



Otunga v Hydro Build Limited (Employment and Labour Relations Appeal E147 of 2022) [2023] KEELRC 1467 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1467 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E147 OF 2022**

BOM MANANI, J

JUNE 15, 2023

BETWEEN

JOHN OTUNGA APPELLANT

AND

HYDRO BUILD LIMITED RESPONDENT

JUDGMENT

Background

1. The dispute between the parties relates to unfair termination of the Appellant's employment contract. From the record, the Respondent hired the Appellant on 11th March 2020 as a mechanical engineer. However, this relation came to an end sometime in May 2021 when the Respondent dismissed the Appellant because it doubted his qualifications. It was the Respondent's position that the Appellant had displayed a high level of incompetence particularly in the last six months preceding termination of his contract. Hence the decision to sever the relation between the parties.
2. Aggrieved by the decision, the Appellant moved to court to challenge it as unlawful. In his pleadings, the Appellant contended that although he was engaged at a monthly salary of Ksh 90,000.00, the Respondent unilaterally varied this term of the contract during the subsistence of the employment relation. The Respondent began by paying the Appellant a net monthly salary of Ksh 40,000.00 before this was increased to a net of Ksh 60,000.00.
3. The Appellant further contended that the Respondent sent him on forced leave in April 2021 before terminating his contract through a text message. It was the Appellant's case that he was not served with notice to terminate his employment. It was his view that the termination of his contract was in disregard of due process and the applicable law.
4. Although the Respondent filed a defense to the cause, it did not offer evidence in opposition to the Appellant's case. Thus, the matter was determined on the evidence that the Appellant placed on record.



5. After hearing the Appellant, the trial magistrate found that the Respondent had unfairly terminated the Appellant's contract. Accordingly, the court issued a declaration to that effect. However, it declined to award the Appellant the other reliefs in his Statement of Claim. The basis for this decision was that the Appellant did not specifically plead and prove the salary he was earning to enable the court determine the quantum of his compensation. Nevertheless, the court granted him costs of the case.

The Appeal

6. Aggrieved by the decision, the Appellant filed the current appeal. In the appeal, the Appellant has raised three grounds of appeal as follows:-
 - a. That the learned magistrate erred in law and fact by holding that the Claimant never pleaded the exact salary he was seeking.
 - b. That the learned magistrate erred in law and fact in failing to award damages for unfair termination of the employment contract despite making a finding that the termination was unlawful.
 - c. That the learned magistrate erred in law and fact by failing to appreciate in totality the evidential bundle produced by the Appellant thereby arriving at the wrong conclusion.

Analysis

7. In my analysis, I will address the grounds of appeal jointly as opposed to singularly. My decision shall take into account the entire of the record presented before me together with the submissions filed by the parties.
8. In this respect, I have reminded myself of my role as the first court of appeal which requires me to re-evaluate the record before the trial court and arrive at my own conclusion on the disputed issues. Even as I do so I also remind myself that I did not have the benefit of seeing the demeanour of the witness who testified in the cause as did the trial court. Consequently, in my decision I ought to make sufficient allowance for this reality (see *Jackson Kaio Kivuwa v Penina Wanjiru Muchene* [2019] eKLR).
9. According to the *Black's Law Dictionary*, the term "plead" in civil proceedings means "to assert or allege in a pleading". Therefore, to determine whether the Appellant pleaded his salary in the Memorandum of Claim that he presented to court, all that one needs to ask is whether he asserted or alleged what his salary was or ought to have been in the document. The answer to this question appears straight forward. It is in the affirmative.
10. At paragraph 7 of the Memorandum of Claim, the Appellant stated in unambiguous terms that on entering the contract of service with the Respondent, the parties agreed on a monthly salary of Ksh 90,000.00. By this statement, the Appellant made a clear assertion as to what his salary ought to have been as per the terms of the contract between the parties. It was to have been Ksh 90,000.00.
11. The Appellant then went ahead to state that the Respondent reduced this amount to Ksh 40,000.00 before revising it upwards to Ksh 60,000.00. This second plea relates to the alleged unilateral variation of a term of the Appellant's contract relating to his salary. From these averments, there is no ambivalence as to what was to have been the Appellant's salary and what he allegedly ended up being paid.
12. To suggest, in the face of these clear statements, that the Appellant did not plead what his salary was or ought to have been appears preposterous. The fact that he said his initial salary of Ksh 90,000.00 was



varied adversely to Ksh 40,000.00 and then Ksh 60,000.00 does not derogate from the truism that the Appellant pleaded his agreed salary as Ksh 90,000.00.

13. Having unambiguously pleaded the foregoing, what the general law of evidence required of the Appellant was to prove his assertions through evidence. It is however critical to always bear in mind that whilst addressing the question of burden of proof in employment matters, regard must be had to what the statutes on employment law require in this respect. In some instances, these statutes impose what is referred to as the reverse burden of proof.
14. The Appellant's averment with respect to his emoluments was that the term of his contract relating to salary had been unilaterally varied. To establish the legal requirements on the burden of proof in this respect, one needs to examine sections 9 and 10 of the *Employment Act* against the contract that the parties entered into.
15. That the parties to this dispute had an employment relation which had lasted for more than three months at the time it was terminated cannot be gainsaid. At paragraph (c) in its submissions section in the Memorandum of Reply to the Statement of Claim, the Respondent asserts that it had computed the Appellant's terminal dues before he unnecessarily filed suit before the trial court. By this averment, the Respondent admitted the fact that the parties had an employment contract which had come to a close. In their response to the Appellant's Advocate's demand letter, the Respondent's Advocates stated that the Respondent hired the Appellant for the period between June 2020 and May 2021 albeit with doubts about his professional qualifications. By this, the Respondent's agents admitted that the Appellant had been in continuous employment of the Respondent for a period exceeding three months.
16. Section 9 (1) (a) of the *Employment Act* requires contracts of service whose duration is for three or more months to be reduced into writing. Section 9(2) of the *Act* places the obligation of ensuring that such contract is reduced into writing on the employer.
17. The responsibility was therefore on the Respondent to document its contract of service with the Appellant. From the evidence tendered before the trial court, the Respondent did not discharge this statutory obligation.
18. Failure by an employer to ensure that the requirements of sections 9(1) and (2) of the *Employment Act* are complied with has its legal consequences. Some of these consequences are discernible in section 10 as read with section 74 of the *Act*.
19. Under section 10 of the Act, the employer is required to ensure that a written contract under section 9 of the Act captures details relating to inter alia: the names of the parties to the contract; the date of commencement and duration of the contract; the place and hours of work; the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits; the intervals at which remuneration is paid among others. By virtue of section 74 of the *Act*, the employer has a statutory obligation to maintain records of various matters relating to his employees including those covered under section 10 of the Act and to produce the records for inspection whenever there is need.
20. Section 10 (6) of the *Employment Act* provides as follows:-

"The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment."



21. Section 10(7) of the *Act* provides as follows:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
22. The net import of the foregoing is that in employment matters, the employer who engages the services of an employee for a period of three or more months has a duty to ensure the contract is reduced into writing. He has a duty to ensure that the written contract captures specific matters including the remuneration of the employee.
23. The employer has a duty to ensure that these records are securely kept for the duration provided for in law and produce them for inspection whenever a dispute as to the terms of the contract arises. Where the employer fails to maintain these records and a dispute on a term of the contract arises, the burden is on the employer to prove or disprove the truth of the assertion by the employee in respect of the disputed term (see *Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR and *Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR).
24. In the case before me, it was up to the Respondent to have maintained the records of employment of the Appellant. It was up to the Respondent to have produced these records before the trial court when a dispute arose as to the remuneration of the Appellant.
25. By virtue of section 10(7) of the *Employment Act*, the burden lay with the Respondent to disprove the Appellant’s assertion that his salary was Ksh 90,000.00 since the Respondent had evidently evaded the responsibility of having the contract between them reduced into writing in terms of section 9 of the *Employment Act* (see *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR). The assertion by the Respondent’s counsel that the burden of proof in this respect lay with the Appellant is premised on the misguided belief that the general principles of the law of evidence on the burden of proof applied to the contested issues in this case.
26. Having said as much, I am alive to the fact that the employee retains the burden of presenting a prima facie case on most aspects including remuneration before the evidential burden shifts onto the employer. Did the Appellant discharge this burden?
27. I have looked at the record before the trial court. First, the Appellant produced a series of pay slips running from page 19 to 22 of the Record of Appeal showing that despite the alleged initial agreement that he was to be paid Ksh 90,000.00, the Respondent began by paying him gross pay of Ksh 44,409.00 (Ksh 40,000.00 net) before the pay rose to gross pay of Ksh 77,034.00 (Ksh 60,000.00 net). In addition, the Appellant produced his bank statement showing monthly credits by the Respondent of the aforesaid amounts and how they transited from the initial Ksh 40,000.00 to Ksh 60,000.00.
28. The Appellant also produced the Respondent’s Advocates’ letter dated 17th June 2021 in which the lawyers stated that the Appellant’s monthly salary was Ksh 70,000.00 and not Ksh 90,000.00 as asserted in the Appellant’s Advocates’ demand of 9th June 2021. Noteworthy, this letter by the Respondent’s Advocates understated the figure of salary evidenced in the pay slip issued by the Respondent to the Appellant dated May 2021. The latter showed that the Respondent was paying the Appellant gross salary of Ksh 77,034.00 at the time.
29. It is important to note that under section 20 of the *Employment Act*, it is the employer who issues the employee with a pay slip. Issuance of this document is a statutory obligation bestowed on the employer. Therefore, the pay slips produced by the Appellant showing that his salary had steadily grown from



a gross of Ksh 44, 409.00 in October 2020 to Ksh 77,034.00 in May 2021 are the Respondent's documents.

30. At the very least, although the Appellant pleaded that his salary ought to have been Ksh 90,000.00 his evidence established that he was earning a lesser amount of Ksh 77,034.00 as at 31st May 2021, the time the contract of employment between the parties terminated. This figure was not contradicted by the defense. It is therefore clear to my mind that the Appellant provided prima facie evidence specifically establishing that as at 31st May 2021, he was earning a gross monthly salary of Ksh 77,034.00. If it wished to dispute the truthfulness of this evidence, the Respondent was obligated by section 10(7) of the Employment Act to provide evidence to the contrary. As the record shows, no evidence was tendered by the defense in this respect or at all.
31. I therefore arrive at the conclusion that the trial court failed to evaluate the totality of the evidence on record against the applicable law thereby arriving at the wrong conclusion in respect of whether the Appellant had pleaded and proved the quantum of salary that he was earning. The fact that the Appellant pleaded that his salary was irregularly stepped down from Ksh 90,000.00 to between Ksh 40,000.00 and Ksh 60,000.00 does not mean that he did not specifically plead the salary that he was allegedly entitled to. The record shows that he pleaded Ksh 90,000.00 as the salary that he was entitled to be paid under the oral contract. Nevertheless, he provided specific proof of Ksh 77,034.00 (Ksh 60,000.00 as net) as his eventual gross monthly earnings as at May 2021.
32. In their submissions, the Respondent's advocates assert that because the Appellant pleaded three figures of Ksh 90,000, Ksh 40,000.00 and Ksh 60,000.00, it was unclear which of these figures he was relying on to advance his claim. To say the least, this submission is perplexing. By this statement, counsel insinuates that he is oblivious of the fact that remuneration under a contract of service is reviewable. It is clear from the evidence on record that the figure of Ksh 40,000.00 (gross of Ksh 44,409.00) was the salary paid to the Appellant as his entry salary. It is also clear that the figure of Ksh 60,000.00 (gross of Ksh 77,034.00) was what the Appellant was earning on exit. This can only mean that the Appellant's salary had been growing incrementally over time and stood at Ksh 77,034.00 at the time of his exit.
33. In working out compensation for unfair termination under section 49 of the Employment Act, courts rely on the exit salary of the employee. Therefore, there ought not to have been any difficulty in the trial court determining which of the figures to apply in determining the compensation that was payable to the Appellant. It was his established exit gross salary of Ksh 77,034.00.
34. It is not disputed that the Respondent unfairly terminated the Appellant's contract of employment. The Respondent has not appealed against the trial court's finding in this respect. This being the case, the Appellant was entitled to the reliefs set out under section 49 of the Employment Act for unfair termination of his contract of service.
35. From the record, the trial magistrate declined to award the Appellant any of the reliefs under section 49 of the Employment Act on the erroneous premise that the Appellant had not pleaded the specific salary that was due to him. As has been demonstrated, this finding was misconceived as the Appellant's exit salary had been tendered in evidence.
36. In any event, the Appellant's claim before the trial court was not only for recovery of salary arrears. It was also for compensation for wrongful termination. Therefore, as long as the trial magistrate was able to ascertain the Appellant's last salary from the evidence that was presented before him, he should have been able to apply this figure to assess the compensation payable to the Appellant for wrongful termination.



37. For the avoidance of doubt, the pay slip of the Appellant for May 2021 evidencing his exit pay was placed before the court. With this, the contention that the Appellant had not presented a specific figure of his salary in order for the court to determine what he could recover ought not to have been a consideration in determining whether the Appellant was entitled to be compensated for wrongful termination.
38. In arriving at its conclusion, the court appears to have relied on the decision in *Consolata Hospital Mathari v Bianka Matens* [2008] eKLR. However, the facts in the two cases are different. In the Consolata case, the court ordered the Respondent to pay the Claimant Ksh 80,000.00 monthly despite the Claimant having not pleaded this sum in her Statement of Claim. In contrast, the Appellant in the case before me did as a matter of fact specifically plead Ksh 90,000.00 as his initially agreed salary but specifically proved a lesser amount of Ksh 77,034.00.
39. The trial court also relied on the Court of Appeal's observation in *Nelson Mwangi Kibe v Attorney General* [2003] eKLR to arrive at its conclusion. It is however clear to me that the observation by the Court of Appeal on the need to specifically plead the figure of salary was made in the context of a claim for salary arrears as opposed to compensation for wrongful termination.
40. Importantly, it may be helpful to point out that the above decisions relied on by the trial court were made in the context of the old regime of employment law in Kenya. Under the current regime and more particularly section 49 the *Employment Act*, the law provides for an entirely new set of remedies that were not available under the retired regime. These include compensation for unlawful termination which the Appellant specifically asked for. Indeed, this transition is alluded to in *Beatrice Everlyn Atieno Abong'o v National Oil Corporation* [2015] eKLR referred to by the trial court and in which I understand the court as restating the position that whilst an employee is not entitled to claim damages for the unexpired term of his contract, he is nevertheless entitled to pursue compensation for unlawful termination capped at 12 months of his salary.
41. In *Ruth Wairimu Kaboro v Nairobi Upperbill Hotel Limited* [2021] eKLR, the court specifically observed that the Claimant had not pleaded for compensation for unfair termination. Instead, she had prayed for salary arrears, general damages and salary in lieu of notice. Whilst referring to salary arrears, the court observed that this needed to have been specifically pleaded and proved. Clearly, this observation was not made with reference to an award of compensation for unfair termination.
42. What is clear to me is that none of the decisions quoted by the trial court support the position that the court can invoke the failure by a Claimant to specifically plead his salary to decline to award him compensation for wrongful termination if this figure can be established from the evidence on record. The views expressed in those cases were made in the context of claims for salary arrears as opposed to a claim for compensation for wrongful termination. Consequently, the decisions could not be relied on as the basis for denying the Appellant compensation for unfair termination.

Determination

43. Accordingly, I set aside the part of the trial court's decision that declined to grant the Appellant the prayer for compensation for unfair termination. Instead I enter judgment for the Appellant against the Respondent as follows:-
 - a. I grant the Appellant compensation for wrongful termination of his contract of service equivalent to his established last gross monthly salary for five (5) months, that is to say, Ksh 77,034.00 x 5 = Ksh 385,170.00.



- b. I grant the Appellant interest on the award aforesaid at court rates to run from the date of the decision of the trial court till payment in full.
- c. The award is subject to the applicable statutory deductions.
- d. I grant the Appellant costs of the Appeal.
- e. For the avoidance of doubt the other orders issued by the trial court remain as issued by the court.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

