



**Mbogho v Oceans Alive Foundation Limited (Cause E128 of 2023)  
[2024] KEELRC 1365 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1365 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E128 OF 2023**

**M MBARÚ, J**

**JUNE 6, 2024**

**BETWEEN**

**MERCY MBOGHO ..... CLAIMANT**

**AND**

**OCEANS ALIVE FOUNDATION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claim herein is that the respondent, a limited liability company employed the claimant from 2020 as a volunteer. Later she was confirmed as the operations manager on 4 January 2021 and worked until December 2022 when she changed to Programmes Manager on 1<sup>st</sup> January 2023.
2. The claim is that the claimant worked until 25 July 2023 when she was called for a meeting with the company directors, Des Bowden and Tilda Bowen to discuss her progress. This was also meant to be handed over to the new project manager who had joined the organization in June 2023. During the meeting, the directors told the claimant that a decision had been taken to terminate her contract of employment with immediate effect. She was then presented with a tabulation of her terminal dues.
3. The claim is that the respondent did not give the claimant any reasons for termination of employment, there was no hearing or notice as required under the law. This was unfair and illegal since the employment contract was due to expire on 31<sup>st</sup> March 2024. The claimant is seeking the following dues;
  - a. A declaration that employment was terminated unfairly;
  - b. Compensation for the remaining contractual period of 8 months Ksh.2,216,784;
  - c. 12 months compensation for unfair termination of employment;
  - d. Certificate of service and
  - e. Costs of the suit.

5. the claimant testified in support of her case that she worked well with the respondent until 25 July 2023 when her employment was unfairly terminated. In June 2023 she applied for her annual leave and on 17 June 2023 the director called her to a meeting held outside the office. Due to changes in the organizational structure, a new programme officer was employed and she had prepared the hand-over report and had hoped to discuss it. The claimant was to become the operations manager but through a letter dated 31<sup>st</sup> July 2023, her employment was terminated. She was not allowed to go back to the office.
6. The claimant testified that she started working for the respondent as a volunteer in the year 2020. She was then issued with a contract for the position of Chief Operations Manager. The organizational structure was changed and she became the programmes manager. After taking annual leave and before she could resume duty, she was called for a meeting and informed that the respondent would terminate her employment
7. Upon cross-examination, the claimant testified that through her email dated 28 February 2023 to the director, she offered to step down as the chief operations manager. This was to help her shift to the programme manager and because there was a transition.
8. The claimant also testified that she wrote and asked to be changed as the bank signatory and that she would want to work as a part-time consultant. As the chief operations manager, in her contract, she was required to give reasons for the termination of issuing a one-month notice or payment in lieu thereof. The respondent did not respond and the contract ended on 31<sup>st</sup> March 2023.
9. In reply to the email, on 1<sup>st</sup> March 2023, the director Mr. Des wrote and asked the claimant to have a meeting with him. He noted his disappointment upon the resignation as the chief operations manager. Several other meetings were held to discuss terms of reference but the claimant was not present. After the meeting held on 27 July 2023, she did not want an argument and hence accepted the offer to have her terminal dues tabulated and paid. This was agreed to comprise notice pay but there was no mutual agreement for the separation. The claimant contested the tabulation for severance pay applied at 2 years whereas she wanted payment for the full contract term.
10. The claimant testified that she was paid Ksh.404, 372 through a settlement agreement.
11. In response, the respondent's case is that there was no termination of employment as alleged but other, parties had a mutual agreement to separate after a long discussion over the claimant's inability to perform her duties as under her contract. In the circumstances, the claimant was not entitled to payment for the remainder of her contract term as there was no termination of employment as alleged save the mutual separation agreement.
12. The claimant was paid her terminal dues in full. The claimant is not entitled to any further payments.
14. The claimant had on various occasions had a strained working relationship with the respondent that culminated in the mutual agreement to separate on mutually agreed terms. On 28 February 2023, the claimant resigned from her assigned role and unilaterally assumed another one which was not in the organogram. On various occasions, without leave or permission, the claimant remained absent from work and absent at meetings. She also refused to obey lawful or proper instructions from the respondent.
15. Through the mutual separation agreement, the claimant was paid her terminal dues in full. This amounted to Ksh.404, 372.54 paid on 31<sup>st</sup> July 2023 for the following;
  - a. Severance pay 2021 Ksh.124,999;

- b. Severance pay 2022 Ksh.136,291;
- c. 13 days leave Ksh.120,075;
- d. Notice pay Ksh.277,098;
- e. July 2023 salary ksh.227,098;

Less

- i. PAYE
- ii. NHIF
- iii. NSSF
- iv. Housing levy
- v. Advance
- vi. July salary

Total paid Ksh.404, 372.54

- 16. The response is also that the claims made are without merit and should be dismissed with costs.
- 17. In evidence, the respondent called Vincent Wachira (Washira) Mwangi the finance and administration manager who testified that the claimant was the chief operations manager and then the programme manager but the respondent received complaints from community members with regard to her work. The director held several meetings with the claimant to resolve these matters which resulted in a separation agreement on 31<sup>st</sup> July 2023 and the claimant was paid her terminal dues in full. She has acknowledged the payments.  
  
At the close of the hearing, both parties filed written submissions.
- 18. The claimant submitted that her employment was terminated by the respondent before the expiry of her contract. There was no prior notice, hearing or any reasons given resulting in unlawful and unfair termination of employment. The respondent changed its organizational structure and the claimant was appointed as the programme manager but the respondent kept the contract. The employer must produce the work records as required under Section 74 of the *Employment Act*. In the case of Abigael Jepkosgei Yator & Another v China Hanan International Company Limited [2018] eKLR the court held that an employer should keep all work records with regard to an employee and produce them in court once a suit is filed.
- 19. The claimant submitted that the response that there was a mutual agreement to terminate employment was without proof. No agreement was negotiated since the claimant asked to be informed about the tabulation of her terminal dues without success. In the case of Vencenslus Kililo *Mghoi v Shreeji Enterprises (K) Limited Cause No.E060 of 2023*, the court held that each contract had a discharge certificate but the same cannot be used to deny the employee his lawful dues under Section 35(4) of the *Employment Act*.
- 20. The claimant submitted that the respondent did not call a competent witness to disprove her case and the same should be disregarded. Vincent Washira Mwangi's entire evidence should be disregarded and the claims made allowed with costs.

21. The respondent submitted that the claimant was employed as the operations manager from 1<sup>st</sup> January 2023 to 31<sup>st</sup> March 2024. Through a mutual agreement dated 31<sup>st</sup> July 2023, employment was terminated and the claimant paid her full terminal dues. In the case of *Pauline Wangeci Warui v Safaricom Limited*, the court held that the common law principles of contract applied with regard to contracts where there is an agreement. An employee should not be allowed to go back on an agreement unless there is evidence of illegality. The claim should be dismissed with costs.

### **Determination**

22. The respondent admitted to the fact that the claimant was last serving under an employment contract running from 1<sup>st</sup> January to 31<sup>st</sup> March 2024.
23. The claim is that there was an unfair termination of employment on 31<sup>st</sup> July 2023 while the response is that employment was terminated through a mutual separation agreement on 31<sup>st</sup> July 2023 and the claimant has been paid in full.
24. With employment admitted, the issue is whether the mutual separation agreement is lawful and whether the same terminated employment fairly or unfairly.
25. Indeed, as the claimant submitted, the employer must keep and file work records once the suit is filed. This legal duty is outlined under Section 10(6) and (6) of the *Employment Act, 2007* (the Act);
- (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
- (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
26. The claimant filed the employment contract dated 1<sup>st</sup> January 2023 for the position of Program Manager and the contract was due to end on 31<sup>st</sup> March 2024.
27. The claimant also filed AGREED TERMS OF TERMINATION OF CONTRAC TOF MERCY MBOGHO dated 31<sup>st</sup> July 2023. This is noted at the mutual separation agreement. Under this agreement, parties noted that;

Based on our meeting on 27<sup>th</sup> of July 2023 the undersigned mutually agreed to the following terms and conditions in respect to termination of your contract with Oceans Alive as of 31<sup>st</sup> July 2023. ...

28. Both parties executed this agreement. The claimant signed the agreement on 4 August 2023.
29. A mutual separation agreement is similar to a contract between parties. Unless one party alleges the same was obtained through fraud, misrepresentation or coercion, the court is bound by the terms and conditions of the mutual agreement. The basis is as held in *Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board* (1973) I WLR 601 at 609 where the court held that;

The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.

30. This position is reiterated in the case of *Godfrey Allan Tolo v Tobias O. Otieno & another* [2022] eKLR that;
- ... It is an established principle of law of contract that parties to a contract, including a contract of employment, can terminate their relationship voluntarily through mutual agreement. It means therefore that what the parties can voluntarily enter into mutually, they can also walk out of the same voluntarily by consent and upon agreed terms.
31. Simply because parties have not agreed on the actual terminal dues to be paid, this cannot invalidate the mutual separation agreement as held in *Eldotec Consultancy Services Ltd v Otieno & another (Cause E019 of 2023)* [2023] KEELRC. Recourse is to the terms and conditions of the mutual agreement to terminate employment.
32. In this case, the claimant's case is that she was issued with a prior tabulation of her terminal dues and she had no occasion to address the same. That there was termination of employment without notice, hearing or for good cause. Her case was that on 25 July 2023, she was called for a meeting with the director outside the office without being told the agenda and as there was a transition, she had prepared the handing over report to the incoming operations manager since she was taking up the position of programme manager.
33. However, upon the contract dated 1<sup>st</sup> January 2023, through email on 28 February 2023, the claimant had tendered her resignation from her current role at COM. ... In this communication, the claimant noted that her contract was due to expire on 1<sup>st</sup> March 2023.
34. The claimant further offered that I would like to work on part-time priority being wildlife and FFI. Any other service required would be consultancy.
35. In reply, the respondent through an email dated 1<sup>st</sup> March 2023 from Des Bowden noted that it is unacceptable behaviour to resign your role forthwith without any notice period in addition, allocate yourself a new role that is not in the organogram that was agreed upon. ...
36. These communications are done without recourse to the already ongoing contract admitted by the respondent running from 1<sup>st</sup> January 2023 to 31<sup>st</sup> March 2024.
37. As outlined above, both parties had a meeting before the mutual separation agreement on 31<sup>st</sup> July 2023. The claimant testified to this fact that on 25 July 2023, she was called from her annual leave and a meeting held outside the office. She was surprised that this meeting did not relate to her progress report but related to termination of employment.
38. After the meeting on 25 July 2023, the mutual separation agreement is drawn on 31<sup>st</sup> July 2023. Hence the claimant had time and occasion to address any issue(s) arising from the meeting with the respondent's director.
39. After the 31<sup>st</sup> July 2023 agreement, the claimant did not sign it until 4 August 2023. This gave her more time to study and appreciate the contents therein.
40. Indeed, through email dated 31<sup>st</sup> July 2023 at 6:21 PM, Tilda Bowden wrote to the claimant and noted;
- To summarize, we agreed to;
- The payment of dues as listed in the sheet Des gave you We have not gone into the detail of counting leave days and off days; We will pay you as staff until the end of July We hope you will complete the full handover by the end of July Were agreed that one month's notice be given The month of August will be the notice period where do not expect you to come to the office. However, we may call on you from time to time for handing over clarity or advice ...

41. The mutual separation agreement executed by both parties to the employment relationship is binding. The claimant does not allege any matter of illegality in securing the agreement under her hand on 4 August 2023. The reliance on Section 35(4) of the Employment Act, 2007 is removed from the claimant.
42. The court finds no matter on record to invalidate the mutual separation agreement dated 31<sup>st</sup> July 2023. The claimant agreed to separate and to end the employment relationship. The parties are bound by their mutual separation agreement.
43. The claimant has since received full payment of her terminal dues which include, severance pay even though there was no redundancy, payment for 13 accrued leave days and notice pay despite notice having been issued and termination of employment being mutual. Full salary for days worked including the month of July 2023 were fully paid.
44. The total payable dues to the claimant were procedurally processed through the application of Section 49(2) of the Act which requires that;
  - (2) Any payments made by the employer under this section shall be subject to statutory deductions
45. To this extent, the statutory deductions are lawful. The salary advance is a lawful and proper deduction at the end of employment.
46. In the penultimate, concerning costs, the claimant aware of the full settlement of her terminal dues went ahead to file the instant suit. Addressed above, the claims found without merit, costs should be awarded to the respondent.
47. Accordingly, for the reasons above, the claim herein is without merit and is hereby dismissed. Costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

.....and.....