



**Omondi v East African Portland Cement PLC (Employment and Labour Relations Cause 6577 of 2020) [2024] KEELRC 2303 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2303 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 6577 OF 2020  
K OCHARO & K OCHARO, JJ  
SEPTEMBER 26, 2024**

**BETWEEN**

**RONALD OTIENO OMONDI ..... CLAIMANT**

**AND**

**EAST AFRICAN PORTLAND CEMENT PLC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 3<sup>rd</sup> December 2020, the Claimant seeks: -
  - a. That the Court do examine the reasons and merits of termination and find that despite the ground of the termination being lawful, the Claimant is entitled to his terminal dues.
  - b. That the Court do find that the Respondent's action of continued withholding, failing, refusal and/or neglecting to pay the Claimant his rightful terminal benefits and other unpaid dues is unlawful and untenable.
  - c. That the Respondent is in breach of the *Employment Act* Chapter 226 of the Laws of Kenya and other relevant labour laws.
  - d. That the Respondent is under obligation to pay the grievant his unpaid overtime dues earned but not paid, wages and salaries earned but not paid, leave days earned but not given and/or paid for.
  - e. That the Respondent do pay the Claimant his salaries earned but not paid, leave, travelling allowance, unpaid off days, and leave days earned but not given and/or paid for.
  - f. That as a result, the Court do ORDER that the Respondent to pay the Claimant all his terminal benefits and other unpaid dues computed as hereunder:



- i. Service pay for the years worked calculated as 122,100 x 16 years Kshs. 1,953,600/=
  - ii. Three months' salary in lieu of notice Kshs. 366,300/=
  - iii. Half monthly salary (withheld) for the months of March-September 2019 Kshs. 366,300/=
  - iv. House and commuter allowance for the Month of March-September 2019 Kshs. 135,000/=
  - v. Unpaid leave for the year 2018-2019 for 15 days (15 x 6105) Kshs. 91,575/=
- Total Kshs. 2,912,675/=
- g. Costs of this claim
  - h. Interest on a, b, c, d, e and f above at Court rates.
  - i. Any other relief as this Honourable Court may deem just and fit to grant.
2. The Memorandum of Claim was accompanied by the Claimant's Verifying Affidavit sworn on 2<sup>nd</sup> December 2020; Plaintiff's Statement dated 2<sup>nd</sup> December 2020; Claimant's List of Documents dated 3<sup>rd</sup> December 2020.
  3. In response to Claim, the Respondent filed a Response to Memorandum, contemporaneously with a List of Witnesses dated 14<sup>th</sup> November 2022; and Respondent's List and Bundle of Documents dated 14<sup>th</sup> November 2022.
  4. In line with the directions of this Court issued on 7<sup>th</sup> March 2023, the Claimant filed written submissions dated 28<sup>th</sup> April 2023; and the Respondent filed written submissions dated 14<sup>th</sup> July 2023.

#### **Claimant's case**

5. The Claimant's case is that he was employed by the Respondent on 1<sup>st</sup> April 2003 as a "Sales Clerk" at a monthly basic salary of Kshs. 122,100/- plus a house allowance of Kshs. 30,000/-, commuter allowance of Kshs. 15,000/-. The Claimant postulates that he served the Respondent diligently until 21<sup>st</sup> March 2019, when he was interdicted over missing funds amounting to Kshs. 2,390,515.987 vide a letter of the same date, to pave way for review, investigations and determination on the alleged missing funds. The suspension letter stated that the Claimant was entitled to half pay during the period of suspension.
6. The Claimant responded to the suspension letter dated 21<sup>st</sup> March 2019, vide a letter dated 25<sup>th</sup> March 2019 which was received by the Respondent on 28<sup>th</sup> March 2019.
7. Instead informing him of the outcome of the investigations into the alleged missing funds and or undertaking disciplinary proceedings against him, whereat he could be accorded an opportunity to defend himself against the allegations, the Respondent issued the Claimant with a termination letter dated 19<sup>th</sup> September 2019 on grounds of redundancy. He was given one month's termination notice. Further, the termination on account of redundancy therefore, overtook the interdiction letter. The Claimant takes issue with the fact that the Respondent is yet to pay him his terminal dues.
8. The Claimant asserts that the Respondent's conduct of withholding his terminal dues including his unpaid salary during the period of suspension, is irregular, unlawful and unprocedural. It has caused the Claimant to suffer loss and hardship.



9. During the hearing of the case on 7<sup>th</sup> March 2023, the Claimant (CW1) adopted his Witness Statement dated 2<sup>nd</sup> December 2020 as his evidence in chief, and produced the documents contained in his List of Documents dated 3<sup>rd</sup> December 2020 as his exhibits.

### **Respondent's case**

10. On its part, the Respondent admits that the Claimant was its employee and confirms that he was interdicted on 21<sup>st</sup> March 2019 for failure to reconcile sale of cement worth Kshs.2,390,515.98 from direct retail sales, reconciliation for the period June 2017 to December 2018. Through the same letter of interdiction, the Claimant was given 7 days to show cause, but failed to do so. Flowing from his failure to show cause and report to work, his services were terminated on account of redundancy. The termination affected on the account of redundancy affected 135 other staff members. He was paid all his dues paid before he cleared from the Company.
11. It is the Respondent's position that the entire claim herein is an abuse of Court process.
12. Notably, the Respondent did not adduce evidence in support of their case by filing and serving written witness statements and testifying in court.

### **Claimant's Submissions**

13. In his submissions dated 28<sup>th</sup> April 2023, the Claimant submits that his evidence that he was employed by the Respondent; served for a long period at the Respondent Company; and was terminated on account of redundancy owing to restructuring and reorganization, is uncontroverted. Contrary to the Respondent's claims, the Claimant insists that he did indeed respond to the interdiction letter. The claims of failure to report to work are therefore false.
14. As a Sales Coordinator he never handled cash and only dealt with receipt matching. Further, no customer ever claimed that they paid the Claimant money for cement and never received it. There was no claim that cement ever left the Respondent's store without being paid for by a customer. The Claimant's evidence remains uncontroverted. On the amount of Kshs. 2,390,515.98 alleged to have gone missing under the Claimant's watch, the Claimant submits that the Respondent made the unilateral decision on 5<sup>th</sup> March 2019, to surcharge his account with this amount before the interdiction.
15. Having served the Respondent for over 16 years, the Claimant is entitled to his lawful terminal benefits including overtime, leave allowances, and service pay as stipulated in the *Employment Act* and the employment contract between the parties.
16. The Claimant points out that there were arithmetic errors in its tabulation of its terminal dues, and corrects the said errors.

### **Respondent's Submissions**

17. In their submissions dated 14<sup>th</sup> July 2023, the Respondent submits that the Claimant was its employee; that he was interdicted and placed on suspension over missing funds amounting to Kshs. 2,390,515.98; and that during the period of suspension the company underwent reorganization necessitating the Claimant and 135 other employees to be rendered redundant. The Claimant's employment was terminated vide a letter dated 19<sup>th</sup> September 2019. The letter also communicated to the Claimant the terminal benefits that he was entitled to including three months' salary in lieu of notice; severance pay



- of thirty (30) days for each year of service; payment for accrued leave days; and the salary earned up to the date of termination.
18. The Respondent explains that the missing funds of Kshs.2,390,515.98 were charged to the Claimant's account, and the Claimant recognized these missing funds in his response to the interdiction letter. The said funds were included in the clearance form for purposes of being deducted from the Claimant's terminal benefits, but the Claimant refused to sign the clearance form, and has never executed the same to enable the release of his terminal dues to him.
  19. The Respondent submits that the reason for termination was redundancy, with effect from 19<sup>th</sup> October 2019. The Respondent had a right to declare the positions redundant and followed due process in doing so, in accordance with section 40. Reliance is placed on the case of *KUDHEIHA vs Aga Khan University Hospital Nairobi Cause No. 815 of 2015* as cited in Bernard Misawo Obora v Coca Cola Juices Kenya Limited [2015] eKLR.
  20. It was further submitted that the declaration of redundancy was not targeted at the Claimant alone, and affected a total of 136 employees. They state that the issue of redundancy was separate from the issue of the missing funds. This issue remains outstanding against the Claimant despite the termination. The amount of Kshs. 2,390,515.98 should still be surcharged against the Claimant as he was in charge of the books and the accounts which could not be reconciled leading to the missing funds. This amount can only be charged against the Claimant's terminal dues as he has never repaid the amount to the Respondent to date.

#### **Issues for Determination**

21. I have reviewed the pleadings, oral and documentary evidence, submissions filed by both parties, and only one prime issue emerge for determination, thus: -
  - a. Whether the Claimant is entitled to the reliefs sought.

#### **Whether the Claimant is entitled to the reliefs sought.**

22. Before I delve further into this issue, I could like to point out that despite the fact that the Respondent had filed a Response to the Claimant's Memorandum of Claim in this matter, it didn't present any witness to testify on its behalf in defence against the claim. The consequence here being that the Response remained a mere statement with no evidential value. Further, I note that its Counsel has gone into immense detail in his submissions, on factual matters that one can without hesitation hold that they flow not from any presented evidence. Submissions have never and will never be a substitute for evidence. As a result, I will treat the Statement of Response as such mere statement. Further, I will not fall into the trap of treating the submissions as though they were evidence.
23. I was common cause that the Claimant's employment was terminated on account of redundancy, an act which happened when he was still under an investigatory interdiction. Therefore, in interrogating what reliefs can be availed to him, the Court shall take into account the fact that there are those that might have accrued to him during the interdiction period, and those that are statutorily available as the termination was on account of redundancy.
24. Section 40 of the *Employment Act*, a provision that the legislature dedicated wholly to terminations of employment on account of redundancy, clearly provides for dues that an employer must pay their employee[s] whom they have discharged from employment on account of redundancy. One of those, is severance pay. The provision provides the formula for computation of dues payable under this head for an affected employee[s], fifteen [15] days' salary for every year worked. The Claimant worked for



the Respondent for sixteen years. His salary was KShs. 167,100. Under this head I will award him, KShs.  $167,100 \times 15 / 30 \times 16 =$  KShs. 1,336,000.

25. There was no contestation that up to the date of the termination, the Claimant was on interdiction and according to the interdiction letter, on half pay. The Respondent decided not to conclude the investigations for which he had been suspended to pave way for. Further, it decided to terminate his employment not on account of an alleged infraction, but on a no-fault account, redundancy. As a result, in my view, the Respondent waived its right to insist that the Claimant had misconducted himself, and to withhold his salary as they did after terminating his employment.
26. It is imperative to note that the Respondent didn't file any counterclaim against the Claimant to help it prove that indeed the latter was guilty of fraud or in one way or the other contributing to it losing the sum of KShs. 2,390,515.98. Further, not a shred of evidence was placed before this Court geared towards demonstrating this. As a result, I will have no reason not to grant the Claimant the relief sought under this head, withheld salary for the period, March – September 2019.
27. I have carefully considered the Claimant's pleadings and evidence, I find immense challenge to fathom what informs his claim under the head, house allowance and commuter allowance. He has not pleaded that though he was entitled to the same he was not paid for such and such period. Further, he placed not any evidence before this Court to prove this. All that the Claimant did was to just throw figures two Court. I reject the claim.
28. The Claimant asserted that termination of his employment, he had 15 leave days earned but not utilized during the period 2018-2019. Section 28 the *Employment Act* 2007, bestow upon employees a right to paid annual leave, and therefore a corresponding obligation on the employer to allow exercise of the right. The Respondent didn't discount the Claimant's evidence. This coupled with the fact that under Section 74 of the Act, the employer is the keeper of records, and therefore if the Claimant had no leave days outstanding, nothing could have been easier than for it to present a record to disabuse the Claimant's assertion, I am persuaded that the Claimant had leave days earned but not utilized as he stated. Consequently, the Claimant shall be compensated for these days.
29. The Claimant has failed to particularize the amount of overtime; travelling allowance; and unpaid off days that he is claiming, and offer evidence on each and every of these items. His claim on these must fail. It is hereby declined.
30. I hear the Claimant as stating that he has not been paid his terminal dues as the Respondent insists that it must deduct the sum of Kshs. 2,390,515.98 which it alleges to have lost due to his inaction. While Section 19(1) (d) of the Act permits the employer to deduct "an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money" from the employee's salary, as indicated hereinabove, the Respondent did not conclude the investigations, undertake disciplinary action against the Claimant, place any evidence before this to support its assertion or lodge a counterclaim for the sum. In the circumstances, the Respondent cannot have any justification to deduct the sum from the Claimant's entitlements.
31. Section 40[1][f], recognizes notice pay, one months' salary. It is worth stating that the notice pay contemplated under the sub-section is the least that an employer shall pay. Where a basis for paying more than this isn't shown, as is in the instant matter, there cannot be any justification for the Court to go beyond the notice pay contemplated by the law. The Claimant without providing justification through evidence, has sought for notice pay to an extent of three months' salary. I am unpersuaded to grant him notice pay to the extent sought, but one month's salary.



32. In the upshot, Judgment is hereby entered for the Claimant in the following terms.

- a. He shall be paid: -
  - i. Severance pay (167,100 x15/30 x 16 yrs.) Kshs. 1,336,800/-
  - ii. One month's salary in lieu of notice Kshs. 167, 100/-
  - iii. 15 accrued leave days (167,100/30 x15) Kshs. 83,550/-
  - iv. Salary for the days worked in October 2019 Kshs. 105,830/-
  - v. Salary withheld from March -Sept 2019  
(50% x 167,100/- x 7 months) Kshs. 584,850/-
- b. Interest on [a] (ii), [iv], and [v] above at court rates from the date 19<sup>th</sup> October 2019, until payment in full.
- c. Interest on [a] [i], and [iii], above at court rates from the date of this Judgment till full payment.
- d. The Respondent shall bear the costs of this suit.

**READ, DELIVERED AND SIGNED AT NAIROBI THIS 26th DAY OF SEPTEMBER 2024.**

**OCHARO KEBIRA**

**JUDGE**

**In the presence of:**

Mr. Omwenga for the Claimant

No appearance for respondent

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

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