



REPUBLIC OF KENYA



KENYA LAW
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**Muema v Dac Aviation (EA) Limited (Cause E985 of 2021)
[2023] KEELRC 1465 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1465 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E985 OF 2021**

MN NDUMA, J

JUNE 8, 2023

BETWEEN

GABRIEL KITAKA MUEMA CLAIMANT

AND

DAC AVIATION (EA) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit by a Memorandum of Claim dated 24th November, 2021 against the respondent seeking the following reliefs:-
 13. That, the Respondent be ordered to pay the Claimant - Gabriel K. Muema his unpaid monthly salaries and/or employment benefits accrued as hereunder:-
 - Unpaid salaries: February, 2020 to October, 2021 - @ Kshs 183,027.00 per month
x 21 months = Kshs 3,843,567.00
 14. That, in the event the Respondent cannot continue with the employment, the claimant be paid his full employment benefits besides the withheld salaries; which are:-
 - (a) Pay in lieu of notice – 1 month salary – Kshs 183,027.00 – See payslip – Annexure 6.
 - (b) 2 years pending annual leave days @ 21 days – 42 days wages @ Kshs 7,039.50 day = Kshs 295,659.00.
 - (c) 8 years' service benefits @ 15 days per year – 120 days wages x Kshs 7,039.50 per day = Kshs 844,740.00
 - (d) 12 months' salary compensation for wrongful loss of employment – Kshs 183,027.00 pm x 12 months = Kshs.2,196,324.00.



(e) Certificate of service within Section 51 of the *Employment Act*, 2007.

Total: Kshs 7,363,317.00

2. The suit is opposed vide a Memorandum of response dated 24th June, 2022. The claimant joined issue with the respondent in reply to the Memorandum of response dated 5th July, 2022.
3. The claimant (C.W.1) testified that he was employed by the respondent as a Sheet Metal Technician on 1st February, 2013. That he worked continuously for the respondent until the month of October, 2021. C.W.1 testified that he stopped going to work because he stayed for many months without receiving a salary from the respondent. That the claimant made a report of non-payment of his salary to the Ministry of Labour by a letter dated 18th November, 2021.
4. According to the letter written by the labour office to the respondent dated 18th January, 2021, the respondent had not paid salary to the claimant since February, 2020 upto the last working day in November, 2020. The claimant demanded payment of arrear salary, accrued leave and any other terminal benefits. C.W.1 testified that he did not receive any letter of termination but was constructively dismissed because his contract of employment was frustrated by non-payment of salary.
5. The claimant also sought Certificate of Service to enable him get alternative employment.
6. The claimant produced a payslip for January, 2020. According to the payslip, his gross monthly salary was Kshs 183,027.00. That his efforts to get paid were not fruitful hence the suit. The claimant under cross-examination insisted that he was owed salary for February, 2020 upto October, 2021 in the sum of Kshs 3,843,567.00 a period of 21 months. The claimant testified also that he was owed leave days calculated at 21 days leave for two years in the sum of Kshs 295,659.00
7. The claimant claimed also service pay for a period of eight (8) years calculated at 15 days salary for each completed year of service. The claimant stated that he was registered with National Social Security Fund (NSSF) but the respondent did not remit the NSSF dues for the last year of employment in 2019. That his designation at the time of termination was Shipment Technician but did other duties.
8. The claimant admitted that the company was experiencing financial difficulties as a result of COVID – 19 pandemic. The claimant testified that all the employees were not getting paid from February, 2020 to December, 2021. That the claimant could not survive any longer since he had to pay his bills including rent, transport fare to go to work, and school fees for his children. Claimant testified that since he had worked for the respondent for many years, he trusted that the company would pay his arrear salary. The claimant testified that the company was still in existence at Wilson Airport. That he only complained to the Ministry of Labour and his advocate wrote a demand letter before the suit was filed. The claimant in addition claims compensation for unfair dismissal.
9. R.W.1, Peter Muga Oguna, testified for the respondent and adopted a witness statement and produced bundle of documents in support of the respondent's case. R.W.1 denied that the claimant was a good performer as per his testimony and the claimant was severally discriminated by the respondent for incorrigible absence from work and other misconduct. R.W.1 referred to email dated 25th May, 2016; 11th December, 2018; a show cause letter dated 12th 2018; a Show Cause letter dated 12th July, 2018 and a progressive disciplinary warning form dated 19th August, 2019.
10. R.W.1 denied that the respondent owed the claimant salary from February, 2020. R.W.1 testified that its operations were disrupted by COVID -19 pandemic effects from early 2020 and wrote an internal memo to all its staff dated 24th March, 2020 in which it informed them of loss of work from ECHO and



- WFP Somalia contract due to the pandemic. That they also had to comply with containment measures made by the Government of Kenya and other foreign Government.
11. That the respondent had therefore scaled down its operations and Managers and Head of departments had been requested to send personnel on leave subject to the operations being able to continue. Meanwhile, the staff were informed that all remuneration including arrears shall be paid to all concerned as funds become available. This letter was indeed produced by the claimant.
 12. R.W.1 testified that after resumption of work, the claimant became incorrigibly truant and used to clock in and after a short period of time clock out immediately. At times, the claimant did not clock in at all or show up at work. The respondent made a decision to stop payment of claimant's salary since the last time the claimant was at work fully was on 15th September, 2020. P.W.1 produced attendance logs from 3rd February, 2020 to 18th December, 2020 showing the time when the claimant checked in to work and out of work.
 13. R.W.1 testified that the claimant proceeded on leave arbitrarily in breach of his contract around this period and never cared to inform the respondent about any reason that made him proceed on unauthorized leave. That the claimant did not respond to calls. Therefore, the claimant deserted work contrary to his testimony before Court.
 14. That the respondent attended meetings at the Labour office on 19th March, 2021 but the claimant did not show up. That the respondent attended subsequent meetings as and when summoned by the labour office.
 15. R.W.1 testified further that the labour officer directed the respondent to produce payment documents in respect of the claimant and that a reconciliation of the accounts by looking at the salary arrangement made with the employees and then attendance logs and or number of hours worked revealed that it was the claimant who owed the respondent on account of salary paid in advance on 21st July, 2020 in the sum of Kshs 100,665.00. That the claimant never offered sufficient service for the payment on account of his continuous absence from work hence the Counter-claim by the respondent in the sum of Kshs 86,222. That the logs produced by the respondent support the testimony by R.W.1 and the respondent claims to be paid by the claimant accordingly.
 16. That the suit has no basis and it be dismissed with costs.
 17. Under cross-examination, R.W.1 conceded that the warnings, and show cause letters produced by R.W.1 were in respect to periods prior to February, 2020 and were not related to this payment claim. That no letter of warning or notice to show cause relates to the period February, 2021 to December, 2021 the relevant period in respect of which unpaid salary is claimed. R.W.1 was also unable to produce any complaint against alleged misconduct and absence by the claimant during the material period in respect of which arrear salaries are claimed.
 18. R.W.1 also under cross-examination could not show any complaint of alleged mal-logging of the claimant during the COVID – 19 period. R.W.1 stated that they complied with recommendations by the labour officer by paying the claimant in arrears for the February, 2020 salary on 21st July, 2020, and the final dues for the claimant of Kshs 86,222 was duly paid.

Determination

19. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by the claimant and R.W.1.
20. The issues for determination are as follows:-



- (a) Did the respondent fail to pay the claimant salary for work done for the period February, 2020 to October, 2020?
- (b) If the answer to (a) above is in the affirmative, did the conduct of the respondent repudiate the contract of employment to comprise constructive dismissal?
- (c) Does the Counter-claim of Kshs86,222 have any merit.?
- (d) Is the claimant entitled to the reliefs sought.?
21. It is a fact that the claimant was employed by the respondent as Sheet Metal Technician on 21st February, 2013. It has been established that the claimant worked continuously for the respondent until the month of October, 2021.
22. The Court has established vide the evidence adduced by C.W.1 and R.W.1 that the operations of the respondent were affected drastically by the coming of COVID - 19 pandemic and had to scale down operations due to the COVID-19 restrictions imposed by the Government. In the Memo from Managing Director to all staff of the respondent dated 24th March, 2020, the Managing Director directed Managers and Heads of Departments to send personnel on leave subject to the operations being able to continue.
23. The respondent meanwhile stated that:-
“ all remunerations including arrears shall be paid to all concerned as funds become available.
24. The contested testimony by C.W.1 is that he worked continuously from February, 2020 upto October, 2021 but was not paid salary by the respondent for that period.
25. R.W.1 admitted that it had not paid all workers salary for several months due to the scaling down of operations as a result of COVID-19 restrictions and loss of its contracts with ECHO and WFP in Somalia. R.W.1 did not adduce evidence to contradict the testimony by the claimant that he was at work between the periods February, 2020 to October, 2020. Instead, R.W.1 adduced some documents showing that on certain dates, the claimant reported to work late, reported for short periods and left immediately and on other dates he did not report at all. By and large, the picture brought by the totality of evidence is that the claimant was at work subject to the restrictions imposed due to COVID-19 pandemic in the month of February, 2020 to October, 2021.
26. The claimant testified that he was last paid Kshs 100,665.00 for the month of January, 2020 vide his KCB account No. 1119610311 on or about 21st July, 2020. R.W.1 admits that the respondent paid arrear salary to its employees including the claimant on 21st July, 2020. R.W.1 testified that since the claimant absconded work during the period February, 2020 to October, 2021, the respondent ought not to have paid him and therefore upon depositing Kshs 100,665.00 in the account of the claimant on 21st February, 2020, the claimant was overpaid by Kshs.86,222.00 and this was discovered after thorough reconciliation of accounts upon the resumption of work by the employees including the claimant and a scrutiny of the attendance log and or number of hours worked. That this exercise revealed that the claimant owes the respondent a sum of 86,222 from an advance payment made to the claimant by the respondent on 21st July, 2020.
27. However, the Court is satisfied that the payment made to the claimant on 21st July, 2020 was not an advance payment but was instead payment of arrear salary not paid from the month of January, 2020.
28. The claimant set out in detail the particulars of non-payment of his salary in the Memorandum of claim and in the reply to the Memorandum of response by the respondent. The claimant therefore



claims payment of 21 months' salary calculated at Kshs 183,077 per month from February, 2020 to October, 2021.

29. The claimant also testified that he had not taken two years annual leave at 21 days per year. A careful analysis of the testimony by C.W.1 vis a vis that by R.W.1 has led the Court to the conclusion that indeed there is no evidence adduced by the Respondent to show that it had specifically requested the claimant not to work during the period February, 2020 to October, 2021. To the contrary, the Court is satisfied that the claimant by and large attended work during that period and was entitled to payment of salaries. The testimony adduced by R.W.1 that on some days the claimant did not attend work, went late, or clocked out early was not satisfactory and did not negate the evidence adduced by the claimant which is credible and satisfactory that indeed the claimant attended work, and worked during this COVID-19 period.
30. The Court finds that the claimant is entitled to payment of salary in the sum of Kshs 3,843,567 calculated at Kshs.183,027 per month for the period February, 2020 to October, 2021. The Court finds that the payment made to the claimant on 21st July, 2020 was payment of arrear salary for the month of January, 2020. The Court therefore finds the counterclaim by the respondent to be without merit and is dismissed.
31. Furthermore, the Court finds that the testimony by the claimant that he was owed in lieu of two years untaken leave was credible and was not rebutted at all and or satisfactorily by R.W.1. The Court therefore awards the claimant Kshs 295,659.00 in lieu of 42 untaken leave days.
32. The claim for payment in lieu of notice by the claimant is not credible and is without merit. The claimant testified that his employment was not terminated but he stopped reporting to work due to financial difficulties occasioned by the non-payment of salaries by the respondent in October, 2021.
33. There is no credible evidence that the contract of the claimant was repudiated by the respondent. Indeed, the effects of COVID - 19, were understood by all at the time and were mitigated by the arrangements made between the employers and employees within the guidelines and restrictions provided by the government following consultations with all stakeholders at the time.
34. The difficulties occasioned by COVID-19 and communicated to the claimant by the respondent cannot be construed to have amounted to a willful repudiation of contract of employment. Indeed, the claimant persevered the difficulties, continued working until when he decided to stop working on his own accord. The claimant was not therefore directly or constructively dismissed from employment by the respondent.
35. The claims for compensation for constructive dismissal and for payments in lieu of notice are therefore dismissed for lack of merit.
36. The claimant admitted that, at all material times, except for a period of about one year when he did not receive salary was a member of National Social Security Fund and the contributions to the fund were remitted. There is no evidence adduced by the claimant that he was entitled to payment of service gratuity as claimed or at all for the 8 years he served the respondent. Indeed, the contract of employment between the parties did not have such provision. This claim is dismissed for lack of merit.
37. The respondent is obliged to provide the claimant with a Certificate of Service and the Court directs the respondent to do so.
38. In the final analysis, the Court enters judgment against the respondent in favour of the claimant as follows:-



(a) Kshs 3,843,567.00 being arrear salary for the period February, to October, 2021

(b) Kshs 295,659.00 in lieu of 42 untaken leave days.

Total award: Kshs.4,139,226.00

(c) Interest at Court rates from the date of judgment till payment in full.

(d) The respondent to provide the claimant with a Certificate of Service within 14 days of this judgment.

39. For the avoidance of doubt, the rest of the claims by the claimant are without merit and are dismissed.

40. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8TH DAY OF JUNE, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

Claimant in person.

Mr. Obala for respondent

Ekale: Court clerk

