



**Omollo & 9 others v Agro-Tech Consultants & another (Cause  
374 of 2019) [2023] KEELRC 1079 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1079 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 374 OF 2019  
NZIOKI WA MAKAU, J  
APRIL 18, 2023**

**BETWEEN**

**CAMILAS OWITI OMOLLO & 9 OTHERS ..... CLAIMANT**

**AND**

**AGRO-TECH CONSULTANTS & ANOTHER ..... RESPONDENT**

**JUDGMENT**

1. The Claimants are former employees of the 2<sup>nd</sup> Respondent which is a health care facility operating a rehabilitation centre in Nakuru town. The nine (9) Claimants instituted this claim against the Respondents through a Statement of Claim dated 11<sup>th</sup> June 2019. They aver that they had signed contracts of employment with the 1<sup>st</sup> Respondent who deployed them to work at the 2<sup>nd</sup> Respondent company and that pursuant to their respective contracts, held different positions ranging from Head and Deputy Head of Department, Counsellor, Psychiatrist Nurse and Clinical Officer and earned different salaries. That during their employment with the Respondents, they loyally performed their duties but the Respondents failed an or neglected to pay them their monthly salaries from time to time as when they fell due. That as a result thereof, they opted to exercise their constitutional right to go on a go-slow to push for payment of their outstanding salary arrears. It is their averment that rather than paying the arrears, the Respondents instead, through the 2<sup>nd</sup> Respondent's Director, purported to terminate their employment by ordering them through a circular dated 30<sup>th</sup> March 2019 to immediately vacate the 2<sup>nd</sup> Respondent's premises and only return on 8<sup>th</sup> April 2019 with handing over notes and to collect their "dues".
2. The Claimants aver that termination of their employment was unfair as it did not adhere to procedure and the reasons for the termination are not valid. That their claim against the Respondents is for damages for unfair termination and further, for payment of salary arrears owed to them. That demand and notice of intention to sue, the Respondents have refused to admit liability and/or to make good the Claimants' claim. The Claimants therefore pray for judgment against the Respondents jointly and



- severally for: a declaration that the termination of their employment by the Respondents amounts to unfair termination; damages for unfair termination; an order for payment of each of their outstanding salary; costs; and interest on both the salary arrears and costs.
3. The 1<sup>st</sup> Claimant filed a consolidated witness statement with authority of the 1<sup>st</sup> to 7<sup>th</sup> Claimants while the 8<sup>th</sup> Claimant filed his own witness statement. The 1<sup>st</sup> Claimant states that as the Head of Department, Counselling in the 2<sup>nd</sup> Respondent company earning a salary of Kshs. 77,900/-, the 1<sup>st</sup> Claimant was the immediate supervisor of the 2<sup>nd</sup> to 8<sup>th</sup> Claimants herein and was listed as such in all their contracts. That the Claimants forwarded a tabulation of their salary arrears/dues to the Director but the same has never been paid to any of them to date. In the second witness statement, the 8<sup>th</sup> Claimant asserts that he was employed by the Respondents in July 2017 as the Head Nurse on a salary of Kshs. 50,000/- and confirms that the 1<sup>st</sup> Claimant was his immediate supervisor.
  4. The Respondents filed a Statement of Response and Counterclaim dated 25<sup>th</sup> September 2020 averring that this suit is premature since the Claimants have deliberately not exhausted the laid down procedures for addressing and ventilating such disputes and issues as per the established Respondents' Disciplinary Code of Conduct and Grievance Procedure. That the Claimants have brought this case with an aim of curtailing the Respondents' right to instigate disciplinary action against them for absconding duty. They contend that the Claimants have conveniently decided to file their Claim at the Nairobi Employment and Labour Relations Court as opposed to the Nakuru Employment and Labour Relations Court where the alleged cause of action arose and/or generally where the Respondents reside and carry on business. Furthermore, the suit lacks merit, is fatally defective, is an affront to mandatory legal provisions governing pleadings and does not disclose any reasonable cause of action against the Respondents.
  5. The Respondents further aver that they had a contractual engagement with the Claimants in which they retained the Claimants under various positions for a fixed term of one year commencing 31<sup>st</sup> October 2018 and ending on 31<sup>st</sup> October 2019. That the Claimants had therefore not been retained under permanent and pension terms as insinuated, or any time prior to the said period. They deny that the Claimants were loyal, averring that poor performance in the Claimants' duties as primary counsellors collectively and individually led to most of the 2<sup>nd</sup> Respondent's payments being withheld by NHIF due to the Claimants' incompetence, negligence and or outright sabotage. That in this regard, there is a pending arbitration matter between the Respondents and NHIF before an arbitrator. Furthermore, that the Claimants bungled and maliciously handled clients' confidential information. The Respondents also deny that they failed or refused to pay the Claimants' salaries as alleged or at all and totally deny the particulars of any outstanding dues as claimed in the Statement of Claim.
  6. It is the Respondents' averment that the Claimants participated in an unlawful and unprotected strike and demonstrations from 5<sup>th</sup> March 2019 and brought the Respondents' operations to a complete halt. That the Claimants' action was in breach of contract, malicious, fraudulent, deliberate sabotage, negligent or reckless further because they ceased work in an essential service provider facility, forged the minutes of the alleged clinical meetings, evaluation forms and alleged notice from a director, and threw stones and bottles to the management and patients. The Respondents further aver that the claim for salary of up to 24<sup>th</sup> April 2019 is legally untenable because the Claimants proceeded on strike from 5<sup>th</sup> March 2019 demonstrating continuously for a period of three weeks and refused to report to work from 30<sup>th</sup> March 2019. According to them, the text message allegedly sent by the 2<sup>nd</sup> Respondent's Director or agent is a forgery and they are strangers to the same.
  7. It is averred further, that the Claimants' claim is a ploy conjured up to facilitate their unjust enrichment and obtain compensation by false pretences. That the 1<sup>st</sup> to 7<sup>th</sup> Claimants resigned by conduct when



they deserted work without any notice and never reported back to work. That the 8<sup>th</sup> Claimant never reported back to work after the 2018 December Christmas Holidays and when the Respondents attempted to reach him through their employees, he expressly stated that he was not coming back. That the 9<sup>th</sup> Claimant on the other hand tendered his resignation with effect from 1<sup>st</sup> March 2019 in order to pursue his education at Moi University from 4<sup>th</sup> March 2019 and thus deliberately lied under oath that he participated in a strike consequent to which he was terminated. It is the Respondents' averment that the Claimants are guilty of perjury and that they accordingly invite appropriate sanction, recommendation or direction from this Honourable Court. They deny that demand or intention to sue has ever been served upon them and aver that this Court has no jurisdiction whatsoever to hear and determine this matter. The Respondents pray that the Statement of Claim be dismissed with costs.

8. In the Counterclaim, the Respondents claim one month's salary in lieu of notice of with respect to each Claimant, totalling Kshs. 448,400/-. They further pray for judgment against the Claimants for a declaration that they infringed on Article 43(1)(a) of the Constitution of Kenya when they participated in a strike in an essential service provider and refused to attend to patients and for damages for the said infringement. In addition, that this Honourable Court do issue an order directing the relevant authorities to instigate appropriate charges against all the Claimants inter alia for giving false information under oath. They also seek interest on the notice pay and damages sought at court rates from 30<sup>th</sup> March 2019 until payment in full, costs of this case and any other appropriate order as shall be deemed by this Honourable Court.
9. The Respondents also filed a witness statement made on 12<sup>th</sup> November 2021 by the Administration Manager of the 2<sup>nd</sup> Respondent, Mr. Nelson Kiarie who states that the 2<sup>nd</sup> Respondent deals with treating people battling various mental challenges and any interruption of its services would put the lives of the delicate patients under rehabilitation in grave danger as well as pose a serious risk to the safety of the population and community nearby. That the Claimants breached their contracts of employment for failing to first address any grievances they may have had with the Human Resource Manager as provided for in the grievance procedure section of their contracts.
10. In response, the Claimants filed a Reply to Statement of Response and Response to Counterclaim dated 28<sup>th</sup> October 2020 denying that the Respondent companies are essential services providers within the statutory definition. They aver that this suit is filed before the correct forum because the 1<sup>st</sup> Respondent, who offered them employment contracts to sign, has its registered physical and postal address in Nairobi and that the Respondents having filed a Counterclaim before this Honourable Court estops them from claiming that this Court lacks jurisdiction to hear and determine this matter. That in any event, the Respondents have admitted at paragraph 57 of their Statement of Response and Counterclaim that this Honourable Court has the requisite jurisdiction to determine the Counterclaim which arises from the same facts the Claimants claim and thus it cannot approbate and reprobate in the same breath. The Claimants further aver that they are strangers to any ongoing arbitration proceedings between the Respondents and NHIF. That even by statutory definition, a go slow is not a strike and as such, they cannot be guilty of participating in an unlawful and unprotected strike. They also deny demonstrating and inciting patients thereby bringing the Respondent's operations to a halt and refute the particulars of breach of contract, malice, fraud, deliberate sabotage, negligence and recklessness as set out against them by the Respondents. Furthermore, that they are not guilty of perjury and are inviting appropriate sanction, recommendation or direction of the Court on the same.
11. In defence to the Counterclaim, the Claimants deny that they at any time refused to attend to clients and resigned without giving a month notice. That in the alternative, it is the Respondents who infringed their constitutional right to fair remuneration under Article 41(2)(a) of the Constitution



of Kenya and further unfairly terminated their employment without any valid reason and without a hearing. The Claimants deny receipt of any demand or notice of intention to sue with respect to the Counterclaim, which they pray it be dismissed and/or struck out with costs.

## Evidence

12. Camilas Owiti Omollo (1<sup>st</sup> Claimant), testified that the Claimants did not stop working during the go slow and that what they did was not to work at their full capacity. That the 2<sup>nd</sup> Respondent terminated their employment through an SMS circulated to the Claimants to vacate the premises of the 2<sup>nd</sup> Respondent immediately. That the termination was after they persisted in asking for their dues (salaries) which have never been paid and they ask this Court to rely on a document they filed tabulating the salary arrears of the 1<sup>st</sup> to 8<sup>th</sup> Claimant. The 1<sup>st</sup> Claimant noted during cross-examination that the Circular asking them to vacate the premises was number ten (10) on the List of Exhibits, stating that the Circular was sent out as an attachment to a text message. He asserted that they never went on strike and that whereas they saw clients on a one-on-one basis, it was only group therapy they did not do.
13. The second witness for the Claimants was Mr. Johnson Githinji, the 8<sup>th</sup> Claimant. He testified that he was unable to go to work in January 2019 because he was made broke as a result of the Respondents failure to pay his salaries from July 2017. That he had travelled to his rural home for the December holidays and could not get fare back to work and called the HR Personnel who said she would get back but never did. He further testified that he received the said text message which forwarded to him by the 1<sup>st</sup> Claimant and denied having deserted work. He stated that there was no process before the termination and prayed for the Court to give compensation for unfair termination and payment of salary arrears. In re-examination, he stated that did not have money to even rent a house so that he could do his work and had notified the HR through a phone call.
14. The Respondent's witness was Mr. Nelson Kiarie who testified that the Claimants staged a sit-in or go slow for some days for almost three weeks from 5<sup>th</sup> March when they would just be in the compound and not work and which culminated in desertion on 30<sup>th</sup> March. He stated that some of the Claimants were housed in the compound and would thus be in their houses and not conduct therapy sessions during the said period of the go slow. During cross-examination, he confirmed that the Respondents offered their employees one-year contracts and that the 1<sup>st</sup> Respondent was domiciled in Nairobi. He further confirmed that the Claimants were not issued with notices to show cause or given a hearing but asserted that the Claimants were not terminated. He insisted that the Claimants were paid their salaries which payment the HR should be able to show. He further stated that the Claimants violently walked out on the Respondents 30<sup>th</sup> March by throwing stones and which amounted to sufficient ground for summary dismissal but were in fact not dismissed. He denied that the Claimants held any meeting, stating that he was present during the Clinical Officers' meetings as the Administrative Manager. In re-examination, he asserted that the Claimants absconded their work. That marked the end of oral testimony and parties were to file submissions.

## Claimants' Submissions

15. The Claimants submit that the law on termination of contracts of service in Kenya is largely provided for under sections 41, 43 and 45 of the *Employment Act*, 2007. They cite the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, in which the Court of Appeal summarized the procedures under those provisions. They cited the case of *George Onyango Akuti v Security Services Kenya Limited* [2013] eKLR, in which the court held that unfair termination arises in circumstances where the employee was not afforded a hearing as required by section 41 of the *Employment Act* or based on failure to comply with the statute or the terms of the actual employment contract. It is the



Claimants' submission that the document or notice sent to them via a text message asking them to leave, did not explain the reason for termination nor invite them for a disciplinary hearing. Furthermore, the Respondent's witness failed to adduce any evidence to prove that the Claimants deserted duty or that they caused any disturbance at the Respondent's premises. It was submitted that the Respondents have therefore failed to show that their alleged reason for terminating the 1<sup>st</sup> to 7<sup>th</sup> Claimants' employment is valid. In respect of the 8<sup>th</sup> Claimant, they submit that the Respondents were unable to rebut the testimony by the 8<sup>th</sup> Claimant that he could not return to work because he was broke. The Claimants submit that the Respondent's witness was also unable to demonstrate that any disciplinary procedure was undertaken against the Claimants before they were dismissed from work. The Claimants thus urge the Court to so find and hold that their termination was unfair.

16. It is submitted by the Claimants that their documents were produced as exhibits in court when the Claimant's first witness testified and the Respondents did not object to production of exhibit 10 or the tabulation of the dues attached thereto. That the Respondents did not also bring any records or evidence to refute the tabulation and as such, this Court should find that the Claimant's tabulations are unchallenged and proceed to enter judgment in favour of the Claimants for salary arrears.
17. On the issue of jurisdiction, the Claimants rely on the case of *Republic v Chairman, Board of Directors National Water Harvesting & Storage Authority & another Ex Parte David Ngure Kairu; Sharon Obonyo (Interested Party)* [2021] eKLR, in which the court noted the observations made in *Kenya Maita Mwawasha v Plan International* Kenya Industrial Court of Kenya at Mombasa Case No. 5 of 2014, that there is no requirement under the *Industrial Court Act and the Industrial Court (Procedure) Rules* 2010 for filing of employment and labour disputes in the geographical jurisdictions where they are deemed to arise. The Court went on to state that the ELRC has no limit in its geographical jurisdiction. It is the Claimants' submission that the Respondent's witness nevertheless acknowledged that the 1<sup>st</sup> Respondent has its physical location in Nairobi within the local limits of this Honourable Court and the Respondents also pleaded that this Court has jurisdiction to determine the Counterclaim. That in the circumstances, the Court has jurisdiction to hear and determine this current claim.
18. The Claimants submit that the Respondents did not adduce any evidence to prove their Counterclaim that the Claimants refused to attend to clients or that they infringed on the rights of other Kenyans to healthcare. That the Respondents also failed to show that the Claimants occasioned any damage, physical or otherwise to the Respondent's premises or clients and further failed to adduce evidence showing that the Claimants resigned from the Respondents' employment. It is the Claimants' submission that the Counterclaim is largely unproved by way of evidence and ought to be dismissed.

### **Respondents' Submissions**

19. The Respondents submit that freedom of assembly, demonstration, picketing and petition guaranteed by Article 37 of the *Constitution* of Kenya is circumscribed by the express constitutional requirement that it must be enjoyed peacefully and by persons who are unarmed. That the said right is subject to reasonable limitations supplied by legislation, which in this case is the *Labour Relations Act*, No. 14 of 2007, *Public Order Act* and the *Penal Code*, which are laws within the meaning of Article 24. In this regard, they cite the case of *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another* [2021] eKLR in which the court stated that the right to industrial action is not absolute and subject to limitation within the parameters of Article 24(1) of the *Constitution* of Kenya. They further submit that the withdrawal of health services by the Claimants did not satisfy the test for 'minimum service' provision and led to inhuman and degrading treatment of patients without



- medical attention. That freedom from cruelty, inhuman or degrading treatment are part of the rights under Article 25 of the Constitution that cannot be limited or derogated.
20. The Respondents further submit that section 81(3) of the Labour Relations Act prohibits strikes in an essential service provider which capacity the 2<sup>nd</sup> Respondent held having been declared so by NHIF through the Cabinet Secretary for Health by a notice in the Kenya Gazette. That under section 80(1)(b) of the Labour Relations Act, an employee who engages in a strike that is not compliant with the Labour Relations Act is deemed to have breached his employment contract and is not entitled to any payment or any other benefit under the Employment Act arising during the period the employee participated in the illegal strike. It is their submission that by engaging in an illegal and unlawful strike in an essential service provider, the Claimants endangered the lives of several innocent patients thereby infringing on their constitutional rights as enshrined under Article 43(1)(a) of the Constitution of Kenya.
  21. The Respondents submit that the 2<sup>nd</sup> Respondent's Human Resource Manual provides for dispute resolution as shown at page 30 of the Respondents' List and bundle of documents. They urge this Court to be guided by the decision in the case of *Kenya Plantation & Agricultural Workers Union v Sotik Highlands Tea Estate Limited* [2013] eKLR in which the court relied on the case of *Kenya Long Distance Truck Drivers & Allied Workers Union v Akamba Public Road Services Limited*, Industrial Cause No. 813 of 2010 and observed that a strike must be reserved for major grievances and only after all other avenues of dispute resolution have failed to resolve the grievance. The Respondents further submit that the Claimants confirmed during hearing in court that they did not write to the HR Manager to inform him of the predicaments they encountered at their place of work as provided in the Human Resource Manual. Submitting that there is no difference in law between a go-slow and a strike, the Respondents are guided by the case of *Kenya Plantation & Agricultural Workers Union v Sotik Highlands Tea Estate Limited* [2013] eKLR, in which the court relied on *Kakuzi Limited v Kenya Plantation & Agricultural Workers Union*, Industrial Cause No. 1450 of 2011 where it was observed that a go-slow strike is a strike that disrupts normal operations, there is no distinction between a go-slow and a full strike, and that both are strikes aimed at impeding normal performance of work at the work place.
  22. The Respondents submit that the Claimants absconded work and have failed to satiate the burden of proof of unlawful termination of employment as provided under section 47(5) of the Employment Act, 2007. That the Claimants have failed to prove on a balance of probabilities that they did not abscond duty. They cite the case of *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* [2021] eKLR where the court relied on the case of *Kipkepe Limited v Peterson Ondieki Tai* [2016] eKLR in which the court observed that as coupled by sections 107 and 108 of the Evidence Act, Chapter 80 Laws of Kenya, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims. The Court went on to find a case of no termination of employment. It is further the Respondents' submission that there was no such text message sent to the Claimants to terminate their services and that the Claimants did not include it in their bundle of documents and/or produce the same during the oral hearing. That the Claimants are relying on a mere print out of words not showing who has sent the message, when it was sent, to whom it was sent to and at what time and date. Further, that there is no certificate of electronic production as stipulated by sections 65(5)(c), (6), (8) and 106 (B) of the Evidence Act, Cap 80 Laws of Kenya.
  23. The Respondents submit that since the Claimants have also failed to show how they arrived at the amounts owed to them in salary arrears as claimed, the claim for unpaid salaries must fail. That the Claimants having not proven that they were unfairly terminated, they are disentitled to the reliefs sought. In this regard, the Respondents rely on the *Protus Wanjala Mutike* case (*supra*) in which the court held that the claimant became disentitled to the reliefs sought as he had lost on the case of



unlawful termination of employment. Regarding the Counterclaim, the Respondents urge this Court to be guided by the case of *Pauline Katbure Kiraithe v Nation Media Group Limited* [202] eKLR where for emphasis, the court relied on *Kenya National Library Services Board v Beatrice N. Ayoti* [2014] eKLR and awarded the respondent salary in lieu of the resignation notice not served by the claimant and found that the claimant is not entitled to reliefs sought in her claim while the respondent was entitled to the reliefs sought by its counterclaim.

24. The Respondents further submit that they have proven that the Claimants breached Article 43(1) of the *Constitution* of Kenya. They urge this Court to be guided by the decision in the case of *Hezekiah Chepkwony & 2 others v Cabinet Secretary, Ministry of Health & 2 others* [2020] eKLR in which the court awarded the 1<sup>st</sup> petitioner Kshs. 500,000 as compensatory damages for the violation of his right to fair administrative action by the respondents. That considering the said award was made two years ago, the Respondents propose Kshs. 2 Million as sufficient damages. They further submit that the Claimants are guilty of perjury contrary to section 108 of the *Penal Code* which calls for appropriate sanction, recommendation or direction from this Honourable Court.
25. The Claimants assert their dismissal was unfair and unlawful having been so executed by way of a short message (SMS). No such SMS was produced in evidence to show that the Claimants were so dismissed. They seek damages for their alleged unlawful dismissal which was alleged to have arisen after an unlawful strike. The Respondent on its part seeks payment of various sums being the notice the Claimants ought to have served. The evidence adduced shows that the Claimants did not engage in group therapy for the clients for a period. They assert that they undertook all the other work save for group therapy. Given the background to the dispute, it seems there was withdrawal of services by the Claimants. They did not serve their employer as required. The reason advanced is non-payment of salaries. The dispute was neither reported to the Labour office nor subjected to conciliation.
26. On the part of the counterclaim, evidence led shows that the 2<sup>nd</sup> Respondent failed in its obligation as an employer to pay salaries on time. The failure to do so, in the view of the Court, disentitles it to make any claim for notice pay as the termination of the employment contracts can be partly attributed to the employer failing to pay salaries as and when they fell due.
27. As the Claimants failed to follow the law in engaging in the go-slow that led to the impasse leading to end of their contracts, their suit is dismissed with no order as to costs. The Respondents' counterclaim which is premised on the failure of the employer to pay salaries as and when they fell due is equally dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL 2023**

**NZIOKI wa MAKAU**

**JUDGE**

