



REPUBLIC OF KENYA



KENYA LAW
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**Shicheni v Royal Ground Industries Kenya Ltd (Cause 377 of 2016)
[2023] KEELRC 3 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 377 OF 2016
HS WASILWA, J
JANUARY 17, 2023**

BETWEEN

IGNITIUS OPULA SHICHENI CLAIMANT

AND

ROYAL GROUND INDUSTRIES KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as an assistant operator. However, his employment was terminated on May 28, 2016. Aggrieved by the termination, the claimant instituted this suit *vide* a memorandum of claim dated September 21, 2016 seeking the following prayers: -
 - a. One-month salary in lieu of notice of Kshs 13,287.
 - b. Underpayments of Kshs 32,870.
 - c. Normal overpayments of Kshs 13,260.
 - d. Off duties of Kshs 48,135.30.
 - e. Public holidays of Kshs 9012.
 - f. Leave for one year of Kshs 8,087.70.
 - g. Gratuity for one year of Kshs 6,643.50.
 - h. Salary for April and May, 2016 of Kshs 26,574.
 - i. Breach of employment contract of Kshs 132,870.
 - j. Compensation based on section 49(1)(c) of Kshs 159, 444.
 - k. Cost of the suit to be borne by the respondent.



2. The respondent entered appearance on the June 21, 2019 and filed a memorandum of reply on October 16, 2019, denying all the averment of the claim and stating that the claimant was termination while serving his probation period as such he is not entitled to the reliefs sought.

The Claimant's Case

3. The claimant avers that he was employed by the respondent on May 4, 2015 and served the respondent for about 10 months when the respondent changed the terms of engagement to contract as from April 6, 2016 and his salary increased to Kshs 11,623 from initial pay of Kshs 10,000.
4. It is contended that the claimant was not consulted before the terms of engagement were changed contrary to section 7, 8, 9, 10 and 37 of the *Employment Act*.
5. Throughout his employment, the claimant avers that he reported to work at 8:00am and clocked out at 5:30 pm and on the night shift he reported at 5:30pm and clocked out in the morning at 8:00am. This was duly captured in the contract of employment of April 6, 2016.
6. He stated that he worked throughout the week without any off day and worked even on holidays without any compensation for the said work. He added that he never took his annual leave for the year worked at the respondent.
7. It is the claimant case that the respondent did not remit his statutory deductions being NSSF as such he should be paid gratuity for the year worked.
8. He also stated that he was not paid his April and May, 2016 salary and that he was terminated on May 28, 2016 with the termination later indicating notice period of 7 days which he was not allowed to serve or paid in lieu. Also that he was not subjected to any disciplinary hearing before the said termination was executed.
9. During hearing, the claimant adopted his witness statement of July 13, 2022 and maintained that he worked for the respondent from May 4, 2015. He also produced the documents annexed to the claim as his exhibits in support of the claim.
10. Upon cross-examination he maintained that he was employed in May, 2015. He also confirmed that he is the one that signed the contract showing his employment commenced on April 6, 2016.
11. On re-examination he clarified that he was employed verbally in May ,2015 and issued with a contract in April, 2016.

The Respondent's Case.

12. The respondent contends that it initially engaged the claimant from May, 2015 as an intermittent casual labourer who was selected for various tasks that never lasted for more than a month and half at a time.
13. It is averred that the claimant was eventually employed on contractual basis commencing on April 6, 2016. A month into the said employment, the claimant exhibited laxity in the way he performed his duties by arriving late to work, insurbodinating his seniors, sleeping at work which issues were raised with him several times to no avail leading to his termination.
14. The respondent avers that the claimant was dismissed while still serving his probation period and therefore is not entitled to the reliefs sough for alleged unfair termination. It added that upon termination he was paid his 7 days' notice as such not entitled to the pay in lieu of notice sought.



15. The respondent did not call any witnesses in support of its defence.

Claimant's Submissions.

16. In his submissions filed on October 31, 2022, the claimant submitted on three issues; whether the claimant was unlawfully, unprocedurally and unfairly terminated, whether he is entitled to the reliefs sought and whether costs should be awarded.
17. On the first issue it was submitted that the respondent terminated the services of the claimant without notice when he had only served the contract employment for 2 months which contract was to run for a period of 12 months. It was argued that the notice period given in the termination letter was 7 days which he was not allowed to served, neither was he paid in lieu of the said notice. It was argued further that the respondent did not subject the claimant to disciplinary hearing as envisaged under the Employment Act, making the entire termination unfair and in violation of sections 42, 43 and 45 of the Employment Act as read with articles 41 and 47 of the Constitution.
18. On whether the claimant is entitled to the reliefs sought, it was submitted that the claimant has argued its case in support of the reliefs sought and without any contrary evidence by the respondent the claim should be allowed as prayed. To support this, he relied on the case of Paul Waigiri Muruiki v Nairobi Water and Sewerage Company Limited [2015] eKLR.
19. On costs, it was submitted that the allegation by the respondent that the claimant was terminated for gross misconduct was not supported by any documentary evidence or testimony by any witness, therefore leaving the explanation by the claimant as the only probably explanation. He then relied on the case of Joseph Oduor Anode v Kenya Red Cross [2012] eKLR where the court stated with regard to costs that;-

“In matters of costs, the general rule as adumbrated in the aforesaid statute is that costs follow the events unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words where the court decides not to follow the general principles the court is enjoined to give reasons for not so doing. In my view it is the failure to follow the general principles without reasons that would amount to arbitrary exercise of discretion and not the other way round.”

20. Accordingly, the claimant sought to be awarded costs of this suit.

Respondent's Submissions.

21. The respondent on the other hand submitted on two issues; whether the claimant's employment was unfairly terminated and whether the he is entitled to the reliefs sought.
22. On the first issue, the respondent cited the case of Cooperative Bank of Kenya Ltd v Banking Insurance abd Finance Union, CA No 188 of 2014[2016] eKLR where the Court of Appeal held that;-

“Our understanding of the Act is that the prescribed remedies, including reinstatement are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies, including reinstatement are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case.”



23. He also cited the case of *Ol Pajeta Ranching Limited v David Wanjau Muboro* [2017] eKLR where the court held that;-

“...The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention”

24. Based on the above case law, the respondent submitted that the claimant had worked for it for only two months before the termination as such full compensation is not justified in the circumstances.
25. On the reliefs sought, the respondent with regard to underpayment submitted that the claimant erroneously placed his job cadre under assistant machine operator as opposed to operator’s assistant as per his job titled that places him under general labourer scale whose salary as per legal notice number 117 of 2015 was Kshs 11,623 inclusive of house allowance, which he was duly paid. To support this they relied on the case of *Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School* [2022] eKLR where the court stated that;-

“It is not enough for a party to make an allegation and expect the court to find in its favour without substantiating such an allegation and supporting the same with oral and or documentary evidence. This is more so where an allegation is expected to be supported with documentary evidence to establish payment of salary or underpayment thereof. This court holds that the claimant failed to prove casual employment from 2004, or payment of wages for such employment, and or underpayment thereof. Proof of a case on a balance of probability places a burden on the alleging party to prove and demonstrate to the trial court that more likely than not the alleged facts or set of facts existed. Although this burden is not the same as beyond reasonable doubts, as expected in criminal cases, nonetheless the party alleging a given set of matters, issues, or circumstances is expected to convince the trial court that more likely than not the alleged facts or circumstances existed as alleged. The claimant failed to discharge this burden and hence prayer (b) on underpayment must fail. – See sections 107, 108, and 109 of the Evidence Act (cap 80).”

26. With regard to overtime pay and off duty pay, the respondent maintained that the claimant has not particularized the holidays he allegedly worked, neither has he given evidence on the overtime pay claim and therefore the claim on both heads should fail. To support this they relied on the case of *Reef Hotel Limited v Josephine Chivatsi*[2021] eKLR where the court held that;-

“An employee claiming compensation for working on public holidays is required to adduce evidence as to which particular holidays they worked worked. This position was affirmed by the Court of Appeal in its decision in *Rogoli Ole Manadegi v General Cargo Services Limited* [2016] eKLR in the following words: “It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he



put in excess hours, when he worked on public holidays or even rest days....he did not justify the global figure claimed in overtime showing specifically how it was arrived at....”

27. On that basis, the respondent argued that the claim on overtime and off days are exaggerated and erroneous which ought to be dismissed by this court.
28. On the salary allegedly not paid for the month of April and May, 2016, the respondent submitted that the claimant has admitted at paragraph 9 of his claim receiving such salary. It was argued that parties are bound by their pleadings and the claimant cannot be allowed to go back on his own pleadings.
29. On the claim for breach of contract, the respondent submitted that the claim is alien to the Employment Act and the same should be disregarded.
30. On gratuity, it was submitted that there was no agreement between the parties with regard to gratuity and since the same is not provided for payment under the Employment Act, it should be disallowed.
31. On leave pay, it was submitted that the claimant only served the respondent for 2 months as such had not qualified for leave or pay in lieu in that case.
32. I have examined all evidence and submissions of the parties herein. The claimant contends that he was initially employed by the respondents on May 4, 2015 and served for 10 months and then his terms changed to contract terms from April 6, 2016.
33. The respondents agreed that indeed they employed the claimant as casual labourer from 2015 April and on contract terms from 2016 April.
34. The claimant indeed agreed and signed the new contract from April 6, 2016 on May 25, 2016.
35. The contract was to last one year. By signing this contract, the claimant agreed to be bound by the terms of the new contract.
36. The contract was within its 1st month when claimant was terminated. There is no statement that the claimant was on probation when he was terminated and even if the claimant was on probation as the respondent content, the claimant was never given any opportunity to defend himself as to why the contract should be terminated.
37. The claimant was indeed entitled to be given an opportunity to be heard as provided for under section 41 of the Employment Act, 2007 which states as follows:-

“41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the



person, if any, chosen by the employee within subsection (1), make”.

38. Assuming that the claimant was even on probation, in a 3 judge bench decision of this court in Petition No 34, 35, 38, 49 and 50 of 2014 (consolidated) *The County Government Workers Union Versus the NSSF Board & others* (eKLR) 2022 this court held that section 42 of the *Employment Act, 2007* is unconstitutional for insinuating that workers serving on probation period are not entitled to a hearing.

39. That being the position and in view of the fact that the claimant was never subjected to any disciplinary hearing and neither were there any reasons advanced for the termination, I find the termination of the claimant unfair and unjustified as provided for under section 45(2) of the *Employment Act, 2007* which states as follows;-

“ 45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

40. In terms of remedies, I therefore find for claimant and order to be paid as follows;-

1. 1 month salary in lieu of notice = 11,623/=

2. Salary for April and May 2016 = 23,246/=

3. Compensation of 8 month’s salary for the unfair and unjustified termination = 8 x 11,623 = 92,984/=

4. Payment of his salary for the remainder of the contract period being from June 2016 to April 2017

= 10 x 11,623 = 116,230/=

Total = 244,083/=

Less statutory deductions

5. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Owiti for Respondent – present

Juma for Claimant – present



Court Assistant – Fred

