



REPUBLIC OF KENYA



**Mbego v Tamani Construction Company Ltd (Cause E657 of 2022)
[2024] KEELRC 619 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 619 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E657 OF 2022
JK GAKERI, J
MARCH 13, 2024**

BETWEEN

MICHAEL ODHIAMBO MBEGO CLAIMANT

AND

TAMANI CONSTRUCTION COMPANY LTD RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 15th September, 2022 alleging refusal by the Respondent to pay terminal dues.
2. The Claimant prays for;
 - a.
 - i. One month's salary *in lieu* of notice Kshs 91,995.00
 - ii. Service gratuity at 15 days per year Kshs 108,892.50
 - iii. Unpaid leave Kshs 151,419.50
 - iv. Compensation for unlawful termination Kshs 181,654.15Total Kshs 580,654.15
 - b. Interest at court rate on (a) above.
 - c. Costs of this suit.
 - d. Certificate of service.
 - e. Any other relief that the Honourable Court may deem fit and just to grant.



3. It is the Claimant's case that he was employed by the Respondent in February 2019 as an Occupational Health and Safety Manager at Kshs 91,995/= per month and served diligently and worked until May 2020 when he called him from the Respondent's site at Konza to the office at Upper Hill where the Managing Director, Mr. Daniel Mburu informed him that his services were no longer required and no reason was given.
4. The Claimant avers that the termination of his employment was malicious and in contravention of the provisions of the *Employment Act*, 2007 as he was not given a notice, reason for termination or fair hearing and has suffered mental anguish, torture and inconvenience.

Respondent's case

5. Evidence on record reveal that the claim was served on the Respondent on 28th September, 2022 by the Claimant's counsel in the company of the Claimant.
6. The Respondent did not respond to the claim or appear in court from 15th February, 2023 to 30th November, 2023 when the matter proceeded for formal proof.

Claimant's evidence

7. In his evidence in chief adduced in court on 30th November, 2023, the Claimant rehashed the contents of the witness statement which echoes the contents of the Memorandum of Claim.
8. The Respondent did not participate in the hearing despite service of the hearing notice on 7th November, 2023 as directed by the court on 23rd October, 2023 when the date for formal proof was taken.

Submissions

9. On 8th February, 2024, mention to confirm the filing of submissions, none of the parties was present and a judgment date was given.
10. The issues that commend themselves for determination are;
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
11. On the 1st issue, in *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* [2020] eKLR, Onyango J. stated;

“In the case of *Monica Kanini Mutua v Al- Arafat Shopping Centre and another* [2018] eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
12. The burden and standard of proof does not change whether the suit is defended or not. (See *Kirugi & another v Kabiya & 3 others* [1987] KLR 347, *Gichinga Kibutha v Caroline Nduku* [2018] eKLR and *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* [2016] eKLR).



13. In the instant suit, other than alleging that he was an employee of the Respondent, the Claimant availed copies of his National Identify Card, NHIF, NSSF and Equity Bank statements.
14. However, neither the NHIF nor the NSSF statement identify the Respondent as the employer.
15. The certified Equity Bank statement from 31st January, 2019 to 9th May, 2019 show that the Claimant's Account Number received three (3) payments from Tamani identified as salary on 11th March, 2019, 5th April, 2019 and 7th May, 2019, a total of Kshs 240,000.00.
16. For unexplained reasons, the Claimant only availed one (1) page of the bank statement for the period 1st February, 2019 to 1st June, 2019.
17. The bank statement confirms that he was paid a salary for 3 months only which leaves the entire half of 2019 and early 2020 unexplained. Was the Claimant in employment after June 2019?
18. The totality of the evidence on record is that eh Claimant rendered services to the Respondent and was paid Kshs 80,000/= on 11th March, 2019, Kshs 80,000/= on 5th April, 2019 and Kshs 80,000/= on 7th May, 2019.
19. Neither the NHIF nor the NSSF statement show that the Claimant was an employee of the Respondent after June 2019.
20. However, the NSSF statement show that deductions were remitted from February 2019 to May 2020 and later from September 2020 to March 2021.
21. The NHIF statement on the other hand shows that the Respondent company remitted deductions from February 2019 to May 2020 consistent with the Claimant's testimony.
22. From the foregoing, it is discernible that the Claimant had a relationship with the Respondent which required remission of NHIF and NSSF deductions.
23. It is the finding of the court that the evidence before it is sufficient to justify a finding that the Claimant was an employee of the Respondent from February 2019 to May 2020.
24. On termination of the Claimant's employment, the home port is the law relating to termination of employment.
25. Needless to belabour, the provisions of the *Employment Act, 2007* are explicit on the requirements of a fair termination of employment namely; a valid and fair reason relating to the employee's capacity, conduct or compatibility or operational requirements of the employer and a fair procedure.
26. Whereas Sections 43, 44, 45 and 47(5) of the Act prescribe the requirement of a reason for termination, the provisions of Section 45(2)(c) and 41 prescribes the requirements of a fair procedure.
27. Ndolo J. echoed these requirements in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR as follows;

“ . . . 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 termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”



28. The Claimant testified that sometime in May 2019, Mr. Daniel Mburu, the boss called him to the office at Upper Hill, Nairobi and informed him that his services were no longer needed. This evidence is corroborated by the NHIF and NSSF statements on remittances.
29. In the absence of controverting evidence and having demonstrated the employment relationship with the Respondent ended in May 2019, the court is persuaded that the Claimant's employment was terminated otherwise that in accordance with the provisions of the [Employment Act](#), 2007, and thus unfair and the court so finds.

Whether the Claimant is entitled to the reliefs sought

i. Salary in lieu of notice

30. As the Respondent adduced no evidence of having given the Claimant the requisite notice or paid salary in lieu of notice, the prayer is merited and granted accordingly, Kshs 91,995/=.

ii. Service gratuity

31. The Claimant adduced no evidence to prove entitlement to gratuity at the rate prayed for or any other rate.
32. Gratuity is an amount paid by an employer to an employee in appreciation of the services rendered and is gratuitous and contractual under the contract of employment or Collective Bargaining Agreement, if any.

The prayer is dismissed.

iii. Unpaid leave

33. Neither the Claimant's written statement dated 16th January, 2023 nor the oral testimony provides the particulars of the unpaid leave.
34. Similarly, the Claimant has not alleged that he did not proceed on leave for the duration of employment.

The prayer lacks particulars and is dismissed.

iv. Certificate of service

35. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007.

v. Compensation for unlawful termination

36. Having found that termination of the Claimant's employment was unfair for want of a substantive justification and procedural fairness, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act](#), 2007.
37. The court has taken into account the fact that the Claimant was an employee of the Respondent for about 15 months, which is fairly short time.
38. The Claimant had no record of misconduct or warning letter.
39. The Claimant did not appeal the Respondent's decision or express his wish to continue in the Respondent's employment.



40. In the circumstances, the court is satisfied that the equivalent of two (2) months' salary is fair, Kshs 183,990/=.

41. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;

- a. Salary *in lieu* of notice Kshs 91,995/=.
- b. Equivalent of two months' salary Kshs 183,990/=.
Total Kshs 275,985/=
- c. Costs of this suit.
- d. Certificate of service to be provided within 30 days.
- e. Interest at court rates from date hereof till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF MARCH 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

