



**PJ Petroleum Equipment Limited v Gathecha (Appeal E105 of 2021)  
[2023] KEELRC 476 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 476 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E105 OF 2021  
MN NDUMA, J  
FEBRUARY 23, 2023**

**BETWEEN**

**PJ PETROLEUM EQUIPMENT LIMITED ..... APPELLANT**

**AND**

**EVALYNE NYAMBURA GATHECHA ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. D.O. Mbeja (Mr) Principal Magistrate in the Milimani Commercial Courts at Nairobi delivered on the 27th August, 2021)*

**JUDGMENT**

1. The respondent in this appeal was awarded Kshs 1,265,364 by judgment of Hon. D.O. Mbeja (Mr) P.M. issued on 27<sup>th</sup> August, 2021 against the Appellant the erstwhile employer of the respondent.
2. The appeal is dated 13<sup>th</sup> September, 2021 and the consolidated grounds of appeal are:-
  - (a) The Learned Magistrate erred in law and fact in finding that the respondent's termination was unlawful.
  - (b) The learned Magistrate erred in law and fact in failing to consider the Appellant's evidence and submissions before writing the judgment.
  - (c) The learned Magistrate erred in law and fact in awarding the respondent the reliefs she sought.
3. In the Statement of Claim filed on 22<sup>nd</sup> August, 2019, the reliefs sought were itemized as follows:-
  - (a) Notice pay .....Kshs 35,000
  - (b) Salary arrears for May, 2010 to July, 2010.....Kshs 105,000



- (c) Salary arrears for 8 days worked in December, 2018.....Kshs 8,077.00
- (d) Gratuity (15/26x35,00 x9.25).Kshs 186,779.00
- (e) Leave days (35,000 x 9.25).....Kshs 323,750
- (f) Service pay (35,000/26x15x9.25....Kshs 186,758.00
- (g) Unfair termination (35,000 x 12)Kshs 420,000
- (h) Certificate of Service.

4. The summary of the case by the claimant is that she was on 29<sup>th</sup> September, 2009 employed by the respondent as a Secretary. That she served continuously upto 6<sup>th</sup> December, 2018, a period of 9.25 years when she received an email from the respondent's Director's Personal Assistant asking her to resign based on various allegations and when she went to the office to confirm the same, she was informed by the Human Resource Officer, Procurement Officer and Accountant that the Director had terminated her employment.
5. That no official communication or reasons were given by the Respondent for the termination nor was the claimant given notice or warning of the intended termination.
6. That the claimant was upon termination not paid the terminal benefits set out in the Statement of Claim. That the termination was unlawful and unfair and the claimant be awarded compensation equivalent to 12 months' salary in respect thereof.
7. The claim was opposed vide Statement of defence filed on 31<sup>st</sup> October, 2019.
8. the respondent herein testified in support of her case and she adopted a witness statement filed on 2<sup>nd</sup> August, 2019 as her evidence in Chief. P.W.1 stated that in her 9.25 years of service, she had no disciplinary issues. Under cross-examination, P.W.1 admitted that she had applied for leave severally but she never got continuous leave days. The respondent admitted that she was paid in lieu of leave days not taken severally. In November, 2013, she was paid Kshs 26,000 in lieu of leave. She was on another occasion paid 21,000 in lieu of leave. P.W.1 stated she was not paid salary for June and July, 2010. P.W.1 admitted National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) was deducted and paid on her behalf. She admitted she was paid house allowance. P.W.1 said she was never called to a disciplinary hearing. P.W.1 stated she was entitled to 21 leave days per year. P.W.1 admitted that she was also paid in lieu of leave, Kshs 26,000 in 2013 and 2016.
9. stated that National Social Security Fund for June, July and August, 2019 was not remitted as per the record.
10. D.W.1, the general manager of the appellant testified and adopted a witness statement dated 17<sup>th</sup> March, 2020 as her evidence in Chief. D.W.1 testified that P.W.1 voluntarily resigned as per the information she had on record. D.W.1 stated that a file was lost and this became a disciplinary issue. That P.W.1 was invited to a meeting but she did not turn up. That the company considered the letter written by P.W.1 as a resignation. That salary for May, 2010 was not paid. That salary for June and July 2010 was paid. She was in an extended maternity leave. D.W.1 stated that P.W.1 took her leave days and other leave days were paid in lieu. D.W.1 repeated that P.W.1 was called to a disciplinary hearing but she did not turn up. P.W.1 stated that National Social Security Fund and National Hospital Insurance Fund was paid for P.W.1.



11. Under cross-examination D.W.1 said she served P.W.1 with a letter inviting her to a disciplinary hearing on 6<sup>th</sup> June, 2019. D.W.1 said P.W.1 was the custodian of all files. When they were returned from seniors, she was supposed to keep them in safe custody. That a report of missing file was made at the police station but no criminal charges were made against P.W.1.
12. D.W.1 stated that P.W.1 was paid in lieu of leave days not taken. P.W.1 stated that no salary was paid in lieu of notice, since the claimant resigned. That P.W.1 was called vide telephone but she did not respond to the calls.
13. This being the first appeal, the role of the Court is as was stated by the Court of Appeal in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machika t/a Machira* eKLR as follows:-
 

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. “
14. In the judgment, the leaned trial magistrate noted that the appellant had issued a letter dated 6<sup>th</sup> December, 2018 to several staff with the subject “Resignation for all P.J. office staff.” The gist was that the management had given all office staff apart from workshop and security staff instructions to resign effective close of business that day. That staff were accused of various misconduct. The staff affected included the P.W.1. The Court noted that P.W.1 stated that she was never issued with any warning or called to any disciplinary hearing and that although D.W.1 stated that there was a disciplinary hearing, minutes of any such meeting were never produced by the appellant.
15. The learned trial magistrate citing the Court of Appeal decision in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR found that the appellant had violated Sections 41, 43 and 45 of the *Employment Act*, in the manner it had terminated the employment of P.W.1. The Court also found that the P.W.1 was entitled to compensation in terms of Section 49(1) and (4) of the *Act*.
16. This Court notes that P.W.1 had responded to the letter by the appellant asking staff to resign dated 6<sup>th</sup> December, 2018 wherein she noted that the forced resignation and closure of office was not properly addressed to her and that the Director should terminate her employment legally and pay her terminal dues, otherwise she still regard herself as an employee of the company.
17. The appellant produced a notice of intention to summarily dismiss P.W.1 dated 1<sup>st</sup> February, 2019. P.W.1 was given 7 days to come to the office and explain herself. By a letter dated 11<sup>th</sup> February, 2019, P.W.1 was summarily dismissed from employment for failure to respond to the 7 days’ notice dated 1<sup>st</sup> February, 2019 and that she was facing criminal charges due to the loss of the speed Governor File OB/79/23/01/2019.
18. It is common cause that by the time the notice to show cause was written, P.W.1 was already out of office which had been closed by the appellant. It is also common cause that P.W.1 was never charged with any criminal offence as alleged by the appellant or at all.
19. It is this Court’s considered finding that the trial Court rightly concluded that no proper hearing was accorded P.W.1 before she was hounded out of the office vide the letter of 6<sup>th</sup> December, 2018. That the subsequent letter of 1<sup>st</sup> February, 2019 and 11<sup>th</sup> February, 2019 had been overtaken by events.
20. This Court confirms the decision by the trial Court that the termination of the employment of P.W.1 was unlawful and unfair and in violation of section 36, 41, 43 and 45 of the *Employment Act*, 2007.



21. With regard to compensation, the trial Court considered the provisions of Section 49(1) and (4) of the Employment Act, 2007. The Court found that P.W.1 did not contribute to the termination and that she desired to continue in her employment. That she had clean record for a period of nine (9) years. That P.W.1 was not paid terminal benefits, upon termination. The trial Court then awarded the compensation as set out in the Statement of Claim.
22. In this respect, the trial Court misdirected itself since it ought to have considered each of the reliefs sought separately and find if the same had merit or not.
23. With regard to compensation, the Court has considered the facts set out on the record and in the judgment of the trial Court and found that there is no justification to interfere with the award of the equivalent of twelve months' compensation the trial Court awarded having considered the relevant matters and the law in arriving at that decision.
24. The Court confirms the award of the equivalent of 12 months' salary in compensation in the sum of (Kshs 35,000 x 12) Kshs 420,000 - Terminal benefits

(a) Notice pay.

The evidence adduced before Court indicates that P.W.1 and her colleagues were hounded out of their offices on 6<sup>th</sup> December, 2018 never to return again. The P.W.1 was not given notice nor paid in lieu of notice. The Court confirms the award by the trial Court of Kshs 35,000 in lieu of notice.

(b) Arrear Salary for May, 2010 – July 2010 P.W.1 did not prove that she was not paid salary for May, to July, 2010 in the sum of Kshs 105,000. The suit was filed in August, 2019. Even if this claim was valid, it was already time barred by dint of Section 90 of the Employment Act, 2007. The Court erred in awarding this amount and the same is set aside.

(c) 8 days salary arrears for December, 2018

The appellant confirmed that it did not pay P.W.1 8 days worked in December, 2018. The award of Kshs 8,077.00 is confirmed by this Court.

(d) Gratuity (15/20 x 35,000 x 9.25)

did not prove on a balance of probabilities that she was entitled to payment of gratuity in the amount claimed or at all. P.W.1 did not provide a letter of appointment which provided this benefit upon termination

Furthermore, there is evidence that the appellant paid National Social Security Fund (NSSF) for P.W.1 and so, gratuity was not payable in terms of Section 35(5) of the Employment Act. This award is set aside.

(e) Leave days (35,000x 9.25 – Kshs 186,779.00

had the onus of proving that she did not take leave at all during the 9 years she worked for the Appellant and that the Appellant did not pay P.W.1 *in lieu* of 21 days leave the respondent was entitled to each year. The evidence produced by the Appellant before Court showed that P.W.1 took annual leave from time to time and was also paid *in lieu* of leave days not taken in respect of certain years.

The blanket claims by P.W.1 for payment *in lieu* of leave days not taken for the entire nine (9) years, was discredited by the appellant and the Court finds that the same has no merit. The award by the trial Court in this respect is set aside therefore.



(f) Service Pay (35,000 x 26 x 15 x 9.25)

did not provide any letter of appointment which showed that she was entitled to Service Pay upon termination of her employment. The trial Court misdirected itself in awarding this relief. The same is set aside.

(g) Certificate of Service

is entitled to a Certificate of Service for the 9 years served. The Court directs the Appellant to provide P.W.1 with a Certificate of Service within 30 days of this judgment.

24. In the final analysis, the judgment by the trial Court is set aside and substituted by the following award by this Court in favour of P.W.1 against the appellant:-

(i) The appellant to pay P.W.1 the respondent the equivalent of 12 months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs 420,000.

(ii) The appellant to pay the respondent Kshs 35,000 in lieu of one month notice.

(iii) The appellant to provide Certificate of Service to the respondent within 30 days of this judgment.

(iv) The award is payable with interest at Court rates from date of the Judgment in the trial Court till payment in full.

(v) The Appellant to pay half (1/2) the costs before the trial Court and this Court.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearances

Mr. Ochuo for Appellant

Mr. Nyamande for Respondent

Ekale: Court Assistant

