Ragira v Ombi Rubber Rollers Limited (Employment and Labour Relations Cause 1535 of 2016) [2024] KEELRC 2533 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2533 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 1535 OF 2016

K OCHARO, J

OCTOBER 18, 2024

BETWEEN

HENRY NYAGATE RAGIRA ..... CLAIMANT

AND

OMBI RUBBER ROLLERS LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times, he was an employee of the Respondent whose employment was unfairly and unlawfully terminated, the Claimant sued the Respondent through a Memorandum of Claim dated 4th August 2016, seeking: -

    a. A declaration that the termination of the Claimant from employment was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages.

    b. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling Kshs. 475,965.40

    c. Costs of this suit plus interest thereon.

2. The Respondent resisted the Claimant's claim through a Statement of Response dated 5th October 2016. In it, the Claimant's cause of action, and entitlement to the reliefs sought were denied.

3. At the hearing hereof, the Claimant adopted his witness statement dated 4th August 2016, as part of his evidence in chief. Further, he tendered those documents he filed under the list of the even date, as his documentary evidence.

4. Similarly, the Respondent's witness, Muchai Githura, adopted his witness statement dated 5th October 2016, as his evidence in chief, and produced the documents filed under a list of documents of the same date, as the Respondent's exhibits.

5. In line with the directions of this Court issued on 22nd March 2023, the Claimant filed written submissions dated 20th June 2023, and the Respondent filed written submissions dated 15th September 2023.

Claimant's case

6. The Claimant's case is that he was employed by the Respondent as a Night Guard on or about December 2008, but commenced his duties in January 2009. Despite working diligently for the Respondent for many years, the Claimant was dismissed from the Respondent's employment effective 1st February 2016 for the reason that it had decided to outsource security services. Hence, his services were no longer required.

7. The termination was expressed through the Respondent's letter dated 25th January 2016. Further, other security guards were affected in the same manner. He was paid his salary for January 2016. At the time of his dismissal from employment, the Claimant was earning a monthly salary of Kshs. 10,396/-.

8. The Claimant asserts that he was dismissed from employment unfairly and unlawfully as he was not issued with a notice of the intention to terminate and the grounds forming the basis thereof; he had committed no wrong to warrant his termination from employment; the reasons for the termination were not valid; legal requirements were not followed in the process leading to the termination; and the Claimant did not receive his terminal benefits following the termination from employment. As a result of the termination, he suffered an abrupt loss of income which caused an inability to meet his continuing obligations.

9. Cross-examined by Counsel for the Respondent, the Claimant testified while in the service of the Respondent, he was accommodated by the Respondent within its premises.

10. The Claimant further testified that his starting salary was KShs. 5000/-. At the time of separation, he was earning KShs. 14,547/-. The increment was effective in 2014. Further, at no time did he complain to the Respondent that whatever he was earning was an underpayment.

11. The termination letter that was issued to him clearly stated the reason for the Respondent's action. In the letter, it was indicated that the outsourced enterprise was to give him priority. He didn't pursue this proposal. All the 7 guards that were in the employment of the Respondent at that time were discharged. There was no meeting between them and the Respondent's director as alleged.

12. The Respondent didn't allow him to proceed for leave at any time, hence his claim for compensation for unpaid leave for seven years.

13. He testified that he was a member of a pension Scheme. Upon dismissal, he picked up his pension benefits, KShs. 81,354/-.

14. On the 8th of February 2016, he signed a clearance form, acknowledging receipt of KShs. 21,352/- as final payment, and undertaking that he had no claim against the employer.

15. In his evidence in re-examination, he stated that he was only accommodated by the Respondent for three years. Thereafter, he was neither given accommodation nor paid house allowance.

16. On the discharge document he executed, he asserted that he didn't understand the contents thereof.

Respondent's case

17. The Respondent presented one witness, Mr. Muchai, its Managing Director, to testify on its behalf. The witness testified that the Claimant was employed by the Respondent as a Security Guard with effect January 2009.

18. He stated further that in 2016, the Respondent underwent a major asset facility and organizational upgrading within its factory premises necessitating a change in its security operations. As a result, there was a need to outsource security services from an experienced, qualified, and professional Service provider.

19. The witness further stated that on the 25th January 2016, the Respondent wrote to the Claimant conveying the decision to terminate his services with effect 1st February 2016. In the letter, the Respondent offered to facilitate his employment with the incoming outsourced security company. The reason for the termination was spelled out in the letter, and at the meeting that he had with the Guards. Despite his advice and assurance that a vacancy was available for the Claimant in the outsourced enterprise, he didn't pursue the opportunity.

20. The witness asserted that contrary to the Claimant's position, the Claimant was not dismissed from employment. The reliefs sought cannot therefore be availed for him.

21. Cross-examined by Counsel for the Respondent, the witness stated that before the termination, the Respondent's decision to reorganize was brought to the attention of the Claimant, through the letter dated 25th January 2016. Further, before issuing this letter, he had a consultative meeting on or about the 24th of January 2016 with all the five Guards whereby he explained to them the direction the Company was taking. However, there are no minutes to show this. The labour officer was informed too.

22. The security services were outsourced from another company. The Respondent however has not placed before this Court any outsourcing agreement between it and the outsourced enterprise.

23. He testified further that the Claimant is not entitled to house allowance as his salary was consolidated per his employment contract. The Claimant's salary was KShs. 10,396/- a month at the time of separation.

24. It was a policy that any employee desiring to take leave had to apply for the same. The Claimant didn't have any earned but unutilized leave days at the time of separation. In any event, he signed a discharge form acknowledging that he had no outstanding claim against the Respondent.

Claimant's Submissions

25. The Claimant's Counsel identified three issues for determination in this suit, thus; Was the dismissal of the claimant by the Respondent fair and lawful? whether the Claimant was paid terminal dues/ redundancy dues in full; and who should bear the costs of this suit?

26. It was submitted that the Respondent terminated the Claimant's employment without following the procedure laid down in Section 40 of the *Employment Act* 2007. Any termination on account of redundancy must meet the requirements set out under this provision. The evidence of the Respondent's witness attests to this fact. The requisite notice[s] were not issued. Only a termination letter was.

27. It was further submitted that the alleged organizational upgrading was just a cover-up. No evidence was placed before the Court to demonstrate that truly, there was an upgrading. Where the laid

down statutory procedure has not been followed in terminating an employee's employment on account of redundancy, the termination shall be deemed unfair and unlawful, entitling him or her to compensation. To support this point reliance was placed on the case of *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR.

28. On the terminal dues sought, the Claimant submitted that he only received his Sacco dues of Kshs. 21,352/- upon his termination from employment. No terminal dues were paid to him. Considering the circumstances of this matter, he is entitled to notice pay equivalent to one month's salary.

29. The Claimant contended that he was entitled to compensation for a house allowance that he never paid. The pay slips he tendered as evidence support this position, they bear no item for house allowance. The Respondent did not provide any evidence to discount the Claimant's position.

30. On the claim for underpayment of salary, the Claimant submitted that at all times, he earned a salary which was below the statutory minimum set out in the relevant Regulation of Wages Orders. Between 2011 and May 2012, he was paid Kshs. 5,000/- instead of Kshs. 8,463/-. Between May 2012 and May 2013, he was paid Kshs. 7,000/- instead of Kshs. 9,572/-. In 2014, he was paid Kshs. 8,470/- instead of Kshs. 10,911/-. The Respondent did not challenge the contents of pay slips tendered in evidence in this matter.

31. It was further submitted that the Respondent did not place forth sufficient evidence to rebut the Claimant's claim for compensation for earned but untaken leave days.

Respondent's Submissions

32. The Respondent's Counsel submitted that the Claimant is not entitled to the reliefs sought. The Claimant was entitled to notice pay. He was paid one month's salary in lieu of notice on 8th February 2016. He was also paid his salary for January 2016. After being deducted his outstanding liabilities in favour of his Sacco, Kshs. 30,417/-, he was paid Kshs. 21,352/-.

33. Concerning house allowance, the Respondent submits that the Claimant earned a negotiated consolidated salary. Thus, the claim for house allowance is an afterthought and should be denied.

34. The Claimant was a member of a pension scheme, during his employment, the British American Umbrella Pension Fund (BRITAM), he was admittedly paid the sum of Kshs. 61,016/- with the sum of Kshs. 20,338.74 retained by the fund, as his pension benefits, there can be no basis for an award of severance pay.

35. On underpayment, the Respondent submitted that the Claimant failed to prove this claim. Moreover, in his evidence under cross-examination, he admitted that he was allowed to take his annual leave. His claim under the head unpaid leave should be rejected.

36. Lastly, the Claimant executed a Clearance Form which confirmed that he had no further claims against the Respondent. He executed the clearance form freely and voluntarily without compulsion or coercion. The form binds him, therefore. All purported claims stand as fully settled and are not claimable.

37. The Respondent brought to the attention of this Court the decision in the case of *James Ngotho Njenga v Ombi Rubber Rollers Ltd* ELRC Case No. 1593 of 2016, where the court dealing with a matter of similar circumstances as is the instant one, held;

> "The Court does not think that there was a redundancy situation where the role of the security guard, was phased out. The role remained. It was only that the Respondent

reorganized its business, outsourcing the role to a 3rd party. The Claimant was offered the opportunity to continue discharging the role. He declined and cannot be heard to complain that his role was declared redundant. There was no redundancy.

Upon his refusal to continue working, the Claimant was paid pension and terminal dues. He argues that terminal dues paid at KShs. 9, 539 after deductions, is reflective of his base rate salary of Kshs, 11,024 monthly. This may well be so but the Claimant executed discharge on 8th February 2016. He acknowledged what was paid to be his final dues, confirming that he had no further claims against the Respondent. Cross-examined on this discharge, the Claimant told the Court that; he discharged the Respondent; and that he read and understood what he was signing. He does not claim that the discharge was signed involuntarily.

Issues for Determination

38. I have reviewed the pleadings, oral and documentary evidence, and submissions, by the parties, and the following issues emerge for determination: -

    a. Whether the Claimant's employment was terminated on account of redundancy;

    b. If the answer to [a] above is in the affirmative, was the termination unfair and unlawful?

    c. Whether the Claimant should be awarded the reliefs sought in his Memorandum of Claim.

a. Whether the Claimant's employment was terminated on account of redundancy.

39. There is no convergence regarding on what account the Claimant's employment was terminated. The parties took radically different positions. The Claimant charged that his employment was terminated on account of redundancy. The Respondent held that it was terminated by notice owing to reorganization within the enterprise. On what account the termination was, is a vital issue that must be determined from the onset. The outcome will certainly inform findings on the other distilled for determination.

40. Redundancy is defined in Section 2 of the *Employment Act* and the *Labour Relations Act*, 2007 as:

> " The loss of employment, occupation, job or career by involuntarily 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 the abolition of office, job or occupation and loss of employment."

41. No doubt, what happened was a loss of employment on the part of the Claimant. An involuntary loss that wasn't a product of the Claimant's fault. It was a termination at the initiative of the Respondent as his employer. This question springs up, was this because his services were superfluous? Yes, the termination letter suggests so.

42. In the context of the legal definition of redundancy, I am of a clear view, that the Claimant's employment was terminated on account of an alleged redundancy situation. Whether the reason was valid and fair, shall be shortly dealt with hereinafter.

43. According to the Respondent, the termination was a result of the facility, and organizational upgrade, within the Respondent enterprise. I struggle to understand this thought as advanced. The Respondent should easily see and understand itself as, stating that the organizational and facility upgrading created

a situation where the Claimant's service was no longer required in the form he had been discharging it, like a financial downturn of an enterprise could, or technological advancement could.

44. The Respondent has urged this Court to take a similar view as that of Justice Rika in *James Ngotho Njenga vs Ombi Rubber Rollers* Ltd ELRC Case No. 1593 of 2016 on the issue of the existence of a redundancy. With the greatest respect, I am not persuaded to. First, the decision is persuasive. Second, I have carefully considered the decision, the Court was not asked to consider the matter in the definitional context of redundancy, and it didn't so consider it. Third, the Court was not urged to consider the reason, facility and organizational upgrading as a catalyst to the situation created, the Claimant's services being superfluous. Indeed, this approach I have given the issue wasn't adopted by His Lordship Justice Rika.

45. To stretch it further, the Respondent's case was that it decided to do away with the entire security department, to allow the outsourced entity to provide security services to it. No doubt, this security function was to be independent of those that the Respondent's departments were discharging. Looking at this from another angle, one can technically and safely say that there was an abolition of office.

Of whether the termination was unfair and unlawful.

46. Termination of an employee's employment falls under the category of no-fault terminations. For this reason, the law imposes a strict procedure to be adhered to by an employer contemplating the termination and spells out the terminal dues payable to employees declared redundant. All these are aimed at ensuring fairness to the affected employees.

47. In the Kenyan situation, the procedure and the dues are elaborately set out in Section 40 of the *Employment Act* 2007 which provides: -

> " 40. Termination on account of redundancy
>
> (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions —
>
> (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
>
> (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
>
> (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary."

48. It is clear that Section 40 (1) (a) and (b) provides for the issuance of a mandatory 30-day notice to either the trade union and labour office (if the employee belongs to a trade union); or to the employee and labour office, before declaration of the redundancy.

49. Did the Respondent comply with Section 40 (1) (b) by issuing a 30-day notice of Intended Redundancy to the Claimant herein? I fear not. The only correspondence that the Respondent did to the Claimant is the letter captioned "Termination of security services" dated 25th January 2016. The letter expressed that the Claimant's services stood terminated from 1st February 2016. Undeniably, this wasn't a 30-day notice, contemplated under the provision forestated. It was a termination letter.

50. In addition, the Respondent's witness's evidence did not establish that it issued a notice to the Labour Officer as envisaged in the provision or at all.

51. These mandatory procedural requirements were not met by the Respondent. The termination was rendered unfair and unlawful, therefore.

52. The justification for the 30-day notice prior to redundancy is to enable consultations as was stated in The German Society School (Supra). The Honourable Court of Appeal held at paragraphs *56*, *57* and *60*: -

> " 56. A notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders. The Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR held:
>
> a) Consultation is implicit in the *Employment Act* under the principle of fair play;
>
> b) Consultation gives an opportunity for other avenues to be considered to avert or minimize the adverse effects of terminations;
>
> c) Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;
>
> d) Consultations have to be a reality, not a charade;
>
> e) Opportunity must be given for the stakeholders to consider;
>
> f) Stakeholders must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done; and
>
> g) Consultation must not be cosmetic.
>
> 57. In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration. A reading of the record shows that the respondent was served with a redundancy notice and asked to proceed with a one-month leave. The trial court found that the redundancy was unfair and irregular for failure to give adequate notice and thereby not giving consultation a chance.
>
> 60. However, on the question whether the notice gave consultations and dialogue a chance, we find that while the requirement for consultation is not expressly provided for in section 40 of the *Employment Act*, this requirement is implied, as the main reason and rationale for giving the notices in section 40(1) (a) and (b) to the unions and employees of an impending redundancy where applicable."

53. Besides placing a duty upon the employer to prove the presence of procedural fairness in the process leading to a decision to terminate an employee's employment, Section 45 [2] of the Act further requires the employer to prove that the reason for the termination was valid and fair. This requirement [prove that the reason was valid and fair] speaks to substantive fairness. In the context of redundancy terminations, the employer is obligated to demonstrate that the reason[s] alleged to underlie that redundancy situation, for instance, reorganization of the enterprise, embrace of technological advancement, right-sizing, and financial downturn, genuinely exist.

54. Addressing the applicability of the provisions of Section 45[2] of the Act, to terminations on account of redundancy, the Court of Appeal in the case of Kenya Airways Ltd and Aviation & Allied Workers Union of Kenya & 3 Others Civil Appeal No. 46 of 2013, stated: -

> " Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy - that is that the services of the employee have been rendered superfluous or that redundancy has resulted in the abolition of office, job or loss of employment—".

55. The Respondent made general assertions that the termination of the Claimant's employment was a result of the facility and organizational upgrade, necessitating outsourcing of security services. The Respondent didn't place before me sufficient evidence to show that true, there was an engagement between it and a 3rd party in the form of an outsourcing agreement. Further, the evidence presented for the Respondent was dead silent on the name of the outsourced enterprise. If indeed there was such an arrangement, nothing could have been easier for the Respondent than tendering an agreement in evidence.

56. No evidence was placed forth from whence one can deduce that there was a decision by the Respondent for the alleged facility and organizational upgrading; the nature and scope of upgrading; the decision to terminate the Claimant's employment on the account; and any arrangement and or negotiations between it and the alleged 3rd party on the plight of the Guards.

57. The Respondent alleged that the Claimant was offered employment with the outsourced party, which he declined to pursue. I am unable to buy this version. All that it did was a suggestion to the Claimant. There was no offer. What the Respondent asserted could make sense if there was concrete evidence that there were negotiations on behalf of the Guards by the Respondent with the alleged 3rd Party enterprise, and an undertaking from the 3rd Party that the Guards were to be absorbed into its workforce. It makes no sense that the Respondent could terminate their employment, and then tell them to pursue "assured opportunities" within the outsourced enterprise.

58. Without prejudice to the foregoing, one critically looking at the circumstances of this matter from another angle holistically, and with the provisions of section 44 [3] of the Act in mind, will conclude and safely so, that what happened was a summary dismissal against the claimant. Summary dismissal which was procedurally unfair as the dictates of Section 41 of the Act was not adhered to, and substantively unfair as clearly the same cannot be said to have been on account of an infraction on the part of the Claimant that could amount to a gross misconduct under Section 44[4] or at all.

59. In the upshot, I am not convinced that there was an outsourcing of security services by the Respondent. The termination was substantively unfair.

Of the reliefs sought.

60. The Respondent argued that no relief should be availed to the Claimant as he executed a Clearance Form acknowledging that he had no further claim against it. The Claimant admitted having executed the form but stated that the contents thereof were not explained to him. In my view, the Respondent

bore the duty to demonstrate that the contents of the form were duly explained to him before he signed the agreement. Borrowing from the provisions Section 9[3] of the *Employment Act*, the duty to explain an agreement to an employee in a language or manner that he or she understands is a legal requirement.

61. A mere allegation by an employer that a clearance form was freely executed and therefore binding on the employee, especially where the employee contends that its contents were not explained to him or her for his or her understanding before he/she executed the same, is not enough to attract a Court's conclusion that it was freely and willingly executed when the employer was duly seized of all the relevant knowledge.

62. In Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR held that:-

> "We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is, however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge."

63. The court acknowledged the trial court's finding that the relative bargaining strengths of the parties was a relevant factor to consider.

64. By reason of the premises, I am persuaded that the contents of the clearance form were not explained to the Claimant for his understanding. Therefore, he executed the document when he wasn't duly sized with an understanding of the contents thereof.

65. I will now proceed to consider the Claimant's prayers. On the claim for one month's salary in lieu of notice, I note that the termination letter dated 25th January 2016 expressed that the Claimant would be paid one month's salary in lieu of notice. In his evidence, he didn't assert that he was not paid.

66. The Respondent resisted the Claimant's claim for unpaid house allowance. It alleged that the Claimant's salary was consolidated, therefore, inclusive of the allowance. The Respondent didn't place before this Court any agreement or document from where it can be deduced that the salary was consolidated. The pay slips tendered as evidence in this matter do not support the Respondent's position. In the circumstances of this matter, the absence of a written contract, Section 10[7] of the *Employment Act*, placed a burden on the Respondent to prove that the salary was consolidated. It didn't.

67. As a result, the relief is available to the Claimant, but only for the three years preceding the filing of the suit herein. This, owing to the limitation of time imposed by section 9o of the Act.

68. On salary underpayment, I also return that the Claimant is only entitled to compensation for 3 years immediately preceding the date of termination pursuant to Section 90 of the *Employment Act* 2007, hence from 1st February 2013 to 1st February 2016. The basic minimum monthly wage for a Night Guard per the Regulation of Wages (General)(Amendment) Order 2012, which came into force on 1st May 2012, was Kshs. 9, 571.65. It is not disputed that between 1st February 2013 and 30th April 2013, the Claimant earned a basic wage of Kshs. 7,700/-. The pay slip for February 2013 produced by the Claimant is a testament. For this period, he was underpaid by Kshs. 1,871.65 per month for 3 months. From 1st May 2013 to 30th April 2015, per the Regulation of Wages (General)(Amendment) Order 2013, which came into force on 1st May 2013, the basic monthly minimum wage for a Night Guard was Kshs. 10,911.70. From 1st May 2013 to November 2014, the Claimant appears to have earned a basic monthly was of Kshs. 7,700/-. He was therefore underpaid by Kshs. 3,211.70 per month for 20

months. The same Regulation of Wages Order applied up to 30th April 2015. On 1st December 2014, the Claimant earned a basic wage of Kshs. 8,470/- per the pay slip for that month. He was therefore underpaid by Kshs. 2,441.70 for the month of December 2014.

69. It is pertinent to note that the Claimant did not clearly state to the Court when his salary was increased to Kshs. 10,396.00, which he pleads was the last salary. He also did not clarify how much he earned from January 2015. This Court has stated time and time again that there must be a specificity of claims filed before it. The business of just throwing figures to Court and hoping for the best should stop. Owing to the lack of specificity, I cannot grant the Claimant any amounts under this head for the period beyond December 2014.

70. I hold that the claim for compensation for the salary underpayment is well anchored. Section 48 of the *Labour Institutions Act* Cap 234 of the Laws of Kenya provides for the same thus: -

> "
>
> "(1) Notwithstanding anything contained in this Act or any other written law—
>
> (a) The minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
>
> SUBPARA (b)
>
> If the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms."

71. The Claimant asserted that for the entire period, he remained in the employment of the Respondent, he was not allowed an opportunity to proceed for his annual leave. The Respondent's Counsel submitted that the Claimant in his evidence under cross-examination admitted that he utilized all his leave days. I can only state that this is a deliberate and unfortunate to mislead the Court. All he said was that he didn't at any point complain about being not paid for the untaken leave days.

72. The Respondent's witness testified that it was a policy that an employee desiring to proceed for leave had to fill out an application form. The record was not produced in evidence to counter the Claimant's claim. The Claimant's claim remained unchallenged. However, considering the provisions of Section 90 of the *Employment Act*, an award under this head shall be for that period, three years immediately before the initiation of this suit.

73. Lastly, the Claimant sought for a compensatory award for unfair termination of employment equivalent to twelve months' gross salary. Section 49 [1][c] of the *Employment Act* bestows upon the Court the authority to make a compensatory award in favour of an employee who has successfully established that his or her employer's decision to terminate his or her employment was unfair, to the maximum extent of twelve [12] months' gross salary. The authority is exercised discretionarily. The exercise is influenced by the circumstances peculiar to each case.

74. I have considered; the circumstances of how the termination was effected; the fact that to this court, the reason for the termination was camouflaged; that the conduct of the Respondent can easily pass for an

unfair labour practice; the failure by the Respondent do comply with the requirements of the law and more specifically those that speak to procedural and substantive fairness; and the length of service to the Respondent, and hold that a compensatory award is deserved and to the extent of five [5] months.

75. In the upshot, Judgment is hereby entered for the Claimant in the following terms: -

a. A declaration that the Respondent's action to terminate the Claimant's employment was unfair and unlawful.

b. The Claimant be paid: -

i. House allowance

(15%xKshs.10,396x36) Kshs. 56,138.40

ii. Salary Underpaid Kshs. 72,290.65

1st Feb 2013 – 30th April 2013 (Kshs. 1871.65x3=5,614.95)

1st May 2013 – 30th Nov 2014 (Kshs. 3211.70x20=64,234)

December 2014 (Kshs. 2,441.70)

iii. Compensation for earned but unutilized
Leave days for 3 years (10,396/30 x 21x3) Kshs. 21,831.60

iv. Compensation for unfair termination of employment pursuant to Section 49[1][c] of the *Employment Act* KShs. 51, 980.00

c. Interest on (b) above at Court rates from the date of judgment until payment in full.

d. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 18th DAY OF OCTOBER, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Wachira for the Respondent

No appearance for the Claimant

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 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