



**Mogiti v Karen Hospital (Employment and Labour Relations Cause
2454 of 2017) [2024] KEELRC 860 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 860 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2454 OF 2017**

AN MWAURE, J

APRIL 16, 2024

BETWEEN

WENDY MANDERE MOGITI CLAIMANT

AND

THE KAREN HOSPITAL RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 11th December 2017.

Claimant's Case

2. The Claimant avers that she was employed by the Respondent as a Receptionist on 01.07.2009 at a monthly salary of Kshs 30,000 which was later increased to Kshs 30,250 effective 01.08.2012.
3. The Claimant avers that she worked for the Respondent until 15.12.2014 when she was issued with a termination notice dated 14.11.2014 which required her to go on terminal leave from 18.11.2014 on grounds that her services as a receptionist were not required and it has been abolished during restructuring.
4. The Claimant avers that she was never paid her terminal dues upon termination.
5. The Claimant avers that throughout her employment, the Respondent never provided accommodation or paid her house allowance.
6. The Claimant avers that throughout her employment, she worked from 6am to 7pm daily and therefore was engaged for an extra 4 hours each day which was not paid by the Respondent.
7. The Claimant avers that she never went on her annual leave neither was she paid leave allowance.



Respondent's Case

8. In opposition to the Claim, the Respondent filed its Response to the Memorandum of Claim dated 8th January 2018.
9. The Respondent avers that the Claimant applied for a job which it could have offered on 09.04.2010, it offered her a 2-month contract as an administrative assistant effective 12.07.2010 to 12.09.2010.
10. The Respondent avers that the Claimant started off with a consolidated salary of Kshs 25,000 per month. Upon expiry of the contract, the Respondent extended the contract for one year effective 11.10.2010 to 11.10.2011 at a consolidated salary of Kshs 25,000.
11. The Respondent avers that it further extended the Claimant's contract for another one year period expiring on 11.10.2012 and the terms of the initial contract did not change.
12. The Respondent avers that due to good performance, the Claimant's salary was reviewed to a gross salary of Kshs 27,000 effective 01.07.2011 and was later further reviewed to Kshs 30,250 per month.
13. The Respondent avers that between 29.10.2012 to 31.10.2012, the Claimant neglected her duties by failing to charge patients who attended the imaging department hence causing the Respondent a loss of Kshs 67,480 which she admitted and apologised and which amount the Respondent claims to be compensated by the Claimant.
14. The Respondent avers that the initial contract of employment dated 08.07.2010 has been used as a base for the terms of extension of other contracts have been referred from. Apart from the changes in the amount of salary payable, other terms remained constant including the fact that the salary had been consolidated.
15. The Respondent avers that the Claimant's authorised working hours were between 8 am and 5.30pm from Monday to Friday and Saturday from 8am to 1pm with one-hour lunch break as indicated in the contract of employment.
16. The Respondent avers that the Claimant only had 13 unutilised leave days which were granted as part of terminal leave to be served together with the termination notice of one month.
17. The Respondent avers that the Claimant was duly paid her terminal dues as was entitled to her the and it is willing to give the Claimant the certificate of service but she has never gone for it.

Evidence in Court

18. The Claimant (CW1) testified that she was employed as a casual in April 2010 and applied for the Administrative Assistant job in July 2010. She was earning a starting salary of Kshs 25,000 and at termination it was at Kshs 30,250.
19. CW1 testified that the extension of contracts dated 06.10.2010 and 23.09.2011 the terms of the contract remained the same. And vide a letter dated 01.07.2011, where she was informed the salary was reviewed to Kshs 27,000.
20. CW1 testified that she did not cause losses to the Respondent and did not fail to charge for services at imaging.
21. CW1 testified that she wrote a letter dated 01.11.2012 where she said that she wished to apologise for the losses incurred in the last 3 days.
22. CW1 testified that she was not paid overtime and she used to clock in daily.



23. CW1 testified that she received her last contract dated 23.10.2011 to October 2012 and she was not issued with any other contract. She continued working for the Respondent and received her salary according to the letter dated 10.08.2012 at Kshs 30,250.
24. CW1 testified that the organisation had different modes of charging clients, they never used to charge but bill. Billing was hand written but was generated by computer.
25. CW1 testified that the handwritten bill was done by one Rutto and they were not in good terms. CW1 testified that she did not cause the loss of Kshs 7,000.
26. CW1 testified that from 2012 to 2014, she was not surcharged her salary and never received a demand. The losses were claimed in November 2012 and the case was filed in 2018.
27. CW1 testified that she received a basic salary and was not paid house allowance.
28. CW1 testified that they used to work on shifts for 10 hours per day and even 24 hours when one colleague fails to show up. The attendance sheet indicates time reported as 7.31 am but does not indicate time left or hours worked.
29. CW1 testified that the attendance sheets are not authoritative on the hours worked as they worked for roughly 20 hours from 6am to 7pm.
30. CW1 testified that the termination letter did not allude to failure to charge patients but that the hospital was restructuring the department and that her position had been removed.
31. CW1 testified that she used to go for annual leave and a few leave days.

Respondent's evidence

32. The Respondent witness by the name Mathangani Muya, adopted the response to the claim and witness statement dated 08.08.2018 as his evidence in chief and produced his list of documents dated 08.08.2018 as his exhibits.

Claimant's Submissions

33. The Claimant submitted that it is not in dispute that she worked for the Respondent for a continuous period of 5 years until 14.11.2014 when she was singled out and issued with a notice of termination of employment contract citing restructuring and removal of the function of receptionist thereby declaring her redundant with effect from 15.11.2014.
34. The Claimant submitted that the Respondent failed to comply with the mandatory provisions of Section 40 of *Employment Act* by issuing the Claimant a termination notice dated 14.11.2014 prematurely and failed to issue a redundancy notice in writing to the Claimant and to the area labour officer, pay for pending leave days, issue a one month notice or paying her in lieu thereof and failing to pay severance pay.
35. The Claimant submitted that the Respondent failed to give parties an opportunity to consider measures to minimize and mitigate the adverse effect of termination on the claimant on chances of securing alternative employment as contemplated under ILO convention. 32.0. She relied on Nairobi ELRC Cause No. E403 of 2021 Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers (Kudheiha)-versus-The Nairobi Hospital.



36. The Claimant submitted that the Respondent failed to prove the reason for termination of the Claimant's employment on account of redundancy and that the Claimant's position had been abolished from its management structure as required under Section 43 and 45 of the [Employment Act](#).
37. The Claimant submitted that she was entitled to 21 days annual leave with full pay every year. The Claimant served the Respondent for continuous 5 years and she never went for her annual leave. As the legal custodian of the Claimant's records, the Respondent was bound to produce evidence that she proceeded for her annual leave. The Respondent failed to so produce any evidence in the pleadings and or witness statement, therefore, the Claimant is entitled to payment for accrued annual leave as prayed pursuant to Section 28 of [Employment Act](#).
38. The Claimant submitted that she is entitled to payment severance pay of Kshs 75,625.00/= pursuant to Section 40(1) (g) of the [Employment Act](#). Severance pay calculated at 15 days pay for each completed year. In this case the Claimant had worked for 5 years.
39. The Claimant submitted that she earned a basic salary of Kshs 30,250/= excluding house allowance. A perusal of the payslips produced confirms that she was not paid house allowance and the Respondent's allegations of consolidated salary has no proof and contradicts the contents of the payslip. The Claimant is entitled to provisions for accommodation or payment of monthly house allowance equivalent to 15% of basic Salary under Section 31 of [Employment Act](#).
40. The Claimant submitted that she used to work for the Respondent even during public holidays but received no extra pay. The Respondent did not produce any evidence to contradict her claim on public holiday.
41. The Claimant submitted that she was not allowed to leave work throughout the week and the Respondent never paid him any extra salary for rest days. The Respondent admitted in his evidence of the Claimant working up to Saturdays, and no evidence was tendered to prove payment of extra amount for working on Saturday up to 1pm as require under section 74 of [Employment Act](#).
42. The Claimant submitted that she has proved her case on overtime, she used to work between 6.00am and 7pm daily and engaged in 4 extra hours daily. This was corroborated by the Respondent's evidence marked TKH 9 to the effect that the Claimant could work between 7.00 am and 11.00pm.
43. The Claimant submitted that she worked for the Respondent for a continuous period of 5 years and is entitled for payment 12 months gross salary as compensation. Further, the Respondent's action caused the Claimants to lose her legitimate expectation of working and earning salary until her retirement age.
44. The Claimant submitted that the Respondent's counter claim filed on 08.08.2018 raised issues that arose between 29.10.2012 and 31.10.2012, therefore, it is statutorily barred. There is no indication as to whether at the time of filing the counterclaim whether leave was sought for or granted to file the same out of time.

Respondent's Submissions

45. The Respondent submitted it did not violate the provisions of Section 45 of the [Employment Act](#) when terminating the Claimant's services. The Claimant failed to demonstrate how the termination was unfair and unlawful.
46. The Respondent submitted that the Claimant failed to produce evidence with respect to public holidays and number of days she did not take leave.



47. The Respondent submitted that the Claimant's letter of employment clearly states that salary offered was consolidated including house allowance and other allowances.

Analysis and Determination

48. Having considered the pleadings, witness statements, submissions and the evidence of record, the issues for determination are:
- a. Whether the Claimant's termination was unfair and unlawful.
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination was unfair and unlawful

49. Pursuant to the notice of termination dated 14.11.2014, the Claimant was terminated on grounds that the Respondent restructured its Imaging Department and removed the functions of a receptionist with effect 15.12.2014.
50. The termination letter referred thereto therefore is to the effect that the position of the claimant as a receptionist at the Imaging Department had been abolished. In essence she was declared redundant.
51. However in the case of *Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 Others* (2014) eKLR :

“... When an employer contemplates redundancy he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties

“..... the requirement of consultation is implicit in the principle of fair play under section 40(1) of the *Employment Act* itself and other labour laws. The notices under this provision are not merely for information... the purpose of the notice under section 40(1)(a) and (b) of the *employment act*, as is also provided for in the ILO convention No 158 termination of employment convention, 1982 is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

52. This is well ratified by section 40 of the *employment act* 2007 which states:
- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –
 - a. 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;
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer ;
 - (c) 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;



- (d) 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;
 - (e) the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash;
 - (f) 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
 - (g) 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.
53. In this case there is no proof of compliance with the provisions of section 40 of the *Employment Act* and ILO conventions on consultation being ILO convention No 158 of termination of employment 1982 and employment recommendation no 166 (1982) which acknowledge that employers can terminate employment for reasons of economic, technological structural or similar nature.
54. In the present case there is no compliance whatever with sections 40 of the *employment act*. The claimant was not issued with the notice of redundancy and neither was the labour officer notified. On 14th November 2014 she was served with a termination letter and the reasons given was that the functions of receptionists were removed from its structure with effect from Monday 15th December 2014. She was to leave employment from 15th December 2014 and at the same time utilise her leave days which were 13.
55. It is clear to all and sundry that the respondent did not give a valid reason as provided in section 43 and 45 of the *Employment Act* for terminating the claimant from her employment. The letter of termination did not set out any grounds of misconduct. The respondent's response refers to a loss of kshs 67,480/- apparently being money not charged on patients. The respondent has prayed for the said kshs 67,480 as counter claim from the claimant.
56. There is however no evidence of such loss and the respondent should have gone through the process stipulated in section 41 of the *Employment Act* in the event they intended to terminate her because of gross misconduct.
57. The court is persuaded the respondent failed the mandatory test provided in law in terminating the claimant whether due to redundancy or due to gross misconduct. Therefore the claimant has established a case for unlawful and unprocedural termination and as a result thereof judgment is entered in her favour.

Reliefs granted

58. As a result of the foregoing, the claimant is awarded the following reliefs:
- 1. Accrued annual leave is declined as claimant admitted she utilised her leave appropriately.
 - 2. Severance pay is deserved at kshs $30,250 \times 4/2 =$ kshs 60,500/-
 - 3. House allowance is not justified as it was not claimed by the claimant until the time of termination in 2014 and is therefore a mere afterthought. It is therefore declined.
 - 4. She is granted 5 months compensation for unlawful termination which amounts to kshs 151,250/-.



5. She is also awarded costs and interest at court rates from date of this judgment until full payment.

Total award is kshs 211,750/-

6. Claimant is to be given her certificate of service within 30 days.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

