



**Mutie v Maxam Limited (Employment and Labour Relations Cause
273 of 2018) [2024] KEELRC 673 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 673 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 273 OF 2018**

**MN NDUMA, J
MARCH 14, 2024**

BETWEEN

JOHN KIMWELE MUTIE CLAIMANT

AND

MAXAM LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 7/3/2018 seeking for an order in the following terms:
 1. A declaration that dismissal of the claimant dismissed from the respondent's service was unfair and unlawful.
 2. An order for the respondent to pay the claimant his terminal dues and compensation in the sum of Kshs. 584,500/=.
 3. Costs and interest to be paid.
2. The claimant (CW1), adopted a witness statement filed on even date as his evidence in chief and explained to court that he was employed by the respondent on 1/9/2014 as a warehouse assistant. That he worked in that capacity continuously and with diligence until the 29th March 2017, when he was served by the respondent with a letter of suspension for an indefinite period. That on 26th and 27th March 2017, the claimant had taken two days off to attend to his sick wife and had resumed work on 29th March 2017, when he was handed the letter of suspension.
3. The letter of suspension was produced before court and read:

“Following fraudulent actions that we experienced on 28th March 2017, within the ware house, the company has lost stock items. Pending investigations into this matter, you are hereby suspended without pay until further notice.”



4. CW1 testified that he was shocked by the suspension because he was not at work on 28th March 2017 and was not aware of the alleged fraudulent actions that took place in his absence.
5. CW1 stated, which evidence was confirmed by RW1, that he was not issued with a notice to show cause and was not called for a disciplinary hearing. However on 31st March 2017, the respondent terminated the employment of the claimant.
6. At the time, the claimant earned Kshs. 15,000/= per month. The claimant denied having done anything wrong to warrant termination of his employment. Claimant stated the termination was unlawful and unfair and that he be compensated in respect thereof. The claimant also seeks payment of terminal benefits including, one month salary in lieu of notice; unpaid salary for the month of March 2017 Kshs. 15,000/=; payment in lieu of untaken leave days Kshs. 37,500/= and unpaid 4 hours overtime for 2 ½ years since he used to work from Monday to Saturday from 8 a.m. upto 9 p.m. and was not paid overtime and all in the sum of Kshs. 337,500/=.
7. Under cross-examination by Mrs. Wambui Advocate, for the respondent, the claimant stated that he worked overtime since he checked in at 8 a.m. in the morning and checked out at times at 11 p.m. in the night. That the clocking in and out records were kept by the respondent and so had no record to produce before court. That the claimant asked the human resource officer why he was being suspended and was informed of the alleged fraud that took place at the warehouse in his absence on 18/3/2014. CW1 said on 29/3/2017 he wrote a demand letter asking to be paid salary for March 2017. CW1 said he did not receive the letter of termination and was not paid any terminal benefits. CW1 said the respondent, said there was nothing to be paid. CW1 stated that he should be paid as prayed.
8. RW1, Benson Wandahi testified for the respondent. He said he was an internal auditor at the respondent's work place. He adopted a witness statement dated 5/11/2018 as his evidence in chief. RW1 stated that the claimant was employed by the respondent on 1/11/2015 as a warehouse assistant at a monthly salary of Kshs. 15,000/=. That the claimant was on a fixed term contract, renewable.
9. RW1 testified that on 28/3/2017, during stock taking he discovered some stock, namely one Glenlivet 15 700ml; one Jameson 350 ml, one Jameson 750 ml, one Olmeca Fusion 750 ml and one Captains Gin 20CL amounting to Kshs. 141,546.00 were missing from the warehouse.
10. That the respondent summoned all the warehouse assistants namely Wilson Mutinda; Evans Malonza; Benedict Musa and the claimant since they were in-charge.
11. The respondent reported the theft to the Ruiru Police Station on 28/3/2017 and the incident was booked in the occurrence book as OB number 26/28/03/17. That Evans Malonza and Benedict Musa, the two gentlemen who were manning the ware house on that particular day were charged in court and there was an ongoing criminal case number 263/124 of 2017 against the two.
12. That the claimant and Wilson Mutinda were absent on the particular day however, the two were suspended from work to allow further investigations of the theft.
13. RW1 admitted that he did not serve the claimant with a notice to show cause but he verbally asked the claimant and Wilson Mundinda to explain why the respondent was losing stock every day. That Wilson Mutinda explained himself and is still working while the claimant responded by asking the respondent to pay him his salary on 30/3/2017 and also to offer him another position in the company.
14. W1 under cross-examination by Mrs. Omamo Advocate for the claimant admitted that the claimant was not at work on the day the theft took place and that no investigation report was produced before court. That the respondent did not issue the claimant with a notice to show cause nor was the claimant



called to a disciplinary hearing to explain himself. RW1 admitted that the claimant exonerated himself from the theft since he was not at work on that day.

Determination

15. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1.
16. The court has found the following facts to have been proved on a balance of probability:-

That the theft took place and/or was discovered at the warehouse of the respondent on 28/3/2017. That the claimant who worked as a warehouse assistant with the others was not on duty on that day. That the two colleagues who were on duty on 28/3/2017 were charged with the offence of theft by servant which charges are still pending before a magistrates' court.
17. That the claimant was suspended on 29/3/2017 when he returned from two days off, for an indefinite period. That the respondent did not recall the claimant back to work nor did it issue the claimant with a notice to show cause to answer to any charges levelled against him at work. The claimant was also not called to a disciplinary hearing to explain himself. However, on 29/3/2017 the respondent terminated the employment of the claimant without notice or payment in lieu of notice. The respondent did not pay the claimant any terminal benefits upon termination.
18. The court finds that the respondent violated sections 36, 41, 43 and 45 of the *Employment Act*, 2007 in that, it has not proved any valid reason to terminate the employment of the claimant and did not follow a fair procedure before terminating the employment of the claimant.
19. The claimant has proved on a balance of probability that the termination was unlawful and unfair.
20. In *Teresa N. Peter versus Kitui Teachers Service and Credit Co-operative Society* [2014] eKLR, the court held:-

“An employee in suspension remains innocent until proved otherwise. In addition, such an employee has a legitimate expectation that they will be given an opportunity to respond to any adverse findings, arising out of the investigations conducted by the employer.”
21. The respondent failed in the above respects and as a result fell short of the aforesaid provisions of the *Employment Act* 2007.

Terminal benefits

1. Notice pay

22. The respondent failed to rebut the evidence by the claimant that it had not paid the claimant in lieu of notice pay having terminated the employment of the claimant without notice. The court awards the claimant Kshs. 15,000/= in lieu of notice

2. Salary for March 2017

23. The claimant has proved that he was unlawfully terminated on 29/3/2017 and was not paid any salary for the month of March 2017. The court awards the claimant Kshs. 15,000/= being salary of the said month.



3. Leave pay

24. The claimant adduced credible evidence that he had not been granted annual leave for the 2 ½ years he served the respondent. RW1 did not produce any documents to rebut that claim.

The court finds that the claim has been proved on a balance of probability especially in view of the provision of section 10(1) (a) (i) which obliges an employer to provide an employee with written particulars of any terms and condition relating to any of the following:-

- i. Entitlement to annual leave as read with 10(7) which provides:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.” (Emphasis made).

25. In the present case, the claimant produced two written contracts dated 30/11/2016 which was for the period 1/9/2016 to 31/12/2016 and another dated 1/11/2015 which was for the period 1/11/2015 to 30/4/2016. He had no written document covering the period his employment was terminated in March 2017. RW1 in his testimony did not adduce any evidence to rebut the testimony by the claimant on matters of leave. The court finds that the claimant has proved on a balance of probability that he was in the least entitled to payment of untaken leave for the period 1st November 2015 to the date of termination 29/3/2017, a period of one year and 5 months but not two and a half years in the sum of Kshs. 22,500/=

4. Overtime

26. The claimant was obligated to prove claims of any unpaid overtime while he worked for the respondent. The claimant did not produce any evidence written or otherwise that he had sought to be paid any worked overtime and that the respondent had failed to pay the claimant. It does not suffice for an employee to allege non-payment of an item not contained in the written contract of employment or in any particulars of employment after separation with the employer without any record of such a claim having been made during the tenancy of the employment.

27. The court finds this claim to lack merit and is dismissed.

5. Compensation

28. The claimant’s employment was unlawful and unfairly terminated by the respondent. The claimant is entitled to compensation in terms of section 49(1) (c) and (4) of the [Employment Act, 2007](#). In this regard, the claimant had faithfully served the respondent from 1/9/2014 to 29/3/2017 though on fixed term contracts but without a break. No fixed contract was produced for the last period of his employment. The claimant had expectation of continued employment. The claimant lost source of income and support without notice, unfairly. The claimant did not contribute to that unlawful termination. The claimant was not paid any terminal benefits upon termination. He was not compensated for the loss of his employment and income. The court refers to the case of *Alphonse Maghaga mwa Chonye versus Operation 680 Ltd [2013] eKLR* together with the facts set out above and awards the claimant the equivalent of five (5) months’ salary in compensation for the unlawful and unfair termination of his employment in the sum of Kshs. 90,000/=.

29. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- a. Kshs. 15,000/= in lieu of notice



- b. Kshs. 15,000/= arrears salary
- c. Kshs. 22,500 in lieu of leave days not taken.
- d. Kshs. 90,000/= in compensation
Total award Kshs. 144,500/=
- e. Interest at court rates from date of judgment till payment in full.
- f. Costs of the suit

DATED AT NAIROBI THIS 14TH DAY OF MARCH 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Ms. Omondi for claimant

Ms. Mambori for respondent

Mr. Kemboi Court assistant

