



**Kenya Building, Construction, Timber & Furniture Industries Employees Union v Vagjiyani Limited (Cause E574 of 2022) [2024] KEELRC 2006 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2006 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E574 OF 2022  
NZIOKI WA MAKAU, J  
JULY 30, 2024**

**BETWEEN**  
**KENYA BUILDING, CONSTRUCTION, TIMBER & FURNITURE  
INDUSTRIES EMPLOYEES UNION ..... CLAIMANT**  
**AND**  
**VAGJIYANI LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit on behalf of the Grievants Mr. Moses Otieno, Mr. Kingoku Munguti, Mr. Bernard Kiamba and Mr. Jonathan Nzioki also known as Jonathan Kivaya. It was averred that the Respondent had terminated the contracts of the Grievants in July and August 2021. The Respondent was said to have declared the Grievants redundant without following the right procedure under section 40 of the *Employment Act*. The Claimant avers it received a complaint that the Respondent had declined to settle the terminal dues for the Grievants and after attempts to settle it with the Respondent directly there was no solution and therefore dispute was reported to the Minister of Labour for conciliation. The Minister appointed Mr. Nelson Kimeu who took up the dispute and as conciliator invited the parties for meetings which bore no fruit hence the issuance of a certificate to bring the matter to the Court dated 6<sup>th</sup> April 2022. The Claimant averred that the Respondent had underpaid the 1<sup>st</sup> Grievant Mr. Moses Otieno by a sum of Kshs. 18,720/- and the Claimant sought payment of one month's notice – Kshs. 23,880/-, 9 months leave – Kshs. 17,820/- making a total of Kshs. 59,420/- for the 1<sup>st</sup> Grievant. The Claimant averred the 2<sup>nd</sup> Grievant Mr. Kingoku Munguti was owed Kshs. 382,044/- as underpayment of wages, leave for 43 months – Kshs. 142,609/-, two months notice – Kshs. 76,648/- making a total of Kshs. 695,637/- for the 2<sup>nd</sup> Grievant. In respect of the 3<sup>rd</sup> Grievant Mr. Bernard Kiamba, the Claimant sought one months notice – Kshs. 16,978/-, 6 months leave – Kshs. 8,815/- and underpayment of Kshs. 23,868/- making a total of Kshs. 49,661/-. In relation to the 4<sup>th</sup> Grievant, the Claimant sought underpayment of Kshs. 20,670/-, accrued leave amounting to Kshs.



22,039/-, severance pay of Kshs. 10,448/- and Kshs. 16,978/- as one month's notice making a total of Kshs. 70,135/-.

2. The Respondent filed its response and denied the Grievants were members of the Claimant. It averred that Jonathan Nzioki otherwise known as Jonathan Kivaya was employed on 8<sup>th</sup> March 2020. It averred that the Grievants were employed to carry out a construction project and that once the construction was completed their contracts were to lapse. It submitted that the project was completed in July 2021 for the Grievants Mr. Kingoku Munguti, Bernard Kiamba and Jonathan Kivaya while for Mr. Moses Otieno, the contract ended in August 2021. The Respondent submitted that the Grievants were not declared redundant but rather, their contracts lapsed as the project was completed. The Respondent denied allegations about underpayment or non-adherence to the law in effecting a redundancy averring there was no redundancy. The Respondent thus sought the dismissal of the suit.
3. The Claimant called Moses Otieno who testified that at the time he left the Respondent, the project was ongoing. He however indicated that he had not availed evidence of the project continuation. He stated that as carpenter he had only fixed some rooms by the time he left and the project was very huge. The Claimant withdrew the claims of Mr. Bernard Kiamba, Mr. Jonathan Nzioki aka Kivaya and that of Mr. Kingoku Munguti and closed its case.
4. The Respondent's witness Mr. Noel Christian Owino testified that the Grievants were never declared redundant. He stated that their contracts ended the moment the project ended. He stated the project was at KIRDI along Lusaka Road and that the Grievants were employed for that specific project. He testified that Mr. Moses Otieno was engaged for one more month to clear the site and for facilitating the return of machinery to the yard. The witness stated that the Grievants were employed on need basis and that they filled the job cards produced in court. He stated the job cards would not indicate that the employment was to end in August 2021. He stated the engagement with the Grievants ended at the end of each day. He testified that the Grievants did not work on the project denoted as A project along Enterprise Road but were instead at the Lusaka Road KIRDI project. He stated that there was no invitation to conciliation as far as he could tell. He stated that based on the wages order, the Respondent paid more than the minimum as the sum due in 2020-2021 was Kshs. 653/- a day and they paid Kshs. 800/- a day. He testified that the Grievant Moses Otieno was entitled to 2.25 pro rata leave days for every 23 and above days worked. He stated that cumulatively, the Grievant worked for 11 months and he was not entitled to prorata leave. That marked the end of oral testimony.
5. The Claimant filed its submissions and in them, submitted that issues for determination are
  - (i) whether the Grievant was employed on a term contract,
  - (ii) whether the Grievant was declared redundant by the Respondent and
  - (iii) whether the Grievant is entitled to the relief sought.

It submitted that under section 8 of the *Employment Act*, there is provision that an employment contract could be written or oral. The Claimant submitted the Respondent did not exhibit the contract but nevertheless, the provisions of the *Employment Act* applied to the engagement with the Grievant. It submitted that under section 10 of the *Act*, the employer was required to prove the term contract that was in place as an employer is obligated to keep the particulars under section 10(1) for a period of 5 years after the termination of employment as well as being under a duty to maintain records in terms of section 74 of the *Employment Act*. The Claimant submitted that the Grievant lost his employment at the instance of the Respondent which it terms as redundancy in terms of section 2 of the *Employment Act* where the term redundancy is defined as the loss of employment, occupation job or career by involuntary means through no fault of the employee, involving termination



of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. The Claimant submitted that the Grievant is entitled to the relief sought in terms of section 40 of the *Employment Act* for the redundancy meted out. It emphasised the provisions of section 40(1)(e), (f) and (g). The Claimant submitted that the Respondent was at liberty to declare the Grievant redundant, however there are preconditions as set out in section 40(1) of the *Employment Act* for a termination of an employees contract on account of redundancy. It thus urged the grant of the prayers sought.

6. At the time of penning the Judgment, the Respondent had not filed any submissions. The claim is in respect of the surviving Grievant Mr. Moses Otieno. He served as a carpenter and the Respondent did not deny he was its employee. The Respondent asserts the contract lapsed as the project the Grievant was working on came to an end. The Claimant submitted that the employer has a duty to keep records in terms of section 74 of the *Act*. It seems the Claimant's member served the Respondent at a site and when the engagement came to an end, the Respondent prepared a schedule which was exhibited by the Respondent. It showed the Grievant worked for 11 months. He had 11.25 days leave entitlement. It was indicated the Grievant was only entitled to Kshs. 8,800/- as an entitlement since wages had been paid in full in August. It was indicated there were various sums owed to the other employees such as Kingoku Munguti was owed Kshs. 46,000/-. The Respondent was unable to dislodge the claim entirely since it never availed documents to show completion of the project. Since the Grievant had only worked for 11 months, he would not be entitled to service pay. He was only entitled to notice which the Court determines to be Kshs. 24,000/-. The Grievant is also entitled to the unpaid leave days – Kshs. 8,800/-. The Claimant is entitled to costs of the suit.
7. In the final analysis I enter judgment for the Claimant against the Respondent for:-

1<sup>st</sup> Grievant Moses Otieno

- a. Kshs. 24,000/- being notice
- b. Kshs. 8,800/- being pro rate leave
- c. Costs of the suit.
- d. Interest at court rates on the sums in (a) and (b) above from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

