



**Oroko v Egis Kenya Limited (Cause 22 of 2018)  
[2023] KEELRC 1766 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1766 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 22 OF 2018  
CN BAARI, J  
JULY 20, 2023**

**BETWEEN**

**JAMES ONSOMBI OROKO ..... CLAIMANT**

**AND**

**EGIS KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before Court is the Claimant's a Memorandum of Claim dated 18<sup>th</sup> January, 2018, and filed on 19<sup>th</sup> January, 2018. The Claimant seeks the following reliefs:
  - i. Salary in lieu of notice.
  - ii. Unpaid leave.
  - iii. Unpaid salary (December, 2017).
  - iv. Unexpired contract period – (Kshs.74,836.00 x 30 months).
2. The Respondent entered appearance on 6<sup>th</sup> February, 2018, and thereafter, filed a memorandum of defence on 1<sup>st</sup> March, 2018, wholly denying the Claimant's claim.
3. Both the Claimant's and the Respondent's cases were heard on 2<sup>nd</sup> May, 2023. The Claimant adopted his witness statement and produced documents filed in support of his case.
4. Mr. James Mageto testified for the Respondent. He equally adopted his witness statement and produced documents filed in support of the Respondent's case.
5. The Claimant filed submissions in the matter. The Respondent did not.



### **The Claimant's Case**

6. The Claimant's case is that he entered into an employment contract with the Respondent on 1<sup>st</sup> July, 2017. It is his further case that by dint of this contract, the Claimant agreed to relinquish his employment with the Ministry of Transport, Infrastructure, Housing & Urban Development and on retirement under the 50-year rule, in consideration that the Respondent company shall retain and appoint him as a Senior Roads Inspector.
7. It is his case that the contract provided inter alia, that it was to commence on 1<sup>st</sup> July, 2017, and terminate on 30<sup>th</sup> June 2020.
8. The Claimant avers that in the course of time, particularly on the 22<sup>nd</sup> December, 2017, the Respondent unlawfully, illegally, maliciously and without any colour of right, terminated his services without giving him any reason nor affording him a hearing as natural justice demands.
9. It is his case that the Respondent acted in breach of the terms and conditions of the contract, and effectively repudiated the contract by conduct, thus entitling him the full benefits of the contract.
10. The Claimant states that he has suffered loss and damage on account of having made the decision to retire early, in consideration that the company shall retain and appoint him as a Senior Roads Inspector 1.
11. It is his further case that he has now been rendered jobless having relinquished his previous employment to take up one with the Respondent.
12. In his testimony before court, the Claimant admitted that he was paid salary for December, 2017, which forms part of his claim in this suit.
13. The Claimant further told the court that he joined the Respondent nine months after resigning from his job at the Ministry of Transport, Infrastructure, Housing & Urban Development.
14. On cross examination, the Claimant admitted that it was his responsibility to notify the Respondent of defects in the project. He further admitted that works that he had supervised was not approved on the basis that some needed to be re-processed, while others needed to be re-worked.
15. The Claimant further told this court that he received a show cause letter and that he responded to it. It is his evidence that the show cause arose from his work.
16. During re-examination, the Claimant told the Court that it was normal for works not to be approved. He further stated that he allocated work to inspectors and who were supposed to report to him.
17. It is the Claimant's prayer that the Court grants him the reliefs listed in his statement of claim.

### **The Respondent's Case.**

18. The Respondent's case is that the Claimant was employed as a Senior Roads Inspector, and mandated to supervise the road works carried out by the Contractors.
19. The Respondent states that amongst the tasks the Claimant was to do include supervision to ensure that each layer of the Earthwork fill on site was the correct thickness in accordance with the correct specifications and to ensure that the material being laid and dumped by the contractor on the site had the right moisture content.
20. It is the Respondent's position that the Claimant was required to complete a request form indicating that the works carried out on any road section under his supervision, were complete and compliant



with the specifications requirements, and the road would then be ready for testing once the Claimant gave the go ahead.

21. The Respondent states that the Special Specification requirements for the Project were made known to the Claimant, and the Claimant was obligated to ensure compliance with all the Special Specifications requirements.
22. It is the Respondent's case that on 22<sup>nd</sup> November, 2017, the Claimant certified various works indicating that the section of the road he was inspecting had been completed and ready for testing.
23. The Respondent further states that when the tests were carried out on the sections of the road approved by the Claimant, it emerged that the layer thickness of the road was significantly out of range and the works were subsequently rejected.
24. The Respondent avers that it was also discovered that the moisture content for the layers he had certified ready for testing varied between 119% - 135%, which was contrary to the normal range which is 75% - 105%.
25. The Respondent states that as an experienced inspector, the Claimant ought to have identified in advance that the layer was almost more than double what is specified, and that the moisture content was too high in the circumstances, the Claimant ought to have advised the Contractor to make the necessary changes before processing and compaction of the road.
26. It is the Respondent's case that again, on 19<sup>th</sup> October, 2017, 16<sup>th</sup> November, 2017 and 3<sup>rd</sup> December, 2017, the Claimant certified different sections of the roads as being ready for testing, but when lab tests were carried out, the moisture content were completely out of range
27. The Respondent further avers that as an experienced inspector, the Claimant ought to have known clearly what was required to ensure compliance of the quality specifications, but failed to enforce compliance with specified standards which was negligent.
28. That the Claimant was given several verbal warnings regarding his failure to diligently supervise the works being carried out.
29. It is the Respondent's case that after the Claimant approved another defective road section on 3<sup>rd</sup> December, 2017, a meeting was held with all the site inspectors to discuss and reiterate to them the quality standards required on the project, and how this standard was to be assessed, and a comprehensive memorandum was issued to guide them in their quality assurance work
30. That the Claimant on 14<sup>th</sup> December, 2017, failed to comply with the matters raised in the memorandum issued to him and the issues discussed during the meeting.
31. That the Claimant was issued with a Notice to Show Cause Letter on 20<sup>th</sup> December, 2017, informing him that he should submit a written response as to why disciplinary action should not be taken against him due to the issues noted on 14<sup>th</sup> December, 2017.
32. That the Claimant responded to the allegations made against him on 21<sup>st</sup> December, 2017, but which response was unsatisfactory, and as a result, the Respondent vide a letter dated 22<sup>nd</sup> December, 2017, terminated the Claimant's services.
33. That in terminating the Claimant's Contract, the Respondent took into consideration the fact that the Claimant, despite being given opportunities to improve his performance, and the necessary training and support, he consistently failed to do so.



34. The Respondent further states that the Claimant's failure to properly carrying out his supervisory role, delayed the Project as the layers/sections which did not meet the specifications had to be redone.
35. That the Respondent's termination of the Claimant's contract was reasonable and justified in the circumstances.
36. The Respondent states that it paid the Claimant all his terminal dues, particularly, one month's pay in lieu of notice.
37. That the Claimant is not entitled to the prayers sought as he was not dismissed unfairly or illegally as alleged in his claim, and as such, the Respondent prays that the suit be dismissed with costs.

### **The Claimant's Submissions**

38. It is submitted for the Claimant that the Respondent failed to prove that the Contractor did not follow procedure and contract specifications as alleged in the Show Cause Letter.
39. It is submitted that it is malicious and a show of ill motive for the Respondent to assume that it was the sole responsibility of the Claimant to supervise the Contractor, and that he is being used as 'scapegoat' by the Respondent to cause him suffer on behalf of the persons who failed in their responsibilities.
40. The Claimant further submitted that he was never served with any warning letter as alleged by the Respondent. It is further submitted that the Respondent did not ensure that the Claimant received reasons for his termination in the presence of a fellow employee or a union representative.
41. It is submitted that the Claimant was terminated barely 2 days after service of Show Cause Letter, hence denying him the opportunity to prepare and make a representation on the allegations levelled against him.
42. It is submitted that the failure to accord the Claimant ample time to look for a representative of his choice was synonymous to denying him a fair hearing.

### **Analysis and Determination**

43. I have considered the pleadings herein, the witnesses' oral testimonies and the submissions by the Claimant. The issues for determination are:
  - i. Whether the Claimant was unfairly terminated.
  - ii. Whether the Claimant is entitled to the remedies sought.

### **Whether the Claimant was unfairly terminated**

44. The Claimant's assertion is that the Respondent unlawfully, illegally and maliciously terminated his services without giving him any reason nor affording him a hearing against the tenets of natural justice.
45. It is his contention that he was not afforded ample time to prepare his representation and the warnings the Respondent purported to have given, were actually not issued at any point in his term of service.
46. A termination is fair where the employer adheres to the termination procedure provided under Section 41 of the *Employment Act*, 2007, and by further meeting the requirements of Sections 43, 45, 46 and 47(5) of the same Act, in respect of the reasons for the termination.
47. A fair hearing or natural justice as its commonly known, is both a Constitutional and statutory obligation demanded of an employer in a termination/dismissal process.



48. Section 41 of the *Employment Act*, which provides as follows: -

“ 41

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

49. It is not in disputed that the Claimant herein was issued with a show cause letter and which show cause, he further admitted having responded to.
50. The Respondent’s witness (RW1) told this Court that the Respondent received the Claimant’s response to the show cause letter and having found it unsatisfactory, it terminated his services.
51. The Respondent’s evidence is that the Claimant was issued a show cause letter on 20<sup>th</sup> December, 2018 and a response received from the Claimant on 21<sup>st</sup> December, 2018. The Claimant was then dismissed on 22<sup>nd</sup> December, 2018.
52. It is clear from this chronology of events that the Claimant’s case was concluded at supersonic speed and which confirms the Claimant’s contention that he was not afforded ample time to prepare his representation.
53. It is further not disputed that the Claimant was not heard by a disciplinary panel on the charges against him, and the Respondent relied solely on the written response to conclude that the Claimant’s defense was not satisfactory, contrary to the express requirement of the *Employment Act* and the *Fair Administrative Actions Act*.
54. In *Angela Wokabi Muoki v. Tribe Hotel Ltd* (2016) eKLR, it was held that the process of hearing and ensuring that an employee is given a fair chance to know the allegations against him, is a mandatory requirement of the law.
55. The Claimant though issued with a show cause letter, nothing shows that the Respondent explained to him the charges levelled against him in the presence of a fellow employee or other representative and nor was he heard in relation to the charges. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
56. I thus find and hold that the Claimant’s termination fell short of the requirements of natural justice rendering the termination unfair, and I so hold.
57. On the question of the validity and fairness of the reasons for the termination, also known as the substantive justification test, the issue is whether the reasons for the termination of the Claimant are valid, fair and justified.
58. The Claimant was employed as a materials technologist, and according to the Respondent, he would easily have been able to identify the defects in the project, but which he did not, and if he did, he did not communicate the defects to the resident Engineer.



59. The Claimant's role was to ensure compliance by the contractor with specified quality standards. He was accused of approving defective road sections on three occasions when the contractor did not meet quality standards in respect of layer thickness of the road which was said to be significantly out of range, and in respect of the moisture content.
60. The Claimant admitted that he had a role to ensure that the contractor was doing the job correctly and report any defects to the resident engineer. He did not notify the resident engineer of the defects which he admitted in his evidence that the defaults were there and he did not report.
61. Sections 43, 45 and 47(5) of the Employment Act, require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified.
62. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee.
63. Courts have settled that the decision to dismiss ought to be hinged on an objective test, such as whether a reasonable employer in similar circumstances, would have dismissed the employee. (See Mwanajuma Juma Kunde v KAPS Municipal Parking Services Limited Cause No. 57 of 2012.)
64. In my view, the reasons for the Claimant's termination are reasonable, considering the recurring defects on the road project which was entrusted on the Claimant, as a specialist in the particular area, but failed to ensure that the quality standards were met.
65. I thus find and hold that the Claimant's termination met the substantive justification test.

#### **Whether the Claimant is entitled to the reliefs sought**

66. The Claimant seeks payment of Salary in lieu of notice, Unpaid leave (full benefit of the contract), Unpaid salary (December, 2017) and Unexpired contract period – (Kshs.74,836.00 x 30 months)
67. The Claimant's response to the show cause notice was received on 21<sup>st</sup> December, 2018, and issued with a termination letter on 22<sup>nd</sup> December, 2018, which is the day following the response.
68. There is no indication that the Claimant was issued with termination notice, and although the termination letter states that the Claimant will be paid one month salary in lieu of notice, no prove was given to show that the payment was made.
69. I find the claim for pay in lieu of notice merited and is awarded as claimed.
70. The Claimant admitted receiving salary for the month of December, 2017. His claim in this respect thus fails and is dismissed.
71. The Respondent did not controvert the claim for unpaid leave. It is the employer's obligation to keep employee records which include leave forms.
72. The Claimant was terminated eleven months into his contract while his contracts provides that he was entitled to 26 leave days after twelve months of consecutive service.
73. The Claimant had thus not earned leave days as at the time of termination. The claim for unpaid leave thus fails on this account.
74. It has largely been held that an employee is not entitled to payment for the unexpired term of the contract premised on Section 49 and 50 of the Employment.



75. The law however allows compensation for the unfair termination and not for the unexpired term of the contract. In the circumstances, I deem an award of three months' salary sufficient compensation for the unfair termination.

76. In whole, Judgment is entered for the Claimant as against the Respondent as follows:

- a. Payment of one (1) month's salary in lieu of notice at Kshs. 100,000/=
- b. Three months' salary for unfair termination at Kshs. 300,000/-
- c. The claim having only partially succeeded, the Claimant gets half the costs of the suit and interest thereon.

77. Judgment of the court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF JULY, 2023.**

**C. N. BAARI**

**JUDGE**

**Appearance:**

Mr. Ogwe present for the Claimant

N/A for the Respondent

Christine Omollo- C/A

