



**Kingoo v Nairobi Plastics Limited (Cause 1930 of 2017)
[2023] KEELRC 236 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1930 OF 2017
JK GAKERI, J
FEBRUARY 2, 2023**

BETWEEN

JACKSON MAKAU KINGOO CLAIMANT

AND

NAIROBI PLASTICS LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated this claim by a statement of claim filed on September 28, 2017 alleging unfair termination of employment.
2. The claimant avers that he was employed by the respondent in 1996 as a casual machine operator until 2004 when he was employed on permanent terms until May 2, 2017 when his employment was unlawfully terminated for no reason. That he served diligently and had no warning letters or complaints.
3. Puzzlingly, paragraph 3 of the statement of claim states that the claimant was employed by the respondent as a dental nurse in 2011 and was stationed at the respondent's Kitengela offices.
4. The claimant further avers that his termination was done in a hasty manner and was not paid his dues.
5. That the termination was unfair for want of a valid reason and disciplinary hearing and the claimant was entitled to leave allowance, 3 months notice in lieu and gratuity.
6. The claimant prays for;
 - i. Compensation for wrongful termination, salary in lieu of notice, service pay for each year worked for, gratuity and certificate of service.
 - ii. Compensation for loss of employment.
 - iii. General damages for breach of claimant's rights as stated on paragraph 13 above.



- iv. Certificate of service.
- v. Costs of this suit and interest.
- vi. Aggravated and exemplary damages.

Respondent's case

7. In its reply to the statement of claim filed on November 17, 2017, the respondent denied having employed the claimant as a dental nurse or machine operator in 1996.
8. That his employment was terminated legally and procedurally and all dues were paid.
9. That the respondent had the prerogative to renew the contract subject to availability of work or satisfactory performance as provided by the contract dated November 1, 2016.
10. The respondent further avers that the claimant's contract of employment lapsed.

Claimant's evidence

11. The claimant's written statement rehashes the contents of the statement of claim.
12. On cross-examination, the claimant stated that he was a machine operator and his employment was terminated on May 2, 2017.
13. The claimant denied having signed any contract or document and disowned the signature on the documents. He denied having been paid anything after termination of employment.
14. It was his evidence that the signatures on the documents and the affidavit were not similar.
15. The witness confirmed that he had no evidence to show that he was at the workplace on May 2, 2017 but had documents to show that he worked for the respondent since 1996. The witness had no document to establish that allegation and had no payslip before 2015 but testified that the respondent started issuing payslips in 2004.
16. On re-examination, the witness testified that he did not sign the employment contract or clearance certificate and denied that the signatures were his and was not given a termination letter.

Respondent's evidence

17. RWI, Irene Kinuthia testified that the claimant was employed by the respondent on a 6 months contract from November 1, 2016 which was renewable at the option of the respondent. That the claimant signed the employment agreement and served until April 30, 2017 when the contract lapsed and was paid all benefits Kshs17,870/= and he acknowledged receipt and signed the certificate of clearance.
18. On cross-examination, the witness confirmed that she joined the respondent in 2016 and knew the claimant. She confirmed that the claimant worked for the respondent from 2004 – 2017 and salary was paid via the Co-operative Bank of Kenya.
19. It was her testimony that the claimant was serving under a renewable contract.
20. That the claimant read and signed the employment agreement in her office but was not given a copy or a certificate of service when the contract lapsed.



21. On re-examination, the witness testified that the claimant signed the certificate of clearance and renewal of the contract was not automatic.

claimant's submissions

22. The claimant's counsel isolated four issues, namely; when the claimant was employed by the respondent, termination of employment, notice and entitlement to compensation.
23. On the 1st issue, reliance was made on the NSSF statement on record to urge that the claimant was an employee of the respondent from 1996 to 2017.
24. As regards termination of employment, it was urged that the same was wrongful, unprocedural, unfair and illegally effected. The decision in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR was relied upon to buttress the submission as were the provisions of section 45(4)(b) of the *Employment Act*.
25. That the respondent did not give a termination notice as by law required and as explained in *National Bank of Kenya Ltd v Samuel Nguru Mutonya* (2019) eKLR.
26. It was further submitted that the claimant was neither afforded an opportunity to defend himself as provided by section 41 of the *Employment Act*, 2007 nor given the reason(s) for termination.
27. As regards the reliefs sought, it was urged that the claimant's salary was Kshs.23,200/= and he was entitled to salary *in lieu* of notice, leave allowance for undefined number of days, that he did not proceed on leave Kshs478,200/=, compensation for 12 months at Kshs278,400/=, service pay of Kshs243,600/=, notice pay Kshs23,200/= totalling Kshs1,032,400/=.
28. Finally, the decisions in *Ayub Imbira V Teachers Service Commission* (2018) eKLR and *Kenfreight (EA) Ltd V Benson K. Nguti* (2016) eKLR and the provisions of section 45(2) of the *Employment Act* were relied upon to buttress the submission that termination of the claimant's employment was unfair, wrongful and unlawful.

respondent's submissions

29. The respondent's counsel addressed three issues, namely; whether the claimant had a valid claim for unfair termination of employment, entitlement to the reliefs sought and costs.
30. On the claim, it was submitted that the claimant's contract of employment lapsed by effluxion of time and the respondent had denied having terminated the claimant's contract of employment. Reliance was made on the decision in *Amatsi Water Services Co. Ltd V Francis Shire Chachi* (2018) eKLR, *Rajab Barasa & 4 others V Kenya Meat Commission* (2021) eKLR, *Margaret A. Achieng V National Water Conservation & Pipeline Corporation* (2014) eKLR to urge that fixed term contracts terminated on expiry and the employer was not obligated to give reasons for termination as it was not a termination of employment.
31. The provisions of section 47(5) of the *Employment Act* and the decision in *Alexander Mutua V Haggai Multi-Cargo Handling Services Ltd* (2014) eKLR were relied upon to urge the claimant's burden of proof.
32. It was submitted that the claimant had failed to prove unfair termination of employment and had been paid all dues and signed a discharge voucher. The decision in *Coastal Bottlers Ltd V Kimathi Mithika* (2018) eKLR was relied upon to reinforce the submission.



33. It was urged that the claimant was not entitled to the declaration sought or the 12 months compensation, or unpaid leave days as none had been proved.
34. As regards service pay, reliance was made on the provisions of section 35(6)(d) of the *Employment Act* as the claimant was a member of the NSSF.
35. As regards salary in lieu of notice, it was submitted that the claimant's employment contract was not terminated but lapsed on April 30, 2017.
36. Counsel urged that the claimant was entitled to a certificate of service.
37. As regards costs, it was urged that since the claimant had failed to prove his case, costs should follow the event and be awarded to the respondent.

Determination

38. The issues for determination are;
 - i. When the claimant was engaged by the respondent and nature of employment.
 - ii. Whether termination of the claimant's employment was unfair.
 - iii. Whether the claimant is entitled to the reliefs sought.
39. As to the date of employment, parties have adopted different positions. While the claimant alleges that he was employed in 1996, the respondent's witness admitted on cross-examination that the claimant joined the respondent in 2004. According to the claimant, he joined as a casual employee in 1996 and became permanent in 2004.
40. Although the claimant testified that he had documentation to show that he joined in 1996, he did not furnish any and a similar submission by counsel had no evidential backing.
41. A copy of the NSSF statement on record dated June 27, 2017 show that the claimant was employed on 1st April, 2003 and registered as a member on April 7, 2004 and that is when contributions commenced.
42. There is no evidence on record to demonstrate that the claimant had an employment relationship with the respondent between 1996 and 2003. In the absence of a contract of service or other authoritative evidence of either party, as to the date of employment, the court is persuaded that it was either in April 2003 or April 2004.
43. As regards the nature of employment, the claimant testified that he became a permanent employee in 2004 and the NSSF statement on record would appear to reinforce the testimony as remittances commenced in April 2004 after registration earlier in the month.
44. RWI on the other hand adduced no evidence on the nature of employment prior to November 1, 2016.
45. It was not her testimony that the alleged 6 months contracts commenced in April 2004.
46. In the absence of documentary or other evidence by the respondent to controvert the claimant's assertion that he was in permanent employment, it is the finding of the court that indeed the claimant was in permanent employment of the respondent.
47. Strangely, although the claimant confirmed that the respondent started issuing payslips in 2004, he did not furnish the court with any payslip dated before January 2015. He could not have been a casual employee in 2014 owing to the duration and was already earning a housing allowance.



48. This reasoning finds support in the provisions of section 10(7) of the *Employment Act* that;
- If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
49. In this case, the respondent failed to prove the terms of employment of the claimant from April 2004 to October 30, 2016.
50. On the other hand, according to the respondent's witness who joined the respondent in 2016, the claimant's renewable 6 months contracts commenced on November 1, 2016.
51. Noteworthy, the witness adduced no evidence of the nature of the claimant's employment before this date which is intriguing in light of the payslips and NSSF statement on record.
52. Significantly, the claimant testified that he did not sign the contract on record dated November 1, 2016 or any other document.
53. It was his testimony that the signatures were not similar. Instructively, the claimant signed the witness statement and verifying affidavit and the signatures are not identical but similar. The signatures on the contract of employment and the certificate of clearance are similar and not identical. It is impossible to ascertain whether they all belonged to the claimant having denied the latter two signatures.
54. RWI on the other hand testified that the claimant signed the document in her office after reading the same.
55. Regrettably, the respondent's witness confirmed that the claimant was not given a copy of the alleged employment agreement and had no evidence to demonstrate that the claimant actually received the sum of Kshs 17,870/=, a claim the claimant denied.
56. Finally, the dates of the employment agreement and its duration appear to have been changed by hand before the document was photocopied and filed.
57. It is apparent that the date of November 1, 2016 was an alteration as is the duration of the contract (Line 10). All the dates were altered and none of the alteration was counter-signed.
58. It is also unclear whether the alterations were made before or after the claimant allegedly signed the document. The only factual aspect of the alleged agreement was the gross salary.
59. Since the claimant was not given a copy of the alleged employment agreement, there is nothing to compare with for purposes of authenticity.
60. For the above-stated reasons, the court is satisfied that it would be unsafe to rely on a copy of a document whose signatures the claimant disowned and which contains unauthenticated alterations.
61. The foregoing notwithstanding, this case turns on whether termination of the claimant's employment was unfair, wrongful, unlawful and unprocedural as alleged and submitted by the claimant.
62. The provisions of the *Employment Act* are clear on the requirements of a fair and lawful termination by an employer.
63. For instance, section 45 which is the bedrock of fair termination of employment is emphatic that;
1. No employer shall terminate the employment of an employee unfairly.
 2. A termination of employment by an employer 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 operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.
64. Under section 43(1) of the Act, the employer is duty bound to prove the reason(s) for the termination.
65. Courts have construed the foregoing and other provisions of the *Employment Act* relating to termination of employment that for a termination to pass muster, it must be substantively justified and procedurally fair as submitted by the claimant’s counsel and as aptly captured by Linnet Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (Supra) and as elaborated by the Court of Appeal in *Kenafri Industries Ltd v John Gitonga Njeru* (2016) eKLR as well as in *Naima Khamis v Oxford University Press EA Ltd* (2017) eKLR.
66. As regards the burden of proof, section 47(5) of the *Employment Act* provides;
For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
67. As submitted by the respondent, the burden of proof is on the employee to prove that unfair termination or wrongful dismissal has taken place. In the instant case, the claimant simply stated that “on or about May 2, 2017 when the respondent illegally, unlawfully purported to summarily terminate his employment without any justification for doing so.” A similar statement is embodied in witness statement.
68. Instructively, the respondent denied having terminated the claimant’s employment and relied exclusively on the documents on record that the claimant’s contract of employment lapsed on expiry of the duration.
69. Puzzlingly, neither the written statement nor the oral evidence adduced in court explain the circumstances in which the alleged termination of employment took place.
70. The evidence on record is reticent on what the respondent or its agents did or did not do which culminated in the separation. In other words, it is unclear as to how the alleged termination of employment took place. Who for instance was the claimant dealing with? Who notified or informed him that his employment had been terminated and when? And what did he do?
71. Strangely, the claimant could not confirm on cross-examination that he was at the place of work on May 2, 2017.
72. The court is of the view that the claimant is required to at the very least allege the factual circumstances in which the alleged termination of employment took place so as to demonstrate how the provisions of the *Employment Act* were not complied with.
73. The rather inelegantly drafted statement of claim make no factual allegations against the respondent, its servant or agents. Atypically, neither the demand letter dated June 27, 2017 nor the statement of claim states the claimant’s salary or quantify or specify the sum or sums being claimed.



74. In sum, the court is being invited to find culpability on the part of the respondent yet the claimant has not attributed any factual culpability on the respondent. The incongruence is apparent and troubling.
75. Finally and as adverted to elsewhere in this judgement, although the claimant confirmed on cross-examination that he had documents to demonstrate that he worked for the respondent from 1996, he provided not a single document. In the court's view, the claimant was not being truthful and knew more than he was willing to disclose to the court.
76. It is the finding of the court that the claimant was untruthful in his pleadings by *inter alia* failing to disclose the factual context in which the alleged termination of employment took place.
77. For the foregoing reasons, it is the finding of the court that the claimant has on a balance of probabilities failed to prove that the alleged termination of his employment was unfair or wrongful.
78. As to whether the claimant is entitled to the reliefs sought, the court proceeds as follows;
- i. Having found that the claimant has failed to discharge the burden of proof under section 47(5) of the [Employment Act](#), that an unfair termination of employment took place on May 2, 2017, a declaration that the termination of employment was unfair is unavailable.
 - ii. Service pay for each year worked for
79. The claimant did not prove entitlement to service pay and more significantly, the NSSF statement on record reveals that he registered as a member on April 7, 2004 and was thus not entitled to service pay by virtue of section 35(6)(d) of the [Employment Act](#).
- iii. Salary *in lieu of* notice
80. The claimant rendered no evidence of entitlement to pay in lieu of notice.
The prayer is declined.
- iv. Gratuity
81. The claimant adduced no evidence to show that he was entitled to gratuity which is either a contractual term or payable under a Collective Bargaining Agreement (CBA).
The prayer is declined.
- v. Compensation for wrongful termination
82. Having found that the claimant did not establish that an unfair termination of employment took place on May 2, 2017, the remedy provided by section 49(1)(c) of the [Employment Act](#) is unmerited.
The prayer is disallowed.
- vi. Premature termination of the claimant's employment
83. The claimant adduced no evidence to establish this relief.
- vii. General damages for breach of claimant's rights in paragraph 13
84. The claimant adduced no evidence as to what specific constitutional and statutory rights were violated and how they were violated and the resultant loss or damage.
The prayer is disallowed.
- viii. Certificate of service



85. The respondent shall issue a certificate of service within 30 days from the date hereof.
- ix. Aggravated and exemplary damages
86. The claimant adduced no evidence to demonstrate entitlement to aggravated and exemplary damages in the context of this case.
- The prayer is dismissed.
- x. Costs of this suit and interest
87. Worthy of note, it is unclear why the claimant's counsel found it unnecessary to specify the amounts the claimant was praying for under the various heads for the court to appreciate the weight the claimant attached to the prayers.
88. It is trite law that special damages must not only be specifically pleaded but also be proved.
89. Accordingly, it is the finding of the court that the suit herein is unsustainable and is accordingly dismissed.
90. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF FEBRUARY 2023

DR. JACOB GAKERI

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 *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.

DR. JACOB GAKERI

JUDGE

