



Mungai v Devyani Foods Industries (Kenya) Limited (Cause E026 of 2021) [2023] KEELRC 1401 (KLR) (8 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E026 OF 2021
MN NDUMA, J
JUNE 8, 2023**

BETWEEN

PETER MARI MUNGAI CLAIMANT

AND

DEVYANI FOODS INDUSTRIES (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on October 16, 2020 against the respondent seeking the following reliefs:-
 - (1) A declaration that the summary dismissal was wrongful, unfair and discriminatory.
 - (2) One month's salary in lieu of notice..... Kshs 322,000.00
 - (3) The equivalent of twelve months (12) salary as compensation for unlawful termination (Ksh 322,000.00 x 12 months)..... Kshs 3,864,000.00
 - (4) Net Salary for the remainder of the contract (Kshs 322,000.00 x 26 months).... Kshs 8,372,000.00
 - (5) Leave pay for a period of 8 years .Kshs 1,803,200.00
 - (6) Severance pay for a period of 8 years worked.....Kshs 1,288,000.00
 - (7) Costs of the claim.
 - (8) Any other relevant prayer the Court may deem fit to grant.
2. CW1, the claimant testified that he was employed by the respondent by a letter of appointment dated January 5, 2012 in the position of Production Manager (UHT Plant) for a two year term. That the claimant served diligently until the first contract expired on December 31, 2013. The claimant was



- issued four different contracts separately on January 10, 2014; June 16, 2016; May 9, 2017 and March 1, 2019.
3. That the last contract dated March 1, 2019 commenced on April 1, 2019 and was to end on July 31, 2022. It was for a three (3) year period.
 4. That the claimant continued to serve well and without any issues until April 12, 2020 when the claimant was issued with a letter of termination.
 5. The termination was said to be in terms of clause 11(e) of the current contract of employment subsequent to a review of current operations.
 6. The respondent gave the claimant one month notice of termination and was to pay terminal dues to be calculated upon clearance with the company.
 7. CW1 testified that before the said termination, the Chief Executive Officer of the respondent had on several occasions abused and harassed the claimant for no apparent reason, including that the claimant's parents wasted money in taking the claimant to school. That when the claimant reported the matter to the Chief Operating Officer, the Chief Executive Officer called the claimant to his office and intensified the abuses.
 8. CW1 testified that he was very shocked by the turn of events since he had all the time a very good working relationship with the respondent.
 9. That no notice or reason was given for the termination of the employment and the Chief Operating Officer told the claimant that the termination was the sole decision of the Chief Executive Officer.
 10. CW1 testified that he was not given any opportunity to be heard before the termination and the same was for no fault on the part of the claimant.
 11. That the respondent did not pay full terminal benefits to the claimant. That no notice to show cause was issued to the claimant prior to the termination.
 12. That the claimant earned Kshs 322,000 per month.
 13. That the summary dismissal was unlawful, unfair and in breach of the provisions of the [Employment Act, 2007](#).
 14. Under cross-examination by Advocate Maina for the respondent, the claimant denied that he had refused to take a salary cut like other employees, to mitigate the effects of Covid 19. The claimant stated that he was unaware that the respondent was not doing well financially. The claimant said that he worked for 8½ years continuously and served only 14 months of the last contract dated March 1, 2019 which was for a three year period. Claimant stated that he was owed dues from previous contracts and was not paid terminal dues at the end of each contract. The claimant denied that he signed a document to acknowledge receipt of Kshs 233,100 as final terminal benefits. He denied the signature on the discharge letter was his though he says that the signature on the document resembled his signature. However, the claimant acknowledged that he was paid Kshs 449,400 to his bank account as per the documents produced by the respondent. The claimant admitted that he saw this document tabulating his dues later and the payment included 25 leave days and 30 days' notice pay.
 15. The tabulation indicates that the claimant joined the respondent on April 21, 2020. The document bears the signature of the claimant dated May 22, 2020 and that of two officers of the respondent dated May 21, 2020 and May 22, 2020 respectively.



16. The claimant denied having received terminal dues for previous contracts including payment made in 2017, in full and final settlement.
17. RW1 Paul Maina testified that he was the Assistant Legal and Human Resource Manager of the respondent. RW1 stated that the claimant was production Manager of the respondent. That around February 2020, the respondent started experiencing financial distress due to effects of Covid 19.
18. That the claimant Operating Officer communicated to all workers about the down-turn in business and some workers agreed to take a pay cut until the situation improved.
19. That despite engaging the claimant in dialogue he declined to take a salary cut like the rest of the workers and the respondent had no alternative but to terminate the claimant's employment as per the letter before Court.
20. That the dialogue commenced by the respondent was according to the negotiations between the tripartite social partners which culminated in the memorandum of understanding dated April 30, 2020 between the partners on mitigation of effects of Covid 19 at the work place.
21. That the termination of employment of the claimant was in terms of clause 1 of the contract of employment.
22. That the claimant was fully paid his terminal benefits and this suit is unwarranted.
23. That it be dismissed with costs.

Determination

24. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by the parties.
25. The issues for determination are:-
 - (1) Whether the termination of the employment of the claimant was for a valid reason following a fair procedure.
 - (2) What remedies if any is the claimant entitled to.
26. Upon a careful analysis of the evidence before Court, the Court is satisfied that the claimant was a diligent employee of the respondent in the position of Production Manager from January 5, 2012 up to April 21, 2020 when his employment was terminated by the respondent.
27. The claimant earned Kshs322,000 monthly salary at the time of termination. The claimant was not candid with the Court about the terminal benefits paid to him upon termination from employment. However, under cross-examination, the claimant admitted having received Kshs 449,400 as terminal dues which comprised one month salary in lieu of notice in the sum of Kshs 322,000 and Kshs 268,332 in lieu of 25 leave days not taken. The Court is satisfied that this payment was received.
28. The Court is also satisfied that the claimant served on separate contracts and was at the time of termination serving a three year contract, which he had only served 14 months. There is no sufficient evidence before Court to demonstrate that the respondent owed the claimant any terminal dues in respect of previous completed contracts. The claim for payment of terminal dues in respect of those previous contracts has no basis and is dismissed.
29. However, the respondent having admitted that it retrenched the claimant from employment for operation and financial reasons, the respondent was bound to demonstrate that the termination



- was for a valid reason in terms of Section 43(1) and (2) read with Section 40 and Section 2 of the [Employment Act, 2007](#). The respondent did not adduce any evidence to demonstrate that it had given the employees and the Ministry of Labour a notice of intended declaration of redundancy of employees in terms of Section 40(1) of the Act. The respondent failed to demonstrate that it was indeed suffering financial distress to warrant retrenchment of its production manager and not any other employee. The respondent also failed to demonstrate that it gave the claimant opportunity to be heard before it terminated his employment. The respondent did not pay service pay to the claimant as mandated by Section 40(1) of the Act.
30. The termination of the employment of the claimant was therefore not for a valid reason and the respondent did not follow a fair procedure as mandated under Sections 36, 40, 41, 43 and 45 of the [Employment Act](#). The termination was therefore unlawful and unfair and the claimant is entitled to compensation for the unlawful and unfair termination of employment in terms of Section 49(1) (c) and 4 of the Act.
 31. First, the claimant was paid in lieu of notice and in lieu of leave days not taken and these claims are dismissed. The claimant is entitled to payment of severance pay for the period of one (1) year served in the last contract of employment equivalent to 15 days salary in the sum of Kshs 161,000.
 32. With regard to compensation, the claimant was unlawfully and unfairly terminated from employment for no fault at all. The claimant received no notice of intended termination and so suffered severe loss and financial damage due to lack of preparation. The claimant was not given any reasons for the termination and was not compensated for the loss. The respondent flouted all the procedural requirements under Section 40 of the Act, to mitigate the job loss. The claimant lost chance of career progression as a Production Manager unlawfully and unfairly.
 33. The claimant had served the respondent diligently for a period of eight and half years (8 ½) without any blemish. The Court accepts the evidence by the claimant that he was abused and treated badly by the Chief Executive Officer for no apparent reason in his last days at work. Though this was Covid 19 period, this granted the employer no excuse to flout employment laws in the country. The respondent did not follow or respect the Tripartite Agreement which was entered into by the tripartite parties to mitigate the effects of Covid 19 in dealing with the claimant.
 34. The Court has considered the case of *Fredrick Ouma -vs- Spectre International Limited* [2013; [Kenya Union of Commercial, Food and Allied Workers -vs- Meru North Farmers Sacco Limited](#) - Cause No 74 of 2013; and the case of [Daniel Mburu Muriu -vs- Hygrotech East Africa Limited](#) [2021] eKLR in determining that this is an appropriate case to compensate the claimant for the unlawful and unfair termination of his employment by granting him the equivalent of three (3) months' salary in compensation thereof in the sum of Kshs 966,000.
 35. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:-
 - (a) Kshs 161,000 severance pay.
 - (b) Kshs 966,000 being the equivalent of three (3) months' salary in compensation.
Total amount : Kshs 1,127,000.
 - (c) Interest at Court rates from date of judgment till payment in full.
 - (d) Costs of the suit.
 36. For the avoidance of doubt, all other claims set out in the Statement of Claim are without merit and are dismissed.



It is so ordered.

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

Mathews N. Nduma

Judge

Appearances

Mr. Were for claimant

Mr. Maina for Respondent

Ekale – Court Assistant

