



Ogero & another v Rotich t/a Chemie Cleaning & General Services (Cause 102 of 2018) [2023] KEELRC 720 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 720 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 102 OF 2018
S RADIDO, J
MARCH 22, 2023**

BETWEEN

NAOMI JELEGAT OGERO 1ST CLAIMANT

HENRY KIPRONO BETT 2ND CLAIMANT

AND

SALINA ROTICH T/A CHEMIE CLEANING & GENERAL SERVICES RESPONDENT

JUDGMENT

1. The 2 claimants sued the respondent alleging unfair termination of employment and breach of contract.
2. Despite service of notice of summons and copy of the statement of claim on 18 April 2018, the respondent did not enter appearance or file a response.
3. On 22 September 2022, the court directed fresh notice of summons to be issued. According to an affidavit of service filed on 7 November 2022, service was effected on 4 November 2022.
4. Again, the respondent failed to enter appearance or file a Response.
5. The cause therefore proceeded to formal proof on 13 February 2023. Both claimants testified and produced documentary evidence.
6. The claimants submissions were not on record by the agreed timeline of 28 February 2023.
7. The court has isolated the issues for adjudication as examined hereunder.



Employment Relationship

8. The claimants did not produce any written contracts of service to establish an employment relationship with the respondent.
9. However, they produced copies of provisional member statement of account from the National Social Security Fund.
10. The statements from the National Social Security Fund indicate that the 1st claimant was employed on 1 June 2010, and the 2nd claimant on 1 August 2012, (by the respondent).
11. Where there is no written contract of service, the court can rely on secondary documentary evidence to infer an employment relationship.
12. Based on the secondary documentation from the National Social Security Fund, the court finds that the claimants were employed by the respondent on the dates indicated in the statements.

Unfair Termination of Employment

13. The claimants testified that they received from the respondent letters informing them of the termination of their contracts on 31 August 2017, and that there was no prior notice nor reasons for the decision.
14. The claimants testimony remained unchallenged.
15. Section 35(1)(c) of the *Employment Act* contemplates written notice of termination at least 28 days in advance and section 41 of the Act requires the employer to allow the employee to make representations before termination of contract.
16. The court is satisfied, based on the material on record, that the respondent did not issue the statutory termination notices or hear out the claimants.
17. The termination of the contracts was unfair.

Compensation and Salary In Lieu of Notice

18. The 1st claimant served the respondent for 7 years.
19. However, she did not disclose how much her salary was at point of separation.
20. In consideration of the above, the court is of the view Kshs 40,000/- would be appropriate.
21. The 2nd claimant served for about 5 years. He did not disclose the salary at time of termination of contract.
22. The court will therefore award compensation of Kshs 25,000/-.

Breach of Contract

Leave

23. Section 28(4) of the *Employment Act, 2007* circumscribes how much leave can be carried forward.
24. The claimants did not disclose whether they accrued leave over the period of employment with the permission of the respondent, or whether they applied for leave and were denied.
25. Without a proper evidential foundation, the court declines to allow this head of the claim.



Underpayments

26. The claimants did not provide an evidential or legal foundation to the claim for underpayments, such as the applicable Regulation of Wages Order and relief is declined.

Conclusion and Orders

27. The court finds and declares that the respondent terminated the claimants' contracts unfairly.
28. The court awards compensation:
- 1st Claimant:
- i. Kshs 40,000/-
- 2nd Claimant
- ii. Kshs 25,000/-
29. The other heads of claim are declined.
30. The claimants are denied costs for failing to file submissions within the timelines agreed with the court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF MARCH 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Rotich, Langat & Partners Advocates

Respondent did not participate

Court Assistant Chrispo Aura

