



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Opemi v Holy Ghost Fathers Technical Training Institute (Cause E076 of 2021) [2023] KEELRC 269 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 269 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E076 OF 2021
AK NZEI, J
FEBRUARY 2, 2023

BETWEEN

ROBERT KUNGURU OPEMI CLAIMANT

AND

**HOLY GHOST FATHERS TECHNICAL TRAINING
INSTITUTE RESPONDENT**

JUDGMENT

1. The Claimant sued the Respondent vide a Memorandum of claim dated August 5, 2021 and filed in Court on August 6, 2021, and pleaded:-
 - a. that the Claimant was employed by the Respondent on January 3, 2012 in the capacity of a principal earning a monthly salary of Ksh 20,000 which was subsequently increased to Ksh 35,000 net.
 - b. that the Claimant was the chief executive officer of the institution and his duties included day to day administration, setting of the curriculum, preparation of timetables and working closely with the Director, management committee and Board of management; liaising with external bodies i.e. Ministry of Education, Directorate of Technical Training and Vocational Institutions and other organizations.
 - c. that on July 8, 2021, the Claimant received a letter from the Respondent's Director terminating his services from the institution and directing him to hand over on July 15, 2021.
 - d. that the Claimant had a contract with the Respondent which ran upto December 31, 2022, and that his termination was unfair and unlawful, was without reason and was without due regard to the provisions of the law as set out in the *Employment Act*. That the Claimant should be compensated.



- e. that the Claimant had diligently performed his duties with dedication and was never issued with any warning, oral or written.
2. The Claimant set out the following claims against the Respondent:-
 - a. one month salary in lieu of noticeKsh 35,000
 - b. salary for the remainder of contract @ Ksh 35,000 upto December 31, 2022 and 8 months unpaid salary during the Covid periodKsh 910,000
 - c. gratuity.....Ksh 157,500
 - d. unremitted PAYE deductionsKsh 194,787.20
 - e. unremitted NSSF deductions.....Ksh 2,400
 - f. 12 months salary for unfair terminationKsh 420,000
 - g. a declaration that the Claimant’s termination was unfair and unjust.
 - h. general damages.
 - i. costs of the suit and interest.
 - j. certificate of service.
 3. The Respondent entered appearance on October 13, 2021 and filed response to the Claimant’s claim on even date. The Respondent pleaded:-
 - a. that the Respondent experienced serious financial challenges and decline in number of students from 370 to 62, which situation worsened with closure of the institution due to Covid-19 pandemic and that the Claimant was aware of those challenges.
 - b. that on June 7, 2021, the Respondent wrote to the County Labour Office Mombasa and informed that office of the Respondent’s intention to declare redundancy on account of the foregoing circumstances.
 - c. that on July 16, 2021, the Respondent again wrote to the County Labour Office Mombasa and sought clarification and confirmation on the break down and amount due and payable to the Claimant on account of redundancy, totalling to Ksh 210,000 and consisting of salary on lieu of notice (Ksh 35,000), 15 days salary for the month of July 2021 (Ksh 17,500) and severance pay of (Ksh 157,500).
 - d. that on July 19, 2021, the county Labour Officer wrote to the Respondent and confirmed the breakdown and total amount payable to the Claimant.
 - e. that the Respondent offered the Claimant the said sum of Ksh 210,000 as his terminal dues, but the Claimant refused to accept the same.
 - f. that the Respondent denies the Claimant’s claim.
 - g. that a declaration be made that the Claimant’s employment was fairly terminated on account of redundancy and the Claimant was offered his terminal dues, which he declined.
 - h. that the Claimant’s case be dismissed.
 4. When trial opened on June 7, 2022, the Claimant adopted his filed witness statement dated August 5, 2021 as his testimony. He further produced in evidence some thirteen documents listed on his list of



documents dated August 5, 2021. The Claimant further told the Court that he was not subjected to any disciplinary proceedings and asked the Court to grant him the reliefs sought in his memorandum of claim.

5. Cross-examined, the Claimant testified that he worked for the Claimant from 2012 to 2021. The Claimant further testified that the Respondent's institute closed for six months during the period of Covid-19 pandemic, and that during this period, the Claimant being the principal, was working as the principal does not close. That he used his own resources to hold virtual meetings. The Claimant denied having been given any offer on payment of his terminal dues, and denied having rejected any such offer.
6. Re-examined, the Claimant testified that although his termination letter indicated that his terminal dues would be paid upon handing over, he handed over but was never paid.
7. The Respondent called one witness, Benedict Wambua Nzioka (RW-1), who told the Court that he is the Respondent's current Director. RW-1 adopted his recorded witness statement dated October 7, 2021 as his testimony. He further produced in evidence some six documents listed on the Respondent's list of documents dated October 7, 2021. RW-1 further testified that in the Claimant's letter of termination, the witness (RW-1) had indicated that a Sister had been appointed in the place of the Claimant. That this step was taken because Sisters are not paid salaries, but allowances; and that the Respondent was running into debt. That the Respondent was trying to cut on costs.
8. Cross-examined, RW-1 testified that the Claimant worked for the Respondent for nine and a half years, and had a contract that was supposed to end on December 31, 2022, but his employment was terminated in July 2021. That the Respondent gave a redundancy notice to the County Labour Office, but did not give notice to the Claimant. That the letter to the County Labour Office only mentioned the Claimant. That the Respondent had no minutes or evidence to show that any consultative meetings were held between the Claimant and the Respondent prior to the Claimant's termination. That the Respondent had already gotten the Claimant's replacement by the time the Claimant was terminated.
9. Having considered the pleadings filed and evidence adduced by the parties herein, issues that present for determination are, in my view, as follows:-
 - a. whether termination of the Claimant's employment by the Respondent was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
10. On the first issue, it is a common ground that the Claimant was employed by the Respondent in the year 2012 and worked until July 15, 2021, and that at the time of his termination, the Claimant had a running contract that was supposed to end on December 31, 2022. What is in dispute is the legality/fairness or otherwise of the procedure adopted by the Respondent in terminating the Claimant's employment. The Respondent pleaded and testified to having terminated the Claimant's employment on account of redundancy. The Respondent did not, however, demonstrate having complied with Section 40 (1) of the Employment Act which provides as follows:-

“(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;



- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."

11. The Court was not told that the Claimant was a member of any trade union. The Respondent (RW-1) told the Court that it served a redundancy notice on the labour officer but did not serve any on the Claimant. The Court of Appeal held as follows in the case of [*Thomas De La Rue \[K\] Limited v David Opondo Omuletema*](#) [eKLR]

"it is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a trade union, the notification is to the union and the local Labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer..."

12. The Respondent admitted in evidence that it did not serve any redundancy notice on the Claimant. The Claimant denied having been given any such notice. Further, the Respondent did not tell the Court what criteria it used in settling on the Claimant (the institution's principal) for redundancy. All that the Respondent (RW-1) told the court was that the Respondent had financial problems and decided to engage a third party to run the school on their behalf. The witness testified to the Respondent having brought in another person (principal) to take over the Claimant's position.

13. The Claimant cited the case of [*Francis Maina Kamau v Lee Cosntruction*](#) [2014] eKLR where it was held as follows:-

"where an employer declares a redundancy, the conditions set out in Section 40 of the [*Employment Act*](#) must be observed and where the employer fails to do so, the termination becomes unfair termination within the meaning of Section 45 of the [*Employment Act*](#)."



14. The Respondent did not adhere to mandatory provisions of the foregoing statute in terminating the Claimant's employment on account of redundancy. The termination was unlawful and therefore unfair within the meaning of Section 45 of the Employment Act.
15. On the second issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of seven months salary being compensation for unfair termination of employment, which is Ksh 35,000X7 = 245,000.
16. The claims for unremitted PAYE and NSSF deductions are declined. This Court has time and again stated that once deducted as statutory deductions, money so deducted ceases to be an employee's entitlement. It becomes the entitlement of the statutory body for which such deductions are effected. Such statutory bodies have elaborate legal mechanisms on recovery of deducted amounts from employers who may fail to remit such deductions as may be stipulated in the particular statutory body's parent statute. Some of the statutory bodies are given coercive powers to force remittance, including prosecutorial powers.
17. The claim for service gratuity is declined as it can be inferred from the claimant's pleadings that the claimant was an NSSF member/contributor. Section 35(6) of the Employment Act is called in aid.
18. The claim for payment of salary for the remainder of the Claimant's contract is unavailable as it is not one of the reliefs available to a terminated employee under Section 49(1) of the Employment Act.
19. The Claimant pleaded that he worked for six months without salary during the Covid-19 period, and testified as much. The Respondent did not deny the Claimant's allegation of having worked for six months without salary prior to his termination, and did not demonstrate that payment during the six months of closure was made. I award the Claimant the unpaid salary for six months which is Ksh 35,000x6 = 210,000
20. The claim for general damages is declined. Such remedy is not available to the Claimant under the provisions of Section 49(1) of the Employment Act.
21. The claim for issuance of a Certificate of Service is allowed. Section 51(1) of the Employment Act enjoins an employer to issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.
22. Finally, and having considered written submissions filed on behalf of both parties, judgment is hereby entered for the Claimant against the Respondent for:-
 - a. Compensation for unfair termination of employment.....Ksh 245,000
 - b. Unpaid salary for six months.....Ksh 210,000

Total ksh.455,000
23. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
24. The Claimant is awarded costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2NDFEBRUARY, 2023.

AGNES KITIKU NZEI

JUDGE



ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Ms Fwaya for Claimant

Mr. Muliro Respondent

