



Kibui & 3 others v Kirinyaga Construction Company Limited (Cause 215 of 2017) [2024] KEELRC 2070 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2070 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 215 OF 2017**

JK GAKERI, J

JULY 31, 2024

BETWEEN

JAMES MWATHAT KIBUI & 3 OTHERS & 3 OTHERS CLAIMANT

AND

KIRINYAGA CONSTRUCTION COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimants commenced this suit by a Memorandum of Claim filed on 7th February, 2017 claiming three months' salary in lieu of notice, salary arrears, leave allowance, transport allowance and service pay.
2. Although, there were 4 Claimants, only three participated in the suit. The 2nd Claimant did not and his suit abated.
3. The Claimants aver that they were employed by the Respondent on diverse days as follows;
James Muriithi Wambugu (1st Claimant) March 2003 – November 2015 at Kshs.57,000/=
Stephen Kavuta (2nd Claimant) May 2014 – November 2015 at Kshs.30,000/=
Raphael Kiambata (3rd Claimant) March 2003 – November 2015 at Kshs.57,000/=
James Mwatha Kibui (4th Claimant) May 2009 – November 2015 at Kshs.40,000/=
4. That they were employed to work in Kenya and South Sudan and served diligently and the Respondent provided them with food, laundry services, medication and housing but delayed payment of the salary and did not submit their SACCO contributions as a consequence of which they filed a suit in South Sudan and a Consent Decree was entered on 11th November, 2015 in their favour and were awarded Kshs.7,392,979.00 and were paid as follows;
James Wambugu Kshs.348,000.00



Stephen Kavuta Kshs.191,800.00

Raphael Kiambati Kshs.133,980.00

James Mwatha Kshs.230,074.00

5. That the outstanding amounts were payable when they returned to Kenya and they signed the agreement.
6. According to the Claimants, the Respondent short changed them by paying less than the agreed sum and terminated their employment on the same day (11th November, 2015).
7. It is the Claimant's case that their employment was unlawfully terminated and they are entitled to Certificate of Service and terminal dues.
8. The Claimants pray for;
 - a. Kshs.3,745,926 as follows;
 - 1st Claimant Kshs.1,458,000.00
 - 2nd Claimant Kshs.286,000.00
 - 3rd Claimant Kshs.1,120,000.00
 - 4th Claimant Kshs.881,926.00
 - b. Certificate of service
 - c. Costs of this suit
 - d. Interest on (a) above
 - e. Any other relief the court deems fit.

Respondent's case

9. The Respondent filed its statement of response on 2nd May, 2023, almost 6 years after the suit was filed.
10. It admits that the Claimants were its employees and avers that the unrest in Southern Sudan made it too dangerous for the Claimants to perform their duties, but made regular monthly payment of their salaries.
11. It also admits having been sued by the employees in South Sudan and prays for dismissal of the suit with costs.

Claimants' evidence

12. On cross-examination, CWI, Mr. James Wambugu confirmed that the document he signed had no indication of any sum of money being paid later and admitted having signed the document on record and was paid Kshs.279,000.00.
13. On re-examination, the witness admitted that they had agreed that he be paid for 10 months and 25 days.
14. That he did not know where the judgment came from.



15. CWII, Mr. Raphael Kiambati confirmed that he was employed as a trailer driver at Kshs.38,000/= in South Sudan but Kshs.57,000/= in Kenya and had no documentary evidence to prove his salary and the Respondent deposited different amounts in his bank account.
16. The witness admitted that they filed a suit in Sudan and was paid Kshs.133,980.00 and signed for it and had no evidence of a promise to be paid later and the court decree was for a specified amount. That he was paid for 10 months.
17. CWIII, Mr. James Mwatha confirmed that they filed a case in South Sudan, and recorded a consent which had no provision for additional payments and had not pleaded other claims in the South Sudan.
18. On re-examination, the witness testified that they had been told that they would get more money in Kenya.

Respondent's evidence

19. RWI, Mr. Robert Maina confirmed that Mr. Raphael Kiambati's salary was Kshs.57,000/= but had not filed any document on the issue.
20. The witness confirmed that he participated in the negotiation that led to the Consent Decree in the case in South Sudan filed by 33 Claimants and each employee agreed on how much they received and a representative of the Respondent in South Sudan signed on behalf of the Respondent, but the witness did not sign the agreements.
21. The witness was categorical that the parties agreed on the amount payable and all signed the agreement.
22. That after filing the suit in Sudan, the Claimants disappeared and filed the instant suit.
23. By 27th May, 2024, none of the parties had filed submissions and the Claimant was absent.
24. The court accorded the Respondent's counsel 7 days to file and serve submissions and judgment was reserved for 31st July, 2024.

Analysis and determination

25. It is common ground that the Claimants were employees of the Respondent engaged on different dates and working in South Sudan.
26. None of the Claimants testified about their work in Kenya or the claims they had, if any, against the Respondent and strangely none of them testified on the circumstances in which their employment came to an end and how.
27. After careful consideration of the pleadings and the evidence on record, the issues for determination are;
 - i. Whether termination of the Claimants employment was unfair or unlawful.
 - ii. Whether the Claimants are entitled to the reliefs sought.
28. On the 1st issue, it requires no belabouring that for a termination of employment to pass muster, the *Employment Act, 2007* requires the employer to demonstrate that it had a valid and fair reason relating to the conduct, capacity or compatibility of the employee or the operational requirements of the employer and conducted the termination in accordance with a fair procedure (Section 45).



29. Under Section 43 of the Act, the employer is obligated to prove the reason(s) for the termination failing which the termination of employment is deemed unfair within the meaning of Section 45 of the *Employment Act*, 2007.
30. The essentials of a fair termination were aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR and the Court of Appeal in *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] eKLR.
31. The Court of Appeal expressed itself as follows:

“From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per the contract or fails to accord the employee an opportunity to be heard as by law required.”
32. In a nutshell, for a termination of employment to pass the fairness test, it must be demonstrated that there was not only a substantive justification for the termination but also procedural fairness.
33. As regards the burden of proof, Section 47(5) of the *Employment Act*, 2007 provides that;

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.
34. This court has consistently held that all the employee is required to prove is a prima facie case of an unfair termination in order to discharge the burden of proof.
35. In *Nicholus Kipkemoi Korir v Hatari Security Guards* (2016) eKLR, Abuodha J. was unambiguous that the burden under Section 47(5) of the *Employment Act*, 2007 “does not become any less on the employee even where the suit is undefended or the employer is absent.”
36. In the instant, suit although paragraph 17(E) of the Memorandum of Claim states that the Claimants were unfairly terminated from employment, it is reticent on the specific circumstances in which the alleged termination of employment took place.
37. Similarly, paragraph 16 states that the termination of employment took place on 11th November, 2015 without prior notice, the date they signed the Agreement Form 1(A).
38. None of the Claimants explained how the termination of their employment took place and why the Respondent is to blame.
39. In the absence of evidence of what the Respondent’s representative did or did not do which culminated in the separation, it is the finding of the court that the Claimants have failed to prove on a preponderance of probabilities that termination of their employment by the Respondent was unfair.
40. This finding is reinforced by the conspicuous omission of the prayer of compensation for unfair termination or damages for violation of the Claimants rights by the Respondent.



Whether the Claimants are entitled to the reliefs sought

i. Three (3) months' salary in lieu of notice

41. Having failed to demonstrate that termination of their employment was attributable to the Respondent and was unfair or unlawful, the prayer for pay in lieu of notice lacks a basis for award.
42. To a lesser extent but significant, why 3 months' salary, yet none of the Claimants provided a copy of the contract of employment or Collective Bargaining Agreement (CBA).
43. The claim lacks justification and is declined.

ii. Salary arrears up to November 2015

44. The 1st, 3rd and 4th Claimant pray for six months, nine months and 11 and ¼ months' salary arrears accumulated in South Sudan.
45. These are the arrears which precipitated the Civil Suit No. 265 of 2015 Robinson B. Nyaga & others V Kirinyaga Construction Co. Ltd which the Claimants acknowledged was their case for salary arrears.
46. It is not in contest that the parties entered into a consent which the court adopted as its judgment for the sum of Kshs.7,392,979.00 or its equivalent in USD as their salaries.
47. The Claimants were also awarded costs of the suit.
48. The Consent Decree is signed by Justice Obac Denyong Anyong of the High Court, South Sudan.
49. On the basis of this judgment, all the Claimants were paid and received sums of money and signed in agreement.
50. For instance, Mr. James Muriithi Wambugu's arrears were for 11 months but agreed to be paid for 10 months and 25 days.
51. Raphael Wambati and James Mwatha had arrears for 17 months but agreed to receive payment for 10 months and 25 days.
52. Since the payment was received pursuant to a consent judgment, a dissatisfied party can only move the trial Court for further orders of directions as necessary.
53. The Respondent's obligations for salary arrears could not extend beyond the consent judgment of a court in another jurisdiction.
54. In the courts view, the claim for salary arrears awarded by the court in Sudan can only be enforced in South Sudan and they were bound by the consent as parties to the suit. Either the Claimants or their legal representative negotiated and agreed to the consent judgement.

The claim is declined.

iii. Four months' salary October to January 2014 (1st Claimant)

55. The 1st Claimant adduced no verifiable evidence as to when the alleged arrears accrued and why they were not included in the South Sudan case bearing in mind that the suit was on salary arrears.

The prayer lacks supportive evidence and is declined.



iv. Transport Allowance to Juba and back to Kenya

56. The Respondent adduced no evidence on how the Claimants left South Sudan or how it facilitated their return to Kenya.
57. Having taken them to South Sudan, it behooved the Respondent to ensure that they returned home safely.
58. In the absence of evidence of how the Respondent facilitated the safe return of its former employees, the prayer for transport appears justifiable, is fairly modest and is awarded as prayed Kshs.32,000/= for the 1st, 3rd and 4th Claimant.

v. Three months leave allowance

59. CWII, Mr. Raphael Kiambati tendered no verifiable evidence on when the leave allowance accrued including whether he had requested for it and it was denied.
60. The same applies to the one (1) month leave allowance by CWIII, Mr. James Mwatha who tendered no evidence.
61. The absence of relevant particulars of the claim renders the same unsustainable and it is declined.

vi. Service pay

62. The Claimants have prayed for service pay as follows;
James Wambugu 13 years Kshs.741,000/=
Raphael Kiambati 17 years Kshs.646,000/=
James Mwatha 6 years Kshs.240,000/=
63. Regrettably, none of the Claimants provided a copy of their National Social Security Fund (NSSF) statements to prove that they were not members of the National Social Security Fund or that the employer was not remitting deductions. Membership of the National Social Security Fund is mandatory for both employer and employee.
64. Having been employees of the Respondent for 13 years, 17 years and 2 years, Mr. James wambugu, Raphael Kiambati and James Mwatha respectively knew or ought to have known that membership of the NSSF is compulsory for every employee.
65. Although the provisions of the [Employment Act](#) require the employee to keep employment records, it is the duty of the Claimants to demonstrate that they were not members of a compulsory social security system under the NSSF.
66. The prayer lacks supportive evidence and is declined.

vii. Certificate of service

67. The Claimants are entitled to certificate of service by dint of Section 51 of the [Employment Act](#), 2007.
68. The upshot of the foregoing is that the judgment is entered in favour of the three (3) Claimants against the Respondent as follows;
 - a. Transport Allowance to Juba and back Kshs.32,000/= each.
 - b. Certificate of service.



69. In the circumstances of this case, it is only fair that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JULY 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

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