Limited (2017) eKLR in taking the position that having been fairly and lawfully terminated the claimant is not entitled to any of the reliefs sought.

VI. Issues for Determination

33. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence presented from both sides, and the written submissions by counsel for both parties. In the considered view of the court the following issues commend themselves to the court for determination -
- a. What was the nature of the employment relationship between the claimant and the respondent and what were the terms thereof?
 - b. Was the termination of the claimant by the respondent unfair and unlawful? And,
 - c. If (b) above is in the affirmative, is the claimant entitled to the reliefs sought?
 - d. Costs?

VII. Employment

34. A casual employee is defined under Section 2 of the Act as -
- “an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”.
35. From the above definition, a casual employee is engaged in for no more than 24 hours at any given time. Section 35(1)(a) of the Act, provides that either party can terminate such an engagement at the end of the day without notice.
36. Section 37(1) of the Act provides that -
- (1) Notwithstanding any provisions of this Act, where a casual employee—
 - (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
 - (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
 - (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.



37. From the foregoing provisions of the law, where a casual employee has been continuously engaged beyond the stated period, his/her employment status is converted from casual to permanent. The employee is then entitled to one month's notice in accordance with section 35(1) (c) of the Act. The terms of the employment become those of a permanent employee.
38. The claimant herein was initially employed as a general worker on a fixed term contract that was renewed from time to time. The claimant produced such contracts for the period from March, 2006 to about June, 2013. Vide a letter dated 24th June, 2014, the claimant was confirmed as a permanent employee of the respondent. Subsequently, the claimant was issued with a letter of appointment dated 1st July, 2013 spelling the terms and conditions of his engagement. The letter, besides declaring the claimant a permanent and pensionable employee of the respondent, also provided for the following – Basic pay Kshs.9,565/=; House allowance Kshs.1,435/=; Gross pay Kshs.11,000/=.
39. The above contract formed the basis and foundation of the claimant's employment relationship with the respondent until his termination on 29th September, 2015.
40. Clearly and evidently, as at the time of termination, the claimant was a permanent and pensionable employee with all the rights and privileges appurtenant to such employment. It is so held and declared.

VIII. Termination

41. Section 45(1) & (2) of the Act provides that the termination of an employee's contract of service is considered unfair if the employer fails to demonstrate and prove that the termination was based on valid and fair reasons related to the employee's conduct, capacity, compatibility, or the employer's operational requirements. Additionally, an employer must apply a fair procedure before, during, and after the termination based on the rules of natural justice as expounded under Article 47 of *the Constitution, Fair Administrative Action Act*, and the various provisions of the Act, among them those cited in the foregoing paragraphs of this judgment.
42. The claimant herein was accused of stealing bags and scrap metal. However, those allegations were found to be baseless due to insufficient evidence and, in fact, as per the evidence on record, the respondent compensated the claimant in the sum of Kshs.40,000/= after it was concluded that the allegations were baseless and unfounded.
43. It is the finding and holding of the court that the respondent did not apply the procedural and substantive fairness as provided for under sections 41 and 43 of the Act. There is no reason that was given for the termination and the claimant was not given a hearing to defend himself in accordance with the law. In the material and relevant part of the letter of termination, the respondent stated that "We ... hereby terminate your services with immediate effect; this has been necessitated due to the reasons best known to yourself." This is truly the epitome of denial of substantive and procedural fairness that this court cannot countenance.
44. There is now a plethora of case law on what constitutes substantive and procedural fairness – See for example *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* where the court held that -

“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 to effect the termination.”



45. In Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR it was held that: -
- “What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.”
46. In Beatrice Nyambune Mosiria V Judicial Service Commission [2019] eKLR, the court held that -
- “In employment matters, the employer has to prove both valid reason and fair procedure.”
47. The court has said enough in demonstrating that the claimant was unfairly and unlawfully dismissed as the respondent denied him both substantive and procedural fairness in accordance with the law.
48. It is important to clarify the following to disabuse employers of the notion that an employee may be terminated or dismissed “without giving any reason”. This quotation cannot be a valid or lawful term of a contract of service as it is antithesis to the provisions of the law that requires that an employee be subjected to substantive and procedural fairness. No employee should be terminated without valid and lawful reason and before being subjected to lawful procedural fairness in accordance with the provisions of the law cited over and over again in the foregoing paragraphs of this judgment. It is not the duty of this court to rewrite employment contracts between parties, however, any contract that contains the above cited term runs the risk of being declared null and void to the extent of its inconsistency with the law. The part of the contract between the parties herein that provides as above quoted is hereby declared null and void to that extent.

IX. Reliefs

49. Having found and held that the claimant was wrongfully, unfairly, and unlawfully dismissed the court shall now consider the reliefs sought as hereunder.
50. Section 90 of the Act states as follows -
- “Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
51. From the above provision, the statutory limitation within which employment claims shall be filed is three years counting backwards from the date that the cause of action arose, and the claim shall be filed within three years. Counting backwards from 1st September, 2015 three years run back to 1st September, 2012 or thereabout. Any claim beyond that period is statutorily time barred.
52. Prayer (a) is for underpayments in the sum of Kshs.58,566/= allegedly for the period from May, 2006 to August, 2015. In view of the holding above, the court can only bend backwards to September, 2012 in consideration of what may be payable to the claimant. However, before doing so, the court has to inquire into whether indeed the claimant was underpaid as alleged.
53. Legal Notice (LN) 71 of 2012 which came into operation on 1st May, 2012 provides that the minimum monthly wage of a general labourer within the former Nakuru Municipality was Kshs.7,915.90 or Kshs.379.30 per day. As noted in an earlier part of this judgment, from 1st March to 24th December, 2012 the claimant was on a fixed term contract with a basic salary of Kshs.7,000/= and house allowance



of Kshs.1,050/= making gross of Kshs.8,050/=. This pay subsisted until 1st July, 2013 when the claimant entered into permanent and pensionable terms at a monthly basic salary of Kshs.9,565/= plus house allowance of Kshs.1,435 /= making a gross of Kshs.11,000/=. LN 197 of 2013 which came into operation on 1st May, 2013 indicates that the regulated minimum basic pay for workers in the category of the claimant was Kshs.9,024.15 or Kshs.432.40 per day. Of course, the daily rate does not apply to the claimant as he was on monthly pay for the entire material period.

54. The court finds and holds that the claim for underpayments for the period between 1st May, 2012 to April, 2013 of Kshs.12,627/= has merit, as well as that for the period from 1st May to August, 2015 of Kshs.2,540.60, making a total of Kshs.15,167.20. This is the amount awarded to the claimant under this head.
55. Item (b) is for leave pay in the sum of Kshs.23,271/= allegedly for the period from 2006 to April, 2012. This claim is denied in its entirety as it is without the limitation period.
56. Item (c) is for gratuity in the sum of Kshs.52,303/=. Now, as the word gratuity implies, this is payment made by an employer to a departing employee in appreciation of services rendered. It is only payable in two situations. Firstly, gratuity shall be paid if it is part and parcel of the terms of the contract and the employee has met the conditions, if any, for payment of the same. Secondly, gratuity may be paid voluntarily at the instance of an employer in appreciation of the services rendered by a departing employee – See Pathfinder International Kenya Limited V Stephen Ndegwa Mwangi (2019) eKLR, Bamburi Cement LTD V Farid About Mohamed (2016) eKLR, and H. Young & Company EA Limited V Javan Were Mbago (2016) eKLR.
57. The last contract under which the claimant served dated 1st July, 2013 does not provide for gratuity and the respondent has not voluntarily agreed or undertaken to pay any gratuity. In the circumstances, the claim for gratuity is denied.
58. Item (d) is for compensation for unfair and unlawful termination. The claimant is seeking the maximum award equivalent to 12 months gross pay under section 49(1) of the Act. Considering the factors provided for under the Act for the consideration by the court in making an award under this head, the court notes that the claimant served the respondent for a considerably lengthy period of time. Firstly, from 2006 to 2012 under casual terms or various fixed terms contracts and, secondly, on permanent and pensionable terms from 2013 to the time of his termination in 2015. It is noted that the respondent denied the claimant fair hearing before termination; failed to settle the terminal dues; yet, the claimant did not contribute to his termination in any proved or demonstrated way.
59. In the considered view of the court, this is an appropriate cause for award of the maximum compensation in the sum of Kshs.139,303/= as prayed. It is so held and awarded.
60. There is no evidence or prove that any monies allegedly paid in the labour office was transmitted to the claimant, in settlement of the specific awards made herein, and as such there is no set-off against the awards made above.

X. Costs

61. Costs follow the event and the claimant is awarded the costs of this cause.

XI. Orders

62. The court enters judgment in favour of the claimant in the following terms –



- a. A declaration be and is hereby made that the termination of the claimant by the respondent was unfair and unlawful.
- b. The claimant is awarded the following –
 - i. Underpayments Kshs.15,167.20
 - ii. Compensation Kshs.139,303.00
 - Total Kshs.154,470.20
- c. The claimant is awarded costs of the cause and interest.
- d. All the other claims are denied and dismissed.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 15TH DAY OF FEBRUARY, 2024.

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DAVID NDERITU

JUDGE

