



**Githachuri v Engplan Consulting Engineers Ltd (Cause 525 of 2017)
[2023] KEELRC 509 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 509 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 525 OF 2017
AN MWAURE, J
FEBRUARY 28, 2023**

BETWEEN

KUNGU GITHACHURI CLAIMANT

AND

ENGPLAN CONSULTING ENGINEERS LTD RESPONDENT

JUDGMENT

1. The Claimant filed an amended memorandum of claim filed on 10th March 2021 and Respondent filed a response dated 19th July 2017.

Claimant's Case

2. The Claimant says he was employed by the Respondent as a Civil Engineer from 5th August 2013. The contract provided that his gross monthly salary was Ksh 233,000/- and he would receive 10% fees on projects Claimant would bring to the organisation.
3. He was entitled to 24 days annual leave and each party could terminate the employment by giving one month notice or one month pay in lieu of the notice.
4. The Claimant says he faithfully served the Respondent and was confirmed on 4th December 2013. He also received a salary increment of Kshs 162,800 and so his net monthly salary was kshs 333,333.00/-.
5. He says that on 24th December 2016 he was terminate from his employment without any sufficient notice and no reason was given to him.
6. He says before the termination the Respondent had communicated to him their intention to reduce their salary effective January 2017 and the Claimant had declined to take a pay cut.
7. He says that his leave days had also been unilaterally reduced from 24 days to 21 days with effective date being 1st January 2014.



8. He says his salary and benefits had been withheld around December 2015 amounting to Kshs 87,177/- which respondent purported was excessive leave days.
9. He says the unilateral withholding of his benefits persisted until when he was terminated on 24th December 2016.
10. The Claimant prays for payment of dues to him as a result of the unlawful termination amounting to Kshs 11,450,349/- as well as damages for wrongful dismissal. He also prays for costs and interest.

Respondent case

11. The Respondent in his response admits they served the Claimant with a termination letter on 24th December 2016. They say they did not terminate Claimant without notice or sufficient reason. They say they complied with the contract which the Claimant agreed to be bound by.
12. The Respondent says the reduction of leave days is as stipulated in the law and that the termination was not discriminatory and indeed they emphasise that the termination was lawful.
13. They pray that the case be dismissed with costs.

Claimant's viva voce evidence

14. The Claimant gave his evidence in Court on 16th March 2022.
15. They also filed a reply to the Respondents response and they stated that the Respondent communicated salary increment to the Respondent and continued to pay kshs 162,800/- by cheques from 27th November 2018 and so asks the Court to find the Respondent is estopped from conferring the Claimant salary was Kshs 333,333/-.
16. He otherwise confirms the contents in his claim in his reply and in his evidence in Court.
17. He says he brought in a project known as Ridge by Cytonn. He says the fees from that project was kshs 85,000,000 and so he was entitled to 10% of the same. He says that project was issued because of him but he did not know it until he was out of the organisation. He says he was informed by one Paul Mburu that the contract was awarded but Paul Mburu is not his witness.
18. He says he has no contract of his increased salary but he used to receive the Kshs 162,800/- over and above his salary.
19. The Claimant also called Martin Papa as a witness who is a document examiner. The witness says he received instructions to write a report on a complimentary slip. The complimentary slip was from Eng Plan Consulting together with 8 cheques from the same organisation. He said the handwriting in the complimentary slip and the handwriting on the cheques had significant similarities.
20. He said he then did the report and filed in Court. He said the documents were copies but that does not limit his examination.

Respondent's evidence

21. The Respondent witness is engineer Mercy Mugure who averred that Claimant was entitled to a commission of Kshs 217,460/- but the company had already paid him monthly fixed bonus to compensate for the commission. She says he introduced the following projects:-

1. Caffrey Ltd Kshs 425,000/-



2. ABM Holdings' Kshs 1,368,534
3. Panel Point Kshs 381,035
22. She says they did not receive fees for the other projects quoted by the Claimant.
23. The witness says they paid Claimant kshs 162, 800/- which was bonus and was not salary increment. She also says she computed leave schedule for the Claimant and it transpired he had gone on leave for more days than he was entitled.

Claimants Submissions

24. The Claimant in his submission avers that he worked faithfully for the Respondent and he received a salary increment vide complimentary slip dated 27th November 2013. The same translates Claimant's gross salary to kshs 400,000/- and so 333,333/- net income. He says the Claimant's pay slips and bank statements and copies of cheques show the total payments to the Claimant.
25. He says that contrary to the Respondent's averment that this was a bonus payment there is no such evidence and only bonus of Kshs 50,000 paid in January 2015. The said amount is also not reflected as 10% commission.
26. The Claimant avers that clearly the Kshs 162,800 was a salary increment. The Claimant says the Respondent is estopped from denying the net salary of the Claimant was kshs 333,333/-.
27. The Claimant says that if termination was by way of redundancy the Respondent should have issued him of notice to declare redundancy and also notice to all the other employees. The Respondent according to the Claimant did not comply with the requirement in declaring redundancy.
28. The Claimant also avers that tampering with his contract to lower his benefits is unfair labour practice and especially without consulting the employee.
29. Claimant says his dues were also withheld amounting to kshs 87,177/-.
30. Furthermore he states that after he was terminated citing financial inability the Respondent employed Mr David Kiama a Civil Engineer and Mr Innocent Gitonga was promoted to share the roles he was performing. He further says deduction of his dues was discriminating against him.
31. He also says there is no evidence that the board sat and deliberated on the fact that the company could not afford to pay him his salary anymore.
32. The Claimant says in his submission that the termination letter did not comply with the statutory notice as the days were less than what is provided in law.
33. The Claimant in his submissions states that if the Respondent terminated Claimant by declaring him redundant he should have followed the right procedure of giving a one month notice, showing criteria used to decide who to declare redundant and consulting the Claimant. He says the Respondent failed to comply with the rightful process and so the manner of termination was not justified and due process was not followed. The Claimant therefore claims for the prayers sought in the amended statement of claim amounting to kshs 15,731,055 plus costs and interest from 24th December 2016.

Determination

34. The Court has considered the evidence in terms of pleadings and the evidence in Court and identifies the following as the issues for determination:-



1. Was Claimant unfairly terminated from his employment
2. Is he entitled to the reliefs sought
35. The trite law is that an employer who terminates the employment of his employee must show a valid reason for such termination. The averment by the Respondent is that they terminated the Claimant's employment as per the contract they had with him and which he had accepted to be bound by it.
36. In the termination letter the Respondent intimate that they would not afford to pay the Claimant any more. They did not declare him redundant and yet he was not terminated on grounds of misconduct or disciplinary issue for that matter.
37. The law is still clear that even if an employee is given a notice to terminate him from employment the due process as provided in employment laws must be adhered to.
38. Section 45(1) of *Employment Act* provides:-

“No employer shall terminate the employment of an employee unfairly.”

Further section 45(2) states

“a termination of employment by an employee 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 employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and

section 45(c)

“That the employment was terminated in accordance with fair procedure.”

39. The Claimant was not given any opportunity to give any feedback or to give his explanation pertaining to the termination. He was merely informed that since he refused to take a salary cut the company could not afford to keep him anymore.
40. He was given one month notice less some 5 days. The due procedure that is mandatory is as provided in section 41(1) of the *Employment Act* which states:

“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.
41. Clearly the Claimant was not given an opportunity to give his explanation and by numerous authorities it has been said time and again that section 41 is mandatory. In the absence of following the right procedure then the employer falls a foul to flouting procedural fairness in conducting the process of terminating an employee.
42. This is irrespective that an employer has given an employee notice as per the contract of employment.



43. In the case of *Kenfreight E. A. Limited vs Benson K. Nguti* 2016 eKLR Civil Appeal No 31 of 2015) The Appeal Court held that:
- “The Court noted that the position which previously held sway to the effect that an employment contract was terminable only under the terms of the same contract and that no general damages were awardable was no longer applicable in view of the current statutory framework. The Court noted that the statutes passed in 2007 including the *Employment Act* were a stark departure from the traditional power of the employer to terminate or dismiss employees at will as demonstrated in the earlier decisions by the Courts.
44. The Court notes “that the *Employment Act* 2007 was modelled along the *International Labour Organization termination of employment convention* no 158 of 1982 in particular, like section 41 of the *Employment Act* and article 7 of the *convention* requires in mandatory terms, that no decision to terminate the service of a worker for reason relating to the worker’s conduct or performance can be taken without providing him with an opportunity to defend himself on the allegations. So that, although there is freedom to contract, under the present regime, the terms of the contract must be in consonance with the irreducible minimum terms and conditions in the *Employment Act*.”
45. The Court ultimately held that apart from issuing proper notice according to the contract (or payment in lieu thereof) an employer is duty bound to explain to the employee in the presence of another employee or a union official in a language the employee understands the reason or reasons for which the employer is considering terminating the contract. In addition an employee is entitled to be heard and his representative if any considered by an employer before a decision to terminate his contract of service is taken.”
46. Ultimately the Court of Appeal agreed with the trial Court in the above case that termination of Claimant’s contract was therefore unfair the payment in lieu of notice notwithstanding.
47. Persuaded by the above ruling by the Court of Appeal in the *Kenfreight E.A. Limited case (supra)* the Court finds that the Respondent did not follow the statutory procedure to terminate the Claimant from his employment without complying with the employment laws.
48. Even before terminating the Claimant the respondent had his leave days reduced without consulting him. He had also been asked to accept a salary reduction but had rejected that proposal. It was his right to reject a salary reduction because they already had a contract that provided his salary was to be ksh 235,000 per month. His refusal to take a salary cut was not sufficient ground to terminate his employment. The Court is not informed the extent of the pay cut but is not even relevant because the same was not implemented in any event.
49. Going by the foregoing the Claimant was terminated unfairly notice to terminate notwithstanding and judgment is entered in his favour.
50. Claimant having succeeded in his claim, he is entitled to the following remedies:-
- a. Unpaid portion of December 2016 salary Court finds there were 5 days not covered in the notice period so the same are awarded at the salary in the contract of kshs 235,000. There is no official letter of salary increment and the referred complimentary slip is just rough working and does not clearly state whether is salary increment or not. Court works with facts and this can only be proved factually so for 5 days is awarded being kshs 39,167/-.
 - b. Severance pay is awarded where termination is by redundancy and that is not the case here.



- c. 3 months' pay in lieu of notice not applicable-Claimant was given one month notice as per the contract.
- d. Unpaid commission not proved and yet is in the realm of special damages so is declined.
- e. As for unpaid leave the Respondent managed to demonstrate Claimant had utilised his leave days and so the prayer is declined.
- f. Claimant prayed for damages for unlawful termination. The Claimant worked for Respondent for about 3 years. He was not terminated because of gross misconduct or poor performance. The Court will award him 4 months equivalent of his salary $235,000 \times 4 = 940,000/-$.
- g. The Claimant also deserves costs having won the case and so costs to the Claimant and interest is also awarded to him from date of judgment till full payment. The total award is kshs 979,167/-

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

