



**Ngari v Cargill Kenya Limited (Cause 31 of 2018)  
[2023] KEELRC 1989 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1989 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 31 OF 2018**

**AK NZEI, J  
JULY 27, 2023**

**BETWEEN**

**KINGI KOMBE NGARI ..... CLAIMANT**

**AND**

**CARGILL KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The suit herein was instituted by the Claimant on 19/1/2018 vide a memorandum of claim dated 12/9/2017 and subsequently amended on 12/9/2018. The Claimant pleaded that he was employed by the Respondent in November 2003, earning a salary of ksh 27,000 per month, and remained in employment for 12 years, and that his salary remained constant through out that period.
2. The Claimant further pleaded that on or about September 22, 2015, the Respondent terminated his employment without prior notice, and without affording him audience to respond to issues underlying his termination. That the Respondent had refused to pay the Claimant his terminal benefits, leave allowance and salary in lieu of notice.
3. It was the Claimant’s further pleading that the termination was unfair, and that the Respondent’s actions violated provisions of the Employment Act and contravened the right to fair labour practices, and that the Claimant’s dismissal was devoid of any justifiable grounds.
4. The Claimant set out his claim against the Respondent as follows:-
  - a. one month salary in lieu of notice .....ksh 27,000
  - b. unpaid annual leave for 11 years .....ksh 207,900
  - c. an equivalent of 12 months salary for unlawful termination (ksh 27,000X12).....  
.....ksh 324,000



- d. service pay.....ksh324,000
  - e. Costs of the suit
5. Documents filed together with the Claimant’s memorandum of claim included an affidavit in verification of the claim, the Claimant’s written witness statement, copies of the Claimant’s identity card and a demand notice dated 7/3/2017.
  6. The Respondent entered appearance on 11/4/2018 and filed a memorandum of response. The Respondent denied the Claimant’s claim and further pleaded that the Claimant was never employed by the Respondent directly, but was part of what was known as a “gang”, which had a gang leader who was employed by the Respondent. That the Respondent would give work to the gang leader, who would then source for his own gang members to perform the Respondent’s tasks. That there was no continuity of service for the gang members who were only contracted by the Respondent when need arose; and that an agreement between the Respondent’s umbrella body, Distributive and Allied Traders Union and Kenya Shipping, Clearing and Warehouse Workers Union governed casual labourers such as the Claimant. That the Claimant never earned a starting salary of ksh 27,000, but was remunerated at the rates stipulated in the agreement and his wages were not constant.
  7. The Respondent further pleaded that it ceased contracting gang leaders in July 2014, and started outsourcing labour from a third party known as Insight Management Consultants Limited, and that the Respondent could not have terminated the Claimant’s employment in September 2015.
  8. The Respondent filed a written witness statement of one Linet Anyika dated 11/1/2019 and an evenly dated list of documents, listing 2 documents. The listed documents were a memorandum of agreement between the Respondent’s umbrella body referred to in paragraph 6 of this judgment and Kenya Shipping, Clearing and Warehouses Workers Union dated 7/6/2013 and an agreement between the Claimant and Insight Management Consultants Limited dated 1/7/2014.
  9. On October 30, 2019, the Respondent filed a written statement of one Raphael Mwadime dated October 25, 2019, and on December 10, 2019 filed the Respondent’s supplementary list and bundle of documents dated 5/12/2019 listing only one documents – a bundle of payment receipts for gang members.
  10. When trial commenced on 27/9/2022, the Claimant adopted his filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 5 of this judgement. The Claimant further testified:
    - a. that he was being paid ksh 900 per day as at the time of his termination, and was being paid by the Respondent; and that the Respondent terminated the Claimant’s employment. That one Mwadime, one of the Respondent’s top most bosses, terminated the Claimant’s employment.
    - b. that the Claimant went to work one day and was told that there was no work, was not given any notice, and was not invited for any disciplinary hearing.
    - c. that the Claimant was not employed by Insight Management (Consultants Limited) as alleged by the Respondent, but was employed by the Respondent from 2003 to 2015, and worked every day until he was terminated. That Insight Management Consultants Limited came later, and that the Claimant did not join it when it came.
    - d. that the Claimant suffered alot when he was terminated as he was not prepared for the termination.



11. Cross-examined and re-examined, the Claimant testified that he was not an NSSF contributor and that his salary was not being subjected to statutory deductions, and that his salary was ksh 27,000 per month, made up of ksh 900 per day. That gangs were groupings within the Respondent company, and existed even before the Claimant joined the Respondent company, and were not of any other company. That the gangs (of workers) were overseen and supervised by the Respondent's more senior employees, including one Mohammed Yeye and Makofu, and that Mwadime was more senior than those. It was the Claimant's further evidence that he and others worked throughout, thirty days per month, and without any off days; and were being paid in cash.
12. The Claimant further testified that he was not given an employment letter or a termination letter.
13. The Respondent called one witness, Raphael Mwadime – the Respondent's Tea Business Manager. He adopted his filed witness statement dated October 25, 2019 as his testimony, and produced in evidence the documents referred to in paragraphs 8 and 9 of this judgment. The witness denied having terminated the Claimant's employment, stating that as at the year 2015, the Respondent was not engaging casual labourers, but was dealing with another company; a third party known as Insight Management Consultants Limited, and that it was them who were engaging casuals.
14. Cross-examined, RW-1 testified that the Respondent paid the casuals through gang leaders who were not the Respondent's employees. This contradicts the Respondent's pleadings whereby it was pleaded that the gang leader was the Respondent's employee.
15. RW-1 further, testified that he did not have a list of casual labourers (gang members) who were absorbed by the third-party company in July 2014.
16. Having considered the pleadings filed and evidence presented by the parties, issues that present for determination, in my view, are as follows:-
  - a. whether the Claimant was employed by the Respondent.
  - b. whether termination of the Claimant's employment was unfair.
  - c. whether the Claimant is entitled to the reliefs sought.
17. On the first issue, the Claimant pleaded and testified that he was employed by the Respondent in the year 2003 and earned ksh 27,000 per month (ksh 900 per day) from the date of employment until he was terminated on 22/9/2015 without notice and without being accorded audience. That the Claimant was not employed by any other entity, and that the gangs referred to by the Respondent were groupings of workers within the Respondent company overseen/supervised by more senior employees of the Respondent, who included Mohamed Yeye, Makofu and Mwadime (RW-1). That the Claimant worked every day without any off days, and was not given any letter/contract of employment.
18. The Respondent did not deny having known the Claimant since 2003, and did not deny that he worked for it since 2003. All it said was that the Claimant was a member of a gang employed by one Mwadime who was the Respondent's employee. Although the Respondent alluded to having started outsourcing labour from a third party (Insight Management Consultants Limited) in 2014, it did not tell the Court how it off-loaded/did away with the Claimant and others gangs that provided labour to it before 2014. The Respondent did not demonstrate that the Claimant ever joined the third party company, and on what terms, and did not produce a list of employees "gang members" who joined Insight Management Consultants Limited when it was contracted by the Respondent in 2014 to provide labour to the Respondent. Indeed, the Respondent did not tell the Court how the Claimant stopped working for the Respondent.



19. The Respondent did not produce any evidence to firm up its allegation/pleading that the Claimant did not earn ksh 27,000 per month (900 per day), and that he earned varied amounts. The Respondent admitted that it paid the Claimant and other “gang members” through its employees.
20. The Respondent did not tell the Court what happened to its workers (gangs) who had all along worked for it over the years after it contracted a third party company to provide labour in 2014. It did not present any evidence to show that any of them, and in particular the Claimant, ever joined the third party company. The Claimant’s pleading and evidence that his employment was terminated by the Respondent was never rebutted.
21. I find, and hold that the Claimant demonstrated, on a balance of probability, that he was employed by the Respondent; and that the Respondent terminated his employment.
22. On the second issue, termination of the Claimant’s employment was not shown to have accorded with provisions of the *Employment Act*, and in particular Sections 35(1) (c), 41,43 and 45 of the *Employment Act*. The Claimant was not served with any termination notice, he was not given any reasons for his termination and was not given an opportunity to be heard before termination. The Claimant’s evidence that he went to work one day (on 22/9/2015) and was told that there was no work was not rebutted by the Respondent.
23. For fairness to be attained in termination of employment, there must be both substantive and procedural fairness in the termination process. It was held as follows in *Walter Ogal Anuro -vs- Teachers Service Commission* [2013] eKLR

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
24. The Court of Appeal stated as follows in *Kenfright [ea] Ltd -vs- Benson K. Nguti* [2016] eKLR:-

“...it is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that the reason related to the employees’ conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...

apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”
25. As already stated in this judgment, the Claimant’s employment was terminated without any termination notice, without any reason being assigned for his termination and without being given any opportunity to be heard before termination of his employment. It is my finding that termination of the Claimant’s employment was substantively and procedurally unfair.
26. On the third issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of eight months’ salary being compensation for unfair termination of employment. That is ksh 27,000X 8 = 216,000.



- 27. The claim for ksh 27,000 being one month salary in lieu of notice is allowed, and I award the Claimant ksh 27,000 in that regard.
- 28. The claim for unpaid leave during the period of employment was not specifically pleaded and proved and is declined. Likewise, the claim for underpayment was not pleaded and is declined.
- 29. In sum, and having considered written submissions filed by the Respondent (as the Claimant was found not to have filed/upload any written submissions pursuant to the Court's orders in that regard), judgment is hereby entered for the Claimant against the Respondent as follows:-
  - a. compensation for unfair termination  
of employment .....ksh 216,000
  - b. one month salary in lieu of notice .....ksh 27,000
  - Total.....ksh 243,000
- 30. The Claimant is awarded costs of the suit and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> JULY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

N/A for Claimant

Ms. Murimi for Respondent

