



**Tororei v Catholic Diocese of Nakuru (Cause 297 of 2015)
[2023] KEELRC 1859 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1859 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 297 OF 2015
DN NDERITU, J
JULY 31, 2023**

BETWEEN

JOSEPH KIPCHUMBA TOROREI CLAIMANT

AND

CATHOLIC DIOCESE OF NAKURU RESPONDENT

JUDGMENT

1. In a memorandum of claim dated 23rd June, 2021 and filed in court on 12th October, 2015 through Maragia Ogaro & Co Advocates the Claimant prays for: -

- a. One month salary in lieu of notice
- b. Underpayments
- c. Normal Overtime
- d. Off Duties
- e. Public Holidays
- f. Compensation Under Article 49(1 (c))

2. The quantified awards claimed are as follows –

Claims Arrangements

- a. Notice - Kshs. 10,377.75/=
- b. Underpayment - Kshs. 118,926.36/=
- c. Normal overtime - Kshs. 548,660.90/=



- d. Off duties - Kshs. 257,396.60/=
- e. Public holiday - Kshs. 60,012.60/=
- f. Compensation - Kshs. 124,533.00/=

Grand total - Kshs.1,119,907.20/=

Less amount paid - Kshs. 20,579.00/=

Balance - Kshs.1,099,328.20/=

3. Together with the statement of claim was filed a verifying affidavit, a statement by the Claimant, and a list and bundle of the listed documents in support of the claim.
4. On 11th November, 2015 the Respondent filed a response to the claim through Rodi, Orege & Co Advocates. In the said response the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. The response was accompanied with a list of documents and a bundle of the listed documents.
6. On 31st March, 2017 the Respondent filed a witness statement by Jimnah Kimani Mwangi (RW1).
7. This cause came up in open court for hearing on 3rd October, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on the same day when RW1 testified and the Respondent's case was closed as well.
8. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Mr. Maragia, filed his written submissions on 21st October, 2022 while Counsel for the Respondent, Miss Kabalika, filed on 28th October, 2022.

II. The Claimant's Case

9. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summarized as hereunder.
10. In his memorandum of claim, the Claimant pleaded that he was engaged by the Respondent as a grounds man on 1st May, 2008. He pleaded that he also worked as a turnboy for a school bus that served students from schools owned by the Respondent. However, the letter of appointment in the bundle of documents indicate that the Claimant was hired as a grounds man and nothing more.
11. The pay-slip for July, 2009 indicates that the Claimant was on a monthly basic salary of Kshs.5,000/=, Kshs.900/= in house allowance, and a medical allowance of Kshs.1,400/=, making a gross monthly pay of Kshs.7,300/=. By July, 2013 the monthly gross pay was Kshs.9,150/= as per the pay-slip availed in court for that month.
12. The Claimant pleads that he was underpaid throughout the entire period of his employment going by various government salary guidelines and Gazette Notices as issued in various legal notices from time to time. Besides, the Claimant pleads that he worked overtime and on public holidays without being compensated by the Respondent as required in law.
13. The Claimant pleads that he worked for the Respondent for a period of five years and eight months when the Respondent unilaterally and against the law purported to introduce new terms of



engagement requiring the Claimant to enter into new short-term contracts. It is the Claimant's case that the Respondent unfairly and unlawfully terminated him in January, 2014.

14. The Claimant pleads that he was paid a sum of Kshs.20,579/= as terminal dues but stated that the same was not complete, full, and or adequate settlement of all that was due and payable to him and hence his filing of this cause. He admits that he was issued with a certificate of service.
15. In his oral testimony in court the Claimant reiterated the foregoing based on his filed statement. He alleged that he not only worked as a grounds man but also did cleaning and also worked as a conductor for a school bus owned and operated by the Respondent for its schools.
16. He reiterated that he received only as sum of Kshs.20,579/= as terminal dues from the Respondent and that the other alleged sum of Kshs.11,650/= was not paid to him.
17. He denied that he had any disciplinary issues at work. He stated that he was not given a hearing before termination. Further, he stated that he did not land another job after the termination by the Respondent.
18. In cross-examination he admitted that his contract did not include any other job description other than that he had been engaged as a grounds man. However, he insisted that he also worked as a bus conductor and a general cleaner and that he was not paid for those additional roles. He maintained that he was engaged on permanent and pensionable terms and that towards the end of 2013 the Respondent unilaterally and unlawfully purported to change those terms to periodic contracts without any consultations or his consent whatsoever. He was issued with a letter dated 20th November, 2013 informing him that his contract was coming to an end on 31st December, 2013. He admitted that he reluctantly applied for renewal of his contract although he insisted that the entire process was flawed and unlawful. He admitted that the contract was not renewed and that he was issued with a letter dated 2nd January, 2014 informing that the Respondent was not renewing his contract.
19. The Claimant admitted payment and receipt of the further sum of Kshs.11,650/= from the labour office, Nakuru. He admitted that this sum was to take care of underpayments and overtime pay. He admitted that he claimed and was paid a sum of Kshs.5,000/= by Britam from a pension scheme facilitated by the Respondent.
20. It is on the foregoing basis that he is seeking for orders as per the prayers in the memorandum of claim as set out in the introductory part of this judgment. The submissions by his counsel shall be considered in a latter part of this judgment alongside those by counsel for the Respondent.

III. The Respondent's Case

21. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel as summarized hereunder.
22. RW1 was at the material time the human resources manager with the Respondent. His testimony in court was based on his filed statement and the response to the claim. He also produced all the documents filed by the Respondent as exhibits in this cause.
23. In the response to the claim the Respondent pleads that the Claimant's letter of appointment is clear that he was engaged as a grounds man and nothing more. It is pleaded that the Claimant worked during the normal working hours between 0800hrs and 1700hrs with one-hour lunch break. It is pleaded that the Claimant was notified about the non-renewal of his contract which was coming to an end on 31st December, 2013.



24. Further, the Respondent states that it did not desire to renew the contract with the Claimant due to his alleged bad disciplinary record. It is pleaded that the Claimant was paid all his terminal dues in the sums of money alluded to in the foregoing part of this judgment.
25. Without prejudice, it is pleaded that the claims for underpayment and overtime that go beyond three years before the filing of the cause in court are time barred. Moreover, it is denied that the Claimant worked overtime and or on public holidays.
26. RW1 based his oral testimony on the foregoing pleadings and allegations by the Respondent. He insisted that the Claimant worked as a grounds man and that he was not allocated any other work. His duties included pruning flowers, collecting garbage, cutting grass, and related duties. He alleged that the Claimant's contract came to an end on 31st December, 2013. He stated that the Claimant worked in the normal times of the day from 0800hrs to 1700hrs with one-hour lunch break in-between. He alleged that the Claimant was allowed to serve for January, 2014 to enable him wind up his services and handover upon clearance. He stated that during the entire period of his employment the Claimant did not lodge any complaint for underpayment or overtime or holiday pay. He stated that in a normal working week the Claimant was on duty for only five days.
27. He testified that the sum of Kshs.11,650/= and Kshs.20,579/= were paid to the Claimant in full and final settlement of terminal dues, that no notice was due for issuance to the Claimant as the notice of non-renewal of the contract is clear on this. He alleged that the contract was not terminated but it expired.
28. In cross-examination he admitted that no employment records were availed in court by the Respondent in regard to the Claimant. He admitted that there were no contracts between the Claimant and the Respondent prior to December, 2013. He admitted that there were no contracts between 2008 and 2013 and that the letter of appointment did not mention that the Claimant was to serve on contract. He also admitted that the sums of money paid to the Claimant as stated above were not itemized.
29. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by its counsel shall be considered alongside those of the Claimant's counsel in the succeeding parts of this judgment.

IV. Issues for determination

30. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
 - a. What was the nature of the employment relationship between the Respondent/employer and the Claimant/employee?
 - b. Was the Claimant unfairly and unlawfully terminated or wrongfully dismissed by the Respondent? Or
 - c. Did the employment contract come to an end?
 - d. If (b) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - e. Who meets the costs in this cause?



V. Dismissal/termination or expiry of Contract?

31. The terms and conditions of employment of the Claimant ought not be contested. It is common knowledge in law that a court has no business writing a contract between parties and or varying the intention of the parties who had capacity to enter into such contract unless the contract is adjudged to be fraudulent, misrepresented, unlawful, or illegal. Parties are bound by the terms of the contract that they willingly, willfully, and voluntarily enter into.
32. The employment relationship between the Claimant and the Respondent was created vide a letter of appointment dated 19th May, 2008. For avoidance of doubt, the said self-explanatory letter provided as follows –

19th May, 2008

Mr. Joseph Kipchumba Tororei

O. Box 938-20100

Nakuru

Dear Mr. Tororei

RE: Appointment as a Grounds Man

We are in receipt of your application seeking to be engaged as a Grounds Man in our organization.

We are pleased to inform you that you have been appointed to fill the position starting from 1st May, 2008.

We wish to congratulate you for this achievement and wish you success in this position.

With best regards.

Yours sincerely.

Signed

Rev. Fr. Moses Muraya

Vicar General/Human Resources Director

C.c - Bishop

- Development Coordinator

- Procurator

- Financial Administrator

- Senior Accountant

33. Documentary evidence cannot be altered, amended, dislodged, or displaced by oral evidence. From the letter of appointment, it is very clear that the Claimant was engaged as a grounds man from 1st May, 2008. Although the said letter does not detail the duties of the Claimant it is clear in my mind what entails the work of a grounds man. RW1 testified that the Claimant was to tend to plants, trees and flowers, cut grass, collect garbage, and other related duties. That is very distinct from what the Claimant alleged to have done in addition, that he was a bus conductor and a cleaner.



34. If the Claimant intended to convince this court that he did any other work besides that provided for in the letter of appointment, it was incumbent upon him to call and avail convincing evidence, whether oral or written, to back-up that allegation. No such evidence was availed and in the circumstances this court finds and holds that the Claimant was engaged by the Respondent as a grounds man in accordance with the letter of appointment produced and relied upon by both parties as reproduced above.
35. There is no doubt that the Claimant was a month to month employee or what is loosely and commonly termed as permanent and pensionable. The uncontroverted evidence on record is that the Claimant worked continuously and uninterrupted until December, 2013 when the Respondent purported to issue him with a notice of termination of contract and subsequently a notice of refusal by the Respondent to renew the contract. There is no other lawful way to interpret the employment relationship between the Claimant and the Respondent other than that the Claimant was a month to month employee who was on permanent and pensionable terms and, that he could only be terminated in accordance with the law and not in any other way or manner. That was the nature of the employment relationship in answer to issue (a) above.
36. On issue (b) the Respondent was under legal obligation to afford to the Claimant a fair hearing before termination. To a large extent the law is now settled on what constitutes fair hearing. An employer has to have a good legal reason for initiating disciplinary action and an employee has to be offered and afforded a fair hearing based on sound procedural fairness grounded on rules of natural justice. The above twin tests constitute what is referred to as substantive and procedural fairness – See Mary Chemweno V Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno V Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro V Teachers Service Commission (2012) eKLR.
37. After working for the Respondent from May, 2008, and without any consultation or consent, the Claimant was issued with a letter dated 20th November, 2013 which letter is in the following terms –

Joseph Kipchumba Tororei

BOX 938-20100

Nakuru

Date: 20.11.2023

REF: End of Contract

This is to formally inform you that your contract with the Catholic Diocese of Nakuru where you worked as a Groundsman will be ending on the 31st December, 2023.

If you wish to renew the contract make a formal application and address it to the Personnel Director.

Thank You.

Yours sincerely

Signed

The Very Rev Fr. Lawrence Mbogo

Personnel Director

Received: Joseph Kipchumba Tororei signed 8/1/2014



Name Signature Date

38. The above letter indicated that the relationship between the Claimant and the Respondent was to come to an end on 31st December, 2013. However, the said letter indicates that it was served upon the Claimant on 8th January, 2014 and he acknowledged receipt thereof as such.
39. In another letter dated 2nd January, 2014 the Respondent informed the Claimant that his contract would not be renewed. This letter was served upon the Claimant on 13th January, 2014 and he acknowledged receipt of the same as such. For ease of reference the said letter stated as follows –

2nd January, 2014

Mr. Joseph Kipchumba

Box 938-20100

Nakuru

Dear Kipchumba,

RE: Contract Renewal

We wish to inform you that after careful consideration the management has decided not to renew your contract as a Groundsman at the Catholic Dioceses of Nakuru.

Kindly liaise with the Procurator and start preparing for completion of the clearance/ handing over exercise by 31st January, 2014 so as to facilitate computation of your final dues.

You shall be paid your terminal dues upon clearance certification.

We thank you on behalf of Catholic Dioceses of Nakuru for your service and wish you good luck in your future endeavors.

Yours faithfully

Signed

Jimnah Kimani

Personnel Officer

CC Bishop

Vicar General

Financial Administrator

Received: Joseph Kipchumba Tororei signed 13/01/2014

Name Signature Date

40. The above letter informed the Claimant to handover by 31st January, 2014. There is no other correspondence between the parties in regard to the termination of the Claimant except a certificate of service issued to the Claimant dated 17th February, 2014. On divers dates in February, 2014 the Claimant was paid the two sums of money alluded to above after he had reported the matter to the county labour office, Nakuru.
41. Even if the Respondent intended that the notice of end of contract dated 20th November, 2013 to operate as a notice of termination of the relationship, the bid failed in law as the said notice was not served upon the Claimant until 8th January, 2014. The Claimant was a month to month employee and



as such he was entitled to a notice of one month prior to termination of the relationship under Section 35 of the *Employment Act* (the Act) or payment of one month's salary in lieu thereof. The evidence on record shows that the Claimant continued working for the entire of the month of January, 2014 as the notice of non-renewal of the contract was served upon him on 13th January, 2014.

42. RW1 confirmed in his testimony that the Claimant worked for the Respondent for the entire month of January, 2014. No letter of termination was issued to the Claimant and no disciplinary hearing was held whatsoever. While RW1 alleged that the Claimant had a bad disciplinary record, there is no evidence that such alleged misconduct contributed to his termination in any way and nothing to that effect is included in the letter of non-renewal of the contract.
43. This court comes to the logical and reasonable conclusion and holds that the Respondent unlawfully and unfairly terminated the Claimant without notice and without affording him both substantive and procedural fairness as envisaged by the law under Sections 41, 43, 45, and 47 of the Act.
44. No notice of termination or dismissal was issued to the Claimant and no disciplinary hearing was held. That is what may be described as classic example of unfair and unlawful termination – Again see *Anthony Makala Chitavi V Malindi Water & Sewerage Company Limited* (2013) eKLR, *Kenya Commercial Food & Allied Workers Union V Meru North Farmers Sacco Limited* (2014) eKLR, and *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* (2014) eKLR.
45. In regard to issues (b) and (c) for determination, this court returns that the Respondent terminated the Claimant unfairly and unlawfully denying him both substantive and procedural fairness. It is so declared.

VI. Reliefs

46. Having held that the Claimant was unfairly and unlawfully terminated by the Respondent, this court shall now consider each of the reliefs sought as hereunder.
47. Prayer (a) is for one month's salary in lieu of notice. As noted in an earlier part of this judgment the last pay-slip exhibited by the Claimant, that of December, 2013 indicates that the gross monthly salary for the Claimant was Kshs.8,550/=, yet that of July, 2013 indicates that the gross salary was Kshs.9,150/= . There is no explanation in the variation of the gross pay either in the pleadings, evidence adduced, or the submissions by counsel. This court shall base any awards on the upper figure which is in favour of the Claimant. In the circumstances, the Claimant is entitled to one month's pay in lieu of notice. He is awarded Kshs.9,150/=.
48. Prayer (b) is for underpayments in the sum of Kshs.118,926.36. The underpayments claim relate to the period from May, 2009 to February, 2014. Notwithstanding that the court directed the Claimant's counsel to avail the legal notices alluded to alongside the submissions the same were not availed. Likewise, during the hearing in court no evidence was availed in proof of the said underpayments. In which category is the Claimant asking for this award? As a grounds man, bus conductor, or general worker?
49. This cause was filed in October, 2015 and under Section 90 of the Act any amount awardable can only relate to a period of three years immediately preceding the date of filing of the cause in court. That goes back to about October, 2012.
50. While it is the duty of an employer to keep employment records under Sections 10 and 74 of the Act it is equally the duty of an employee to properly plead and prove his or her case. It is my view that the Claimant failed to plead and prove his claim under this head for the reasons stated above. There is no evidence on which position or job description that this claim is based and the legal notices alluded to



have not been provided as directed by court. While legal notices are public documents for which this court may take judicial notice, the Claimant's case as pleaded and presented does not help in enabling this court to relate the claim to the said legal notices for the reasons stated above.

51. For all the foregoing reasons, prayer (b) is denied.
52. Prayer (c) is for Kshs548,660.90 for normal overtime. The Respondent admitted that it had no records to show how many hours the Claimant worked for the entire period that he worked for the Respondent. However, lack of those employment records does not automatically authenticate the claim by the Claimant. It is still the duty, obligation, and burden of the Claimant to prove his case on a balance of probability that the allegations made are true.
53. A close scrutiny of Section 10(7) of the Act indicates that failure of the employer to produce records of employment exposes the employer to bear the burden of any term of the contract alleged by the employee. Overtime is a matter of fact that shall be compensated under the Act if proved. It need not be an express term of the contract. It was the duty of the Claimant to prove that he indeed worked overtime.
54. The Claimant alleged that the only reason he worked overtime is because he had duties as a school bus conductor for schools owned by the Respondent. However, this court has already held that there is no proof that the Claimant worked as such bus conductor as the written contract as expressed in the letter of appointment is very clear on his engagement as a grounds man. The evidence from the Respondent as adduced by RW1 is that the Claimant as a grounds man worked in normal working hours from 0800hrs to 1700hrs with one-hour lunch break. That evidence was not rebutted or dislodged by the Claimant. What the Respondent pleaded and stated through RW1, in not so many words, is that the Claimant did not work overtime or on public holidays and as such there are no records to that effect.
55. Should this court presume that the allegation by the Claimant is the gospel truth since no employment records have been availed and produced by the Respondent? My emphatic answer is no. This is because the overall burden of proving each allegation in the case belongs to the Claimant or he who alleges. It is not enough for a party to plead some alleged facts and then leave it to the other party to disprove the allegation. If an allegation has not been proved on a balance of probability, the other party has no burden of disproving the same.
56. As it stands there is no evidence that the Claimant worked overtime or during public holidays. It would have made sense had the Claimant called a co-worker to demonstrate that indeed he worked overtime and on public holidays. That way the Respondent should have had a legal burden to disprove that allegation. It would be a dangerous precedent for this court to presume that for such an allegation made without any support the burden shifted to the Respondent to disapprove the same.
57. Why did the Claimant, as a grounds man, have to work overtime? Why would it have been necessary for him to work on public holidays? These rhetorical questions do not find answers in the evidence adduced by the Claimant and submissions by his counsel. There is no evidence on the specific public holidays that the Claimant worked. It does not make logical sense that the Claimant allegedly worked on all the public holidays during the entire period of his employment. This is a court of law and justice and it is the duty and indeed an obligation on a party who pleads a fact to prove the same. Such a party must establish a prima facie case for the burden, if the law states so, to shift to the other party.
58. In cross-examination the Claimant admitted that the sums of Kshs.20,529/= and Kshs.11,579/= paid to him were to cater for underpayments and overtime. Although he had denied in examination in-chief that the latter amount was paid to him he later admitted that he received both amounts during cross-



examination. This did not portray the Claimant as a truthful person. He came out as a person who was out to enrich himself through this cause.

59. For all the foregoing reasons, this court shall deny the Claimant prayers (c) and (e) for overtime and public holidays pay respectively.
60. Prayer (d) is for off-duty pay in the sum of Kshs.257,396.60. The evidence from the Respondent, which is not supported with records, is that the Claimant worked for five days a week from Monday to Friday, and hence he rested on Saturday and Sunday. From the tabulation presented by the Claimant he alleges to have worked for seven days a week. There is no evidence whatsoever in support of this proposition.
61. The Respondent is a diocese of the Catholic Church which in its doctrines believes in resting on Sundays as a day set aside for worship and thanks giving. This is a matter of common knowledge and notoriety. There is no way that the Respondent would have directed the Claimant to work on Sundays, the very day that the Catholic Church has from time immemorial set aside for worship. The court is not persuaded that the Claimant ever worked on Sundays and in any event the evidence by the Respondent that he worked for only five days a week has not been rebutted or dislodged by evidence from the Claimant.
62. For all the foregoing the claim for off-duty pay is denied.
63. Prayer (f) is for compensation for unfair and unlawful termination equivalent to 12 months gross pay at the rate of Kshs.10,377.75/= per month. Section 49(4) of the Act provides a sample of the factors that this court ought to consider in making an award under this head.
64. This court has already found that the termination was unfair and unlawful both in substance and procedure. The parties have not expressed willingness to re-engage and this court cannot order reinstatement as time has expired for such an order to be made. The Claimant had served the Respondent for a period of over five years as at the time of termination. There is no doubt that the service that the Claimant was offering as a grounds man is not a specialized service and opportunities for the said service are to a large extent available in the job market. It is however noted that the Respondent did make some payments to the Claimant in terminal dues as stated in the foregoing parts of this judgment. This court has not detected any undue conduct on the part of the Claimant that might have contributed to the termination.
65. Considering all the relevant factors as enumerated above and in the interest of fairness and justice, this court is of the considered view that an award of six months gross salary is fair and reasonable compensation to the Claimant. The same is calculated as $Kshs.9,150/= \times 6 = Kshs.54,900/=$.

VII.Costs

66. The Claimant is awarded costs of this cause.

VIII.Disposal

67. In final disposal of this cause, this court issues the following orders: -
 - a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent was unfair and unlawful.
 - b) The Claimant is awarded a total of Kshs.64,050/= made up as follows –
 - i. One month's salary in lieu of notice .. Kshs. 9,150/=



ii. Compensation for unfair and unlawful termination
.....Kshs.54,900/=

TotalKshs.64,050/=

- c) All the other claims are denied.
- d) Costs to the Claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 31ST DAY OF JULY, 2023.

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DAVID NDERITU

JUDGE

