



**Omengo v Ultimate Engineering Limited (Cause 1438 of 2017)  
[2023] KEELRC 1032 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1032 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1438 OF 2017  
K OCHARO, J  
APRIL 27, 2023**

**BETWEEN**  
**GEORGE OUMA OMENGO ..... CLAIMANT**  
**AND**  
**ULTIMATE ENGINEERING LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a Memorandum of Claim dated the 30<sup>th</sup> May 2017, the Claimant instituted a Claim against the Respondent seeking the following reliefs.
  - a. A declaration the Respondent’s actions of terminating his employment was unfair and un-procedural.
  - b. Loss of earnings.....Ksh.660, 000.
  - c. House allowance pay per month for 50 months..... Ksh.600, 000.
  - d. Severance pay.....Ksh. 297,000.
  - e. Salary in lieu of notice.....Ksh.33,000
  - f. Annual/unpaid leave.....Ksh.287, 684.
  - g. Emergency kitty pay.....Ksh.11, 100.
  - h. Salary in full for 35 months (Suspension period) .....Ksh. 1,155,000.
  - i. Loan plus interest taken with family bank.....Ksh.164, 637.



- j. General damages for the breach of contract, breach of the statute and for cruel, harsh and degrading treatment.
  - k. Letter authorizing release of CFC Life Pension Fund to the Claimant.
  - l. Issuance of Certificate of service.
  - m. Cost of the Claim.
  - n. Interest on (i), (ii), (iii) and (iv) until awarded amounts are fully paid as directed.
  - o. Any other relief the court may deem fit to grant.
2. The Statement of Claim was filed together with the Claimant's witness statement and the list of documents that he intended to place reliance on as documentary evidence in support of his case.
  3. Despite the service of Summons to enter appearance, the Respondent failed to enter appearance and file a response to the statement of Claim, consequently, on the 7<sup>th</sup> of March 2019 the Court directed the matter to proceed as an undefended Claim.
  4. When the matter came up for hearing, the Claimant sought, and the Court allowed that reliance be placed on his pleadings, witness statement as his evidence in chief and the filed documents as his documentary evidence for the determination of this matter.

#### **The Claimant's Case**

5. The Claimant first joined the Respondent's service vide a contract of employment dated 17<sup>th</sup> April 2004, as a Technician for a gross salary of Ksh.18, 000 per month. The Claimant was gradually promoted and as at 19<sup>th</sup> February 2013 he had risen to the position of Senior Technician, his salary rose to KShs. 33,000 per month. He attributes the promotions and salary increments to his diligence and loyalty in the manner he discharged his duties.
6. The Claimant contends that on 10<sup>th</sup> March 2013 the Respondent's Human Resource Manager and the Managing Director informed him that he was under suspension until a Criminal case in which he was implicated of conspiracy to sell the waste materials from the Construction site where he was stationed, was heard and determined.
7. The Claimant avers that he had been earlier on informed by the Human Resource Manager that he could be reinstated only after being acquitted or discharged of the criminal case. On or about the 21<sup>st</sup> July 2015, he was discharged pursuant to section 87[a] of the Criminal Procedure Code. He on the same date informed the Respondent of the discharge and sought for reinstatement but it required of him to avail a signed order from court as a precondition for the reinstatement.
8. The Claimant further stated that in or about the month of February 2016, he managed to obtain a certified copy of the court's order discharging him from culpability in the criminal case, but when he availed the same to the Respondent, the promise for his reinstatement was not honoured. Another condition was thrown his way, he could only be reinstated after withdrawing a demand letter he had earlier written to it. This to the Claimant amounted to duress and undue influence.
9. The Claimant avers that he was dismissed from employment on the 10<sup>th</sup> February 2016 without any Notice to show cause as required by the law or informed of the reasons for the termination. The dismissal was callous, un-procedural and cruel.



10. It is the Claimant's case that throughout the time he was in the service of the Respondent, in its outside Nairobi stations, during the years 2004, 2006-2007, 20.11.2008-2009 and 2009-2010, the Respondent failed to and intentionally omitted to pay him the house allowance due.
11. In the year 2011, he had taken a facility in form of a loan from Family Bank Limited for Kshs. 200,000, loan which the Respondent guaranteed. He dutifully liquidated the loan and as the time of the termination, only Kshs. 90,000 was outstanding as due and owing to the bank on the loan account. Following the termination, the loan account ran into arrears and the balance rose to Kshs. 164, 637. The Respondent unjustifiably stopped remitting the loan repayment instalments. Consequently, the Claimant got listed as a defaulter with the Credit Reference Bureau.
12. The Respondent further failed to authorize the payment of the Claimant's pension from the time of termination despite having done so for other individuals whom it had terminated.
13. The Claimant further stated that the termination of his employment was procedurally unfair and without any fair and valid reason.
14. He told the court that he was not given a suspension letter or a termination letter and all communications from the Respondent were verbal.

#### **The Claimant's written Submissions.**

15. In her very brief submissions, Counsel for the Claimant submitted that the Respondent having not entered appearance and filed a response to the statement of claim, this court should find the Claimant's case unchallenged and allow the same as pleaded. That this is the appropriate course this court should take, reliance was placed on the case of *John Hawala Ogola v St. Marys Hospital* [2020] eKLR.
16. Counsel further submitted that it is now trite law that termination of an employee's employment must accord the provisions of sections 41, 43, 45, and 47 of the *Employment Act*. Any failure to adhere to the provisions will render the termination unfair. Considering the circumstances of this matter, it is clear that the termination of the Claimant's employment was without compliance with the provisions.

#### **Analysis and determination**

17. Having read the pleadings, evidence on record and the Submissions by the counsel, the issues for determination are:
  - i. Whether the termination of the Claimant from employment was unfair
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Who should bear the costs of the suit.

#### **Whether the termination of the Claimant's employment was unfair.**

18. It is clear that the Claimant first joined the Respondent's workforce as a Technician through a contract of employment of 17<sup>th</sup> April 2004, with a starting monthly gross salary of Ksh. 18, 000. It is also evident that he was confirmed into employment on permanent and pensionable terms in February 2011.
19. The Claimant contended that as at the time he was being suspended from employment he had risen to the position of Senior Technician earning a salary of KShs. 33000. The Claimant, didn't however place before me a single document from which it can be discerned that his position and salary were as stated. To the contrary, the Claimant availed documents inclusive of pay slips that indicate his position



and salary as Technician and KShs. 30,000, respectively. For purposes of this judgment I shall use the position and apply this salary.

20. In addressing the presence of fairness or otherwise in termination of an employee's employment or summary dismissal of an employee, the court must consider two aspects, the substantive justification and the procedural fairness. Absence of these two components or any of them shall render the termination or the summary dismissal unfair.
21. In the case of *Mary Chemwono Kiptui v The Kenya Pipeline Company Limited* (2014) eKLR the Court observed that:

“Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”

22. The legal burden to demonstrate that the termination of an employee was through a fair procedure rests upon the employer. The Respondent did not adduce any evidence to discharge this burden and in the absence of evidence from the Respondent, I find the Claimant's evidence that he was verbally dismissed without being accorded the reasons for the same and an opportunity to defend himself unchallenged. Consequently, I come to an inevitable conclusion that the dismissal of the Claimant from employment was in total disregard of the mandatory provisions of section 41 of the *Employment Act* 2007, and resultantly by operation of the law- Section 45 [2] of the *Employment Act* procedurally unfair.
23. Section 43 of the *Employment Act* places upon the employer a legal burden to prove the reason[s] for the termination of an employee's employment. Before, this Court has held again and again that a legal burden imposed by the law is only dischargeable by adduction of sufficient evidence, and where the person burdened to discharge the burden doesn't place forth any evidence, it is impossible for a conclusion that he discharged the burden to be attracted. The Respondent didn't testify in this matter, I find no difficulty in concluding that in the circumstance, it did not discharge its legal burden under section 43 of the *Act* and consequently deem the termination unfair by operation of the stipulations of section 45[2] of the *Act*.
24. In section 45[2] of the *Act*, lay a further legal burden for the Respondent to discharge, to prove that the reason[s] for the termination was valid and fair. Equally, as the Respondent didn't place any evidence before this Court, it failed to discharge the burden.
25. I have carefully considered the uncontroverted evidence by the Claimant regarding his suspension; the Respondent's word that he would be reinstated once the outcome of the criminal case was in his favour; the procedure in the termination, and conclude that prima facie, he was able to establish that the termination was absent of procedural and substantive fairness, he discharged the legal burden contemplated under section 47[5] of the *Act*.
26. By reason of the premises, I conclude that the termination of the claimant's employment by the Respondent was both procedurally and substantively unfair.



**Whether the Claimant is entitled to the reliefs sought.**

27. In determining whether the Claimant is entitled to the reliefs sought, I will tackle each relief per head.

**a. Salary in lieu of notice.**

28. The Respondent's letter dated 10<sup>th</sup> February 2011 confirming the Claimant into employment on Permanent and pensionable terms stated:

“.....in addition, the prerequisite notice by either party to terminate your services will now be one[1] month in writing or in the alternative payment of one[1] month salary in lieu of notice.”

29. The Claimant contended, and the Respondent did not disapprove the fact, that he was terminated without notice. In the premise of this matter, the Claimant is entitled to Ksh.30, 000 as salary in lieu of notice.

**b. Annual/Unpaid leave.**

30. The Claimant urged this court to award him Ksh.287, 684 for the unpaid leave. Section 28 of the Employment Act entitles the employee to proceed for leave and the leave not taken should be paid in lieu of having not taken. Further section 74 of the Employment Act enjoins the employer to keep proper records concerning the employee including the leave days taken or having not taken and the payment thereof. The Respondent did not lead any evidence to establish whether or not the Claimant had any unused leave days. The Claimant's claim under this head was not challenged. However, it would be an abdication of duty, if I were to proceed and grant the claim wholly without considering the limitation imposed by section 90 of the Employment Act. By dint of the provision, the Claimant is only entitled to three years compensation in lieu of the untaken/unpaid leave days. In the premise, I hereby award the Claimant Ksh.99, 000 for the unutilized leave days.

**c. House Allowance pay.**

31. The Claimant urged the court to award him Ksh.600, 000 as house allowance for 50 months. Section 31 of the Employment Act provides for house allowance as follows:-

- (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service—
  - (a) Contains a provision which consolidates as part of the basic wage or Salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
  - (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)

32. The Respondent did not lead any evidence to demonstrate that the Claimant's gross salary was inclusive of house allowance. The payslips issued to the claimant provided only for basic salary with no item for House allowance. In absence of any evidence from the Respondent, leaves this Court with no option other than to conclude that contrary to the prescripts of the above stated



provision, the Respondent didn't pay the Claimant house allowance. However, the Court notes that the Claimant has been specific in his pleadings regarding the period for which his house allowance was not paid, 28.09.2004-29.2004, 2006-2007, 20.11.2008-2009 and 20.08.2009-2010, periods which in my view fall outside the limitation period of three years contemplated under section 90 of the Act. Consequently, I cannot rightfully award under this head.

#### **d. Severance pay.**

33. Severance pay is provided for under Section 40 (1) (g) of the Employment Act provides. The provision dedicates itself to redundancy situations and employee entitlements resultant of the situation[s]. The matter herein had totally nothing to do with a redundancy situation in his employment. Consequently, severance pay cannot be availed to him.
34. The Court has not lost sight of the fact that often litigants and counsel alike confuse severance pay provided for under the above stated provision, with the service pay provided for under section 35 of the Act. The two are not alternate benefits. They are available in very different circumstances in the world of work. Even if for a moment I were to hold that the Claimant meant to seek for service pay, still the same cannot be availed to him as it is clear from the pay slips tendered in evidence by him, that he was a member of National Social Security Fund. In the upshot, I decline to make any award under this head.

#### **e. Emergency Kitty pay.**

35. The Claimant urged this court to award him Ksh.11, 000 as the emergency kitty pay. I have keenly considered the evidence on record and specifically the Claimant's payslips and in it the emergency kitty was deducted at Ksh.100. The Claimant was engaged by the Respondent on 17<sup>th</sup> April 2004 and separated on 10<sup>th</sup> March 2013 which suspension was pending the hearing and determination of a criminal case levelled against him, this gives us a period of 95 months. I have lost sight on how the Claimant arrived at the period of 111 months, Consequently, I hereby award the Claimant Ksh.9, 500 as Emergency Kitty pay.

#### **f. Loss of earnings.**

36. The Claimant contends that after the termination of his employment, in the month of February 2016, he only started to earn in the month of May 2016. He started earning KShs. 3000 per a week, therefore KShs. 12000 per a month. That therefore as a result of the termination, his earnings diminished by Kshs. 21,000. I gain an undoubtable impression that the Claimant secured another job three months after the termination. Under this head, the Claimant claims for Kshs.660,000. I have found considerable difficulty in comprehending how this figure was arrived at and the justification for its entitlement by the Claimant. No evidence was led to by the Claimant on this. In the circumstance, this court can only but decline the relief.

#### **g. Salary in full for the 35 months Suspension.**

37. The Claimant urged the Court to award him Ksh.1, 155,000 as salary for the period he remained under suspension. It was his case that he was suspended from employment pending the criminal case, Kiambu CMC, No. 656 of 2013. The Criminal case was concluded 35 months after the suspension. Though he was entitled to earn during this period of suspension, the Respondent unlawfully withheld his salary for the entire of the period. The question that needs to be answered is, is an employee under suspension



entitled to his salary during the period of suspension? *E.Chianu, Employment Law Bemico Publishers Ltd 2004 at page 209*, defines suspension to mean:

“At common law an employer retains the authority to urge an employee not to report for duty. Even where this is referred to as suspension that is not what it is in law. In strict legal parlance, suspension only arises where an employer directs his employee not to report for work, and during this period he withholds his salary or an aliquot part thereof. In the public service suspension is akin to interdiction save that in the latter, the employee is suspended from duty until a criminal charge against him is concluded. The criminal charge may or may not relate to his employment in any way.”

38. Suspension is neither a termination of the contract of employment nor dismissal of the employee. It operates to suspend the contract rather than terminate the contract obligations of the parties to each other. This position is buttressed by the National Industrial Court of Nigeria’s judicial decision in *Duru v. Skye Bank Plc* (2015) NLLR at Page 731. where it held that:

“During the period of suspension of an employee, the employment is neither terminated nor dismissed. Rather, it is merely put on hold to enable the employer properly carry out its investigations on its allegations against the employee. For the period of the employee's indefinite suspension without pay, he is still in the employ of the employer and so is entitled to his salaries and allowances.”

39. In the circumstances herein, the Court has no reason not to agree with the Claimant that during the suspension period the Respondent didn’t pay him any salary. The suspension appears to have been indefinite. However, absent of any contractual term allowing the Respondent not to pay the Claimant’s salary during the entire period of suspension or any part thereof, the Respondent remained under duty to pay the Claimant’s monthly salary. By reason of the premise, I award the sums sought under this head, Kshs. during the period he was suspended as tabulated hereunder:

(30,000 X 35 months) = Ksh.1,050,000.

#### **h. Damages for the unfair termination.**

40. The Authority to make the award flows from the provision of section 49 of the *Employment Act*. The same is exercised depending on circumstances of each case. Taking into consideration the Claimant’s unlawful suspension and subsequent termination, the length of time he had worked for the Respondent and the fact that he secured another employment after the termination, I conclude that he is entitled to the compensatory relief contemplated under the said provision, and to an extent of seven [7] months’ gross salary for the unfair termination, Ksh.210,000.

#### **i. Outstanding Loan plus interest thereon with the Family Bank.**

41. From the material placed before this court, it is not difficult to state that there is nothing emerging therefrom that can be basis for an order directing the Respondent to pay the outstanding loan facility that was obtained by the Claimant from the stated bank, in the course of his employment. The loan was personal to the Claimant. As can be discerned from the Respondent’s letter dated 8<sup>th</sup> September,2011 addressed to the Bank, the Respondent’s role was merely to facilitate deduction of the monthly loan repayment instalments.



**j. Release of the CFC Pension Funds to the Claimant.**

42. It is evident that the Claimant was a beneficiary of the CFC Pension Scheme. From the Respondent's letter dated 19<sup>th</sup> June 2014 to one its former employees, I have gained a clear impression that at termination of an employee's employment, the Respondent had an obligation to write to the Scheme, notifying them of the termination of the employment relationship, and urging them to release the pension funds to such an employee, or allow transfer of the same to another Scheme. Following precedent, [the above-mentioned letter], I hereby authorize the Respondent to facilitate the release of CFC Life Pension Funds to the Claimant.

**k. Issuance of Certificate of Service**

43. The Respondent is hereby ordered to issue the Claimant with Certificate of service pursuant to the section 51 of the Employment Act 2007.

**Who shall bear the costs?**

44. The costs of this suit to be borne by the Respondent, as costs follow the event.

45. In the upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

- i. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
- ii. Salary in lieu of notice.....Ksh.30, 000.
- iii. Pay for untaken leave days.....Ksh.99, 000.
- iv. Emergency Kitty.....Ksh.9, 500.
- v. salary for the 35 months of suspension.....Ksh.1,050, 000.
- vi. Seven [7] months' gross salary, compensation for the unfair termination.....Ksh.210, 000.
- vii. Order for the facilitation of release of CFC Life Pension Funds.
- viii. The Respondent to issue Certificate of Service, within 30 days of this Judgment.
- ix. Cost of the Suit.
- x. Interest at court rates for the sums awarded hereinabove, from the date of this judgment till full payment.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of

Mr. Jude for the Claimant.

No appearance for the Respondent.

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 [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.

A signed copy will be availed to each party upon payment of court fees.

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**OCHARO KEBIRA**

**JUDGE**

