



**Tendeti v Kiesta Industrial Technical Services Limited (Cause
2465 of 2016) [2024] KEELRC 873 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 873 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2465 OF 2016**

JK GAKERI, J

APRIL 8, 2024

BETWEEN

PROTUS MAIRA TENDETI CLAIMANT

AND

KIESTA INDUSTRIAL TECHNICAL SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 30th November, 2016 alleging unfair dismissal from employment and non-payment of terminal dues and contractual benefits.
2. It is the Claimant's case that he was employed by the Respondent in March 1993 as a semi-skilled fitter in moulding metallic machines and instruments and was promoted to Fabricating Manager in June 2008 and a partner employee in December 2008 and served diligently until his employment was unfairly terminated on 7th March, 2015.
3. It is the Claimant's case that he sought the assistance of the Kenya National Union of Service Employees (KNUSE) as a member to act on his behalf in demanding terminal dues from the Respondent and arising from various correspondences and a meeting held on 17th July, 2015 attended by Mr. Evans V. Boge MD of the Respondent, Simon Njenga Director of the Respondent, Fredrick Ashimosi Respondent's Lawyer and Protus Maira Tendeti, the Claimant, it was agreed that the Claimant be paid as follows;

Salary for March and April Kshs.47,700.00

Leave grant for 6 years Kshs.60,000.00

Service pay 22 years Kshs.349,000.00

Provident Fund Kshs.105,638.00

Total Kshs.515,438.00



and on 7th August, 2015, he was paid Kshs.42,441.58 vide cheque No. 001475 and no other sum was paid and follow ups yielded no response from the Respondent.

4. That the outstanding balance attracted a monthly penalty interest of 20% from 20th August, 2015.
5. The Claimant prays for;
 - i. Sum of Kshs.472,996.42 being the balance of terminal dues.
 - ii. 20% monthly interest on the unpaid balance from 20th August, 2015.
 - iii. Certificate of service.
 - iv. Costs of this claim.
 - v. Interest on the above payments at court rates.
 - vi. Any other relief that the court may deem fit to grant.

Respondent's case

6. In its reply to the Memorandum of Claim filed on 12th January, 2017, the Respondent avers that the Claimant and 13 others were shareholders of the Respondent effective 1993 when it was incorporated and he was appointed a director in 2013 and was a general fitter.
7. That he resigned on 24th July, 2009 and was paid all terminal dues but was re-employed on or about 17th April, 2015 but refused to take his benefits from ICEA Insurance.
8. That being a director, he could not make the claims made in this suit.
9. That his benefits were paid in 2009 and the balance was payable by ICEA Insurance.
10. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's Evidence

11. The Claimant rehashed his written statement as captured in the Memorandum of Claim and prayed for the balance of Kshs.472,996.42 from the Respondent.

Respondent's evidence

12. On 13th April, 2023, the Respondent's counsel ceased to act for the Respondent for lack of instructions and hearing was scheduled for 19th September, 2023. The court directed counsel for the Claimant to serve the Respondent and file an Affidavit of Service which counsel did as Evidenced by the Affidavit dated 15th August, 2023 sworn by one Kisilu Munyao Joel. Records show that the Respondent received the hearing notice on 8th May, 2023.
13. On 19th September, 2023, the suit was listed as an application and the Respondent was absent and as a consequence, the court adjourned the hearing to 5th December, 2023 and directed counsel to serve the hearing notice.
14. On 5th December, 2023, the Respondent was absent and hearing proceeded.
15. The Respondent did not tender any evidence or file submissions service notwithstanding.



Claimant's submissions

16. On 5th December, 2023, parties were accorded 21 days a piece to file and exchange Submissions but by 13th February, 2024, none of the parties had complied.
17. The Claimant's counsel sought 2 days to file and serve but did not even after being accorded the 2 days.

Determination

18. The issues for determination are;
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether the Claimant's employment was unfairly terminated by the Respondent.
 - iii. Whether the Claimant is entitled to the reliefs sought.
19. On the 1st issue, in undefended suits or where the Respondent is absent at trial, the Claimant is duty bound to establish his/her employment status with the Respondent as a preliminary issue before proceeding to establish the unfair termination of the employment. (See the sentiments of Onyango J. in *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR citing *Monica Kanini Mutua v Al- Arafat Shopping Centre and another* (2018) eKLR).
20. It is the Claimant's case that he was an employee of the Respondent from 1993 and to reinforce his allegation, the Claimant availed copies of payslips from September 2005 to January 2008 and one for January 2015 and February 2015.
21. The Claimant availed no payslip from September 2008 to December 2014.
22. From the copies of the payslips on record, it is surmisable that there was an employer/employee relationship between the parties from September 2005 to October 31st 2008 and then again from January 2015 to May 2015 when he was suspended.
23. However, letters on record reveal that the Claimant joined the Respondent as a semi-skilled fitter on 1st May, 1993 as alleged.
24. From the letters on record, it is clear that the parties had no relationship from late 2008 to December 2014, a duration of about 6 years.
25. There is however, overwhelming evidence to show that the Claimant was an employee of the Respondent having started as a semi-skilled fitter to become the Extension Service Fabrication Manager in 2008 and partner by December 2008.
26. To the issue whether the Claimant was an employee of the Respondent, the court returns that he was albeit with an unexplained break from 2009 to December 2014.
27. A copy of a letter dated 24th July, 2009 reveal that the Claimant resigned from employment vide letter dated 2nd July, 2009 to take up an opportunity in Southern Sudan as revealed by his undated letter to an unnamed recipient at ICEA Building notifying them that he was closing his A/c No. 90xxxx706 citing his resignation from the Respondent and dues were computed.



28. As to whether termination of the Claimant's employment was unfairly terminated, the Claimant's written statement states that his employment was unfairly terminated "with no reasonable and or justifiable cause".
29. The Claimant makes no attempt to explain or show how and by whom his employment was terminated and perhaps why.
30. He does not blame anyone including the Respondent for any particular act or omission on 7th March, 2015.
31. After the Respondent filed its documents, the Claimant filed a further list of documents in June 2022 to counter the Respondent's documents and explain his case more comprehensively.
32. Evidence produced by the Claimant show that on 27th January, 2015, he was appointed a Director at the Annual General Meeting held on 24th January, 2015 but did not sign the letter and by an undated Director's Report, the Claimant recommended certain changes. Among the documents the Claimant availed later is the suspension letter dated 7th March, 2015 suspending him as an employee of the Respondent on even date for lateness, poor performance and absenteeism without permission and a response was required within 10 days and the Claimant responded by letter dated 12th March, 2015.
33. Strangely, the Claimant did not deny the allegations but endeavoured to explain them citing illness, jealous of one Mr. Mwanzia and attributed his absence to the illness as well.
34. Documents on record reveal that by letter dated 17th April, 2015 to the Managing Director of the Respondent, the Claimant gave one (1) month's resignation notice from even date to 16th May, 2015 and cites the reason for terminating employment as focusing on farming in his home county.
35. The Claimant takes the opportunity to thank the management for the opportunity to work with the company from 1993.
36. The Respondent accepted the resignation by letter dated 16th May, 2015 which the Claimant received on 27th October, 2015. The Managing Director thanked the Claimant and wished him success.
37. The Claimant did not deny having resigned in 2009 and in April 2015 or having been suspended.
38. From the documentary evidence on record, it is clear that the Claimant's allegation that his employment was terminated by the Respondent on 7th March, 2015 refers to the letter of suspension which explains his subsequent resignation on 17th April, 2015.
39. Why would the Claimant accord the Respondent one (1) month's notice of resignation if he had ceased to be the Respondent's employee on 7th March, 2015, more than one month earlier? How did he respond to the suspension letter after termination?
40. In *Kennedy Obala Oaga v Kenya Ports Authority* (2018) eKLR, Rika J. stated as follows;

"It is not conceivable to have 2 dates when termination would be deemed to have taken effect. It is not conceivable to have an employee's date of termination and a different employer's date of termination. There was one contract of employment. It could only be terminated on one date not on two different dates . . . The Claimant resigned pre-empting any inquiry by this court on the fairness of the procedure and validity of reasons leading to summary dismissal . . ."



41. Similarly, the Claimant adduced no evidence to demonstrate that his resignation was attributable to the Respondent having committed a repudiatory breach of the contract of employment.
42. The resignation letter reflects cordiality between the parties as opposed to animosity and the Claimant explains the reason for terminating his employment.
43. The court is unable to decipher or discern any other reason for the resignation or evidence of an unlawful or unfair termination of employment.
44. Needless to underscore, resignation from employment is a unilateral act of the employee and terminates the employment relationship between the parties and requires no acceptance by the employer and it is available to the employee at any time during the subsistence of the employment relationship.
45. The employee is not obligated to give a reason(s) for the resignation.
46. The only requirement under the provisions of Section 35 and 36 of the *Employment Act*, 2007 is to give the requisite notice or pay in lieu of notice. (See *Owade v Chandaria Industries Ltd* (2021) KEELRC (4)).
47. On the burden of proof, Section 47(5) of the *Employment Act*, 2007 provides;

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
48. In *Nicholas Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR, Abuodha J. held as follows;

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case . . .”
49. Similarly, in *Kirugi & another v Kabiya & others* (1987) KLR 347, the Court of Appeal held that;

“The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
50. Finally, the court expressed similar sentiments in *Gichinga Kibutha v Caroline Nduku* (2018) eKLR.
51. The court is guided by the foregoing sentiments.
52. From the evidence on record, it is decipherable that the Claimant has failed to prove on a preponderance of probabilities that his employment was unlawfully or unfairly terminated by the Respondent.
53. The Claimant did not deny that he authored the letter dated 17th April, 2015 which the Respondent responded to by its letter dated 16th May, 2015.
54. The Respondent’s written evidence overwhelms the Claimant’s allegation that his employment was unfairly terminated on 7th March, 2015 which lacks supportive evidence.

Whether the Claimant is entitled to the reliefs sought



i.The Claimant prays for the sum of Kshs.472,996.42 as balance of terminal dues

55. Strangely, as early as before 23rd April, 2015, the Claimant had approached the Kenya National Union of Service Employees (KNUSE) which engaged the Respondent.
56. In its letter dated 15th February, 2016, the union demanded Kshs.942,554.00 as terminal dues comprising terminal benefits Kshs.673,254.00 and 20% interest, Kshs.134,650.00 urging that the matter had been discussed on 17th July, 2015 by 5 named individuals.
57. A handwritten document availed by the Claimant as the minutes of the alleged meeting is dated 18th July, 2015.
58. The document addresses salary for March and April, resignation, leave grant from 2009, service pay 15 days per completed year, provident fund and pro rata leave.
59. The total amount due is stated as Kshs.515,438.85.
60. Shockingly, none of the attendees signed the purported agreement including the company lawyer who was allegedly present.
61. It is unclear as to who prepared the handwritten document and only the Claimant has it.
62. In the court's view, it is inconceivable that in July 2015, the Managing Director of the Respondent, the Respondent's lawyer, Mr. Simon Njenga, a Senior Officer of the Respondent, Mr. Joseph Odhiambo and Claimant met at some undisclosed place and one of them wrote the minutes by hand and they had no time to have the document typed out and prepared for signature and actually signed by the attendees of the alleged meeting.
63. The alleged agreement lacks ownership as it is unclear who prepared it. It lacks authenticity as it is not signed by any of the alleged attendees.
64. In simple terms, the document lacks any probative value, is unreliable as evidence of an agreement.
65. Significantly, the letters availed by the Claimant reveal that by letter dated 9th July, 2015, the union wrote to the Respondent as a follow up to its letter of 23rd April, 2015 on the Claimant's terminal dues complaining that the letter had not been replied or the Claimant's terminal dues paid and suggesting a meeting on 17th July, 2015 at 10.30 am for a discussion.
66. The Respondent responded by letter dated 7th August, 2015 received by the union on 20th August, 2015 and the Respondent requested to visit the union's office to discuss the issue and dispatched a cheque of Kshs.42,441.58 as final salary payment of the Claimant.
67. These letters reveal that the issue had not been discussed by the parties before 7th August, 2015 which raises further doubts about alleged agreement, the substratum of the Claimant's prayers.
68. Having found that the handwritten document produced by the Claimant lacks ownership and authenticity, the sum claimed by the Claimant lack a factual or legal anchorage and thus unmerited and the prayer is declined.

ii. 20% Monthly interest on the unpaid balance from 20th August, 2015

69. Having found that the alleged balance has not been evidentiary proved, the prayer of interest as part of the alleged agreement or otherwise is, in the court's view unsustainable and it is declined.



iii. Certificate of Service

70. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007.
71. Having found that the Claimant has failed to prove that his employment was unfairly terminated by the Respondent on 7th March, 2015, and having further found the alleged agreement lacks authenticity, the Claimant's suit against the Respondent is unsustainable and it is accordingly dismissed save for the issuance of a certificate of service within 30 days.
72. In the circumstances, it is only fair that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF APRIL 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

