



Oluchiri v Mary Njeri Macharia t/a Genbell Enterprises (Employment and Labour Relations Cause 43 of 2017) [2024] KEELRC 1667 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1667 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 43 OF 2017**

DN NDERITU, J

JUNE 27, 2024

BETWEEN

MOSES ELIKANA OLUCHIRI CLAIMANT

AND

MARY NJERI MACHARIA T/A GENBELL ENTERPRISES RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 13th February, 2016 filed in court on even date through Munene Chege & 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 –
 - a. A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal.
 - b. Payment in lieu of notice.
 - c. Compensation for unfair termination.
 - d. An order compelling the Respondent to settle the outstanding benefits.
 - e. General damages.
 - f. Cost of the suit and interest thereof at court rates
 - g. Any other relief that this court may deem fit to grant.



3. The respondent, then acting in person, entered appearance on 11th July, 2017 and filed a response to the memorandum of claim on 17th August, 2017 wherein she prays that the entire claim be dismissed with costs for lack of merits.
4. The respondent at different times appointed different lawyers to act for her in the matter but finally settled on Naomi Muriithi & Co Advocates.
5. The cause came up for hearing in open court on 17th May, 2023 when the claimant (CW1) testified and closed his case.
6. The defence was heard on the same date and the respondent (RW1) testified and closed her case.
7. Upon conclusion of the oral testimonies counsel for the parties addressed the court by way of written submissions. Both counsel for the claimant and the respondent filed their respective written submissions on 19th June, 2023.

II. The Claimant's Case

8. 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 his counsel. The same is summed up as hereunder.
9. In the memorandum of claim, the claimant avers that he was engaged by the respondent in January, 2015 as a machine-attendant until July, 2016 when he alleges that he was unfairly and unlawfully summarily dismissed. The claimant alleges that he was underpaid, denied leave allowance, denied fair hearing before dismissal, denied notice or payment in lieu thereof, and he also claims for compensation for the alleged wrongful, unfair, and unlawful dismissal.
10. In his testimony in court the claimant stated that the respondent operated a printing business in Nakuru town, now city. He grounded his testimony on his filed statement and produced his listed documents as exhibits 1 to 3.
11. He alleged that he was dismissed for failing to report to work on a public holiday on 7th July, 2016, Eid Ur Fitr. He alleged that he had not been instructed to report to work on the said public holiday and that he reported the dismissal to the labour office but the respondent failed and or refused to attend the conciliation proceedings thereat which informed him to file the claim in court.
12. In cross-examination the claimant stated that the respondent was his sole employer and that he was a month to month employee on an oral contract of service. He alleged that the salary was paid in cash and that his last gross salary was Kshs12,000/=. He denied threatening the respondent at any time, before or after the dismissal.
13. 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

14. The respondent's case is contained in the response to the memorandum of claim, her oral testimony and documentary evidence adduced in court, and the written submissions by her counsel, as summarized hereunder.
15. In her response to the claim the respondent denied the entire claim in toto. It is denied that the claimant was on a month to month contract but rather the respondent states that the claimant was a casual employee. It is pleaded that the claim is time-barred, vexatious, and without merits.



16. In her testimony in court the respondent claimed that she engaged the claimant in January, 2016 not January, 2015. She stated that the claimant was not engaged as a machine-attendant but a binder of books as she already had engaged a machine operator as at the time of engaging the claimant. She stated that she orally engaged the claimant on casual basis at Kshs440/= payable daily or weekly cumulatively. She stated that the claimant was a perennial absentee and when she inquired about his absence from work on 8th July, 2016 he became rude and abusive and even threatened to physically attack her. She alleged that she reported the threats to the police.
17. The respondent said that she responded to the summon from the labour office whereat she explained the dismissal and the reasons therefor to the satisfaction of the labour officer.
18. She relied on her filed statement and produced her filed documents as exhibits 1 to 5.
19. In cross-examination the respondent stated that she issued written contracts to permanent employees and not to casuals such as the claimant. She stated that after the public holiday on Thursday 7th July, 2016 the claimant failed and or refused to report to work on Friday 8th July, 2016. She alleged that it is then that the claimant confronted and threatened her after her inquiring why he had failed to report to work. She stated that she reported the matter to the police but she did not produce any documents in court to confirm that position. She also admitted that she had no employment records in regard to the claimant including payments of salary made.
20. 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

21. On the one hand, the claimant's counsel identified three issues for determination- Whether the claimant absented himself from work; Whether the claimant was unfairly terminated from work; And, Whether the claimant is entitled to the reliefs sought.
22. On the first issue, counsel submitted that since the respondent failed in her legal duty to avail and produce records of employment of the claimant the court ought to go by the evidence adduced by the claimant. Counsel cited *Chengo Kitsao Chengo V Umoja Rubber Products Limited (2016) eKLR*.
23. On the second issue, it is submitted that the respondent failed and or neglected to follow the laid-down procedural steps before the dismissal rendering the entire process unlawful. Counsel has cited Sections 42 & 45 of the *Employment Act* (the Act) as some of the provisions that the respondent violated.
24. On the other hand, counsel for the respondent identified two issues of determination – Whether there was an employer-employee relationship between the parties; and, Whether the termination was unlawful.
25. In regard to the first issue, it is submitted that the claimant was a casual employee who was not entitled to any notice before dismissal.
26. On the second issue, it is submitted that the claimant did not avail adequate evidence in support of his claim as required under Section 107 of the *Evidence Act* and Section 47(5) of the Act. In that regard counsel cited *Bernard Ochieng Odhiambo & Another V Prime Aluminium Casement LTD (2016)* as a persuasive decision for this court to follow.



V. Issues For Determination

27. 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 there a contract of employment between the claimant and the respondent and what were the terms thereof?
 - b. Is the claimant entitled to the reliefs sought?
 - c. Who should bear the costs of the cause?

VI. Employment

28. In her defence the respondent alleged that the claim is time-barred. However, that allegation was not escalated beyond there. Now, Section 90 of the Act provides that a claim based on employment and labour relations ought to be filed in court within three years of arising of the claim. This cause was instituted on 17th February, 2017 well within the limitation period and as such the allegation by the respondent is baseless.

29. Section 2 of the Act defines a contract of service as “an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies.” Section 8 of the Act provides that “The provisions of this Act shall apply to oral and written contracts”.

30. Section 9 (1) and (2) of the Act further provides as follows -

- (1) A contract of service—
 - (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
 - (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.
- (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

31. From the provisions above, a contract of service can either be oral or written. It is the legal duty and obligation of an employer to ensure that an oral contract of service is reduced into writing.

32. The claimant’s case is that he was engaged by the respondent as a machine operator in her printing business. The respondent admitted in her pleadings and oral evidence that the claimant was indeed her employee but alleged that the claimant was a general casual worker. Sections 10 and 73 of the Act place a legal obligation upon an employer to keep and maintain employment records and to avail the same for inspection whenever required to do so. Those are the records that the respondent ought to have availed in court to dislodge and rebut the evidence by the claimant. Having failed in that duty the respondent lost the ground to convince the court otherwise. In fact, in her oral testimony in court the respondent admitted that she did not keep such records.



33. In the circumstances, the court shall go by the evidence from the claimant that he was engaged on month to month basis as a machine operator and that his last gross monthly salary was Kshs12,000/=.
34. Likewise, there is no evidence that the respondent subjected the claimant to due process applicable before dismissal. No notice was issued, no disciplinary hearing was held or conducted, no reason or notice of termination was issued, and no terminal dues were paid. The respondent violated the legal requirements on substantive and procedural fairness – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
35. For the foregoing reasons the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.

VII. Reliefs

36. Prayer (a) has already been dealt with above as the dismissal has been declared wrongful, unjust, unfair, and unlawful.
37. The evidence on record from both the claimant and the respondent is that the claimant was engaged as a machine-attendant. There is no evidence whatsoever that he was engaged as a shop attendant. In his very own evidence the claimant's last known salary was Kshs12,000/=. In the circumstances, for prayer (b) payment in lieu of notice is awarded at Kshs12,000/=.
38. Prayer (c) is for compensation for wrongful, unfair, and unlawful dismissal. Counsel for both parties did not submit on in respective views as to what may be reasonable award under this head. Section 49(4)(c) of the Act caps the award of compensation equal to 12 months' gross salary. Considering the entire circumstances of this cause and the evidence on record vis a vis the factors to be considered in the above law, an award of six months' pay is in my considered view adequate compensation calculated at Kshs72,000/= subject to statutory deductions.
39. Prayer (d) simply asks the court to compel the respondent to settle outstanding benefits. Those benefits are neither specified nor particularized and counsel for the claimant did not submit on the same. Prayer (e) is for general damages which again are neither disclosed nor proved nor supported by evidence. In my considered view, the damage suffered as a result of unlawful termination or dismissal is in the loss of legitimately expected earnings bar the termination or dismissal. Such loss has been taken care of in the award of compensation above.
40. The claimant did not avail evidence on what leave pay was due to him and for what period. Likewise, the claim on underpayment was not proved as no evidence was tendered in support thereof. Further, there is no evidence on record on which three months the claimant was allegedly not paid for. All those items are hereby dismissed for lack of particulars and evidence in support thereof. Likewise, no evidence was availed on the alleged underpayment of salary. No severance pay is due to the claimant as he was dismissed, not declared redundant.

VIII. Disposal

41. In the disposal of this cause, the court issues the following orders in favour of the claimant -
 - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
 - b. Consequently, the claimant is awarded as follows –



- i. Notice pay Kshs12,000/=
- ii. Compensation Kshs72,000/=
- Total Kshs94,000/=

- 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 and interest thereon to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 27TH DAY OF JUNE, 2024.

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DAVID NDERITU

JUDGE

