



**Ndegwa v Murang'a South Water and Sanitation Co. Ltd & another; Murang'a Water and Sanitation Company Ltd (Interested Party) (Employment and Labour Relations Cause E012 of 2022) [2023] KEELRC 1070 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1070 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E012 OF 2022**  
**ON MAKAU, J**  
**APRIL 27, 2023**

**BETWEEN**

**JACKSON KIROKO NDEGWA ..... CLAIMANT**

**AND**

**MURANG'A SOUTH WATER AND SANITATION CO. LTD . 1<sup>ST</sup> RESPONDENT**  
**KAHUTI WATER AND SANITATION CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MURANG'A WATER AND SANITATION COMPANY LTD .... INTERESTED PARTY**

**JUDGMENT**

1. The claimant is an advocate and an officer of this court. He brought this suit in person on 1<sup>st</sup> March 2022 seeking the following reliefs:-
  - a. A declaration that the respondent are in breach of the provisions of the [Employment Act](#) 2007.
  - b. A declaration that the letters of termination dated 10<sup>th</sup> May 2021 and 20<sup>th</sup> August 2021 by the respondent is null void and or no effect.
  - c. An order for the reinstatement of the claimant to the employment of the respondent and the treatment of the claimant in all respects as if the claimant's employment had not been termination.
  - d. An order for the re-engagement of the claimant to the employment of the respondent in work comparable to that in which the claimant was employed prior to his termination.



- e. In alternative to prayer c) and d) an order for compensation of the claimant's salaries for the remainder of the contract term.
  - f. An order for payment in full for the unpaid salary and disbursements incurred by the claimant during his execution of duties.
  - g. General damages respondent for breach of the employment contract.
  - h. Costs of the suit.
  - i. Interest on (e) (f) and (g) above at court rate.
  - j. Any other relief that this court may deem fit to grant.
2. The fact of the case according to the claimant are that in June 2019 he was hired under a contract of employment by the respondents, the interested party, Gatanga Water and Sanitation Company Limited and Gatamathi Water and Sanitation Company Limited (hereinafter called the WSPs) as legal officer for a period of one year. When the contract term lapsed, he was appointed for a further term of 3 years on 11<sup>th</sup> June 2020.
  3. Under the said contract, the claimant was entitled to monthly retainer of kshs. 250,000 of which each of the five WSPs was to contribute Kshs. 50,000 per month. In addition, the claimant was entitled to bill WSPs for any disbursement incurred towards filing fees, document reproduction expenses, necessary accommodation expenses for out of jurisdiction travel subject to sanctioning by the WSPs.
  4. The contract provided for summary dismissal of the claimant for gross misconduct and also termination with a written notice of three months or payment of salary in lieu of notice for a just cause. On 10<sup>th</sup> May 2021, the 1<sup>st</sup> respondent served a notice of 3 months to terminate the contract on 28<sup>th</sup> July 2021. Subsequently, the 2<sup>nd</sup> respondent served a 3 months termination notice on 20<sup>th</sup> August 2021 to end their contract effective 1<sup>st</sup> October, 2021.
  5. The claimant protested the said termination notices vide his letters dated 30<sup>th</sup> July 2021 and 29<sup>th</sup> August 2021 but the respondents never responded. Therefore, he avers that the two respondents breached the contract of employment and violated Section 45 (1) of the *Employment Act* through unfair termination of his contract of employment.
  6. The 1<sup>st</sup> respondent filed defence on 27<sup>th</sup> April 2022 admitting that together with other 4 Muranga WSPs employed the claimant as their legal officer. The contract was for 3 years subject to performance by the claimant which was a ground for termination. The contract was also terminable by three months' notice.
  7. The 1<sup>st</sup> respondent denied that the claimant was faithful and diligent in his work. It further denied owing the claimant any unpaid dues and averred that it paid the claimant all his dues as at 24<sup>th</sup> January, 2022. Therefore it prayed for the suit against it to be dismissed with costs.
  8. The 2<sup>nd</sup> respondent obtained leave of the court to file late defence but it never did so.

### **Evidence**

9. The claimant adopted his written statement dated 15<sup>th</sup> February, 2022 while the first respondent adopted the witness statement written by its managing director Ms Mary Nyaga. The two statements basically reiterates the facts pleaded in the respective pleadings and summarized above.



## Submissions

10. The claimant submitted that the termination of his contract of service was not grounded on a just cause as required under clause 10 of his contract of employment. Consequently, he maintained that the termination was unfair within the meaning of section 45 of the *Employment Act* because there was no valid reason and due process was not followed. For emphasis, he relied on the case of *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR, *Jacob Kelly Omondi Onyango v National Bank of Kenya* [2021] eKLR and *Lydia Moraa Obara Vs Tusker Mattresses* [2021]eKLR.
11. Based on his averment, he prayed for the reliefs sought contending that as at the time of filing the suit, the respondents had not paid him the sums claimed as salary arrears. Finally he prayed for costs of the suit.
12. The 1<sup>st</sup> respondent submitted that the termination of the claimant's employment was done by invoking the termination clause in the contract which allowed either party to terminate the contract by issuing 3 months' notice to the other or paying retainer fees for 3 months in lieu of notice. It was submitted further that the termination clause in the contract was lawful by dint of section 35 of the *Employment Act*. Therefore it was urged that the termination of the contract vide the letter dated 10<sup>th</sup> May 2021 was lawful because the termination clause allowed termination without assigning reasons for the termination.
13. For emphasis, the 1<sup>st</sup> respondent cited the case of *Joseph Ndambuki & 4 others v Delmonte (K) Ltd* [2012] eKLR which relief on the Court of Appeal decision on *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR that a party can terminate a contract without giving any reason and opt to pay damages in respect of the notice period specified in the contract, and if not specified, a reasonable notice.
14. As regards the claim for salary arrears, it was submitted that the amount claimed is not owing. It was pointed out that on 28<sup>th</sup> September, 2022, the claimant invoiced the 1<sup>st</sup> respondent for an outstanding balance of Kshs. 3,000 which was fully paid, and therefore the claim for kshs. 850,738 is an afterthought and made in bad faith. Therefore the court was urged to dismiss the suit because the termination was lawful and the 1<sup>st</sup> respondent did not owe any terminal dues to the claimant.

## Analysis and Determination

15. The issues for determination are:-
  - a. Whether the termination of the claimant's contract of service was unfair and unlawful.
  - b. Whether the relief sought are merited.

## Unfair termination

16. The claimant contends that his contract of employment was terminated by the respondents unfairly because it was not grounded on any just cause and due process was not followed. The 1<sup>st</sup> respondent contends that it invoked the termination clause in the contract of employment which allowed any party to terminate the contract by a prior notice of 3 months or payment of salary in lieu of notice and without the need to cite any reason for the termination.
17. Clause 10 of the contract of employment dated 11<sup>th</sup> June, 2020 stated that:-

“Termination of contract will occur in the event of one of the following:-



- i. Continuous failure and or non-performance of duties.
- ii. Expiry of contract without renewal
- iii. Protracted illness, permanent disability or death.
- iv. Mutual agreement between the two parties.

Either party shall be entitled to terminate the contract with just cause, by giving three (3) months' notice of such intention in writing, to the other party or forthwith by paying to the other party three (3) months retainer fees in lieu of notice. Summary dismissal due to gross misconduct will however not require any notice."

18. The Court of Appeal was faced with a similar dispute in the case of *Kenfright (EA) limited v Benson K.Nguti*, *supra*, and held that:-

"Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken."

19. The above decision is binding on me and I find it to be on all fours with the suit before me because clause 10 of the contract did not permit termination of the contract at will. It expressly provided that termination by notice had to be for a "just cause" which basically means a justifiable reason. The four justifiable reasons permitted under clause 10 of contract have been copied herein above.
20. The 1<sup>st</sup> respondent admitted that it never cited any reasons because it was not required when a party invoked the termination clause in the contract. The claimant was also not given any hearing before the termination of his contract of employment. The 2<sup>nd</sup> respondent did not controvert the alleged unfair termination. Consequently, I find and hold that the termination of the claimant's contract of employment by the two respondents through the letters dated 10<sup>th</sup> May 2021 and 20<sup>th</sup> August 2021 was unfair within the meaning of Section 45 of the *Employment Act* and therefore unlawful.

### Reliefs

21. In view of the foregoing holding, I make declaration that the termination of the claimant's contract was unfair and in breach of the provisions of the *Employment Act*.
22. The claim for reinstatement or re-engagement is declined, because the claimant has not demonstrated any special circumstances that would allow an order for specific performance. He has also not shown that the order for reinstatement is practicable. These considerations are provided under Section 49 (4) of the Act for the court to take into account based on the evidence before it. Without any evidence to support the remedy of reinstatement or re-engagement, I grant the alternative prayer sought being award of damages under Section 49 (1) of the Act read with Section 50 thereof.
23. Section 49 (1) provides for an award of salary in lieu of notice plus compensation for unfair termination of upto 12 months gross salary for unfair termination. In this case the claimant was given three months' notice and therefore he is not entitled to salary in lieu of notice. However I award him 5 months gross salary compensation for unfair termination considering that he did not contribute to the termination through misconduct, and that he had legitimate expectation to continue working and earning for over



a year before the lapse of his contract term on 31<sup>st</sup> May 2023. I assess the award against each respondent at the rate of Kshs. 50,000 per month which equals to kshs. 500,000.

24. The claim for unpaid salary and disbursement incurred by the claimant during execution of his dues have not been specifically pleaded and proved by evidence. Consequently, I decline to allow that claim.
25. The claim for general damages for breach of contract is alien to the *employment Act* which is the substantive law in employment claim in Kenya.
26. In conclusion, and on the basis of evidence, law and precedents, I enter judgment for the claimant declaring the termination of his employment contract by the respondent unfair and awarding him Kshs. 500,000 as compensation for the unfair termination. The award is subject to statutory declaration but in addition to cost and interest at court's rates from the date hereof.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 2023.**

**ONESMUS N MAKAU**

**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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**

