



Khabongo v Speed Eye Investments Ltd t/a Salt Club and Restaurant (Cause 1917 of 2017) [2023] KEELRC 746 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 746 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1917 OF 2017
JK GAKERI, J
MARCH 27, 2023**

BETWEEN

EDWARD LINGANGA KHABONGO CLAIMANT

AND

SPEED EYE INVESTMENTS LTD T/A SALT CLUB AND RESTAURANT RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on 26th September, 2017 alleging unlawful termination and refusal to pay salary arrears and terminal dues.
2. The Claimant avers that he was employed by the Respondent on 10th February, 2015 as a Hotel Manager at Kshs.35,000/= initially on a 3 months probationary period and subsequently worked until 4th October, 2016.
3. That the terms of engagement were oral and worked diligently and had no warning letter.
4. The Claimant avers that he was dismissed from employment by a text message without notice and no reasons were given.
5. It is the Claimant's case that the September 2016 salary was not paid and he had not taken leave.
6. That before termination of the Claimant's employment, the Respondent engaged two former employees as Trainee Managers at Kshs.50,000/= per month.
7. That during the Claimant's tenure, business's turnover grew from Kshs.4,000,000/= to Kshs.6,000,000/=.
8. That letters from the Labour Office to the Respondent were unresponded to.
9. The Claimant prays for;



- a. Declaration that his dismissal was unlawful.
 - b. Re-engagement in work comparable to his previous work without loss of benefits.
 - c. Reinstatement.
10. In the alternative;
- a. The sum of Kshs.2,580,389.00 comprising;
 - i. 12 months compensation Kshs. 420,000.00
 - ii. One month notice Kshs. 35,000.00
 - iii. September 2016 salary Kshs. 35,000.00
 - iv. Leave days Kshs. 36,473.00
 - v. 28 off days Kshs. 32,648.00
 - vi. Compensation for discrimination Kshs.2,000,000.00
 - vii. Service Kshs. 17,500.00
 - viii. 4 days October 2016 Kshs. 3,498.00

Total Kshs.2,580,389.00
 - b. Costs of this suit.
 - c. Interest from date of termination until payment in full.
 - d. Certificate of service.
 - e. Any other remedy the court may deem fit to grant in the circumstances.
11. The Respondent did not respond to the claim. A copy of a Notice of Summons dated 27th September 2017 shows that service was by notice.
12. It is unclear why the Claimant's counsel did not serve the claim against the Respondent.
13. More strangely, the court file had no entries before 3rd November, 2021, the date on which the Notice to show cause was scheduled for hearing. Evidence on record show that the Notice to Show Cause was served upon counsel's for the parties.

Claimant's evidence

- 14. The Claimant's written statement which he adopted in court rehashes the contents of the Memorandum of Claim and restated in court on 7th December, 2022.
- 15. The Respondent did not attend the hearing although the hearing notice was served on 22nd November, 2022 and an Affidavit of Service filed.

Claimant's submissions

- 16. The Claimant's counsel did not isolate the specific issues to submit on but rehashed the evidence adduced by the Claimant and the prayers.



17. As regards discrimination, counsel submitted that a fellow manager of the Claimant was earning Kshs.45,000/= yet the Claimant earned Kshs.35,000/= and worked from 6.00 am to 9.00 pm yet the other manager worked from 2 pm to midnight.
18. That the Respondent's conduct offended Section 5 of the Employment Act, 2007 and the provisions of the Constitution of Kenya, 2010.
19. Reliance was also made on Article 1 of the ILO Convention on Discrimination (Employment and Occupation) Convention, 1958 (No. III) on discrimination at the work place.
20. The decisions in Ol Pejeta Ranching Ltd v David Wanjau Muhoro (2017) eKLR, VMK v Catholic University of Eastern Africa (2013) eKLR and Koki Muia v Samsung Electronics East Africa Ltd (2015) eKLR were relied upon to urge that the Claimant be awarded Kshs.2,000,000/= for discrimination.
21. Further, reliance was made on the decision in Communication Workers Union of Kenya v Telkom Kenya Ltd (2018) eKLR.
22. Counsel urged the court to reinstate the Claimant.
23. The Respondent did not file submissions.

Determination

24. The issues for determination are;
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Depending on the answer to (i), whether termination of the Claimant's employment was fair.
 - iii. Whether the Claimant was discriminated.
 - iv. Whether the Claimant is entitled to the reliefs sought.
25. As to whether the Claimant was an employee of the Respondent, the Claimant testified that he was employed by the Respondent on 10th February, 2015 at a monthly salary of Kshs.35,000/=.
26. However, the Claimant tendered no documentary evidence on his employment or payment of salary or indeed anything tangible, not even the alleged short telephone message of termination of employment.
27. Other than copies of the letters from the County Labour Officer, Nairobi, there is no scintilla of evidence connecting the Claimant with the Respondent at all.
28. Similarly, the Claimant adduced no evidence on how he used to receive his salary or how much it was.
29. It is puzzling that for the entire duration the Claimant allegedly worked for the Respondent, he had no documentary evidence to connect him with the Respondent.
30. The only evidence that would appear to suggest that he dealt with the Respondent are copies of the letters by the County Labour Officer on record dated October and November 2017 which is proximate to the date of the alleged termination.
31. The situation is exacerbated by the fact that the Respondent did not respond to the claim to either admit or deny the Claimant's allegations, thus the Claimant's evidence is uncontroverted.
32. The foregoing notwithstanding, it is the obligation of the Claimant to prove his case, first and foremost that he was an employee of the Respondent and that the Respondent terminated his employment



unlawfully. (See *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR and *Nicholus Kipkemoi Korir v Hatari Security Guards* (2016) eKLR.

33. It is immaterial that the suit is undefended.
34. The provisions of the *Evidence Act* are clear on the burden of proof.
35. Section 107 of the *Evidence Act* proves;
 1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
36. Section 108 ordains that;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side.
37. Further, Section 109 provides that;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in any particular person.
38. The totality of the foregoing provisions and case law is that the Claimant is legally required to prove the existence of the facts he alleges, failing which the suit collapses.
39. However, in this case, it is the finding of the court that the Claimant has demonstrated that he was an employee of the Respondent through oral evidence which is further buttressed by the letters written by the County Labour Officer, Nairobi to the Respondent dated 12th October, 2016, 19th October, 2016, 26th October, 2016 and 2nd November, 2016, demanding payment of the Claimant's dues and inviting the Respondent for meetings which demands and requests the Respondent did not honour.
40. Significantly, the fact that the Claimant had no written contract of employment for the duration of employment and had no payslip is exclusively attributable to the Respondent's failure to comply with the relevant provisions of the *Employment Act*, 2007 and in particular Sections 9, 10 and 20.
41. Moreover, Section 10(7) of the Act provides 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.
42. As regards termination of employment, both the provisions of the *Employment Act*, 2007 and judicial authority are clear that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair.
43. As held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, the *Employment Act*, 2007 imposes a heavy burden on the employer in matters germane to termination of employment in that there must have been reason(s) for termination, the reason(s) must be valid, fair and justifiable and the mandatory procedural process must be complied with.
44. The provisions of the *Employment Act*, 2007 are designed to ensure substantive and procedural fairness in termination of employment, as explained by the Court of Appeal in *Naima Khamis v Oxford University Press (E.A) Ltd* (2017) eKLR and aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.



45. In the instant case, the uncontroverted evidence of the Claimant is that his employment was terminated by the Respondent's Supervisor, one Mr. Kalakacha by a text message on 4th October, 2016 and he was not paid terminal dues. The Claimant testified that he went to the Respondent's place of business and met Mr. Kalakacha who intimated to him that he had determined that the Claimant could not take the business to the next level
46. In sum, the Claimant was neither given the reason(s) for termination of employment nor were the procedural steps prescribed by Section 41 of the Employment Act, 2007 complied with.
47. The Respondent furnished no evidence that it terminated the Claimant's employment in accordance with the provisions of the Employment Act, 2007.
48. With no evidence to demonstrate substantive and procedural fairness in termination, it is the finding of the court that termination of the Claimant's employment was unfair within the meaning of Section 45 of the Employment Act.
49. As regards discrimination, the Claimant alleged that he was discriminated because another manager was earning Kshs.45,000/= and used to report at 2.00 pm and leave at 12.00 midnight yet the Claimant earned Kshs.35,000/=. Neither the Claimant's written statement nor the oral evidence adduced in court make reference to his reporting and exit from the work place or off-days or how many leave days were pending, if any.
50. Closely related to the foregoing, the managers in question were unnamed nor were their salaries proven.
51. In a similar vein, the Claimant adduced no evidence that he raised the issue with his supervisor and no action was taken.
52. Finally, the Claimant did not explain the specific duties he used to perform to demonstrate that he and the Trainee Managers were performing identical duties.
53. In *Raila Odinga & others v Independent Electoral and Boundaries Commission & others* (2014) eKLR, the Supreme Court held as follows;

“ . . . a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden.
54. In *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR, the Supreme Court held that;

“In the foregoing context, it is clear to us that the Petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court in discharge of the evidential burden establishing their treatment at the hands of the 1st Respondent as unconstitutional.”
55. The court is guided by these sentiments.
56. In this case, the Claimant adduced no tangible evidence of the alleged discrimination.
57. In the absence of cogent evidence, the court is satisfied and finds that the Claimant has on a balance of probabilities failed to establish that he was discriminated by the Respondent.
58. As regards the reliefs sought, the court proceeds as follows;



- i. Having found that termination of the Claimant's employment was unfair, a declaration to the effect is issued.
 - ii. Reinstatement or re-engagement
59. The Claimant adduced no evidence of entitlement to any of these reliefs or the circumstances obtaining at the Respondent's place of business.
60. Relatedly, the Claimant left employment in 2016 almost 6 years ago and circumstances have undoubtedly changed and neither of these remedies appear opportune in this instance.
- The prayers are declined.

iii. 12 months compensation

61. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
62. The court has in determining the quantum of compensation taken into consideration the fact that;
1. The Claimant was an employee of the Respondent for a fairly short time, about 1 year 5 months.
 2. The Claimant does not appear to have appealed the Respondent's decision.
 3. The Claimant wished to continue in the Respondent's employment.
 4. The Claimant testified that he served the Respondent diligently.
63. In the circumstances, the court is satisfied that the equivalent of one (1) month's gross salary is fair, Kshs.35,000/=.

iv. Salary in lieu of notice

64. As no termination notice was given, the Claimant is awarded Kshs.35,000/= as salary in lieu of notice.

v. Salary for September 2016

65. The Claimant testified that the salary for September and the 4 days worked in October 2016 were not paid and the same are allowed, Kshs.35,000/= and Kshs.3,498/= respectively.
- The claims are allowed.

vi. Leave days

66. The Claimant adduced no evidence of the number of leave days outstanding and when they accrued. In the absence of particulars, the claim is disallowed.

vii. 28 off-days

67. Neither the Claimant's written statement nor the oral evidence adduced in court make reference to off-days and when they accrued.
- The claim lacks particulars and is disallowed.



viii.V Compensation for discrimination

68. Having found that the Claimant did not adduce evidence to establish the claim for discrimination, the prayer is declined.

ix. Service

69. It is unclear to the court what this prayer entails as it lacks particulars. Is it service pay under Section 35 of the *Employment Act*, 2007 or service charge payable to employees serving in hotels and restaurants?

In either circumstances, the Claimant adduced no evidence to establish the claim.

The prayer is declined.

x. Certificate of service

The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

70. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;

- a. Declaration that termination of the Claimant's employment was unfair.
 - b. Equivalent of one month's salary Kshs.35,000/=.
 - c. One month's salary in lieu of notice Kshs.35,000/=.
 - d. Salary for September 2016 Kshs.35,000/=.
 - e. Salary for 4 days of October 2016 Kshs.3,498/=.
- Total Kshs.108,498.00
- f. Certificate of service.
 - g. Costs of this suit.
 - h. Interest at court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF MARCH 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

