



**Nzyuko v Africa Apparels EPZ Limited (Cause 645 of 2018)  
[2023] KEELRC 652 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 652 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 645 OF 2018  
B ONGAYA, J  
MARCH 10, 2023**

**BETWEEN**

**ALFRED WAMBUA NZYUKO ..... CLAIMANT**

**AND**

**AFRICA APPARELS EPZ LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim on May 2, 2018 in person. Subsequently the claimant appointed John Mwariri Advocate of Kituo Cha Sheria to act in the matter. The claimant's case is that the respondent employed him as a Rivet M Operator at a monthly salary of Kshs 11, 760.00 and a house allowance at 15% of his basic pay on a three months' contract from 02.01.2015 to 30.06.2015. Overtime was payable at 1,5 times normal working days and 2 (double) times for selected rest days. Normal working hours were 45 per week. The claimant served successfully and continued to be engaged on successive fixed term contracts. The last of such contract was for the period February 3, 2017 to June 30, 2017. On February 6, 2017 the claimant received a termination on account of redundancy which was effective on the same date because of work shortage occasioned by reduced order levels forcing the respondent to scale down its activities and operations. The letter required the claimant to report on February 17, 2017 to facilitate his clearance and thanked the claimant for the services rendered. The letter stated that upon clearance, the claimant would be paid as follows:
  - a. Notice pay as per the letter of appointment.
  - b. Salary for days worked upto and including the last day of work.
  - c. Accrued leave on prorated basis (if any).
  - d. Severance pay at the rate of 15 days for each year of completed service, where applicable.
  - e. The payments to be subject to taxes and other deductions.



2. The claimant pleaded that his monthly salary was reviewed from May 2015 to Kshs 12, 789.00 and then to Kshs 13, 045.00 from August 2016. His pay slip for February 2017 is exhibited.
3. The claimant's case is that the termination was in bad faith, malicious, unfair and unlawful because of the following grounds:
  - a. It was abrupt without notice.
  - b. The reason was not genuine because another employee was engaged in his place.
  - c. He was not consulted about looming redundancy.
  - d. There was no fair selection process.
  - e. No consideration of redeployment options.
  - f. He was only targeted employee.
  - g. Breaching legitimate expectation per the contract of service.
4. The claimant claimed as follows:
  - a. Service pay Kshs 14, 785.70.
  - b. Underpayment throughout period served Kshs 61, 143.00.
  - c. Severance payment Kshs 14, 785.70.
  - d. Compensation for wrongful dismissal Kshs 268, 142.00.
5. The claimant prayed for judgment against the respondent for:
  - a. A declaration the termination was unfair, wrongful, unprocedural, and unlawful.
  - b. A declaration that the respondent fundamentally breached statutory obligations under the Constitution of Kenya and the Employment Act, 2007.
  - c. Payment of Kshs 268, 142.00 as claimed.
  - d. Issuance of a certificate of service.
  - e. Costs and interest.
  - f. Any other or further relief as the Court may deem just and expedient to grant.
6. The respondent filed the memorandum of response on October 31, 2018 through Eshiwani Ashubwe & Company Advocates. The respondent admitted employing the claimant upon fixed term contracts which were extended upon availability of work. The respondent further pleaded as follows. The claimant did not have clean record of service per warning letters she received. The claimant was paid as pleaded and it was not an underpayment. All final dues were paid. The claimant was declared redundant together with other 100 employees due to shortage of work. The claimant was notified of redundancy and also paid in lieu of notice. The employment was subject to peak and of seasons and therefore, availability of work. By letter dated September 13, 2016 the claimant was notified through workers' representative about scaling down of respondent's operations due to reduced orders. On September 15, 2016 the management and the workers' representatives discussed redundancy issue and numbers for termination agreed to be 350 workers down from 500 workers. On January 12, 2017 the management and the representatives agreed 200 surplus workers be rendered redundant in January 2017. Further at the meeting on January 18, 2017 the management and the representatives of workers



and their lawyer agreed terminal dues for affected staff be paid. The respondent suffered sudden drop in orders and 100 more employees had to be declared redundant. The rule of last in first out was applied. The claimant knew the employment was unpredictable.

7. On remedies the respondent pleaded that service pay was not due as the claimant was a member of NSSF; there was no underpayment as alleged; severance pay was duly effected; the termination was not unfair; and the claimant had failed to collect his certificate of service. The respondent prayed that the suit be dismissed with costs.
8. The Court has considered the parties' respective pleadings, testimonies, and final submissions. The Court finds as follows.
9. First there is no dispute that parties were in a contract of service. Further the termination was by letter dated February 6, 2017.
10. Was the termination unfair? The Court has considered the meetings held between the respondent and the workers' representatives and the workers' advocates. The minutes for the meetings have been exhibited for meetings on September 15, 2016, January 12, 2017, and January 18, 2017. The Court finds that by reason of those meetings the respondent has demonstrated that as at the time of the termination, the respondent's enterprise was undergoing difficulties. The Court finds that as per section 43 of the *Employment Act*, 2007, the reason for redundancy thus drop in orders and thus unavailability of work has been established on a balance of probabilities. On procedure, whereas meetings were held, it is clear that the respondent failed to serve a month notice to the claimant and the area labour officer as per section 40 of the *Act*. That failure rendered the redundancy decision unfair and unlawful as urged for the claimant. On selection criteria, the respondent has shown that hundreds of employees were rendered redundant and the claimant having failed to show the unfair selection as alleged, his allegation that he was the only one targeted is flaccid.
11. The Court has considered the factors in section 49 on award of compensation for unfair termination. The claimant was on a fixed term contract running from January 3, 2017 to June 30, 2017 and was terminated abruptly on February 6, 2017. He had 5 months of service to go. The mitigating factor in favour of the respondent is that the reason for termination was genuine. The Court awards the claimant 3 months' salaries in compensation making Kshs 15, 427.50 (last gross payment per February 2017 pay slip x 3 = Kshs 46, 282.50).
12. As pleaded and submitted for the respondent the claimant has failed to by pleadings to strictly plead the particulars of underpayment and then to strictly proof the same. That prayer will fail. The claimant has failed to discharge the burden of proof in terms of sections 107 and 108 of the *Evidence Act* Cap 80 as urged for the respondent.
13. As submitted for the respondent NSSF was remitted for the claimant and service pay is not due per section 35 of the *Employment Act*, 2007.
14. The pay slip for February 2017 shows the claimant was paid severance Kshs 6, 523.00 and the prayer will fail.
15. The certificate of service will issue as not contested.
16. The Court has considered all circumstances of the case and the respondent will pay partial claimant's costs of the suit fixed at Kshs 10, 000.00 only.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. A declaration the termination was unfair and unlawful for want of procedural fairness.



- b. The respondent to pay the claimant a sum of Kshs 46, 282.50 (less PAYE) plus costs Kshs 10, 000.00 by May 2, 2023 failing interest to be payable thereon from the date of this judgment till full payment.
- c. The respondent to deliver the claimant's certificate of service in 7 days from the date of this judgment.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 10<sup>TH</sup> MARCH, 2023**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

