



**Ogari v Bandari Football Club (Cause E081 of 2023)
[2024] KEELRC 1413 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E081 OF 2023
M MBARŪ, J
MARCH 20, 2024**

BETWEEN

ALBERT OBEGI OGARI CLAIMANT

AND

BANDARI FOOTBALL CLUB RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent through a contract of employment dated 21st November 2021 for a 3-year term as the team manager at a gross salary of Ksh. 89,824 per month. The contract was to end in November 2024.
2. The claim is that despite working diligently, on 6 July 2023 the respondent, without good cause or justification issued the claimant with a termination notice. There was no prior notice, hearing, or any reasons given for such drastic action. The claimant had just completed his annual leave and before reporting back received notice terminating his employment. The claim is for the following dues;
 - a) Notice pay Ksh. 89,824;
 - b) Unexpired term contract of 505 days Ksh. 1,744,658.88;
 - c) Compensation for mental anguish and reputational damage;
 - d) Costs of the suit.
3. The claimant testified in support of his case that he was serving under a 3-year contract with the respondent from 1st November 2021 and due to end on 1st November 2024. He worked diligently without any issue being addressed with him. he took a break after a productive season and was to resume work in July 2023 but on 6 July 2023 he received notice terminating his employment. He was shocked and distressed since he had no prior notice or any performance challenges discussed with him.



He has since been unable to secure new employment and suffered reputational damage which is crucial in the football sector and hence the claims made should be awarded.

4. In response, the respondent admitted that there was an employment contract with the claimant and it was a term thereof to terminate employment by notice or payment of two months in lieu thereof. As the team manager, the contract allowed termination of employment for breach of the agreement or upon the required notice. There was no unfair termination of employment as alleged, the respondent applied the agreed terms of the contract and issued notice on 6 July 2023 and paid instead of the due notice period. The claimant has since acknowledged payment for two months in notice pay.
5. The response is that the respondent is a football club required to conform with the requirements of having officials that meet the FKF, CAF, and FIFA Statutes and the club's union requirements. The respondent followed the terms of the contract and released the claimant in accordance with the law and the claims made are without foundation and should be dismissed with costs.
6. In evidence, the respondent called Twaha Mbarak the chairman who testified that the claimant was under a 3-year contract with the response ending 1st November 2024. The contract allowed for the termination of employment upon payment for two months which the respondent did. The respondent issued the claimant notice and also paid instead of notice in accordance with the agreement.
7. At the close of the hearing, both parties filed written submissions which are analyzed and taken into account in the findings.
8. The respondent does not challenge the employment relationship. This was secured through a contract running from 1st November 2021 to 1st November 2024 for 3 years. The contract had terms and conditions including clause 7 which allowed termination of employment upon notice or payment of two months' salary in lieu of notice thereof.
9. An employment contract is not only regulated between the parties, it must also meet the threshold of the applicable law, the [Employment Act](#), 2007 which the parties agreed to be bound. Clause 8 allowed for dispute resolution through Kenyan law. Even without the direct reference to the [Employment Act](#), 2007 the parties being Kenyan and employment in Kenya, the applicable law about securing employment rights and benefits is the [Employment Act](#), 2007 (the Act).
10. Under Section 35 of the Act, the employer is allowed to terminate employment by notice or payment in lieu thereof. However, the Act must be seen as a whole. Termination of employment must be valid and genuine reasons. The reasons leading to severing employment relationships are regulated under Sections 40, 41, 43, 44, and 45. There must be notice before termination of employment. The employee must be allowed to attend and address any matter of alleged misconduct or gross misconduct.
11. Even where parties agree on the modalities for termination of employment, the legal threshold and basic minimum must be protected.
12. The only defense given by the respondent is that the employment contract provides for termination of employment or payment in lieu of notice. This is no longer sufficient under Kenyan law. the employer must give reasons leading to the decision to terminate employment. the reasons must be valid, reasonable in the circumstances, and valid by Section 43 of the Act. These requirements are lacking in this case. The court finds the respondent failed to adhere to the mandatory provisions of Sections 41, 43, and 45 of the Act. This resulted in the unfair termination of the claimant's employment.
13. The claimant is entitled to notice pay which was paid immediately and he admitted receipt of a month's gross salary.



14. The claimant had a 3-year contract and had not expired. He is seeking payment for the balance of the term.
15. Section 49 of the Act allows the court to grant all or any of the remedies outlined thereof including the wages which would have been paid had the employee been allowed to serve under his term contract. Section 49(1)(b) requires that;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to under the contract; or ...
16. In this context, the claimant's primary remedy was payment for the unexpired term of his contract.
17. In the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) (Civil Appeal 240 of 2018)* [2021] eKLR the court held that under Section 49 of the Act, the court is allowed to award compensation or any other relief or as the case may require. The Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR reiterated these findings.
18. In this case, the finding that there was unfair termination of employment, the claimant had 15 months before his employment contract terminated. He was paid in lieu of notice for two months, reducing such time by 13 months. As a seasoned team leader, he was required to mitigate the loss of employment and secure new employment as held in the case of *Joseph Mwaniki Nganga v United Millers Limited* [2022] eKLR and *Peri Formwork Scaffolding v White Lotus Projects Limited* [2021] eKLR. Despite termination of employment, the claimant retained his skills and should have made them available in the market. Putting these factors into consideration, the distress and reputational losses, an award for ten months' gross salary is hereby found justified.
19. The claimant was earning Ksh. 89,824 per month which amounts to Ksh. 898,240 in compensation.
20. The claimant is seeking exemplary damages for loss of employment. This is addressed and redressed as outlined above.
21. Accordingly, judgment is hereby entered for the claimant against the respondent with a declaration that employment was terminated unfairly; compensation awarded at Ksh. 898,200; and costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

