



Mbugua (Suing through the Next Friend and Representative of James Waweru Mbugua) v Marshalls East Africa Limited (Cause 669 of 2013) [2023] KEELRC 1759 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1759 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 669 OF 2013
MN NDUMA, J
JULY 13, 2023

BETWEEN

DIANA WAITHIRA MBUGUA CLAIMANT
SUING THROUGH THE NEXT FRIEND AND REPRESENTATIVE OF JAMES WAWERU MBUGUA

AND

MARSHALLS EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The deceased claimant James Waweru Mbugua is suing through the next friend and Representative, Diana Waithera Mbugua vide amended Statement of Claim dated February 3, 2022. Initially the claim was filed on 15/5/2013 by the deceased claimant. The claim by Peter Kamau was not prosecuted.
2. CW1 the claimant testified that she is the next of kin of the claimant who was employed by the respondent on 1/6/1983 in the IT department. The claimant was declared redundant by the respondent by a letter dated 27/4/2012. Sometimes in May, 2012, the claimant received computation of terminal dues payable to him in the sum of Kshs 1,031,333.33. The computation was presented before Court in evidence.
3. By the time the claimant filed suit, he had not been paid his terminal dues despite demand and has not been paid to date.
4. Further, the respondent had established a provident fund for its employees from November, 2009 to July, 2011. The respondent deducted a sum of Kshs1,105 being 2.5% of the salary earned by the claimant and was contributing Kshs 4,420 being 10% of the said salary from August, 2011 to April, 2012. On August 30, 2011, the salary of the claimant was increased and the deductions went up to Kshs 1,381 per month and the contribution by the respondent was increased to kshs 5,525 per month.



- At the time of termination, the contributions to the fund had accumulated to Kshs 178,181 but to the claimant's surprise there was no money payable to him in the account of the ICEA fund.
5. CW1 testified that the deceased claimant was declared redundant and his employment was wrongfully and unfairly terminated. He was never given one month notice and the redundancy procedure was not followed.
 6. The claimant was then employed by the respondent on a different fixed term contract. The claimant was never paid house allowance for the 28 years he served. The termination took place on 4/5/2012.
 7. The claimant prays to be awarded:-
 - (a) 3 months salary in lieu of notice Kshs 165,750.
 - (b) Untaken leave up to 30/4/2012 in the sum of Kshs 5,525.
 - (c) Severance pay calculated at 20 days salary for 28 completed years of service in the sum of Kshs 1,473,332.
 - (d) House allowance for 28 years in the sum of Kshs 2,784,050 plus 91,162.5.
 - (e) Certificate of Service.
 - (f) Payment of contribution to the Provident fund with ICEA company in the sum of Kshs 178,181.
 - (g) Compensation for unlawful termination of employment.
 - (h) Costs and interest.
 8. The respondent filed amended response to the statement of claim on 22/3/2022 in which it pleads that the claimant was declared redundant lawfully by a letter dated April 27, 2012. The respondent pleads that the claimant received consolidated pay and was not entitled to payment of house allowance. The respondent admits that it computed terminal benefits for the claimant upon termination in the sum of Kshs 165,750 but same is not payable because the claimant was immediately re-engaged on a fixed contract basis in the month of May, June and July and the claimant was duly paid for these months. The respondent denied all the claims set out in the statement of claim and placed the claimant to strict proof thereof. The respondent admits that it was making contribution to the Pension Fund on behalf of the claimant as set out in the Statement of Claim.
 9. RW1 Samson Nyagoto Maraga testified in defence of the suit and testified that the claimant was employed by the respondent from June, 1983 upto April 30, 2012 and that from 1983 to June 1, 1989 he was a member of the union.
 10. That the claimant was declared redundant due to financial difficulties the respondent was facing and issued the claimant a one month notice on 27/4/2012. That the claimant was then re-engaged on a fixed contract basis from the month of May, June and July, 2012.
 11. That the claimant earned a consolidated monthly salary and so house allowance was not payable. That the claimant was deducted and the employer made contribution to National Social Security Fund (NSSF) and to the Provident Fund and so is not entitled to payment of gratuity.
 12. That the basis of calculating gratuity at 20 days salary for each completed year of service has not been shown and the claim is denied. That the respondent did not refuse to issue the claimant with a certificate of service.



13. That the termination of the claimant on grounds of redundancy was lawful and fair.
14. That the claimant had admitted to some loss of money with others and lawfully agreed to repay the same and same was deducted from his salary.
15. That the suit has no basis and it be dismissed.

Determination

16. In the initial suit filed by the claimant on 13/5/2013, the deceased had only claimed payment of terminal dues duly computed by the respondent on April 30, 2012 upon terminating the employment of the claimant on grounds of redundancy as follows:-
 - i. 3 months' notice (May, June, July, 2012) Kshs 165,750.
 - ii. Leave earned but not taken upto 30/4/2012 - 3 days - Kshs 5,525.
 - iii. 20 days for every completed year of service for 28 years (Redundancy) Rounding of - Kshs 1,031,333.33.

Gross Pay Kshs 1,202,608.00
Less PAYE (354,714.00)
Net payment Kshs 847,894.00
17. RW1 in his testimony did not deny having made this computation and testified that the respondent was not entitled to this payment because upon termination the respondent employed the claimant on a three month fixed contract in the month of May, June and July, 20-12.
18. The Court finds the reasons by RW1 flawed. This cannot constitute justification not to pay terminal benefits to an employee declared redundant in terms of Section 40 of the [Employment Act, 2007](#) which RW1 admits happened to the claimant.
19. Accordingly, the Court awards the claimant terminal benefits duly calculated by the respondent on 30/4/2012 but not paid to the deceased claimant in the sum of Kshs 1,202,608 less Pay As You Earn (PAYE).
20. The Court notes that the deceased claimant did not allege that the termination of his employment was unlawful in the statement of Claim dated 16/4/4013 and filed on 13/5/2013. There cannot be any basis for the next of kin now suing on behalf of the deceased claimant to file an amended Statement of Claim dated February 3, 2022 after the death of the claimant adding new claims, long after the limitation period of three (3) years had passed.
21. CW1, the next of kin did not adduce any evidence to justify the added claims including a prayer to declare the termination of the employment of the deceased claimant was unlawful and unfair and a claim for payment of unpaid house allowance for a period of 28 years.
22. These claims are not only time barred but have no merit for lack of any supporting evidence. After all RW1 testified that the deceased claimant earned a consolidated salary which included house allowance and had not complained about the issue for the 28 years he had served the respondent.
23. Accordingly, judgment is entered in favour of the claimant as against the respondent for a sum of Ksh 1,202,608 being terminal benefits due and owing to the deceased claimant a at 30/4/2012.



24. The claimant also claims a sum of Kshs 233,431 being his dues from the provident Fund created by the respondent for the benefit of the staff. CW1 testified that the funds though were deducted from the salary of the claimant and employer contribution added, the Provident Fund under ICEA did not have the said funds. RW1 did not explain why the Fund did not reflect the benefits due and owing to the deceased claimant as at 30/4/2012.
25. In the absence of that explanation, the Court finds that the respondent held in trust the sum of Kshs 233,431 which ought to have been remitted to the provident fund but there was no evidence that the respondent had done that on behalf of the deceased claimant. Therefore, the Court finds that the respondent owes the claimant Kshs 233,431 as the terminal benefits.
26. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
- (a) Kshs 1,202,608 being terminal benefits due and owing to the claimant.
 - (b) Kshs 233,431 being contribution to the Provident Fund held by the respondent on behalf of the deceased claimant.
Total award: Kshs 1,878,038.
 - (c) Interest at Court rates from 30/4/2012 till payment in full.
 - (d) Costs of the suit.
 - (e) Certificate of Service within 30 days of the judgment.
27. For the avoidance of doubt all other claims set out in the Amended Statement of Claim are dismissed for lack of merit and for having been filed outside the 3 years limitation period.
28. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF JULY, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Mwangi for Claimant

M/s Awinja for Respondent

Ekale – Court Assistant

