



REPUBLIC OF KENYA



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**Onsongo v Eoh Seal Limited (Cause 189 of 2020)  
[2023] KEELRC 237 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 237 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 189 OF 2020  
JK GAKERI, J  
FEBRUARY 2, 2023**

**BETWEEN**

**MAUREEN ONSONGO ..... CLAIMANT**

**AND**

**EOH SEAL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant initiated this claim by a statement of claim filed on May 8, 2020 alleging that her employment was unlawful and unfairly terminated by the respondent.
2. The respondent employed the claimant as a SAP K3 Consultant on August 1, 2015 at a monthly salary of Kshs 300,000/=.
3. The letter of appointment provided for a 6 months probationary period and the claimant's employment was confirmed by letter dated June 29, 2016 effective February 1, 2016. Working hours were 8.00am – 1.00pm and 2.00 pm – 5.00 pm.
4. The claimant averred that she served the respondent diligently and with dedication and had no complaint.
5. That on March 3, 2020, she was summoned by the human resource manager who informed her that she wanted to know her better by discussing the projects she was undertaking and whether she had any challenges.
6. The claimant further averred that on March 11, 2020 at about 4.45 pm, she was summoned again to the human resource manager's office and her request to have the meeting the following day was rejected and proceeded to the office where she found the human resource manager (May Nyaga), Ben Siro (payroll officer) and Pamela Ahere (sales department). That May Nyaga informed her that her services had been terminated with immediate effect as the respondent was experiencing financial turmoil as that



- termination letter dated on even date stated. That her role in supporting TTCS projects had ceased owing to business challenges.
7. That May Nyaga informed her that she was not being declared redundant.
  8. It is the claimant's case that the information was devastating as she had bills to pay including loans but was requested to sign the termination letter which she did reluctantly.
  9. The claimant avers that she was not issued a copy of the termination letter but took a photo of the same.
  10. The letter tabulated her dues to be paid in 4 monthly instalments.
  11. The claimant prays for;
    - i. A declaration and finding that the claimant suffered unfair and unlawful termination by the respondent.
    - ii. General damages for unlawful termination equivalent to 12 months' pay, Kshs 3,600,000/=.
    - iii. An order directing the respondent to pay the claimant her terminal dues as follows; 11 days worked in March 2020, Kshs 165,000/= .One (1) month's salary *in lieu* of notice Kshs 300,000/= .11.5 days leave accrued until March 11, 2020, Kshs 172,500/= .4 years of service at 15 days per completed year Kshs 900,000/=   
Total Kshs 1,537,500/=
    - iv. Certificate of service
    - v. Costs of the suit and interest of the general damages at court rates from the date of filing this suit until payment in full and interest of the special damages in prayer (iii) from that date until payment in full.

### **Respondent's case**

12. In its statement of response dated January 12, 2021, the respondent avers that the claimant's services were terminated procedurally as she was invited for a meeting to discuss the reasons for the termination and she signed the minutes willingly as well as the termination letter and completed the Exit Interview Form.
13. It is the respondent's case that it opted to terminate the claimant's contract due to financial constraints in accordance with the provisions of the contract which provided for termination by one month's notice.
14. That the claimant rejected the dues as tabulated by the respondent in favour of a court case.
15. The respondent avered that the claimant's suit had not matured as she had not cleared with the respondent and appeared as an active employee.
16. That the respondent was ready and willing to pay her dues but her claim was inflated.
17. That the claimant's employment was fairly terminated and was not entitled to general damages equivalent to 12 months' salary.
18. The respondent prays for dismissal of the suit with costs.



### **Claimant's evidence**

19. The claimant testified that her services were terminated on the ground of financial turmoil but was not taken through a redundancy process and her last working day was March 11, 2020 and the COVID-19 restrictions had not been operationalized.
20. The witness confirmed on cross-examination that her department had 7 employees and she was the only one whose services were terminated.
21. It was her testimony that she attended a meeting on March 11, 2020 and signed the minutes and the reasons for termination were explained.
22. The witness was emphatic that she would still have sued the respondent even if the terminal dues had been paid as she faulted the process of termination.
23. The witness stated that she cleared with the respondent though she had no documentary evidence and had not been given a clearance form.

### **Respondent's evidence**

24. RWI, Mr Kevin Muiruri confirmed on cross-examination that he had 8 years experience in human resource. It was his testimony that the instant case was not a redundancy and the attendant steps were not complied with. According to him, inability to pay salaries did not amount to a redundancy. It was a termination of employment.
25. He testified that the claimant was invited for a meeting on March 11, 2020 and her services were terminated on the same day and payment of terminal dues was not conditional upon clearance.
26. Puzzlingly, the witness confirmed that he had no evidence of what was outstanding from the claimant and she had not been paid as promised.
27. It was his testimony that the respondent was no longer in operation.

### **Submissions**

28. According to the claimant's counsel, the issues for determination were;
  - i. Whether termination of the claimant's employment was substantively and procedurally valid.
  - ii. Whether the claimant was entitled to the reliefs sought.
29. As regards termination of the claimant's services, reliance was made on the provisions of section 41 of the *Employment Act*, 2007 to urge that the procedure adopted by the respondent fell below the statutory threshold. The submission was reinforced by the decision in *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR.
30. Reliance was also made on the provisions of section 43(2) of the Act as regards the reason(s) for termination of employment.
31. It was submitted that the employer did not inform the employee that it was considering termination of her employment as she was unaware that the respondent was facing financial hardships and that employees would be declared redundant and the provisions of section 40 of the *Employment Act* were not complied with.



32. It was further submitted that for the respondent to demonstrate financial constraints, it sought to rely on financial statements for the year ending December 31, 2018 published on April 17, 2019 and the claimant remained in employment until March 11, 2020 and no COVID-19 case had been reported in the country.
33. Reliance was made on the decision in [John Nduba v Africa Medical Research Foundation \(AMREF\) Health Africa](#) (2020) eKLR to reinforce the submission.
34. As regards the reliefs sought, it was urged that the claimant's letter of termination set out the specific items due to her namely, the day worked in March, pay in lieu of notice, leave days and 4 year service at 15 days for every completed year but the respondent did not pay the amount due though unspecified.
35. The court was urged to award 12 months compensation as was the case in [John Nduba's case](#) (supra).
36. The court was also urged to award costs to the claimant.

### **Respondent's submissions**

37. The respondent's counsel identified four issues including costs, termination, clearance and reliefs.
38. As to whether termination of the claimant's employment was unfair and unlawful, reliance was made on the provisions of section 43, 45(2) and 47(5) of the [Employment Act](#) to urge that the employer was bound to prove the reason(s) for termination of employment. The sentiments of Lord Denning in [British Leyland UK Ltd v Swift](#) (1981) IRLR 91 cited in [Joseph Mwaniki Ng'ang'a v United Millers Ltd](#) (2022) eKLR were also relied upon.
39. Counsel submitted that the financial challenges the respondent was facing was a valid and reasonable reason for termination of the claimant's employment.
40. The decisions in [Kenya Union of Domestic Hotels, Education Institutions and Allied Workers \(KUDHEIHA\) v Rabai Road Primary School](#) and [Tobias Onyaya Auma & 5 others v Kenya Airways Corporation](#) (2007) eKLR were relied upon to submit that the employers in these cases were held to have correctly terminated the contracts of an employee for economic reasons.
41. The respondent's counsel submitted that in this case, since the respondent was facing financial challenges, termination of the claimant in the restructuring of the business was necessary and justified.
42. Relatedly, it was submitted that termination of the claimant's employment was procedurally fair as the respondent had agreed to pay salary *in lieu* of notice.
43. On clearance, it was submitted that the claimant did not clear with the respondent's human resource department and did not return office equipment and a clearance certificate was not issued and she was not paid.
44. As regards the reliefs sought, it was urged that the claimant was not entitled to the declaration sought, general damages or the dues payable under the termination letter, other than the certificate of service.
45. On costs, it was submitted that the claimant should bear the costs of this suit.

### **Determination**

46. After careful consideration of the pleadings, evidence and submissions by counsel, the issues for determination are;
  - i. Whether termination of the claimant's employment was unfair and unlawful.



- ii. Whether the claimant is entitled to the reliefs sought.
47. As regards termination of the claimant’s contract of service, while the respondent submitted that the termination was in accordance with the terms of the letter of appointment, the claimant submitted that the termination was unfair as the respondent neither proved compliance with the provisions of section 41 of the *Employment Act* nor section 43(2) and 40 of the Act.
48. The letter of termination dated March 11, 2020 states inter alia follows;
- “The company has been undergoing a financial turmoil and cannot sustain to pay salaries. Your role has been supporting TTCS Projects which have now ceased due to the business challenges.
- In view of the current circumstances, the company has been compelled to terminate your employment. The termination takes effect immediately. Your last working day will be March 11, 2020 . . .”
49. As adverted to elsewhere in this Judgment, on the material day, the claimant was preparing to go home when she was summoned to the Human Resource Manager’s office.
50. The contents of the termination letter lay it bare that the respondent’s business environment had changed and with reduced sources of revenue, it had to make certain adjustments or changes to cut costs including laying of staff.
51. The respondent’s witness, Mr. Kevin Muiruri vehemently denied that the claimant was declared redundant although the letter of termination of employment was explicit that the reason was business challenges and inability to pay salaries which in the court’s view was a redundancy statement as it was the respondent’s reaction to the new business environment, which is a prerogative of the board of directors of a business entity.
52. The foregoing finds support from the sentiments of Maraga JA (as he then was) in *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR where the Judge explained the definition of redundancy in section 2 of the *Employment Act* as follows;
- “There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn brought about by factors beyond the control of the employer which leaves the employer with no option but to take an initiative the consequence of which will be inevitable loss of employment.
- The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and termination of employment arises “where the services of an employee are superfluous” through “the practice commonly known as abolition of office, job or occupation and loss of employment.”
53. In the instant case, the letter of termination of the claimant’s employment appears to suggest that the claimant’s office, job or occupation had ceased due to economic challenges.
54. Although excerpts of the respondent’s financial statements for the year ended December 31, 2018 revealed that company made net loss of Kshs 5,020,598/=, the statements were signed on April 17, 2019 and the statements for the year ended 2019 were not availed.



55. The circumstances relied upon by the respondent as the ground for termination of the claimant's employment necessitated a redundancy but the respondent tactfully refused to apply the provisions of section 40 of the *Employment Act* and purported to rely on other provisions of the Act.
56. Needless to emphasize, it is trite that a redundancy conducted otherwise than in accordance with the provisions of Section 40 of the *Employment Act*, 2007 amounts to an unfair termination of employment.
57. Significantly, it requires no gainsaying that for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair as aptly captured by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

### **Reasons for termination**

58. In this case, the letter of termination dated March 11, 2020, merely informed the claimant her role in “Supporting TTCS Project had ceased due to business challenges.”
59. The letter was silent on when her role ceased and how. Although the letter makes reference to a meeting held on July 11, 2019 and other discussions regarding the status of the respondent, no details were furnished by the respondent to enable the court understand the business terrain before March 11, 2020.
60. The respondent's submission that it had a valid and fair reason to terminate the claimant's employment within the meaning of section 45(2) of the employment was in the court's view unpersuasive as the alleged “economic challenges” were neither identified nor testified about by the respondent's witness.
61. The excerpts of the financial statements on record have no narrative or figures from which inferences could be drawn and as explained elsewhere, the statement related to the company's position in 2018.
62. Section 43 of the *Employment Act*, 2007 provides that;
  1. In any claim out of termination of a contract, the employer shall be required 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.
63. From the evidence on record, it is the finding of the court that the respondent has on a balance of probabilities failed to prove, that it had a valid and fair reason to terminate the claimant's employment.
64. The decision in Industrial Court cause No. 231 of 2010 *Kenya Union of Domestic, Hotel, Education Institutions and Allied Workers (KUDHEIHA) v Rabai Road Primary School* relied upon by the respondent is unpersuasive as neither the economic reasons relied upon by Mukunya J nor the circumstances in which the termination took place were canvassed.



## Procedure

65. The claimant testified that she was summoned to the Human Resource Manager's office a few minutes to 5.00 pm as she prepared to go home and her attempts to have the meeting held on the following day failed and at the meeting she was requested to sign the termination letter and its effect was immediate.
66. Evidently, the claimant was not taken through the mandatory process provided by section 41 of the [Employment Act](#), 2007. (See [Pius Machafu Isindu v Lavington Security Guards Ltd](#) (2017) eKLR.
67. Procedural fairness is one of the hallmarks of fair termination of employment within the meaning of section 45 of the [Employment Act](#).
68. Contrary to the respondent's submissions, compliance with the provisions of section 35 and 36 of the [Employment Act](#) does not render a termination of employment fair. The two provisions address notice and pay *in lieu* of notice exclusively. Other relevant provisions must be complied with as well.
69. From the foregoing, it is the finding of the court that the respondent has failed to demonstrate that termination of the claimant's employment was procedurally fair.
70. As regards clearance, the respondent's submission that it had a clearance procedure for employee and the claimant failed to comply with it lacks the necessary material to sustain it.
71. First, the respondent led no evidence on the procedure the claimant was supposed to follow.
72. Second, the respondent adduced no evidence that it gave the claimant a clearance form, if it was necessary to facilitate clearance.
73. Third, since the termination was at the instigation of the respondent, it was duty bound to give the claimant clear instructions on how any outstanding issues would be handled. The respondent for instance gave the claimant the Exit Interview Form (EIF) to complete which she did.
74. Fourth, the respondent did not claim or adduce evidence to show that the claimant was in possession of any of its assets and had declined to hand it over.
75. Finally, RWI confirmed on cross-examination that payment of terminal dues was not conditional upon clearance by the claimant. This issue is of no moment in the matter before the court.
76. As regards the reliefs sought by the claimant, the respondent admitted that it was ready and willing to pay the dues payable to her but the claimant rejected the same.
77. The respondent however, adduced no scintilla of evidence on how the claimant rejected the gesture. Why for example was the first instalment due in April 2020 not paid?
78. Puzzlingly, RWI testified that he was not aware of the total amount due to the claimant as the claimant was never paid.
79. Similarly, the respondent did not deny that it owed the claimant certain monies for;
  1. Days worked in March 2020
  2. Pay *in lieu* of notice
  3. 11.5 days leave upto March 2020
  4. 4 years service of 15 days per completed year, the claimant is awarded the sum due under these heads to be computed by the respondent.



80. As regards general damages, the *Employment Act* has no provision for the award of damages for unlawful termination of employment.
81. Section 49(1)(c) of the *Employment Act* provides the discretionary remedy of compensation upto a maximum of 12 months' salary.
82. In determining of the quantum of compensation for unfair termination of employment or summary dismissal as was the case in the instant suit, the court is enjoined to take into account all the relevant parameters under Section 49(4) of the *Employment Act, 2007*.
83. In this case, the court has considered that;
- i. The claimant was an employee of the respondent from August 1, 2015 to March 11, 2020 a duration of 4 years and 7 months and 10 days which was neither too short nor too long.
  - ii. The respondent offered the claimant service pay.
  - iii. In the Exit Interview Form, the claimant indicated that she would consider working for the respondent in future.
  - iv. The financial statements for the year ended 2019 show that the company made a net loss of Kshs 5,020,598/= and appeared to justify termination of the claimant's employment on poor performance of the entity.
84. In the circumstances, the court is satisfied that the equivalent of three (3) months' salary is fair, Kshs 900,000/=.
85. In the upshot, judgement is entered for the claimant against the respondent as follows;
- a. Declaration that termination of the claimant's employment by the respondent was unfair and unlawful.
  - b. Equivalent of 3 month's salary, Kshs 900,000/=
  - c. 11 days worked in March 2020
  - d. 11.5 days accrued leave
  - e. One month's salary in lieu of notice
  - f. 4 years of service at 15 days per completed year
  - g. Certificate of service.
  - h. Costs of this suit.
  - i. Interest at court rates from the date of judgement till payment in full.
86. Orders accordingly.

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

