



Nyaachi v Rembo Shuttle Savings & Credit Co-operative Society (Cause 746 of 2017) [2023] KEELRC 687 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 687 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 746 OF 2017
JK GAKERI, J
MARCH 16, 2023

BETWEEN

EDWARD OGEKA NYAACHI CLAIMANT

AND

REMBO SHUTTLE SAVINGS & CREDIT CO-OPERATIVE SOCIETY RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Statement of Claim filed on April 19, 2017 alleging unfair termination of employment and non-payment of terminal dues.
2. The Claimant avers that he was employed by the Respondent as a Stage Manager on August 12, 2014 at Kshs 35,000/= per month and was sent on compulsory leave on April 8, 2016 and received a final warning on June 8, 2016 which demoted him and reviewed his salary downwards, which the Claimant protested by letter dated September 19, 2016. That his services were terminated on January 31, 2017 without a valid reason.
3. It is the Claimant's case that he did not proceed on leave and worked on public holidays without pay and had no housing allowance and off days.
4. That he was not compensated for overtime.
5. The Claimant prays for;
 - i. A declaration that his termination from employment was unfair, wrongful and unmerited.
 - ii. The Claimant be paid terminal dues amounting to Kshs 1,056,988.05 comprising; Deductions made in June, July, August, September, October, November and December 2016 and January, 2017 Kshs 80,000/=. Housing allowance at 15% for 29 months Kshs 152,250/=. One month's salary in lieu of notice Kshs 40,250/=. Service gratuity at 15 days Kshs 46,442.3 Public holidays



for 2 years worked Kshs 30,961.60 Off duty Kshs 148,615.40 Overtime Kshs 75,468.75 12 months salary compensation Kshs 483,000/=

- iii. Certificate of service.
- iv. Costs of this suit with interest.

Respondent's case

6. In its response filed on June 7, 2017, the Respondent admitted that it employed the Claimant as a Stage Manager on August 12, 2014 for a period of 3 months and the contract was renewed.
7. That the salary payable to the Claimant was at the discretion of the Respondent as per the contract signed on January 21, 2016 and it issued a circular on January 9, 2017 notifying the Claimant that his contract was about to end and the same was terminated on January 31, 2017 and the contract was for a fixed term and notice was given and no terminal dues were owing.
8. The Respondent avers that termination of the Claimant's employment was lawful and prays for dismissal of the case with costs.
9. When the matter came up for hearing on October 25, 2022, counsel for the Claimant indicated to the court that he could not reach the Claimant and proposed to proceed by way of documents and written submissions and sought a judgement date.
10. The respondent was unrepresented as was the case on July 14, 2021, November 10, 2021, November 16, 2021, November 29, 2021 and June 8, 2022.
11. The court directed that the matter proceeds by way of written submissions and directed the Claimant's counsel to serve Mention Notice which he did and filed an Affidavit of Service.
12. The Respondent did not attend the mention on December 5, 2022 when a judgement date was taken.

Evidence

13. It is common ground the Claimant was first employed by the Respondent on August 12, 2014 under a written contract for 3 months. There is no evidence on renewal of the contract or what transpired between 2015-2016. The second written contract was signed by the Claimant on January 21, 2016 and was effective from January 15, 2016 and makes no references to the earlier contract. The Claimant was interviewed before employment.
14. The contract was for one year renewable after assessment of his performance.
15. The Claimant proceeded on compulsory leave for 30 days from April 11, 2016 to May 16, 2016.
16. By letter dated June 8, 2016, the Claimant was given the last warning and was demoted to a stage attendant at Kshs 25,000/= per month from Kshs 35,000/=.
17. The Claimant questioned the letter dated September 19, 2016.
18. The Claimant's employment was terminated by letter dated January 31, 2017.
19. On leave, the Respondent availed leave forms dated June 20, 2016, October 3, 2016 and November 28, 2016 respectively showing that he had proceeded on leave for at least 15 days.

Claimant's submissions

20. The Claimant identified four issues including costs, namely;



- i. Whether the Respondent had a valid reason to summarily dismiss the Claimant.
 - ii. Whether the Respondent observed fair procedure and the principles of natural justice.
 - iii. Whether the Claimant is entitled to the terminal dues sought.
 - iv. Who should pay the costs of the suit?
21. On the first issue, reliance was made on the provisions of Section 44(4) of the *Employment Act*, 2007 to urge that the Respondent had no justifiable reason to terminate the Claimant's employment as he was not given a notice to show cause.
 22. As to whether procedural fairness and principles of natural justice were observed, reliance was made on the provisions of Section 41 of the *Employment Act* to underline the essence of procedural fairness.
 23. The decision in *Kenya Revenue Authority V Renwel Withaka Gitahi & 2 others* (2019) eKLR was relied upon to highlight the tenets of procedural fairness as elaborated by courts.
 24. Reliance was also made on the decisions in *Kenya Union of Commercial Food and Allied Workers V Meru North Farmers Ltd* (2014) eKLR and *Kenya Ports Authority V Fadhil Juma Kisuwa* (2017) eKLR to buttress the submission on the import of Section 41 of the Act.
 25. It was urged that deviation from the prescribed procedure rendered the termination unfair as was the case here where the Claimant was neither issued with a notice to show cause nor taken through a disciplinary hearing.
 26. As regards the reliefs sought, counsel submitted that the Claimant was entitled to one month's salary in lieu of notice as ordained by Section 35 of the *Employment Act*, unpaid public holidays, house allowance on account of Section 31 of the *Employment Act*, service pay and compensation under Section 49(1) of the Act.
 27. The Respondent did not file submissions despite service of the mention notice dated October 25, 2022.

Determination

28. I have carefully considered the pleadings, documents on record and submissions by counsel for the Claimant and the issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
29. As to whether termination of the Claimant's employment was unfair, the starting point is the evidence on record.
30. While the Claimant submits that termination of his employment was unfair for want of substantive justification and procedural propriety, the Respondent's case is that the Claimant's contract was lawfully terminated as notice was given (a circular dated January 9, 2017). However, a copy of the circular was not availed for perusal by the court. It is unclear as to what the alleged circular notified that Claimant or required him to do.
31. Although the contract executed by the Claimant on January 21, 2016 stated that it was for one year effective January 15, 2016, the end date was not explicit.
32. Significantly, the contract was renewable subject to a performance appraisal by the employer.



33. Similarly, although the letter of termination dated January 31, 2017 makes reference to a performance appraisal, it availed no evidence of an actual appraisal or evidence to demonstrate that the Respondent had put in place a performance appraisal policy and framework.
34. It is unclear why the Respondent found it necessary to terminate the Claimant's contract if it was a fixed term contract as implied by its pleadings.
35. It requires no gainsaying that the Respondent's failure to avail evidence of the circular dated January 9, 2017 and the performance appraisal rendered its pleadings ineffectual.
36. This reasoning finds support in the provisions of the [Evidence Act](#).
37. Section 107(1) of the Act provides that;
- 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.
38. Relatedly, under Section 108;
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
39. Similarly, under Section 109 of the [Evidence Act](#);
- 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 on any particular person.
40. These provisions leave no doubt that evidence is the grease that moves trials in court and without it, averments remain mere allegations unless admitted by the other party as explained by Madan J A (as he then was) in [CMC Aviation Ltd v Cruisair Ltd](#) (1987) KLR 103.
41. In the words of Mulwa J in [Kenya Power and Lighting Co Ltd v Nathan Karanja Gachoka & another](#) (2016) eKLR,
- “I am of the opinion that uncontroverted evidence must bring out the . . . A court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probabilities whether the evidence is unchallenged or not.”
42. Sections 107 and 108 of the [Evidence Act](#) are clear that he who asserts or pleads bears the burden of proof (see [Edward Muriga Through Stanley Muriga V Nathaniel D Schulter](#) Civil Appeal No 23 of 1997).
43. Granted that a part from the termination letter, the Respondent tendered no other evidence on how the Claimant's employment ended, the Claimant's version of events appears more probable.
44. The foregoing position is substantially reinforced by the fact that the Respondent adduced no evidence on when it conducted the alleged performance appraisal and what the outcome was, including whether it invited the Claimant for a discussion on the findings as articulated in [Jane Samba Mukala V Ol Tukai Lodge Ltd](#) (2010) eKLR where the court stated as follows;
- “Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared



where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses . . .”

45. Similar sentiments were expressed in [Nancy Jemutai Kirui V Unilever Tea Kenya Ltd](#) (2020) eKLR.
46. Finally, the letter dated January 31, 2017 under the reference ‘Termination of Contract’ is explicit that this was indeed a termination of employment.
47. The Second paragraph of the letter states as follows;

“In view of the above, the Management board has resolved to terminate your contract” as opposed to non-renewal of the contract.
48. For a termination of employment to pass muster, it must be substantively justifiable and procedurally fair. (See [Walter Ogal Anuro V Teachers Service Commission](#) (2013) eKLR. In this case, there is no evidence to show that there was either substantive justification or procedural fairness in the termination of the Claimant’s employment.
49. It is also puzzling that the letter is dated January 31, 2017 yet the Claimant’s contract was for one (1) year effective January 15, 2016.
50. For the foregoing reasons, it is the finding of the Court that termination of the Claimant’s employment by the Respondent was unfair for non-compliance with the provisions of the [Employment Act](#), 2007.
51. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;
 - a. Having found that termination of the Claimant’s employment was unfair, a declaration to that effect is merited.
 - b. As regards terminal dues,
 - i Deductions for the months of June, July, August, September, October, November 2016 and January 2017, Kshs.80,000/=.
52. It is not in dispute that the Respondent by letter dated June 8, 2016 unilaterally and for unsubstantiated reasons demoted the Claimant from inspector to a stage attendant.
53. The Respondent adduced no evidence that it consulted the Claimant as required by the provisions of Section 10(5) of the [Employment Act](#), 2007.
54. At common law, such a variation amounts to a repudiation and breach of contract and amounts to unfair labour practice as was held in [Jackline Wakesho V Aroma Cafe](#) (2014) eKLR, [Maxwell Miyawa & 7 others V Judicial Service Commission](#) (2017) eKLR and [Ronald Kamps Lugaba V Kenol Kobil Ltd](#) (2016) eKLR.
55. Flowing from the foregoing, it is the finding of the court that variation of the terms of employment without consulting the Claimant was unlawful and unfair and the Claimant is awarded Kshs 80,000/= for the unfair and unlawful deductions.
 - ii House allowance for 29 months
56. From the evidence on record, it is clear that the Respondent did not comply with the provisions of Section 20 of the [Employment Act](#) as regards an itemised pay statement or payslip and the primary contractual document made no reference to housing allowance or consolidated salary, which is a statutory right of the employee under Section 31 of the [Employment Act](#), 2007.



57. From the documents on record, it is unclear as to when the first contract ended. There is no evidence to show that the three (3) month contract was in fact renewed in November 2014 or at any other time thereafter. Relatedly, the subsequent contract makes no reference to the earlier one.
58. There is no evidence to suggest that the contracts were back to back with no interruption. However, the Claimant was interviewed for the last contract.
59. Why would the Respondent subject an employee to an interview who had been working for it since August 12, 2014?
60. In the premise, house allowance will only be awarded from January 15, 2016 to January 31, 2017, the equivalent of 12¹/₂ months, Kshs.65,625/=.
- iii. One month's salary in lieu of notice
61. The Respondent did not avail evidence of its alleged circular dated January 9, 2017 allegedly informing the Claimant about the end of his contract. Significantly, termination of employment on January 31, 2017 was not preceded by a notice as ordained by Section 35 of the [Employment Act](#).
- The sum of Kshs 41,000/= is awarded.
- iv. Service gratuity
62. The Claimant adduced no evidence to establish this prayer. The Claimant did not allege or demonstrate that the Respondent was not remitting his NSSF contributions.
- The prayer is disallowed.
- v. Public holidays worked
63. Similarly, the Claimant adduced no evidence to establish how the claim arose. More significantly, the alleged public holidays were not particularised. It was the duty of the Claimant to demonstrate that he worked on the particular date on which the public holiday was celebrated as explained by Mbaru J in [Javan Were Mbanggo V H Young & Co \(EA\) Ltd](#), Industrial Course 1478 of 2010 and affirmed by the Court of Appeal in [H Young & Co \(EA\) Ltd V Javan Were Mbanggo](#) (2016) eKLR.
- The prayer is declined.
- vi. Off duty
64. Analogous to the previous claim above, the Claimant adduced no evidence to demonstrate that he used to work during off days or had no off-days at all.
65. His evidence on record made no reference to his work week and the contract of employment was reticent on the issue.
- The prayer is declined.
- vii. Overtime
66. Although the Claimant averred the he worked overtime, the averment was not supported by any evidence as neither the Statement of Claim nor the witness statement made reference to when he reported or exited the place of work to demonstrate entitlement to overtime pay.
- He adduced no evidence as to whether the Respondent maintained a record of the extra hours worked.



67. In a similar vein, the contract of employment made no reference to working of extra-hours or payment. The sentiments of Githinji J A in *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR are instructive.

The prayer is declined.

viii. 12 months compensation

68. Having found that termination of the Claimant's employment was unfair for non-compliance with the provisions of the *Employment Act*, the Claimant qualifies for the discretionary relief under Section 49(1)(c) of the Act.

69. In determining the quantum of the compensation, the court is enjoined to take into consideration the relevant factors set out in Section 49(4) of the Act.

70. In this case, the court has considered the following; It is unclear as to whether the Claimant wished to continue as an employee of the Respondent as he does not appear to have taken any action after the termination on January 31, 2017. The Claimant was sent on compulsory leave for over one (1) month effective April 11, 2016 which was followed by a demotion less than one (1) month later.

In sum, the Claimant substantially contributed to the termination of his employment.

The Claimant did not appeal the Respondent's decision. The Claimant had served the Respondent for a fairly short time. The Claimant did not appeal the Respondent's decision or demonstrate his dissatisfaction with the decision before filing the instant suit.

71. In the circumstances, the court is satisfied that one (1) month's compensation is fair, Kshs 41,000/=.

c. Certificate of service

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

73. In the upshot, 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. Unlawful deductions Kshs 80,000/=

c. House allowance Kshs 65,625/=

d. Pay in lieu of notice Kshs 41,000/=

e. Compensation Kshs 41,000/=

Total Kshs 227,625/=

f. Certificate of service.

g. Costs of this suit.

h. Interest at court rates from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH 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

