



Chibanza v Avc Management Co. Ltd t/a Mnarani Club (Appeal E005 of 2023) [2024] KEELRC 1530 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1530 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E005 OF 2023**

**AK NZEI, J
JUNE 13, 2024**

BETWEEN

RICKSON MUNGA CHIBANZA APPELLANT

AND

AVC MANAGEMENT CO. LTD T/A MNARANI CLUB RESPONDENT

(Being an appeal from the judgment of SPM Court at Kilifi – Hon. J. KM. Kitiku – SPM delivered on 17th March 2023 in Kilifi – CM ELR- No. E037 of 2023)

JUDGMENT

1. The Appellant was the claimant in Kilifi Principal Magistrate’s Court Employment Cause No. E037 of 2022. He had sued the Respondent herein seeking the following reliefs:-
 - a. A declaration that termination of the claimant’s employment was unfair, unjust and wrongful.
 - b. One month pay in lieu of notice..... kshs. 25, 342
 - c. Unpaid salary balance of 75% April-July 2020 (kshs. 25,342x75% 4 months) ... kshs. 16, 026.
 - d. Unpaid salary – August – October 2020 (kshs. 25,342x 3 months)
 - e. Salary arrears January – October 2020 (8% x25,342x12 months).....kshs. 24,328.32
 - f. Compensation for unfair termination (25,324x12 months)... ksh. 304,104
 - g. Costs of the claim and interest thereon at Court rates.
 - h. Any other relief that the Honourable Court may deem just and fit to grant.
2. The Appellant had pleaded that he had been employed by the Respondent from 1/11/2017 as a waiter, earning a monthly salary of kshs. 25,324 at the time of termination. That he worked for 3 years, and



was declared redundant on 7/10/2020 without notice and without being appraised of the selection criteria used in declaring him redundant.

3. The Appellant had further pleaded:-
 - a. that the Respondent had failed or neglected to issue requisite notices for the intended redundancies as contemplated under Sections 40(1) (a) and 40(1) (f) of the *Employment Act* 2007.
 - b. that the Respondent failed to inform the Appellant of the selection criteria adopted to declare him redundant, and that there was no regard to seniority in time, skill, ability and reliability of the Appellant as contemplated under Section 41(c) of *Employment Act* 2007.
 - c. that the Respondent failed to pay the Appellant all his contractual and terminal dues prior to termination on account of redundancy contrary to the provisions of Sections 40(1) (d) (f) and (g) of the *Employment Act*.
 - d. that the Appellant had no genuine reasons to declare the Appellant redundant. That the Respondent, through her senior officers, had been calling the Appellant to return to work and offer his services on short term contracts, meaning that the Respondent's business was still running and that the Respondent was mercilessly using the Covid-19 pandemic situation to engage in unfair labour practices.
 - e. that the Appellant was unfairly and unjustifiably declared redundant by the Respondent without following due process as per the law, and without payment of terminal and contractual dues.
4. Documents filed by the Appellant alongside the memorandum of claim dated 20/10/2020 and filed in Court on 28/10/2020 included the Appellant's witness statement dated 28/10/20101 and a list of documents dated 27/10/2020, listing 5 documents. The listed documents included copies of the Appellant's identity card, certificate of service, a copy of termination of employment letter dated 7/10/2020 a copy of a payslip and copy of the Appellant's NSSF statement.
5. The Respondent filed response to the Appellant's claim on 27/11/2020 admitting having employed the Appellant but denying his claim. The Respondent denied having unfairly declared the Appellant redundant and pleaded that the declared redundancy was fair, just and procedurally sound in that:-
 - a. the Respondent was guided by the Collective Bargaining Agreement and provisions of the *Employment Act*.
 - b. that the Appellant was issued with the necessary redundancy notice.
 - c. that Respondent computed and paid the Appellant's terminal and contractual dues.
 - d. that the Respondent closed doors for a while and was forced to reduce staff due to the new normal brought by Covid10 pandemic.
 - e. that the Appellant was given reasons for the redundancy termination, and the decision to declare him redundant was fair, lawful and justifiable.
6. Documents filed by the Respondent alongside the response to the Appellant's claim included a written witness statement of Hendrick Venter (the Respondent's Resort Manager) and a bundle of copies of documents, among them some hand written documents, and lists of names regarding payment of the Respondent's employees' salaries for the month of November 2020. Also included in the bundle of copies of documents was an application for funds transfer dated 5/11/2020 indicating an amount of



five million Kenya shillings and the purpose as “staff final dues phase 1”. Names and particulars of the intended beneficiaries of the said final dues were not presented in evidence. It is to be noted that the Appellant’s employment had, according to the termination letter dated 7/10/2020, terminated on 7/10/2020. Other documents included is what is shown to be the “Appellant’s termination letter dated 15/5/2020”, among others.

7. At the trial, the Appellant adopted his filed witness statement which substantially replicates the statement of claim, as his testimony, and produced in evidence the documents referred to in paragraph 4 of this judgment. The Appellant further testified that he did not receive the termination letter dated 15/5/2020, and that termination of his employment was abrupt.

8. I have seen the letter dated 15/5/2020 filed by the Respondent, which reads in part:

“This letter therefore serves as a notice to terminate your service with effect from 31/5/2020”.

The said letter is not shown to have been served on the Appellant or to have been received by him.

9. The Respondent called one witness, Hendrick Venter (DW-1) who adopted his filed witness statement as his testimony and produced in evidence the Respondent’s documents referred to in paragraph 6 of this judgment. DW-1 further testified in the trial Court that there were two termination letters, dated 15/5/2020 and 7/10/2020. That there was no evidence that the letter dated 15/5/2020 was served on the Appellant, and that the said letter (dated 15/5/2020) was of no effect. It is to be noted that the Respondent did not refer to the said termination letter dated 15/5/2020 in its pleadings, but rather sought to justify the impugned redundancy shown (by the Appellant) to have been effected vide the termination letter dated 7/10/2020.

10. The termination letter dated 7/10/2020 states in part:-

Re: Termination Of Your Employment

The purpose of this letter is to confirm the outcome of a recent review of AVC Management LTD trading as Mnarani Club, of its operational requirements, and what this means for you.

As a result of the economic downturn due to the current Covid-19 Pandemic, and the change, in operational requirements of Mnarani Club, the position of F& B Waitress is no longer needed.

Regrettably, this means your employment was terminated. This decision was not a reflection on your performance.....

Due to the current Covid-10 pandemic, we propose that your final dues to be paid in 3 equal instalments as discussed with the works committee and Union representatives to the banking records currently on your staff file....”

11. It is to be noted that the lower Court suit was filed on 28/10/2020, 21 days from the date of termination of the Appellant’s employment. I have not seen, in the trial Court’s proceedings and documents produced in evidence by both parties, any proof of any payment to the Appellant after the date of termination of his employment (7/10/2020). Further, it is clear from the foregoing letter that termination of the Appellant’s employment was NOT on account of redundancy as there is no such indication in the termination letter dated 7/10/2020.

12. The trial Court delivered its judgment on 17/3/2023 and dismissed the Appellant’s suit with costs to the Respondent.



13. Aggrieved by the trial Court's judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-
 - a. the learned magistrate erred in law and fact by disregarding the Appellant's evidence that procedure was not followed by the Respondent before the termination.
 - b. the learned magistrate erred in law and fact by finding that the Respondent had complied with the CBA and the Employment Act before terminating the Appellant despite there being evidence to the contrary.
 - c. the learned magistrate erred in law and fact by dismissing the Appellant's prayers by stating that he was paid, thus estopped from claiming the same, despite the evidence of the alleged payment being controverted by the Appellant.
14. The Appellant sought the following reliefs on appeal:-
 - a. that the appeal be allowed, and the judgment delivered on 17th March 2023 by the trial Court be set aside in its entirety.
 - b. that the Court awards the Appellant the prayers sought in the claim.
 - c. costs of the appeal be awarded to the Appellant.
15. This is a first appeal, and the pleadings filed in the trial Court and the evidence presented thereon by both parties are before me for fresh evaluation and consideration. This Court, however, takes cognizance of the fact that it neither saw nor heard the witnesses first hand.
16. In my view, issues that fall for determination are as follows:-
 - a. whether termination of the Appellant's employment by the Respondent was unfair.
 - b. whether the reliefs sought by the Appellant in the trial Court are deserved.
17. On the first issue, both parties testified before the trial Court that the Appellant's fixed term contract was set to lapse on 31/10/2020, having commenced on 1/11/2019. The Appellant had pleaded that he had worked for the Respondent since 1/11/2017. This averment is corroborated by the certificate of service issued to the Appellant by the Respondent and dated 7/10/2020. The Appellant was, therefore, entitled to plead unfair termination pursuant to Section 45(3) of the Employment Act.
18. The Appellant's employment was terminated without notice pursuant to Section 35(1) (c) of the Employment Act, and this rendered the termination unfair. I therefore find that termination of the Appellant's employment was unfair, and I so declare.
19. On the second issue, and having found that termination of the Appellant's employment was unfair, and having taken note of the fact that the Appellant's fixed term contract was on its homestretch, I award the Appellant the equivalent of five months' salary being compensation for unfair termination of employment. The evidence on record shows that the Appellant's monthly salary at the time of termination was kshs. 25,342. The Appellant had pleaded as much. The equivalent of five months' salary is kshs. 126,710, which I award the Appellant. I also award the Appellant terminal dues as tabulated by the Respondent based on the CBA and stated in the termination letter dated 7/10/2020, at kshs. 50,684. The Appellant never faulted the tabulation. He only denied having received payment. The Respondent never demonstrated that payment was made. The claims for terminal and contractual dues as set out in the statement of claim is declined.



- 20. In sum, and having considered written submissions filed on behalf of the parties herein, the appeal herein is allowed, and the trial Court’s judgment delivered on 17/3/2023 is hereby set aside. Judgment is hereby entered for the Appellant against the Respondent as follows:-
 - a. compensation for unfair termination of employmentkshs. 126,710
 - b. terminal dueskshs. 50,684Total kshs. 177,394
- 21. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
- 22. The Appellant is awarded costs of the appeal and of proceedings in the Court below.
- 23. The Appellant is also awarded interest on the awarded sum, to be calculated at Court rates from the date of the trial Court’s judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH JUNE 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

