



**China Civil Engineering Construction Corporation (Kenya) Limited v Lewa
(Appeal E021 of 2023) [2023] KEELRC 1926 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1926 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E021 OF 2023**

**M MBARŪ, J
JULY 13, 2023**

BETWEEN

**CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION (KENYA)
LIMITED APPELLANT**

AND

LEWIS HARO LEWA RESPONDENT

*(Being an appeal from the judgment of the Hon. D. O. Mbeja
dated 23 February 2023 in Mombasa CM ELRC E783 of 2021)*

JUDGMENT

1. The background to this appeal is a claim filed by the respondent in Mombasa CM ELRC No.783 of 2021 against the appellant on the grounds that that respondent was the employee of the appellant as a liaison officer under a contract earning a wage of Ksh. 60,000 per month without a house allowance but on 9 April 2021 his employment was terminated without notice or payment of his terminal dues on an alleged redundancy.
2. In response, the appellant's case was that, in order to curb Covid pandemic, in May 2020 they advised the respondent to stay at home and when required would be called back to work. They paid him half salary between May 2020 to 9 April 2021 and paid separately for work done during this period. The notice to pay half salary was issued and there were no objections. Notice of redundancy was then properly issued due to significant reduction of work.
3. In his judgment, the learned magistrate analysed the pleadings and the evidence and applied the law and made a finding that the respondent had been on a one year contract from the year 2015 ending each year in December 2015 up until December 2020 and the claims made beyond the 3 years period envisaged under Section 90 of the *Employment Act*, 2007 (the Act) were time barred but there was



unfair termination of employment and the compensation was assessed at 6 months based on the monthly gross wage of Ksh.60,000 all at Ksh.360,000 with costs.

4. Aggrieved, the appellant filed the appeal on the grounds that the trial court ought to have assessed the compensation awarded based on the reduced salary. The award of compensation was grossly unreasonable and without merit at 6 months and this should be reviewed and reduced.

Cross- appeal

5. The respondent filed a cross-appeal on the grounds that the trial court erred in failing to award the respondent the unpaid salaries for the period of May 2020 to April 2021 and that the house allowances for the period of November 2018 to February 2021 were not due. Compensation due to the respondent was a matter of right and the cross-appeal should be allowed and there be award of half unpaid salaries at Ksh. 350,000 and house allowances of Ksh. 234,000 together with the 6 months awarded in compensation for unfair termination of employment.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that the appellant terminated the respondent's employment due to a redundancy and the appellant issued notice dated 8 March 2021 giving 30 days notice and copied to the labour officer which matter was admitted by the respondent in evidence. there was work reduction leading to reduced structure and due to Covid pandemic, the appellant had advised the respondent to stay at home and would only be called when there was work and he was paid for it. the respondent was invited for a meeting on 9 March 2021 and his final dues tabulated at Ksh. 148,150.50 and he accepted being payment for;
Ksh. 37,381.50 accrued leave days;
Ksh. 110,769 Severance pay for 2 years and 6 months
8. The claim made by the respondent that there was summary dismissal and not redundancy which is not correct. The appellant adhered to the provisions of Section 40 of the *Act* and has paid all terminal dues. The respondent was already working on half salary due to reduced work and this amount should have been applied in tabulating the award for compensation, if at all.
9. In the case of *Rono Cheruiyot & 15 others v S.B.I. International Holding (AG) Ltd* [2019] eKLR the court held that where the employer notified the labour officer about the redundancy, then there was compliance with the law.
10. The appellant submitted that the last salary for the respondent was Ksh.30,000 per month which should have been applied as the terminal due wage as held in *Abednego Ngwabe Were v East African Safaris Express Ltd* [2017] eKLR the employee had accepted the reduced salary for 8 months without any complaint after the employer had negotiated the same. The respondent was thus estopped from claiming any other amount after accepting his reduced wage for several months.
11. The findings on the rate of compensation was too high looked at from other similar cases where an award of two months has been the norm.
12. The cross appeal has no merit and should be dismissed since the court found the claims for house allowances were time barred and there is no basis to claim under a different wage other than Ksh. 30,000 last paid to the respondent.
13. The respondent submitted that the redundancy provisions under the law were not complied with in this case leading to unfair termination of employment. The attendance of the respondent on 9 march



2021 to accept payment of his dues did not discharge the appellant from undertaking a fair process of termination of employment as held in *Aviation and Allied Workers union v Kenya Airways & 3 others* [2012] eKLR. there was no evidence that the office held by the respondent had been abolished so as to terminate his employment as held in *Irene Korbolo v Kenya Aids NGOs Consortium* [2012] eKLR.

14. On the cross-appeal, following Covid, the appellant paid the respondent half salary without his consent and he took it under the belief that he would eventually be compensated. He protested the reduced salary and did are directed by the appellant. Reduction of salary is unlawful under Section 10(5) of the *Act* where the employee has not given a written approval. No record was filed in this regard.
15. The house allowance for the entire period of employment is due. The respondent worked continuously for the appellant and without stoppage of employment, all terminal dues accrued at the end of his employment.

Determination

16. This being a first appeal, the court is required to re-evaluate the pleadings, the evidence findings of the trial court and arrive at own conclusions.
17. From the record, in May 2020 the appellant advised the respondent to remain at home due to Covid pandemic and would be recalled back to work as the liaison officer on a needs basis. The appellant also reduced the salary for the respondent by 50% on the grounds that there was reduced work. This is the same reason that led to termination of employment on the basis that there was reduced work following Covid pandemic.
18. Any change to an employment contract terms and conditions should be lawful. This is a requirement under Section 10(5) of the *Act* read together with Section 13 of the *Act*. An employer who seeks to review the terms and conditions of employment must issue notice to the employee and upon which the employer must give his written consent. In the case of *Godfrey Odipo Tom v Tabasamu Sacco Limited* [2022] eKLR.
19. In the case of *Bakery Confectionery Food Manufacturing and Allied Workers Union (K) v Kenafriic Industries Limited* [2021] eKLR the court in addressing the provisions of Section 10(5) of the *Act* held that;

The law is also clear on the procedure to be followed before a reduction of salary is deemed to be valid. Section 10(5) of the *Employment Act* provides as follows:

Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

20. In Nakuru ELRC Petition No. 29/2016 *Maxwell Miyawa & 7 others v JSC* (2017) eKLR the Court held as follows: -

Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.

21. The appellant has relied on the case of IN *748 Services Limited v Theuri Munyi* [2017] eKLR where the Court of Appeal held that where an employee has accepted a reduced salary for a few months without



- complaint, he is estopped from suing for the balance, but paying fidelity to the law under Sections 10(5) of the Act read together with Section 13 thereof, before an employer can reduce the payable wage agreed upon in a contract of employment, the subject employee must give an approval in writing.
22. In my humble view, the alternative to accepting the reduced salary due to operational requirements is to apply redundancy provisions allowed under Section 40 of the Act, which the appellant well applied on the respondent in April 2021 when work became completely reduced and could no longer sustain the employment of the respondent.
 23. For the appeal, notice of the operational need to terminate employment issued and the respondent had 30 days notice and which was copied to the labour officer. Such then removed the appellant from any unfairness having satisfied the requirements of Section 40 of the Act.
 24. The findings by the learned magistrate that there was unfair termination of employment based on the record and evidence of a redundancy notice and the clearance the respondent went through on 9 March 2021 is not justified. Employment terminated lawfully.
 25. The respondent is entitled to his withheld salaries for the period of May 2020 to April 2021 all at 30,000 each month all at Ksh.330,000.
 26. With regard to house allowances, the respondent was employed under a written contract as the liaison officer. His was not a minimum wage which confer a direct benefit of a house allowance per the Wage Orders and regulations.
 27. Each contract which issued from start of employment started and ended on its term and terms. A claim for house allowances, if at all due, which is not the case here, ought to abide every term in terms of Section 90 of the Act. The findings by the learned magistrate though on different grounds cannot be faulted in this regard.
 28. On the cross-appeal, the issue of due unpaid wages addressed, the claim for house allowance addressed above, the finding that there was no unfair termination of employment, both appeal and cross-appeal are addressed.
 29. On costs, the appeal and cross-appeal have each partially succeeded and each party should meet own costs.
 30. Accordingly, the judgment in Mombasa CM ELRC No.783 of 2021 is hereby reviewed with finding that the respondent is only entitled to unpaid salary for May 2020 to April 2021 all at Ksh. 330,000 and each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

