



**Wanyonyi v Quissal Enterprises Ltd (Cause 849 of 2017)  
[2023] KEELRC 1112 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1112 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 849 OF 2017**

**AK NZEI, J  
APRIL 27, 2023**

**BETWEEN**

**SILAS JUMA WANYONYI ..... CLAIMANT**

**AND**

**QUISSAL ENTERPRISES LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent vide a memorandum of claim dated August 11, 2017 and filed in Court on November 10, 2017, and pleaded that he was employed by the respondent as a truck driver in June 2015, earning a monthly salary of ksh. 25,000 and that he worked for a minimum of twelve (12) hours per day and seven days per week, with no rest day or payment in lieu thereof.
2. The claimant further pleaded that he was forced to work on gazetted public holidays without compensation, and was not provided with reasonable accommodation or paid sufficient sum as rent in addition to his salary to enable him to obtain reasonable accommodation; and was not allowed to take annual leave as by laws stipulated, or paid in lieu.
3. It was the Claimant's further pleading that he was neither issued with a written contract nor an itemized pay statement by the respondent; and that on or about 30/12/2016, the respondent terminated the claimant's employment via a telephone call, telling the claimant that there was no longer any more work for him, and that he should leave work immediately. That the termination was unlawful, abrupt and contravened both the law, the *Constitution* and rules of natural justice as the Claimant was not given notice, an opportunity to be heard, was not paid his accrued dues and was not issued with a certificate of service.
4. The claimant set out his claim against the respondent as follows:-
  - a. notice pay at ksh. 25,000



- b. accumulated leave days at ksh. 30,288.51
  - c. maximum compensation for unlawful termination at ksh. 300,000
  - d. an order compelling the respondent to issue the claimant with a certificate of service in conformity with section 51 of the *Employment Act*.
  - e. costs of the suit and interest at court rates.
5. Other documents filed alongside the claimant's memorandum of claim included a verifying affidavit, the claimant's written witness statement dated 11/8/2017 and a list and index of documents dated 11/8/2017, listing some seven documents. The listed and filed documents included letters from the labour office dated 2/2/2017, 23/2/2017 and 8/3/2017 respectively, a demand letter dated 21/3/2017, a letter from the labour office dated 26/3/2017, a bundle of M-pesa statements and a copy of the claimant's port control work permit/pass.
  6. The respondent filed a response to the claim on 14/5/2019 and denied the claimant's claim. In particular, the respondent denied ever having employed the claimant, and pleaded that the claimant was at all material times employed by Westline Oilstream Supplier Limited, whom the respondent majorly contracted for purpose of transporting merchandise for its clients. Further, the respondent filed a written witness statement of one Bernard Kariuki Maina, the respondent's director.
  7. When trial opened, the claimant adopted his field witness statement as his testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. He further testified that his monthly salary was ksh. 25,000 and that the same was paid to him by the respondent, either in cash or by M-pesa; and that he was not issued with a payslip.
  8. The claimant further testified that on 30/12/2016 as he was coming from Kampala Uganda, upon reaching Mai Mahiu, he was telephoned by the respondent's Director, Barnard Maina, and told to take the vehicle he was driving to the respondent's yard in Limuru, to leave it there and to then proceed to Mombasa. That on getting to Mombasa, he was told that he had been terminated, and was after a week paid his salary arrears from previous months, but was not paid his terminal dues.
  9. The claimant further testified that he went to the labour office but the respondent's director said that the respondent was not the claimant's employer. The claimant further told the court that the Port pass and M-pesa statements that he produced in evidence were proof that he was employed by the respondent.
  10. Cross-examined, the claimant testified that on 3/10/2015, he was paid ksh. 25,190 by Bernard Maina through M-pesa and was on 11/5/2016 paid ksh. 20,000 by M-pesa. That at times he (the claimant) could take money in advance and that such amounts could be deducted from his salary. The claimant further testified that on 7/1/2017, he was paid ksh. 33,000 being two months' salary as there was an outstanding two months' salary, November and December (2016), less what the employer (respondent) said was fuel overconsumption by the motor vehicle and an earlier advance of ksh. 10,000. It was the claimant's further testimony:-
    - a. that he was being paid overtime, that he worked throughout and was paid mileage/allowance for every trip undertaken, depending on the distance to be covered.
    - b. that the port pass issued to the claimant was to authorize his entry into the port to get the respondent's cargo.



- c. that the claimant worked from 2015 to 30/12/2016, and that the labour officer's letter dated 2/2/2017 stated as much.
11. The respondent called one witness, Bernard Maina (the respondent's director – RW-1), who adopted his filed witness statement as his testimony. He denied that the claimant was an employee of the respondent and maintained that the claimant was employed by a company known as Westline Oilstream Suppliers Limited, and that RW-1 did not pay him any salary. That the claimant came at around June 2015 and worked until 2017 when he was terminated. That RW-1's first contact with the claimant was when he went to RW-1's office with a letter from the labour office.
  12. Regarding the M-pesa statements produced in evidence by the claimant, RW-1 testified that he sent money to the claimant being mileage and highway levies from the claimant's employer.
  13. RW-1 admitted that the claimant was issued with a port user movement control pass in the name of the respondent to enable the claimant to access the respondent's cargo. That the respondent was supposed to ask for issuance of those passes for purposes of clearance and movement of the respondent's goods. That the claimant's employer requested the respondent to apply for the claimant's pass as the employer did not have some of the documents required by KPA.
  14. Cross-examined, RW-1 admitted having known the claimant, and that the respondent requested for issuance of a port pass to the claimant and that the respondent did not have any documentation to show the existence of a contract between the respondent and Westline Oilstream Suppliers Ltd to show that the trucks used belonged to the said company or to any other person. It was RW-1's further evidence that he sent money to the claimant three times, and that he had no documentation to show that he sent the money on behalf of Westline Oilstream Suppliers Limited.
  15. Having considered the pleadings filed and evidence adduced by both parties, issues that fall for determination, in my view, are as follows:-
    - a. whether the claimant was employed by the respondent.
    - b. whether termination of the claimant's employment was unfair.
    - c. whether the claimant is entitled to the reliefs sought.
  16. On the first issue, the respondent's director (RW-1) admitted having known the claimant and having sent money to him (by M-pesa) three times. The witness further admitted that the respondent requested the port (KPA) to issue the claimant with a Port User Movement Control Pass in the respondent's name in order to access the respondent's cargo. RW-1 did not demonstrate that the respondent did all this on behalf of any other entity, and did not demonstrate that there existed any form of a contract between the respondent and Westline Oil Stream Suppliers Limited alluded to by the respondent (RW-1).
  17. On his part, the claimant candidly testified that he was employed by the respondent as a truck driver, earning ksh. 25,000 per month and that he was not issued with a written contract of employment and was never issued with payslips. He however produced a port pass issued to him by Kenya Ports Authority bearing the respondent's name as the employer. RW-1 admitted that the respondent applied for the port pass to enable the claimant to access the respondent's cargo. The claimant also produced in evidence M-pesa statements showing payment to the claimant by the RW-1 (the respondent's director). RW-1 admitted having made those payments. This corroborates the claimant's evidence that the Respondent used to pay his salary either in cash or by M-pesa.



18. I am satisfied that on a balance of probability, the claimant was an employee of the respondent, earning ksh. 25,000 per month. It is not by coincidence that on 3/10/2015, the respondent (RW-1) send ksh. 25,198.18 to the claimant by M-pesa. RW-1 admitted to having send money to the claimant (by M-pesa) three times. He did not demonstrate that he did so on behalf of an entity other than the respondent.
19. Section 10(7) of the *Employment Act* provides as follows:-
- “If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be in the employer.”
20. I find and hold that the claimant was an employee of the respondent.
21. On the second issue, RW-1 testified that the claimant came around June 2015 and left in 2017. The claimant testified that he was employed by the respondent in June 2015 and was terminated on 30/12/2016, and that his outstanding two months salary was paid by the respondent on 7/1/2017. The claimant testified that while on his way from Kampala in Uganda, he was telephoned by RW-1 and told to leave the motor vehicle he was driving in Limuru and proceed to Mombasa, and that upon reaching Mombasa, he was told that he had been terminated. That the termination was done without notice, without being accorded an opportunity to be heard, and without payment of his terminal dues.
22. The respondent did not rebut the foregoing evidence. RW-1 simply told the court that the claimant came in June 2015 and left in 2017. He did not tell the court how the claimant left and did not give reasons for his leaving.
23. It was held as follows in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR:-
- “...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
24. Section 43(1) of the *Employment Act* provides:-
- “(1) (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
25. Section 45(4) (b) of the *Employment Act* on the other hand provides:-
- “(4) A termination of employment shall be unfair for the purpose of this part where
- (a) .....
- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”
26. The claimant gave an account on how his employment was terminated by the respondent’s director (RW-1). Which evidence RW-1 did not rebut. Further, the respondent did not prove the reason for the claimant’s termination. I find and hold that termination of the claimant’s employment was unfair.



Further, the respondent did not act in accordance with justice and equity in terminating the claimant's employment abruptly and without any form of notice.

27. On the third issue and having found that termination of the claimant's employment was unfair, I award the claimant the equivalent of seven months salary being compensation for unfair/wrongful termination of employment, that is ksh. 25,000X7 = 175,000
28. On the claim for one month salary in lieu of notice, the claimant, who had worked for the respondent for over a year, was entitled to one month salary in lieu of notice pursuant to section 35(1) (c). I award the claimant ksh. 25,000 being one month salary in lieu of notice.
29. It was a common ground that the claimant was employed in June. The claimant pleaded and testified that he was employed by the respondent in June 2015 and was terminated on 30/1/2016. On the other hand, the respondent testified that the claimant left in 2017. The claimant pleaded that for one and a half years, he worked without being allowed to take annual leave. The claimant claimed ksh. 30,288.51. In that regard, the respondent did not produce any leave records pursuant to section 74(f) of the Employment Act to show that the claimant took annual leave during the period of employment. I allow the claim for ksh. 30,288.51. The claim for issuance of a certificate of service under section 51 of the Employment Act is also allowed.
30. Finally, and having considered submissions filed by both parties, judgment is hereby entered for the claimant against the respondent for:
  - a. Compensation for wrongful/unfair termination of employment .....ksh. 175,000
  - b. One month salary in lieu of notice .....ksh. 25,000
  - c. Unpaid leave days .....ksh. 30,288.51Total ksh. 230,288.51
31. The respondent shall issue the claimant with a certificate of Service pursuant to Section 51 of the Employment Act within thirty days of this judgment.
32. The claimant is awarded costs of the suit and interest at court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> APRIL 2023**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

This Ruling 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

