



**Anthony v Wambugu t/a Lemo Pastries (Cause 223 of 2014)  
[2024] KEELRC 1678 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1678 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 223 OF 2014  
DN NDERITU, J  
JUNE 27, 2024**

**BETWEEN**

**GEOFFREY MUHATI ANTHONY ..... CLAIMANT**

**AND**

**JOHN KARIUKI WAMBUGU T/A LEMO PASTRIES ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. The claimant commenced this cause by way of a memorandum of claim dated 18<sup>th</sup> June, 2014 filed in court on even date through Muthanwa & Co. Advocates. As it is the procedure, the memorandum of claim was accompanied with a verifying affidavit sworn by the claimant on even date, the claimant's written witness statement, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking for judgment against the respondent for –
  - i. One month's pay in lieu of notice - Kshs.12,184.25
  - ii. Underpayments - Kshs.55,376.65
  - iii. Overtime - Kshs.87,491.95
  - iv. Annual Leave for 2008, 2009, 2010, 2011, 2012 & 2013 respectively - Kshs.39,705.55
  - v. Compensation - Kshs.146,211.00Total - Kshs.340,969.40
3. The respondent, acting in person, filed a memorandum of defence on 19<sup>th</sup> September, 2014 wherein he prays that the entire claim be dismissed with costs for lack of merits.



4. Further, alongside the memorandum of defence, the respondent filed an affidavit in response to the claim, and a bundle of copies of documents, all in support of his position.
5. The claimant filed a response to the memorandum of defence on 6<sup>th</sup> October, 2014 reiterating the contents of the memorandum of claim and insisting that judgment be entered against the respondent as prayed.
6. This cause was heard by Radido J on 16<sup>th</sup> February, 2015 when the claimant testified and closed his case. The respondent called one witness, Ann Kendi (RW1), who testified on 29<sup>th</sup> October, 2015.
7. On 15<sup>th</sup> November, 2022, after a long period of dormancy, this court ordered and directed the matter to proceed from where Radido J had left. On 6<sup>th</sup> March, 2023 when the matter came up for further defence hearing, the respondent informed the court that he had no further witnesses or evidence to tender in court and the hearing of the case was closed. By consent, it was agreed and directed that the parties address the court by way of written submissions.
8. On 24<sup>th</sup> April, 2023 the respondent appointed Motanya & Co Advocates to act for him in this cause.
9. Mr. Muthanwa for the claimant filed his written submissions on 20<sup>th</sup> April, 2023 while Mr. Siah for the respondent filed his submissions on 11<sup>th</sup> May, 2023.

## **II. The Claimant's Case**

10. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence by the claimant (CW1), and the written submissions by counsel.
11. In the memorandum of claim, the claimant avers that he was engaged by the respondent on 4<sup>th</sup> August, 2007 as a baker at an agreed gross monthly salary of Kshs.8,000/= . It is pleaded that he was unfairly and unlawfully terminated on 5<sup>th</sup> October, 2013 and by then his gross monthly salary was Kshs.12,000/=.
12. It is pleaded that on 5<sup>th</sup> October, 2013 the claimant reported to work as usual only to find out that his duties had been allocated to another employee and upon inquiring the respondent informed him that his services were no longer needed and that he had been terminated.
13. On 14<sup>th</sup> October, 2013 the claimant reported the dispute to the county labour office, Nakuru, but efforts by the said office to resolve the dispute were futile as the respondent allegedly failed, refused, and or neglected to cooperate and or participate in that conciliation process.
14. It is pleaded that the termination was unlawful for lack of both substantive and procedural fairness also known as due process.
15. The particulars of each of the claims as prayed have been set out and itemized in the body of the memorandum of claim and the supporting documents are annexed.
16. In his testimony in court (Radido J) the claimant stated that when he reported to work on 5<sup>th</sup> October, 2013 at 0630hours he worked until 0900hours and took a break and returned at 1200hours only to find the workplace locked from outside. He went away and came back to check at about 1700hours only to be informed by the respondent that he, the claimant, had failed to work on that day and that his services were no longer required. The claimant pleaded to be allowed to work overnight to recover on the hours lost but the respondent was allegedly adamant and insisted on terminating the claimant. He allegedly went back on 7<sup>th</sup> October, 2013 to plead with the respondent but his plea to resume duty was dismissed.



17. It is for the above reasons that the claimant reported the matter to the labour office in writing on 4<sup>th</sup> November, 2013 and a meeting was convened on 14<sup>th</sup> November, 2013 wherein the respondent stated that he had already replaced the claimant. The respondent undertook to calculate and remit the claimant's terminal dues to the labour office. The claimant stated that the respondent later on, without involving him, remitted a sum of Kshs.63,000/= as his terminal dues to the said office.
18. The claimant stated that he was neither informed of the reason(s) for termination, nor issued with a notice before termination, and nor given a hearing. He stated that the sum of Kshs.63,000/= deposited in the labour office was released to him on 23<sup>rd</sup> December, 2014 following a court order to that effect. He produced his filed documents as exhibits 1 to 4.
19. In cross-examination by the respondent, the claimant maintained the foregoing position and stated that in the meeting at the labour office the respondent refused to reinstate him alleging that he had already replaced him. The claimant stated that he was not given a breakdown of the Kshs.63,000/= paid to him from the labour office.
20. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

### **III. The Respondent's Case**

21. The respondent's case is contained in the memorandum of defence, the evidence adduced by ANN KENDI (RW1), and the written submissions by his counsel. The respondent did not testify and his filed documents were not produced in court as exhibits.
22. However, in an unusual manner of pleading, the respondent accompanied his memorandum of defence with an "affidavit in reply" wherein he reiterated the contents of the defence under oath. Nonetheless, the respondent's defence is that after the claimant had over the time settled and established himself at workplace he started undermining other employees and picking quarrels with them as well as the respondent, the employer, misconduct that resulted in creating a toxic workplace environment.
23. It is pleaded that the claimant started demanding from the respondent to dismiss some employees that the claimant did not like or get along with and when the respondent declined the claimant allegedly walked out of employment in protest and that the claimant was not terminated and or dismissed as he alleged.
24. Further, it is pleaded that subsequently the parties met in the labour office and a settlement was reached wherein the claimant was to be paid a sum of Kshs.63,000/= which amount the respondent deposited in the said office and was subsequently released to the claimant. It is pleaded that the claimant's filing of this claim in court is an afterthought intended to unfairly enrich himself.
25. In her evidence in court RW1 stated that the claimant disagreed and argued with the respondent before he left employment. She stated that she did not witness the respondent terminating or dismissing the claimant. She stated that she did not know why or under what circumstances the claimant left employment of the respondent but that around the material time the claimant and the respondent argued. She stated that employees used to work for six days and rested for one day each week.
26. It is on the basis of the foregoing that the respondent prays that the claimant's cause be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding part of this judgment alongside those by counsel for the claimant.



#### **IV. Submissions By Counsel**

27. On the one hand, the claimant's counsel identified two major issues for determination- Whether the claimant was unlawfully and irregularly terminated; Whether the claimant is entitled to the reliefs sought; and, Who should meet the costs of the cause.
28. It is submitted that the amount of Kshs.63,000/= awarded and paid to the claimant through the labour office, as a conciliator, was received on without-prejudice basis and that it did not bar or estop the claimant from pursuing his other claims in court as he did through this cause.
29. It is submitted that the respondent failed to comply with the substantive and procedural fairness before, during, and after termination. Counsel cited *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, and Sections 43(1), 45(2), (4)(b), & 47 of the *Employment Act* (the Act) in support of the argument that the respondent simply locked out the claimant from the place of work on 7<sup>th</sup> October, 2013 after sending him home on 5<sup>th</sup> October, 2013 and as such failed to comply with the substantive and procedural demands of the applicable law.
30. It is submitted that no charges/allegations, notice of hearing or termination was issued, and no disciplinary hearing was held as to afford the claimant an opportunity to defend himself against any charges. Further, it is submitted that no notice of termination or dismissal was served upon the claimant. It is submitted that in those circumstances, the claimant was denied both substantive and procedural fairness and due process by the respondent rendering the termination unfair, unjust, and unlawful.
31. The submissions on the reliefs and costs shall be tackled in a succeeding part of this judgment.
32. On the other hand, counsel for the respondent identified the following issues for determination – Whether the claimant has made out a case for unlawful and or unfair termination; Whether the claimant is entitled to any payments from the respondent, and if so, to what extent; and, Who should bear the costs of the cause.
33. On the first issue, it is submitted that the claimant failed to prove his cause as required by Section 107 of the *Evidence Act* and Section 47(5) of the *Employment Act*. It is submitted that no evidence was availed and tendered to confirm that indeed the claimant was terminated or dismissed as pleaded and alleged.
34. It is submitted that the claimant has failed to prove his cause on a balance of probabilities and as such the court is urged to dismiss the cause with costs. The submissions on reliefs and costs shall be tackled in a subsequent part of this judgment.

#### **V. Issues For Determination**

35. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered, and the written submissions by counsel for both parties. The court identifies the following issues for determination -
  - a. Was the claimant unfairly and unlawfully terminated?
  - b. Is the claimant entitled to the reliefs sought?
  - c. Who should bear the costs of the cause?



## VI. Employment

36. The terms and conditions of employment of the claimant by the respondent are not really in dispute. The respondent owned and operated a bakery wherein he orally engaged the claimant as a baker in or around 2007 or 2008. He started off at a gross monthly salary of Kshs.8,000/= but as at the time he left that employment on 5<sup>th</sup> October, 2013 his gross monthly salary was Kshs.12,000/=.
37. What the parties are not agreeable to is the circumstances pertaining to the departure of the claimant from the employment. According to the claimant he was simply and orally dismissed by the respondent on 5<sup>th</sup> October, 2013 when the respondent declared that his services were no longer required. According to the respondent, the claimant walked away after the respondent declined to accede to a request, nay demand, from the claimant that some employees whom the claimant was not getting along with be terminated. To the respondent, the claimant deserted duty and brought his own employment to an abrupt end.
38. RW1 stated that there was a quarrel between the claimant and the respondent on the material dates, 5<sup>th</sup> and 7<sup>th</sup> October, 2013, but she stated that she did not understand or get to know what the argument was about. She stated that the claimant then left employment and was replaced with other workers.
39. The court finds and holds that the respondent dismissed the claimant on 5<sup>th</sup> October, 2013 based on the following reasoning. One, if the claimant deserted duty as alleged, what efforts did the respondent make to trace him and bring him back to work or to report the desertion to the labour office? Why was the claimant quickly replaced with other workers as per RW1? If the claimant deserted duty as alleged, why did the respondent not offer to re-engage him when the parties appeared before the labour officer on 14<sup>th</sup> November, 2013, barely a month after he had allegedly deserted duty? Why did the respondent offer to compensate the claimant if indeed he had deserted duty?
40. While the court has not benefited from the minutes of the proceedings for conciliation before the labour officer, and while the sum of Kshs.63,000/= has not been itemized and particularized, it is my considered view and the court so holds, that the parties herein disagreed on matters related to the employment relationship on 5<sup>th</sup> and 7<sup>th</sup> October, 2013 as a result of which the respondent dismissed the claimant. It may as well be true that the claimant was suffering a bloated ego thereby wanting to control and manage the workplace which angered the respondent hence the disagreement and differences between them.
41. Either way, no evidence was tendered by the respondent to prove that he applied due process in dismissing the claimant. No charges or allegations were formally served upon him, no disciplinary hearing was held, and no notice of dismissal was issued. On a balance of probabilities, therefore, the court finds and holds that the dismissal of the claimant lacked in substance and procedure.
42. This court (ELRC) has made numerous decisions on what constitutes or amounts or does not amount to unfair dismissal or termination. The claimant's counsel has cited Walter Ogal Anuro (Supra) – See also Mary Chemweno v Kenya Pipeline Company Limited (2017) eKLR, and Loice Otieno v Kenya Commercial Bank Limited (2013) eKLR.
43. No matter the circumstances, the mode, or style of termination or dismissal, it was incumbent upon the respondent to apply and afford due process to the claimant both in substance and procedure. The court finds and holds that the dismissal was wrongful, unfair, and unlawful on both counts.



## VII. Reliefs

44. The evidence on record, which is admitted by both sides, is that the claimant received Kshs.63,000/= from the respondent towards settlement of his terminal dues. Since the said compensation was neither itemized nor particularized, it is the holding of this court that the said payment did not bar or estop the claimant from seeking further compensation or settlement in court as he did. However, the court has to consider the said sum paid and deduct it from the total award made, if any.
45. The court shall consider each of the prayers as follows. Prayer (i) is for a declaration that the termination of the claimant was unlawful. The court has found and held that the dismissal was wrongful, unfair, and unlawful, and it is so declared.
46. Sections 10 & 74 of the Act obligates an employer to keep and maintain employment records. The presumption in law therefore is that when and where an allegation is made whose response should be found in such records, the employer bears and shoulders the burden of disproving the allegation. Where an employer fails to produce records to rebut an allegation, the presumption holds and the evidence by the employee shall carry the day except under very rare and peculiar circumstances that the court must explain and expound on.
47. With the above in mind, prayer (ii) consists of two items. Item (a) is for one month's pay in lieu of notice in the sum of Kshs.12,184.25. This amount is awarded as no notice was issued or paid for. Item (b) is for unpaid annual leave in the sum of Kshs.39,705.55 which is hereby awarded as no evidence to the contrary has been availed by the respondent who bears the burden of keeping and maintaining employment records and availing them whenever necessary. The hearing of this cause was such one necessary occasion and the respondent did not avail those records.
48. Prayer (iii) is for compensation for the wrongful, unfair, and unlawful dismissal equivalent to 12 months' gross pay in the sum of Kshs.146,211. The evidence on record is that the claimant, and there is no other way to logically explain the circumstances under which he left employment, picked a quarrel with his employer, the respondent, over management of the workplace especially in regard to an alleged demand from the claimant for the dismissal or termination of some co-workers that he felt that he did not get along with. When the respondent refused to dismiss or terminate the said workers, the claimant was allegedly agitated and, though wrongfully and unlawfully, the respondent dismissed the claimant as they could no longer continue working together.
49. In my view, and in the circumstances described above, the claimant contributed to his own dismissal. Probably, if it had been well documented, the claimant may as well have been guilty of insubordination. Be that as it may, the dismissal was wrongful, unfair, and unlawful mainly for lack of procedural fairness, and even the alleged insubordination was not documented or proved by the respondent in court. The respondent made attempts to settle the matter by paying a sum of Kshs.63,000/= to the claimant through the labour office. The court was not informed whether the claimant secured another job and how long he took to locate such alternative employment. But the court notes that this happened in 2013 and probably, may be, jobs were more available then than they are today, and in any event no special skills or training was needed for the type of services that the claimant offered.
50. Considering all the relevant factors in Section 49(4) of the Act, the court finds and holds that an award of four months' gross salary is adequate compensation in the circumstances – Kshs.12,184.25 \* 4 months = Kshs.48,737/=.
51. Prayers (iv) and (v) are for underpayments for the period from 1<sup>st</sup> May, 2012 to 5<sup>th</sup> October, 2013, totalling to Kshs.118,328.61 based on various gazette notices on minimum wage adduced by the



claimant as evidence in support of these prayers. The respondent's counsel has not commented on or contested this prayer. The respondent did not avail any evidence or records to prove that he indeed paid the claimant in accordance with the gazetted minimum wages as per the notices availed by the claimant. In the circumstances, the claimant is awarded the above sum for underpayments.

52. The awards made are subject to statutory deductions.

### VIII. Costs

53. The claimant is awarded the costs of the cause.

### IX. Disposal

54. In the disposal of this cause, the court issues the following orders in favour of the claimant -

- a. A declaratory order be and hereby issued and proclaimed that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
- b. The claimant is awarded the following –
  - i. One month's pay in lieu of notice ... Kshs12,184.25
  - ii. Annual leave pay ..... Kshs39,705.55
  - iii. Compensation ..... Kshs48,737.00
  - iv. Underpayments .....Ksh.118,328.61

Total .....Ksh.218,955.41

Less paid .....Kshs 63,000.00

Balance due ..... Kshs155,955.41
- c. The above amount shall earn interest at court rates from the date of this judgment till payment in full.
- d. Costs of the cause to the claimant.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

