



**Onyango v National Oil Corporation of Kenya (Cause 350 of 2019)
[2023] KEELRC 1540 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1540 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 350 OF 2019
B ONGAYA, J
JUNE 22, 2023**

BETWEEN

HENRY ABEL ONYANGO CLAIMANT

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on May 29, 2019 through Brenda & Brenda Advocates. He claimed and prayed for orders as follows:
 - a A declaration that the conduct of the respondent against the claimant of terminating his employment amounted to violation of the claimant's constitutional rights contrary to Article 41(1) of the Constitution of Kenya 2010 on the right to fair labour practices.
 - b A declaration that under section 12(3) (iv) of the Industrial Court Act the claimant's termination should only take effect when the respondent conforms to all legal requirements stipulated by the Constitution, statute and the employment contract and therefore declare that the claimant is entitled to his monthly salary until the respondent terminates his services within the law.
 - c An order of compensation as directed by Article 23(3) of the Constitution and section 12(3) (v) of the Industrial Court Act by the respondent to the claimant for the remainder of the 12 years he has until attaining the retirement age at the rate of Kshs 71, 838, 000.00 being salary receivable for 12 years in case of termination before age of retirement; and Kshs 288,000.00 leave allowance receivable for 12 years in case of termination before retirement age.
 - d 12 months' salary Kshs 5, 986, 500.00 as contemplated in section 49 (1) (c) of the Employment Act, 2007.



- e Unpaid leave days mounting to Kshs 498, 875.00.
 - f Two months' salary in lieu of notice amounting to Kshs 997, 750.00.
 - g Unpaid dues for additional responsibility for the year 2013 – 2016 at 15% of the basic salary by the three years worked as of that time amounting Kshs 993, 330.00.
 - h Kshs 47, 600.00 unpaid allowance not remitted to the respondent.
 - i An order the respondent to pay general damages to the claimant for unfair termination as per section 12(3) (vi) of the Industrial Court Act.
 - j An order directing the respondent to pay general damages to the claimant for violating the claimant's right to fair labour practices under Article 41 (1) of the Constitution.
 - k An order directing the respondent to grant the claimant all retirement benefits earned.
 - l An order directing the respondent to issue a certificate of service per section 51(1) of the Employment Act.
 - m An order that the termination can only take effect once the respondent conforms to all orders issued by the Court.
 - n Costs and interest at court rates from the date of the judgment.
 - o Any other relief that the Honourable Court deems fit to grant.
2. The claimant's case is as follows. The respondent employed him on permanent and pensionable terms effective March 08, 2013 as a Safety Health Environment and Quality Manager. He was assigned additional duties to manage security department from 2013 to 2016. In 2016 the respondent employed a management head of security who served until 2018 when he resigned. He was assigned to run the security department at a special duty allowance of Kshs 43, 874.00 per month. The head of security had received higher salary than the claimant until January 01, 2018 when the respondent agreed to review the claimant's salary upwards. By letter dated December 04, 2018 the respondent reviewed the claimant's terms of service from permanent and pensionable to fixed term contract. It was for 3 years running December 01, 2018 to November 30, 2021. The gross salary was Kshs 450,000.00. clause 18 on renewal stated it was renewable at the discretion of the Board of Directors for a further 3 years at a time until attainment of 60 years of age. The renewal was to be guided by the recommendation of the Chief Executive Officer (CEO) and the outcome of performance evaluation. A written request for renewal had to be made by the claimant 3 months before the expiry date of the contract. The claimant declined to accept translation of his permanent and pensionable terms to fixed term contract.
3. The claimant's further case is as follows. On January 23, 2019 he reported at work and he was given a notice stating that his contract of employment would stand terminated on January 31, 2019. The letter referred to a discussion with the Manager, HR & Administration and his exit package would be one-month salary for each year served, 2 gross salaries for two months in lieu of notice, transport cost Kshs 40,000.00, golden handshake Kshs 100,000.00 and outstanding leave days. The claimant's case is that no prior reason was given for termination of his contract of service. The claimant's case is that the termination breached Articles 41 and 47 (1) of the Constitution.
4. The respondent filed a statement of response and counterclaim on October 02, 2019 through Rachier & Amolo Advocates. The respondent admitted employing the claimant as pleaded for the claimant. The respondent admitted until January 01, 2018 the Head of Security received higher salary than the claimant but the jobs were different, with differing roles and qualifications and, experience. The



discrepancies were due to grading system and the newly recruited staff were more experienced. The Board harmonised the salaries for all management staff on August 12, 2016 after a job evaluation and reorganisation. On December 19, 2017 Board decided management staff convert from permanent and pensionable to fixed term contracts. It was after approval of a new staff organisation on May 30, 2017 which merged the claimant's job with that of Security (SSHEQ) Manager to form position of Safety Health Environment Quality Manager. The claimant failed to apply for advertised position of SSHEQ Manager. The government advised that in view of reorganisation staff would be exited with a package such as one offered to the claimant in the termination letter and in event the staff declined to take up the fixed term contractual terms. The claimant was informed of the reorganisation process.

5. The respondent counterclaimed that the claimant was appointed by the PS Ministry of Energy and Petroleum to serve in the Mwanachi Gas Project as tender evaluators and subsequently in the Inspection and acceptance committee of the ministry. The claimant travelled to several countries in that behalf. The respondent advanced the claimant Kshs 670, 371.09 as per diem on understanding the claimant would reimburse once the Ministry paid him. He was paid Kshs 457, 704.00 leaving a balance of Kshs 212, 667.09 due to discrepancies in per diem rates. The respondent counterclaimed the Kshs 212, 667.00 plus interest and costs. The respondent prayed that the suit be dismissed with costs.
6. The Court has considered the parties' respective pleadings, testimonies and witness statements and final submissions. The Court returns as follows.
7. To answer the 1st issue there is no dispute that parties were in a contract of service which was terminated per letter on record as pleaded for the parties.
8. To answer the 2nd issue the Court returns that the termination was unfair. While it is true that the officers who declined to accept the fixed term contract, it is clear that the situation amounted to a redundancy. The respondent while purporting to offer a redundancy package, clearly failed to follow the due procedure of a notice and consultation especially as provided in section 40 of the [Employment Act](#) on notice to the claimant and area labour officer. The termination was unfair in procedure. Further, it appears that it was unfair to impose the fixed term contract without the concurrence of the claimant who had already been emplaced on a permanent and pensionable service. To that extent the reason for termination appears to have been unfair as not relating the claimant's contract, compatibility or capacity per section 45 of the [Employment Act](#). The Court returns it was unfair in procedure and merits. The Court has considered the factors in section 49 of the Act. The claimant had a clean record and desired to continue in employment. The aggravating factors against the respondent were the failure to comply with section 40 of the [Employment Act](#) and failing to consult the claimant as he was already protected by the permanent and pensionable terms of service. The respondent acted unilaterally to impose a fixed term contract failing and when the claimant rejected he was dismissed. The Court has as well considered the terminal dues offered by the respondent. The claimant also substantially contributed to his termination when he signed accepting the package. The Court awards 2 months' compensation for the unfair termination making Kshs 450,000 x 2 = Kshs 900, 000. 00 (less PAYE).
9. To answer the 3rd issue the Court finds that the discrimination was not established at all. The claimant was paid differently based on his contract and job roles different from those of the substantive Security Manager. The discrepancy in pay has been shown to have been a service wide problem in the respondent's managerial establishment. The claimant has not shown any thing attributable to the respondent making it impossible to engage gainfully after the termination. The claim for pay for time until 60 years of age or retirement is declined as unjust. The Claimant has made no specific submissions to justify the other claims which are declined. The claim for acting or special duty is with respect to a time barred claim as it was a continuing claim which ceased long ago and 12 months of limitation in



section 90 of the *Employment Act* had lapsed as at time the suit was filed. He is entitled to a certificate of service.

10. As for the 4th issue on the counter-claim, the Court finds that it must fail. The evidence is that the arrangement was between the respondent and its parent Ministry. The respondent knew as much and it was not an issue at separation.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination was unfair and unlawful.
2. The respondent to pay the claimant Kshs 900,000.00 by September 01, 2023 failing interest to be payable thereon at court rates.
3. The respondent to deliver the certificate of service forthwith.
4. Dismissal of counterclaim.
5. The respondent to pay costs of the suit and counterclaim.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 22ND JUNE, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

