



REPUBLIC OF KENYA



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

**Oduori v Twenty Cube Logistics Ltd & another (Cause 19 of 2019)
[2023] KEELRC 554 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 554 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 19 OF 2019
AK NZEI, J
MARCH 2, 2023**

BETWEEN

CHARLES MDADI ODUORI CLAIMANT

AND

TWENTY CUBE LOGISTICS LTD 1ST RESPONDENT

EXCELLENT SERVICE FREIGHTERS LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant instituted suit against the respondent *vide* a memorandum of claim dated March 28, 2019 and pleaded that in May 2013, he was employed by the respondent to the position of executive operation, earning Usd 11400 per annum. The claimant further pleaded:-
 - a. that due to the claimant's good performance, the respondents reviewed the claimant's salary on December 8, 2015 to a gross monthly salary of Kshs 90,220.
 - b. that on October 30, 2018, the claimant's gross monthly salary was raised by the respondents to Kshs 94,344.
 - c. that in January 2019, the respondent asked the claimant to accept a pay cut if he wanted to retain his job, and was informed that his monthly salary would be reduced to Usd 350.
 - d. that the claimant refused to accept a pay cut, and was on January 17, 2019 served with a letter of termination of his employment, dated January 17, 2019, terminating his employment effective from January 17th 2019, and that the termination was unlawful and unconstitutional and offends sections 35,36,43,45,49 and 50 of the *Employment Act* 2007.
 - e. that for the years 2014, 2015,2016, and 2017, the respondent did not allow the claimant to take his annual leave, and did not pay the claimant in lieu of the leave.



- f. that the claimant was not issued with a termination notice, and no reasons were given for termination of his employment; and that the respondent did not act in accordance with justice and equity in terminating the claimant's employment.
 - g. that terms and conditions of the claimant's employment were set out in a contract of employment dated November 7, 2017.
2. The claimant set forth the following claims against the respondent:-
- a. a declaration that the claimant's termination was unfair and unlawful.
 - b. notice pay.....Kshs 94,344
 - c. leave pay Kshs 377,367
 - d. compensation for wrongful and unlawful termination of employmentKshs 1,132,228
 - e. costs of the suit and interest.
3. The respondents entered appearance on April 15, 2019 and subsequently filed a memorandum of response on September 23, 2019. The respondents pleaded:-
- a. that owing to the advent of the Standard Gauge Railway (SGR) as the preferred carrier for containerized cargo, and following the government directive for cargo handling to be conducted at Nairobi, the respondents' business of clearing and forwarding was drastically affected, leading to downsizing.
 - b. that among those earmarked for redundancy was the claimant, whose job exclusively involved clearing of the respondent's cargo from the port for onward forwarding to customers.
 - c. that prior to considering redundancies, an offer for salary reduction instead was made to the claimant for his consideration, which he refused to take up, leaving the respondent with no option but to declare the claimant redundant.
 - d. that the claimant was on January 17, 2019 issued with a letter notifying him of the respondent's intention to declare him redundant effective February 16, 2019, which was copied and delivered to the labour office on January 23, 2019.
 - e. that termination of the claimant was occasioned by factors beyond the respondents' control, and was neither unlawful nor unconstitutional.
 - f. that upon expiry of the notice, the claimant was paid his final dues being basic salary, house allowance, travelling allowance, notice pay, service pay and 2 leave days; a total of Kshs 248,139.
 - g. that the claimant executed a declaration to the effect that he had no claim against the respondent.
 - h. that upon expiry of the notice, the claimant was paid salary for February 2019.
 - i. that the claimant is not entitled to the reliefs sought.
 - j. that the respondents duly followed the provisions of section 40 of the *Employment Act* 2007.
4. When trial opened on March 14, 2022, the claimant adopted his filed witness statement dated March 28, 2019 as his testimony. He further produced in evidence the documents listed on his list of documents dated March 28, 2019. The documents included an offer of employment letter dated May



6, 2013, contract of employment dated November 7, 2017, salary review letters dated December 8, 2015 and October 30, 2018 respectively, a termination letter dated January 17, 2019 and a demand letter dated February 4, 2019.

5. The claimant further testified :-
 - a. that on January 2, 2019, the claimant was informed by the respondent that the respondent wanted to reduce his salary and that the claimant said he would think about the issue.
 - b. that on January 17, 2019, the claimant was given a termination letter.
 - c. that the claimant was not given any reasons for the termination and was not given notice.
 - d. that the claimant was earning Kshs 94,344 per month at the time of termination, and was on his 5th year of service.
 - e. that the claimant was not being given off days, and did not take leave during the entire period of employment; and was not being paid in lieu.
6. The respondent did not attend court on the date fixed for hearing (March 14, 2022), though duly served with a hearing notice. The respondents' case was closed by the court without any evidence being called by the respondents. An application by the respondents (dated April 11, 2022) seeking the setting aside of this court's proceedings taken on March 14, 2022 was dismissed by this court *vide* its ruling dated November 3, 2022.
7. The evidence adduced by the claimant was, therefore, neither controverted nor rebutted by the respondent. It stands unchallenged.
8. It was stated as follows in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*, Nairobi (milimani) Hccc No 1243 Of 2021: -

“it is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged.”
9. It was stated as follows in *Chrispine Otieno Caleb v Attorney General [2014] eKLR*: -

“Although the defendant has denied liability, in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”
10. Having considered the pleadings filed by the claimant and the evidence adduced by him, issues that fall for determination, in my view, are as follows:-
 - a. whether termination of the claimant's employment was unfair.
 - b. whether the claimant is entitled to the reliefs sought.



11. On the first issue, one of the documents produced in evidence by the claimant was his termination letter dated January 17, 2019. The letter states in part:-

“Termination Of Your Employment By Reason Of Redundancy

Dear Charles,

As per the discussion we had with you on January 15th, 2019, with the micro-economic conditions prevailing at the moment, the management has taken a decision to remain prudent during this period in time and whilst we have considered all available alternative options, it has not been possible to avoid instituting redundancies, as a result of which, the role of executive operations has become redundant. We regretfully have to inform you that effective from January 17, 2019, we need to conclude your employment with us.

As per the appointment letter, either party can terminate the appointment by giving 30 days’ notice in advance. Therefore, your employment will end on February 16, 2019...”

12. Although redundancy was alleged in the foregoing letter of termination, section 40 of the [Employment Act](#) was not shown to have been adhered to by the respondents. The termination letter was not even shown to have been copied to or to have been served on the area labour officer. The purported termination of employment on account of redundancy was, therefore, unfair; and in the circumstances of the case, the respondents were not shown to have acted in accordance with justice and equity in terminating the claimant’s employment. Reasons for the termination were never proved. The claimant was not heard before termination.
13. It is my finding that termination of the claimant’s employment by the respondents was unfair within the meaning of section 45 of the [Employment Act](#); and I so declare.
14. On the second issue, the claimant’s pleading and evidence that he was earning a monthly salary of Kshs 94,344 at the time of termination was not controverted. Indeed, the claimant produced in evidence a letter dated October 30th 2018, *vide* which he was notified by the respondents of the upward review of his monthly salary to Kshs 94,344.
15. The claim for notice pay is declined as the claimant’s letter of termination dated January 17, 2019 gave him a one month termination notice.
16. On the claim for leave pay, the claimant was, by dint of section 28(1) of the [Employment Act](#) 2007, entitled to a minimum of twenty one (21) working days’ leave, with full pay, for every completed year of service. The claimant pleaded and testified that he did not take any leave during the entire period of employment. The claimant claimed Kshs 377,376 being leave pay. The respondent did not adduce any evidence controverting this claim. I award the claimant Kshs 377,376 being leave pay.
17. On the claim for compensation for unfair termination of employment, 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. That is Kshs 94,344x7 = Kshs 660,408.
18. In sum, and having considered submissions filed on behalf of parties herein, judgment is hereby entered in favour of the claimant against the respondent jointly and severally for:-
- a. Leave pay.....Kshs 377,376.



b. Compensation for unfair termination of employmentKshs
660,408

Total Kshs 1,037,784

19. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.

20. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND MARCH 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:

.....for claimant

..... for respondent

