



Nzeve v Ancarta Construction Company Limited (Employment and Labour Relations Cause 565 of 2016) [2023] KEELRC 366 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 366 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 565 OF 2016**

**SC RUTTO, J
FEBRUARY 10, 2023**

BETWEEN

JAMES MULI NZEVE CLAIMANT

AND

ANCARTA CONSTRUCTION COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted the suit through a Memorandum of Claim dated March 31, 2016. The claim was later amended on February 16, 2021. The claimant avers that he was employed by the respondent on April, 2009 as a general worker and upon completion of three years, he was promoted to the position of a storekeeper. He states that he was verbally informed by the respondent's clerk, that he was not to report to work the coming week as his services were no longer needed. That in spite of following up, the respondent did not give him audience and explain to him why they had taken the decision to summarily dismiss him from employment. It is on this account that the claimant seeks against the respondent the sum of Kshs 693,745.00 being notice pay, house allowance, unpaid leave days, service, compensatory damages for unlawful termination and underpayments.
2. The respondent opposed the Amended Memorandum of Claim through its Response dated March 23, 2022. It avers that the claimant was first employed in April, 2009 as a casual worker and was earning Kshs 7,800/= per month. The respondent denies terminating the claimant's employment unlawfully and unfairly. It avers that the respondent through its Advocates on record informed the claimant through his Advocates, that his employment had not been terminated and urged them to advise him to resume his duties. On this account, the respondent has asked the Court to dismiss the suit with costs.
3. The matter proceeded for hearing on June 20, 2022. Each side called oral evidence at the trial.



Claimant's case

4. The claimant testified as CW1 and to start with, he adopted his witness statement and bundle of documents filed together with his claim, to constitute his evidence in chief.
5. It was his testimony that he was employed by the respondent on April, 2005. That his employment with the respondent was continuous. That he was employed verbally and was never issued with an employment contract. That given the nature of the respondent's business, they were very casual and never keen on following up on their employments with a contract.
6. That at the time he was employed he was earning Kshs 175/= which was paid in aggregate at the end of every week. That after three years, he was promoted to the position of a store keeper and his daily wage rate rose to kshs 400/=.
7. The claimant stated in evidence that on February 6, 2016, as he was receiving payment for his weekly wages, the respondent's clerk by the name Mr Ramesh, informed him not to report to work the following week and that in the event of a vacancy, he would be called for reemployment. He contended that he was not notified that he will be terminated and had not committed any wrong. That further, he was not given a show cause letter and no one looked for him to resume work.
8. He further testified that the contract between the respondent and the 3rd party was still ongoing and that he was the only one who was terminated.
9. In further evidence, the claimant stated that he was not paid any money following his termination. That subsequently, on Monday, the following week, he decided to go to work and follow up on the reasons for his termination as he also sought how the respondent was going to pay his terminal benefits. That in spite of his follow ups, the respondent informed him that since he was a casual employee, he was not entitled to any terminal benefits and neither was he entitled to a certificate of service.
10. In closing his testimony in chief, the claimant asked the Court to order the respondent to pay his terminal dues.

Respondent's case

11. The respondent called oral evidence through Mr Francis Tabu Nyengenyne who introduced himself as a Supervisor in the respondent company. Similarly, he sought to rely on his witness statement, as well as the bundle of documents filed on behalf of the respondent, which he adopted to constitute his evidence in chief.
12. It was his testimony that the claimant was first employed as a casual worker in April, 2009 at a salary of Kshs 7,800/=. That before the claimant went to work for the respondent, he was working for another company called Great Properties Limited who were the developers of Eagle Plains Housing Estate, along Mombasa Road. That this was phase one and the respondent was the supervising contractor of the project until 2008.
13. That when phase two of the project began, the respondent was appointed the main contractor and the claimant was absorbed in 2009. That the claimant's claim that he had been informed that his services had been terminated was not true.
14. That the company had no work at the time as the building contract the respondent was handling had ended. That everyone was temporarily laid off until the next job was available. He told Court that this was normal in the industry. That after one and a half months, the respondent got another contract, and the boss (Mr Suleiman) recalled all workers to resume their different works. That however, the



claimant refused to go back to work and left employment without the knowledge and authority of the respondent.

15. RW1 stated in further evidence that the respondent did not terminate the claimant at any time during his employment as claimed. That the respondent would not have attempted to do so without sending the claimant formal written communication in that regard. It was his testimony that the claimant was not told to leave and never go back.
16. He further stated that the respondent sent out word to the claimant through people known to him asking him to resume work. That he personally went and met the claimant who informed him that he had instructed his Advocates (Collete Akwana Advocates) hence the respondent was to deal with them. He told the Court that the claimant was invited back to work but he failed to do so.

Submissions

17. It was submitted on behalf of the claimant that he was a full time employee of the respondent as there was no evidence that there was a break in his service. Placing reliance on the provisions of section 37 of the *Employment Act*, it was submitted that the law looks at the continuity of service and not the mode of salary payment. That therefore, he was protected under section 41 of the *Employment Act*. In support of this position, the claimant cited the case of *Chemelil Sugar Company vs Ebrahim Ochieng Otuon & 2 others (2015) eKLR*.
18. That further, the respondent's allegations are pure fabricated lies meant to cover up for their dismissal. The claimant further argued that the respondent has not proved a case of desertion against him. On this issue, reliance was placed on the case of *Felistas Acheba Ikatwa vs Charles Peter Otieno (2018) eKLR* and *Judith Atieno Owuor vs Sameer Agriculture & Livestock Limited (2020) eKLR*.
19. Citing the case of *Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR*, it was the claimant's further submission that the respondent did not substantiate the reasons for dismissing him from employment and did not accord him a fair process as envisaged under Section 41 of the *Employment Act*.
20. The respondent did not file any submissions as the same could not be traced on the online portal and were not on the Court's physical record.

Analysis and Determination

21. Flowing from the pleadings before Court, the documentary and oral evidence tendered by both parties as well as the submissions on record, the issues falling for the court's determination are:
 - i. Was the claimant terminated from employment?
 - ii. If the answer to (i) is in the affirmative, was his termination unfair and unlawful?
 - iii. What reliefs if any, avail to the claimant?

Was the claimant terminated from employment?

22. The *Black's Law Dictionary, 10th Edition* defines the term 'Termination of Employment' to mean: -

' The complete severance of an employer-employee relationship.'
23. What this means is that there must be total disconnection between an employer and an employee thus marking the end of the employment relationship. It is only upon establishing this total disconnection,



that the Court can proceed to evaluate the fairness or otherwise of the alleged termination of employment.

24. In this case, the claimant has alleged that he was verbally terminated from employment. It was his evidence that the termination was communicated through the respondent's clerk who was responsible for paying their wages. On its part, the respondent refuted this assertion and maintained that the claimant was not terminated as the work it was handling at the time had ended and there was a temporary lay off of all its staff. That when work picked up and the respondent secured another contract, the claimant was recalled to resume work but he declined to do so.
25. In view of the conflicting positions taken by both parties, it is imperative to evaluate the evidence on record in order to resolve this issue.
26. In support of its position, the respondent exhibited copies of letters exchanged with the firm of Colette Akwana & Company Advocates, who were acting for the claimant at the time. The first letter which is dated March 22, 2016 is couched as follows:

' Collette Akwana & Company Advocates

Re: Employment Of James Muli Nzave

Your letter dated March 16, 2016 and our advocate's letter to yourselves dated March 18, 2018 refer.

There is a clear misunderstanding in this matter. Your client's services have not been terminated and thus we request your client to resume work immediately hereof.

Thank you.

Signed

SM Admani'

27. The second letter is from the respondent's Advocate and is addressed to the claimant's Advocate. It reads:

' Collete Akwana & Company Advocates,

Dear Madam,

Re: Alleged Unlawful And Unfair Termination Of Employment Of James Muli Nzeve

The above matter refers.

Your letter dated March 30, 2016 has been placed before us.

We have also perused our client's precipitate letter of March 22, 2016.

Our client has clearly indicated that they have not terminated your client's employment. We are of the considered opinion that that is a statement of fact that does not require any proof to the contrary.

We therefore urge you to advise your client to resume his duties immediately so as not to cause the instigation of an unnecessary law suit.

Yours faithfully,

signed



Azim Taibjee.'

28. What manifests from the foregoing correspondence, is that the respondent was very clear in its mind that it had not terminated the claimant's employment hence urged him to resume work. It is essential to point out that the claimant did not disown the letters dispatched to his erstwhile Advocates.
29. Judging by the correspondence on record, it is evident that the respondent still considered the claimant its employee hence the reason he was being urged to resume work. The claimant did not give reasons why he failed to resume work despite being requested to do so by the respondent.
30. Section 47(5) of the *Employment Act* places the burden of proving that an unfair termination or wrongful dismissal has occurred on the employee. To do this, the employee, must prove that termination has taken place. This position was amplified as follows in the case of *Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR*: -

' So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): 'to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.'
31. I wholly concur with and reiterate the above position. Therefore, taking into account the definition of the term 'termination' and in light of the provisions of section 47(5), the claimant was required to prove that there was complete severance of the employment relationship between him and the respondent.
32. As discerned from the correspondence emanating from the respondent's end, the claimant's employment was not terminated and it is apparent that the respondent was practically pleading with him to resume work but he was adamant. I doubt that would have been the case had the respondent actually terminated the claimant's employment.
33. To this end, I cannot help but find that the claimant has failed to prove that termination of employment had occurred. Quite the contrary, it is the claimant who was not keen on resuming work, hence he cannot now turn around and allege unfair termination.
34. Having found that there was no termination, it is not logical to consider whether the termination was unfair and unlawful, as that issue falls by the wayside.

Reliefs

35. As the Court has found that the claimant was not terminated from employment, the claim for notice pay and compensatory cannot be sustained. The same case applies to the claim for service pay.
36. The claim for unpaid leave days was not specifically pleaded and particularized hence cannot be awarded for lack of specificity.
37. With regards to the claim for house allowance and underpayments, the same are denied for want of proof. The claimant did not lead evidence to prove that he was earning salary below the wage guidelines. In this regard, there was no evidence of the salary he was earning at the time hence it is impossible for the Court to ascertain whether there was underpayment and that indeed, the claimant was not paid house allowance.



Orders

38. It is against this background that I dismiss the claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Omamo

For the Respondent Mr. Ng'ang'a

Court Assistant Abdimalik Hussein

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 had 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 Civil 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.

