



**Adego v Alpha Logistics Services (EPZ) Limited (Cause 401 of 2018)
[2023] KEELRC 1196 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1196 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 401 OF 2018**

M MBARŪ, J

MAY 11, 2023

BETWEEN

ALBERT ADEMBESA ADEGO CLAIMANT

AND

ALPHA LOGISTICS SERVICES (EPZ) LIMITED RESPONDENT

JUDGMENT

1. On June 14, 2018 the claimant filed the memorandum of claim and served the respondent who entered appearance on 4th July, 2018 but no response was filed.
2. On March 21, 2019 parties attended court and the respondent was given 30 days to file response. There was no compliance.
3. On July 26, 2019 the court allowed parties time to comply with rules 15 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
4. Directions to comply were issued on further dates together with negotiations to settle the matter out of court and on March 14, 2023 both parties attended court and requested to be allocated a hearing date which was allocated for 18th April, 2023.
5. On the due date the respondent applied to adjourn the hearing and to be allocated time to file a response. The court directed parties to proceed with the hearing since pleadings had closed and time for hearing was allocated for 10.30AM at which point the respondent and the advocate remained absent. The claimant was heard on his case.
6. The claimant was employed by the respondent as a Vessel Security Personnel in October, 2010 earning Ksh. 4,200 per week. He worked continuously until July, 2017 when his employment was terminated.
7. The claim is that the claimant reported to work as usual but was issued with letter terminating his employment without notice or being given reasons and is claiming the following dues;



- a. Underpayments Ksh. 4,340,544;
 - b. Compensation Ksh. 744,169;
 - c. Notice pay Ksh. 62,014;
 - d. Service pay Ksh. 496,112;
 - e. Unpaid leave Ksh. 400,705;
 - f. Public holidays Ksh. 152,650;
 - g. Overtime Ksh. 1,030,386;
 - h. Certificate compensation Ksh. 171,700;
 - i. Certificate of service; and
 - j. Costs.
8. In evidence, the claimant testified that he was employed by the respondent and was working at Kenya Maritime Authority and regulated under a Collective Agreement (CBA) but the respondent removed some tariffs in the CBA of the chief contractor and paid less than agreed upon. The claimant was placed in an 8 hours shift but ended up working for 12 hours per day without payment of overtime hours.
 9. The claimant testified that he made a complaint with the regulator Kenya Maritime Authority (KMA) regarding his working conditions and they wrote to the respondent stating that there was unfair termination of employment and should pay all underpayments and days off. There was no compliance.
 10. The claimant also testified that for the entire period of employment, his NSSF and NHIF were not paid, he did not take annual leave, overtime hours were not paid and despite KMA directing the respondent to train its employees this was not done forcing him to pay for his own training and hence his Certificate of Compensation should be paid for by the respondent.
As noted above, the respondent did not file a response.
No evidence was called in response.
 11. At the close of the hearing, the claimant filed his written submissions.
 12. The claimant submitted that he was employed by the respondent as a Vessel Security Personnel from October, 2010 until July 31, 2017 when his employment was unfairly terminated. At the time employment terminated the claimant was earning Ksh. 4,200 per week. He was not given notice before his employment was terminated or accorded the due process. Section 41 of the *Employment Act, 2007* (the Act) requires that an employee be accorded a hearing and the allegations made subjected to investigations to allow the employee give his responses. In the case of *Donald Odeke v Fidelity Security Limited* Cause No.1998 of 2011 the court held that it does not matter what offence the employee has committed, if the employee is not given a hearing, such action is unfair and unlawful. In the case of *Josephine M Akinyi v Farbiyo Mohamed* Cause No.148 of 2012 the court held that the employer has a duty to hear the employee before terminating employment.
 13. The claimant submitted that he is entitled to the claims made because he was being underpaid, he worked 4 hours overtime, there was no rest day allowed and compensation is due following unfair termination of employment.



14. The claims herein are not challenged. As addressed above, there was no response filed by the respondent.
15. The claimant does not have any contract of service. This is appreciated in the letter by Kenya Maritime Authority (KMA) dated 24th November, 2017 that the claimant had made a complaint with them on the grounds that he had been dismissed from his employment by the respondent. In reply to KMA, the respondent in the letter dated December 19, 2017 proposed for a meeting to discuss the matter.
16. There is a list filed by the claimant indicating that he was part of the casual employees of the respondent.
17. Upon the claimant making demand against the respondent through his advocates, the respondent responded on March 8, 2018 and admitted that the claimant was an employee in the security department and that there were ongoing negotiations with KMA on the matter.
18. Employment hence admitted, without any employment records, the claims that such employment subsisted from the year 2010 to 2017 is not contested. The claimant became protected under the provisions of Section 37 of the Act with rights and benefits therefrom.
19. Before termination of employment can be found to be fair, notice must issue pursuant to section 35 of the Act and the employee must be given a hearing to defend himself over any misconduct, incapacity of poor work performance as required under section 41 (1) of the Act in what is outlined as the due process of the law.
20. Without any evidence of the respondent having taken the claimant through the due process, employment terminated unfairly.
21. The claimant testified that he was earning Ksh. 4,200 per week. Such wage paid weekly removed him from the description of a casual employee to an employee protected under the law and is entitled to notice pay for 30 days. For a general worker in July 2017, the minimum wage was Ksh.12,926 which is due in notice pay.
22. At this rate, compensation at one month is hereby found appropriate all at Ksh. 12,926.
23. On the claim for service pay, such pay is due where the employer fails to abide the provisions of section 35(5) and (6) of the Act. The employer is required to pay statutory deduction or have the employee under a medical cover. On the findings that the claimant was a protected employee and without any work records to confirm the respondent was compliant, service pay is due at the rate of 15 days' pay for every year worked. From 2010 to 2017 that is a total of 6 full years. On the last payable daily wage of Ksh.600 x 15 per year is Ksh. 9,000 x 6 full years worked the total service pay is Ksh. 54,000.
24. Unpaid leave is claimed and for a total of 6 full year worked, the claimant was entitled to 21 leave days each year and a prorated rate for the months served under a year. 600 x 21 x 6 total leave pay is Ksh. 75,600 in leave pay.
25. On the claim for work during public holidays, the claim is for Ksh. 152,650 without a particularisation of the gazetted public holidays claimed. Each year has distinct public holidays gazetted by the Minister and a claim under such vote head must put these days into account. The general claim is declined.
26. Overtime is claimed at 4 hours of work every day. It is humanly impossible that for 7 days each month and spanning over 6 years the claimant worked for 12 hours each day. The claimant testified that at some point he went for training and such period is not taken into account. The general claim for overtime worked is exaggerated and generalised and is hereby declined.



27. With regard to Certificate of Compensation, the claimant testified that KMA required the respondent to employ persons who were qualified in their duties but the respondent refused to pay the claimant for his trainings. The claimant took the initiative to pay for his trainings so as to be suitable for employment by the respondent. He enjoyed employment because of his skills in his trade of choice. He offered his labours to the respondent and was paid for his time and for the unfair termination of his employment, such is addressed and awarded accordingly. He cannot claim for training so as to be fit for the job where such qualification was a requirement to obtain employment.
28. On the claim for underpayment, the claimant has relied on the Kenya Ship Contractors Association wage schedules. He however failed to clarify the relationship between the Association and the respondent but has attached a Certificate of CBA registration between the Association and Seafarers Union of Kenya. It cannot automatically be surmised under what context the claimant applied to enjoy the wage schedules of the Association and not under a CBA which would have protected him better as an employee. Having assessed the compensation due on account of unfair termination of employment, the claim for underpayment in this regard is declined.
- The claim largely successful, costs are due.
29. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. Compensation Ksh. 12,926.55;
 - b. Notice pay Ksh. 12,926.55;
 - c. Leave pay Ksh. 75,600;
 - d. Service pay Ksh. 54,000; and
 - e. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

