



Ayombe v Nelliwa Buildings & Civil Engineering Limited (Cause E814 of 2021) [2023] KEELRC 1485 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1485 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E814 OF 2021
AN MWAURE, J
JUNE 16, 2023

BETWEEN

JACK OMONDI AYOMBE CLAIMANT

AND

NELLIWA BUILDINGS & CIVIL ENGINEERING LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a statement of claim dated August 2, 2021.

Claimant's case

2. The Claimant's case is that he was employed by the Respondent as his site manager at OlKalou Law Courts. This was on November 15, 2017. He claims he was not given a letter of appointment. His monthly salary was Kshs 100,000/= per month.
3. He says that on March 15, 2019, he was unlawfully terminated and he was not given any reason for the said termination or any warnings during the period of his employment.
4. He now claims damages amounting to Kshs 1,754,758/= inclusive notice pay and damages for unfair termination among others.

Respondent's case

5. The Respondent did not file any defence or submissions. The case proceeded as an undefended claim. Mr Aduda advocate appeared in court but failed to file a notice of appointment of advocate and failed to put a response.

Claimant's submissions

6. The court considered the claimant's written submissions dated January 24, 2023.



Analysis and determination

7. The main issues that emerge for determination based on evidence, pleadings and submissions are;
 - i Whether the Claimant was unlawfully terminated.
 - ii Whether he is entitled to the reliefs sought.

8. Issue one on whether the Claimant was unlawfully terminated the court would say as follows:-

The Claimant avers that he was employed in the Respondent's site as a Manager from November 15, 2017 up to March 15, 2019 when he was unlawfully terminated without any warning or any notice.

9. There are numerous emails produced as exhibits which are meant to demonstrate that the Claimant worked for the Respondent in his Olkalou Law Courts site. There is no letter of appointment but then the Respondent never denied that the Claimant was his employee. In fact, a lawyer who appeared during the proceedings on several occasions by the name Aduda advocate admitted they were in the process of settling the matter out of court.
10. They were given an opportunity to settle the same but no consent ever materialized. The court finds there is no evidence on record to controvert that the Claimant was an employee of the Respondent.
11. There are bank statements from Equity Bank Nanyuki but they are all cash payments and so the name of the one who was depositing the cash is not given. The employer should give records of his employees and in due case the Respondent failed to give the same as stated in Section 9(1) of the *Employment Act*. At the same time, he failed to give evidence to show whether that the Claimant was his employee or not.

The said Section 9(1) provides as follows;

- 1 A contract of service –
 - a for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
 - b which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months shall be in writing.
12. The court is therefore left to infer from the emails on record between the Claimant and the Respondent and from the evidence on record that the Claimant and the Respondent had an employment relationship.
13. As to whether the Claimant was unfairly terminated, the court will rely on the minimum terms of *employment Act*.
Under Sections 45(1) where employment is terminated without adherence to fair procedure, the termination must be termed unfair.
14. This alongside Section 41(1) of the *Employment Act* if an employee is being terminated on grounds of indiscipline he must be heard in the presence of a fellow worker or a shop floor union representative.



15. In the cited case by the Claimant in his submissions, Case No. 725 of 2016 *Martin Ireri Ndonga -Vs- Olerai Management Company* where court held:

“I find the conduct of the Respondent and its officer, they failed to meet the mandatory pronouncement of the law as set out under the *Employment Act* with regard to employment and termination of the same for the Claimant.”

16. The court finds that in the absence of any evidence by the Respondent to refute the Claimant’s averments, judgement must be entered in favour of the Claimant and award some remedies.

Remedies

- a One month salary in lieu of notice Kshs 100,000/=.
- b Damages for unfair termination which court will award at equivalent of 2 months as per guidelines in Section 49(1)(c) of the *Employment Act* considering the period the claimant worked for the respondent Kshs 200,00/-
- c Salary arrears for January, February and March 2019. The Respondent did not prove he paid the same, Kshs 282,258/=.
- d Service charge is not proved and so is declined.
- e House allowance amount not proved and is declined.
- f Communication allowance is not proved and is declined.

Claimant is awarded a total sum of Kshs 582,258/= plus costs and interest at court rates from date of judgement till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE, 2023

ANNA N MWAURE

JUDGE

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 Civil 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.

ANNA N MWAURE

JUDGE

