



**Adera v Central Organization of Trade Unions (Cause E033 of 2023)
[2024] KEELRC 1058 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E033 OF 2023
CN BAARI, J
APRIL 25, 2024**

**BETWEEN
FLORENCE ADHIAMBO ADERA CLAIMANT
AND
CENTRAL ORGANIZATION OF TRADE UNIONS RESPONDENT**

JUDGMENT

Introduction

1. Ms. Florence Adhiambo Adera, the Claimant herein, filed this suit on 26th May, 2023, seeking the following reliefs: -
 - a. General damages for unfair termination.
 - b. A certificate of service under Section 51 of the *Employment Act*.
 - c. One (1) month salary in lieu of notice at Kshs. 200,000/=.
 - d. Salary arrears/unpaid salary Kshs.2,000,000/=.
 - e. Leave days earned but denied- Kshs.400,000/=.
 - f. Gratuity as per employment terms -Kshs,400,000/=.
2. Summons dated 29th May, 2023, were issued upon the Respondent. The Respondent did not file a defence despite service, culminating in an order that the matter proceeds as undefended.
3. The Claimant's case was heard on 1st November, 2023, when she testified in support of her case. She sought to adopt her witness statement and further produced her list and bundle of documents which were admitted and marked Claimant exhibits Nos. 1-7.
4. The Claimant filed submissions.



The Claimant's Case

5. The Claimant's case is that she was appointed the deputy Principal/Registrar of Tom Mboya Labour College on 25th January, 2017, and later promoted to the position of Acting Principal on 24th December, 2018.
6. It is her case that she earned a consolidated salary of Kshs. 150,000/= on appointment in 2017, and which amount was subsequently revised to Kshs. 200,000/=
7. The Claimant avers that she successfully completed her probationary contract period and delivered on all her responsibilities and targets, thus her promotion in December, 2018.
8. She states that she received a letter dated 21st June, 2021, terminating her services and further referring to a mutual agreement that she knows nothing about. That her termination was by the said letter, effective 20th November, 2020.
9. It is her case that she was never served with a notice of intention to terminate her services, nor informed of any actions on her part that led to the termination of her services. She further avers that her salary was last remitted to in the month of September, 2020, and the salary has been in arrears from the months of October, 2020 to July 2021.
10. The Claimant's further asserts that she had been denied leave for two years during her employment with the Respondent. It is also her case that she was not issued with any certificate or recommendation upon termination of her services.

The Claimant's submissions

11. It is submitted for the Claimant that a notice of termination should be given to an employee before the termination, and not months later after terminating the employee's services. It is submitted further, that the Claimant was never issued with any notice of intention to terminate her employment as required by law, hence the termination is unfair.
12. The Claimant further submits that Section 44 of the *Employment Act* of 2007, provides for termination of an employee without notice or with less notice, otherwise known as summary dismissal, and that the Act gives actions that may amount to gross misconduct as to justify the summary dismissal of an employee.
13. The Claimant further submits that she was never informed of any commissions or omissions on her part that led to termination of her employment and since she was not summarily dismissed, she was entitled to a termination notice as stipulated in law.
14. It is the Claimant's submission that in the period of the Covid Pandemic, employers and employees were to agree on how to manage running employment contracts, and this was not the case in her situation.
15. It is the Claimant's further submission that though most employment contracts were frustrated due to the Covid-19 pandemic, this was not a reason for the Respondent to bypass the due process for termination as required by law. She sought to rely in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR to buttress this position.
16. It is submitted that since the Claimant was not summarily dismissed as provided for under Section 44 of the *Employment Act*, and for reason that no notice was given prior to her termination of employment, she is entitled to one (1) month salary in lieu of notice in the sum of Kshs. 200,000/=.



17. The Claimant submits that she has worked for the Respondent for two years with no leave, and that she was entitled to thirty days (one month) leave for each year worked. It is submitted that she is therefore entitled to two months' worth of payment for the two years worked since she never went on leave during her employment.
18. The Claimant finally submits that she is entitled to an award of gratuity, the same having been provided for under her employment contract.

Analysis and Determination

19. I have considered the pleadings, the Claimant's oral testimony and her written submissions. The following issues coalesce for determination:
 - i. Whether the Claimant was unfairly terminated
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated

20. The Claimant's case is that she was unfairly terminated by reason of not having been issued with notice of intention to terminate her services, nor informed of any acts or omissions on her part that led to the termination of her services. It is her position, that even though her termination was effected more like a summary dismissal, the same does not meet the grounds provided under Section 44 of the [Employment Act](#), as to justify such a dismissal.
21. For starters, the Respondent did not deem it necessary to defend this suit despite several returns of service showing that service was effected. The question for this court therefore, is whether the Claimant's was terminated fairly.
22. *Vide* a letter dated 21st June, 2021, produced in evidence, the Respondent notified the Claimant of termination of her contract effective 20th November, 2020, which it terms as the last day the Claimant performed her duties. The letter further refers to an earlier letter of 14th September, 2020 Ref. Cotu/Conf/Pf/Faa/7, sending the Claimant on unpaid leave owing to the COVID-19 pandemic.
23. It is evident that the Claimant's termination was not informed by misconduct on her part, hence the provisions of Section 41 on being informed that termination is under consideration and making representation does not come into play.
24. In my view, the termination having been occasioned by the difficulties arising from the COVID-19 pandemic, and which the Claimant confirmed in her pleadings, goes to confirm that this was a case of redundancy. The termination was at the instance of the employer and for no wrong committed by the employee.
25. This being the case, the Claimant ought to have been issued with redundancy notice and paid her terminal dues, in addition to full compliance with the provisions of Section 40 of the [Employment Act](#).
26. Section 40 of the [Employment Act](#) states: -
 - a. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
 - b. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is



- employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- c. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - d. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - e. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - f. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
 - g. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
 - h. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”
27. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR held –
- “Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982 requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy.....”
28. It is evident that the Respondent neither issued proper notice of redundancy to both the Claimant and the Labour officer prior to the Claimant's termination, nor held any sort of consultation with the Claimant regarding the termination.
29. In the premise, I find and hold that the Claimant was unfairly terminated.

Whether the Claimant is entitled to the reliefs sought

Damages for unfair termination

30. The Claimant's termination having been found to be unfair entitles her to compensation in accordance with Sections 49 and 50 of the *Employment Act*, 2007.
31. The court in *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR held that the measures of compensation should be guided by the statutory capping at the time of termination.
32. Further in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.
33. The letter terminating the Claimant, provided the reason for the termination to be the COVID-19 pandemic. The Claimant confirmed that she was aware that the pandemic frustrated many contracts of employment even with other employers.



34. The Court further takes judicial notice of the period when the termination herein took place being the time COVID was ravaging the world, and like the Claimant puts it, frustrating contracts.
35. Considering the circumstances leading up to the Claimant's termination, I hold that she has not proved a case for maximum compensation, and I deem an award of two months' salary sufficient compensation for the unfair termination.

One-month salary and gratuity pay

36. The letter of 21st June, 2021, terminating the Claimant, carries a computation of terminal dues, which include one month notice pay and a computation of gratuity for the term served. The Claimant did not at any point deny receipt of the terminal dues as computed in the termination letter.
37. The claims for one-month salary in lieu of notice and gratuity, thus fail on this account.

Salary arrears/Unpaid salaries

38. The Claimant attributes the salary arrears claim to the period she was away on unpaid leave. The letter terminating her employment referred to a letter issued to her dated 14th September, 2020, sending her on unpaid leave, which curiously was not produced in evidence. This letter in my view, would have enabled the court know what the terms of her unpaid leave were.
39. For reason that the letter dated 14th September, 2020 sending the Claimant on unpaid leave was not produced in evidence, the court holds that the Claimant has not proved that she is owed any money on account of salary arrears.
40. This claim thus equally fails and is dismissed.

Leave days earned

41. The Claimant states that she did not take leave in the two years she was in the service of the Respondent. This claim could only have been rebutted by the Respondent through production of a leave roster or employee leave forms.
42. For reason that the suit was not defended, the claim is found to have merit and is allowed as prayed.

Conclusion and Disposition

43. The Court accordingly makes the following final awards:
 - a. Two months' salary as compensation for the unfair termination at Kshs. 400,000/-
 - b. Pay in lieu of leave days at Kshs 400,000/-
 - c. The suit was undefended; hence the Claimant will bear her own costs.
44. Judgment of the Court.

DATED, SIGNED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF APRIL, 2024.

CHRISTINE. N. BAARI

JUDGE

Appearance:



N/A for the Claimant

N/A for the Respondent

Mr. Erwin Ongor - Court Assistant

