



REPUBLIC OF KENYA



KENYA LAW
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Ng'ethe v Kivia Engineering Services Limited (Employment and Labour Relations Cause 1481 of 2017) [2023] KEELRC 1226 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1226 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1481 OF 2017**

K OCHARO, J

MAY 18, 2023

BETWEEN

GRACE WANJA NG'ETHE CLAIMANT

AND

KIVIA ENGINEERING SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim Dated July 28, 2017 alleging unfair/unlawful dismissal from employment and therein seeks for various reliefs against the Respondent. Imperative to state that the Claimant was unrepresented and this informs the not pleasant nature of her pleadings filed. The reliefs sought were;
 - a. A declaration that the Claimant employment services with the Respondent were terminated discriminatorily, wrongfully and unfairly.
 - b. Damages for wrongful and unfair termination
 - c. Unpaid leave for two years.
 - d. Unpaid house allowance for two years.
 - e. Payment of unfair reduction of salary from the outsourcing company from Kshs 100,984 to Kshs 35,000
 - f. Compensation and computation of salary from July 2014 until court judgment.
 - g. Honouring Collective Bargaining agreement cost of this cause/suit
 - h. Any other or further relief the Honourable courts may deem fit and just to grant.



2. It was her case that she- was first employed by Tata Chemical Magadi Limited on the July 1, 2011, whose services had been outsourced by the Respondent. She was so employed as a Fitter. Her starting salary was Kshs 30,000 per a month.
3. She stated that she worked under this arrangement till March 30, 2012, when she was re-employed by Tata Chemical Magadi Ltd, the outsourcing company, to the Respondent in the same position but at a salary of Kshs 69,303 that was later increased to a basic monthly salary of Kshs 91,804. Inclusive of allowances she earned Kshs 100,984. This was under a contract of employment whose lapse appointed time was January 2013.
4. The Claimant averred that after effluxion of her contract with Tata Chemicals, she got employed by the Respondent at a salary of Kshs 35,000 monthly, a reduction of what she used to earn at Tata Chemicals by Kshs 65,984.
5. The Claimant stated that she worked for the Respondent diligently and with due honesty until July 31, 2014 when she was verbally terminated by the Respondent without notice contrary to the law. Despite the termination, the Respondent allowed her to work through the month of August.
6. Prior to the termination, she was never served with any warning letter or subjected to a disciplinary hearing. The termination was unfair, unlawful and discriminatory therefore.

Determination

7. After careful consideration of the material placed before me by the Claimant, the following issues emerge for determination;
 - i. Whether the claimant's employment was unfairly terminated.
 - ii. Whether the Claimant is entitled to the prayers sought.

Whether the claimant was unfairly terminated

8. The Claimant did not present any written contract of in evidence to demonstrate that she was an employee of the Respondent. However, this court has considered the savings account statement, account hosted at Magadi Sacco Society Ltd, and notes that thereon there are entries in respect of salary remittances from the Respondent into the account for her. I am convinced that at the material time, she was an employee of the Respondent.
9. For termination to be considered fair, procedural and substantive fairness must be present. Where the two components are absent or any of them are absent, the termination by operation of the law, section 45 of the [Employment Act](#), is deemed unfair.
10. Section 41 of the [Employment Act](#) provides for the procedure that an employer contemplating terminating an employee's employment or summarily dismissing an employee must follow.
11. Procedural fairness encompasses three components, first, notification, the employer contemplating the dismissal or termination must inform the employee of the intention and the grounds prompting the same, second, the hearing, the employee must be accorded a sufficient opportunity to prepare and make a representation on the grounds, and third, the consideration component, the employer shall consider the representation[s] made by the employee before making a decision.
12. It is worth stating that the legal burden to prove that the termination was procedurally fair lies on the employer, by dint of the provisions of section 45[2][c] of the [Employment Act](#).



13. In the case of *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR* the Court held that:

' For a termination to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.'

14. The claimant alludes that she was verbally terminated by the employer on the July 31, 2014. There was not evidence by the Respondent to demonstrate either that there was no termination as alleged or that if there was, the same was anchored on a fair and valid ground, and on a procedure that was fair. The Respondent failed to discharge the burden contemplated under the provisions of section 41 and 45[2] of the *Employment Act*, proving that the termination was procedurally fair.
15. Section 43(1) of the *Employment Act* requires the employer to prove the reason or reasons for the termination of an employee's employment whenever there is a dispute regarding the termination. However, it is not enough for the employer to demonstrate the Reason[s] for the termination, section 45 of the Act places a further burden on the employer to prove, that the reward fair and valid.
16. Legal burdens are dischargeable by evidence. Where a party legally charged to discharge a burden of proof on a certain matter or fact, does not place forth evidence geared towards establishing the same, no doubt it cannot be said that he has discharged the burden. The Respondent didn't enter appearance or file a response to the Claimant's Claim. It didn't present any evidence therefore. In the upshot, I find that the burden of proof under section 43 and 45 of the *employment Act* were not discharged.
17. By reason of the premises foregoing, I find no difficulty in concluding that the termination of the Claimant's employment was both procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought?

18. The Claimant sought for a number of reliefs against the Respondent as has been brought out herein before. To be straight, most of the reliefs sought do not make sense at all. The Claim didn't place forth evidence to establish her entitlement to them. Imperative to state therefore. that this Court can only avail two reliefs to her in the circumstances of the matter, a compensatory award pursuant to the provisions of section 49[1][c], and salary for the month of August 2014.
19. The Claimant seeks payment of salary for the month of August 2014, contending that she worked but wasn't paid for that month. There was no evidence to rebut hers on this. I consequently award her, Kshs 35000 under this head.
20. The compensatory relief contemplated under section 49[1][c] is grantable as a matter of judicial discretion. The discretion is exercised depending on the peculiar circumstances of each case. In this matter, considering the manner how the Claimant's employment was terminated, I am inclined to grant the relief and to an extent of six] [6] months' gross salary, Kshs 210,000.
21. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms;
- [a]. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
 - [b]. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, six [6] months' gross salary, Kshs 210, 000.
 - [c]. Unpaid salary for the month of August 2014, Kshs 35,000.



[d]. Costs of this suit.

[e]. Interest at court rates from the date of this judgment till full payment.

READ, DELIVERED AND SIGNED THIS 18TH DAY OF MAY 2023.

OCHARO KEBIRA

JUDGE

In presence of

The Claimant.

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 March 2020 and subsequent directions of 21st 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.

OCHARO KEBIRA

JUDGE

