



**Waithaka v Sunflag Textiles and Knitwear Mills Limited (Cause
336 of 2018) [2023] KEELRC 1735 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 336 OF 2018
MN NDUMA, J
JULY 13, 2023**

BETWEEN

JULIUS KARECHE WAITHAKA CLAIMANT

AND

SUNFLAG TEXTILES AND KNITWEAR MILLS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 16/3/2018 in which he prays for the following reliefs:-
 - a. Determination that the Respondent's actions infringed on Claimant's constitutional right to fair labour practices.
 - b. Determination that the Claimant was unlawfully, unfairly and wrongfully terminated.
 - c. Determination that the Claimant was racially discriminated in terms of salary payments.
 - d. Declaratory Order that the act of discrimination in the place of work between Asian and African of the same work status is unconstitutional, unlawful and illegal.
 - e. Declaratory Order that the act of the Respondent of underpaying the Claimant's basic pay and allowances was unlawful and illegal.
 - f. Order for payment to the Claimant of the actual pecuniary loss suffered as a result of wrongful termination from date of such termination to date of such determination and as detailed through paragraph 17 to 24.
 - g. Order for payment of interest in (d) above at Court rates to the Claimant by the Respondent.
 - h. Order for payment of legal costs.



- i. Order for the payment of other costs and any other relief this Honourable Court may deem fit to grant.
2. The claimant has pleaded that his employment was unlawfully terminated. He was discriminated against on grounds of race, hence paid less salary than his counterparts and was subjected to unfair labour practices and unfair administrative action. He seeks to be awarded as prayed in the Memorandum of Claim.
3. C.W.1, the claimant testified that he was employed by the respondent on 24/7/2009 in the accounts department. That he worked diligently and rose to the position of Senior Accountant by the time he left the employment of the respondent on 6th September, 2017. That he had served for a period of eight (8) years.
4. That he had a clean record and had no warning letter during that period and his salary was regularly reviewed upwards.
5. That on 6/9/2017, the claimant was informed by the Human Resource Manager that his employment was terminated with effect from the said date.
6. That he was not given notice of termination nor was he given proper reasons for the termination. That he was not given opportunity to be heard also. That the termination was wrongful and unfair. That whilst he worked, he was paid less salary compared to his counterparts of Asian Origin. That the respondent discriminated him on grounds of race despite his seniority and excellent service to the respondent.
7. That the respondent violated Articles 27, 35, 40, 41 and 50 of *the Constitution* and Sections 5, 17, 18, 19, 21, 35, 41, 43, 45, 46, 49 and 50 of the *Employment Act*, 2007. That the respondent also violated the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work and the International Convention on the Elimination of all forms of Racial Discrimination 1965 (ICERD).
8. That the termination amounted to an unlawful summary dismissal and was unlawful and unfair. C.W.1 narrated the particulars of unlawfulness and discrimination in the matter. The termination was simply without notice to show cause, hearing or valid reasons and was executed by the respondent. That he was not availed opportunity to bring a fellow employee to assist him to defend himself before the termination. That the respondent violated all the rules of natural justice and the claimant prays for the reliefs sought. The claimant testified that he earned a gross salary of Kshs.99,736 at the time of termination and compared his salary to that of Abhishek Kangsia who earned Kshs.490,860; Jessica K. Agravat- Kshs.307,377; and Jayesh Dave – Kshs.212,135 who are of Asian origin and held positions relative to that which he held. C.W.1 stated that he severally asked for salary review to reflect uniformity relative to the positions held and match market, experience and qualification. C.W.1 said that the respondent failed to offer any tangible reason why his salary was so low as compared to others.
9. The claimant produced a letter of resignation dated 14/9/2017 written by him to the Group General Manager and copied to the Human Resource department. In the letter, the claimant raised no grievance against the company but thanked the company for the opportunity granted to him over the years and required to be allowed to stay in the company premises for at least three months before he relocated elsewhere.
10. The respondent wrote a letter of the same date to the claimant accepting his resignation.



11. The claimant told the Court that his employment had been terminated by a letter dated 6th September, 2017 but upon discussion with the company, the termination letter was withdrawn upon the claimant being coerced to resign from his position as he did on 14/9/2017.
12. In terms of the letter of acceptance, the claimant was to receive terminal benefits set out therein including arrear salary up to 6th September, 2017; one month salary in lieu of notice; payment in lieu of leave days not taken for the period 2014 to 2018 and Gratuity calculated at 15 days salary for 7 years up to the date of retirement age of 55 years.
13. The claimant was also to receive his pension as per the company pension scheme.
14. The claimant produced copies of payslips for the Asian counterparts he said were paid much higher than himself for similar or equivalent roles.
15. Under cross-examination by M/s Ateko for the respondent, C.W.1 stated that he had a letter of appointment and letters which progressively reviewed his terms and conditions of service including his salary. C.W.1 stated that he held the position of Accounts Assistant but he was given responsibilities of a senior accountant though he was not appointed to the position of a Senior Accountant. C.W.1 Stated that he started with a gross salary of Kshs.30,000 but by the time he left he was earning a gross salary of Kshs.99,000 in a span of seven (7) years. The claimant stated that though he worked overtime, his contract did not allow payment of overtime. C.W.1 stated that as Assistant Account, he was the custodian of the payslips of staff and that is how he was able to see the discrepancies in salary and terms and conditions of service between African employees and those of Asian extraction.
16. C.W.1 stated that is how he knew, the company was discriminating against him and other fellow Africans.
17. C.W.1 admitted that he had no authority to produce the payslips for his colleagues before Court but since they were in his lawful custody he made copies to show the Court how the respondent was discriminating against its employees on grounds of race. C.W.1 stated that he was not coerced to write a letter of resignation but he did so to pre-empt unlawful termination that had already occurred and to allow himself to be paid terminal benefits. C.W.1 stated that he did not agree on a package to be paid to him upon resignation but these were offered to him by the respondent and were paid upon his resignation though not fully. C.W.1 stated he was allowed to stay in the company house for 3 months upon resignation.
18. C.W.1 stated that his resignation did not leave his record untainted as alleged by the respondent. C.W.1 stated that he was still unemployed despite making applications for new employment. C.W.1 said he was a CPA II Professional and was qualified for the job he did. The claimant stated he ought to have been paid Kshs.490,860 per month. That he said Abhishek Kangsia was Financial Controller and earned that salary. C.W.1 stated that Jessica Agravat joined at the same position as himself. That C.W.1 had trained her but she got more salary than him. C.W.1 said Jayesh Dave was a clerk at the Finance Department. That he was in the line of accounts and he earned much more than the claimant. C.W.1 said most of the staff of Asian original were expatriates though some may have been Kenyan citizens. C.W.1 stated that the termination before the resignation was unlawful as it was without any opportunity to be heard.
19. C.W.1 insisted that the payslips show clearly the great disparity in salaries offered to staff of Asian origin as compared to Kenyans. That most staff of African origin were aware of these discrepancies and were disgruntled. C.W.1 said he was asked to leave the company premises before he was paid terminal benefits on 2nd November, 2017.



20. C.W.1 prays to be awarded as prayed.
21. R.W.1, Harrison Kinuthia testified for the respondent. He stated that he was a Director of the respondent and joined the company as a Personnel Officer and rose to become a Director of the company. R.W.1 stated that the claimant started with a gross salary of Kshs.33,000 but was earning Kshs.89,736 by the time of his resignation. R.W.1 stated that the respondent terminated the employment of the claimant by a letter dated 6/9/2017. That on 14/9/2017, the claimant had a meeting with the respondent's Human Resource Manager and R.W.1.
22. That in the meeting, the claimant requested that his termination from employment be converted to resignation from employment. That the respondent agreed and the claimant handed to the respondent a letter of resignation dated 14/9/2017. That the respondent then wrote to the claimant a letter dated 14/9/2017, accepting the claimant's resignation and withdrew the claimant's letter of termination. That the claimant received the letter of termination on 20/9/2017. The letter showed that the claimant was to be paid his terminal dues. That the claimant was not coerced to resign so as to get his terminal benefits. That the letter of termination had also provided for payment of terminal benefits to the claimant. The claimant said he wished to resign so as to pursue other economic interests.
23. That it is lawful for an employee and employer to enter into negotiations just like the claimant and the respondent did. That the claimant received and acknowledged payment of his terminal dues through a discharge voucher dated 2/11/2017.
24. That the respondent did not discriminate against the claimant or any other staff on grounds of race. That the termination of the employment of the claimant earlier was due to fraudulent transactions in the finance docket. That the claimant had been given a hearing before that termination. That in any event that termination of employment was receded and superseded by a letter of resignation.
25. That the claimant was treated well and was not underpaid as alleged or at all. That the respondent is a reputable employer that follows the laws and employment policies of the Country. That wage difference in an organization are for different reasons and do not amount to discrimination. That employees are paid according to the positions they hold and enter into contracts of employment which provide terms and conditions of employment for each employee. That the suit lacks merit and it be dismissed.
26. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by the parties.
27. The issues for determination are as follows:-
 - (a) Was the employment of the claimant terminated or the claimant resigned from his job.?
 - (b) Was the said separation lawful?
 - (c) Is the claimant entitled to the reliefs sought?

Determination

28. The claimant served the respondent for a period of seven years in the position of Assistant Accountant in the accounts department of the respondent. The claimant started with a gross salary of Kshs.33,000 and as at the time of leaving the employment of the respondent, the claimant earned a gross salary of Kshs.99,736. The salary had been reviewed severally vide letters produced before Court.
29. It is common cause that the employment of the claimant was terminated by the respondent by a letter dated 6/9/2017. The reason given in the letter of termination was due to "a spate of fraudulent



financial transactions within the Accounts Department.” In the said letter of termination, the claimant was offered terminal benefits including arrear salary for September, 2017, one month’s salary in lieu of notice; payment in lieu of leave days not taken for the period 2014 to 2018 and payment of pension as per the company’s pension scheme.

30. It is also common cause that the claimant and the respondent had a meeting on 14/9/2017 wherein it was resolved that the respondent to withdraw the letter of termination dated 6/9/2017 and allow the claimant to tender a letter of resignation. Indeed, the claimant tendered a letter of resignation dated 14/9/2017 and the respondent accepted the resignation of the claimant by a letter of acceptance of the same date. The claimant did not make any complaint and or set out any grievance in the said letter of resignation. To the contrary, the claimant thanked the respondent for the opportunity it had offered the claimant for the period of seven years and states that he was leaving the company to go and explore other economic opportunities. In the letter accepting the resignation, the respondent added a further terminal benefit to the claimant which was not in the termination letter of 6/9/2017 being payment of Gratuity calculated at 15 days Salary for the seven (7) years served by the claimant.
31. It is also common cause that the terminal benefits were paid to the claimant on 2/11/2017 and the claimant was allowed to stay in the company premises for a period of 3 months from the date of resignation.
32. It is the Court’s considered finding that the resignation of the claimant from the employment of the respondent was mutually agreed upon by both parties and the claimant received added terminal benefits upon resignation. That the earlier termination of employment by the respondent was receded and does not exist in law or fact. The claimant has failed to prove that he was coerced to tender resignation having not stated so in the letter of resignation. The Court therefore finds that the separation between the claimant and the respondent was lawful and fair and the claim by the claimant in this respect lacks merit and is dismissed. With regard to the claim for discrimination, it is pertinent to state that the claimant served as an assistant accountant but had wrongly pleaded and testified that he was employed as a Senior Accountant. Indeed, under cross-examination the claimant conceded that he was never employed in the position of a Senior Accountant.
33. It is also important to note that the claimant did not offer any documentary evidence to demonstrate that he had at any one time during his tenure of employment complained to the respondent that he was being discriminated upon on account of race. The claimant acknowledged that he had received regular salary reviews from a gross salary of Kshs.33,000 when he joined the company to a gross salary of Kshs.99,736 at the time of separation. The claimant failed to prove on a balance of probability that he held a position equal or equivalent to those held by Mr. Abhishek Kangsia, Jessica K. Agravat and Jayesh Dave employees he claimed were paid higher salaries than him only on account of their Asian Origin.
34. In terms of Section 108 of the *Evidence Act*,

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Whereas Section 109 provides:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



35. Section 5(7) of the [Employment Act](#), which deals with discrimination at the work place provides:

“In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

36. In the present case, the claimant merely alleged that his salary of Kshs.99,736 in the position of Assistant Accountant was much lower than that of Kshs.490,860, earned by Abhishek Kangsia, who held the position of Financial Controller; Kshs.307,377 earned by Jessica K. Agravat who did not hold the position of Assistant Accountant and that of Jayesh Dave who earned Kshs.212,135 but who did not hold the position of Assistant Accountant. The respondent vide R.W.1 was able to demonstrate that the three employees used by the claimant for comparative purposes to demonstrate discrimination held different and not same or equivalent positions to that held by the claimant. The claimant did not produce any documentary evidence to show that indeed he had complained of the alleged discrimination during the more than seven years he had served the respondent.

37. The Court is satisfied that the respondent had discharged its burden of rebuttal in terms of Section 5(7) of the [Employment Act](#) and had demonstrated that the salary differential adduced by the claimant did not arise from any discrimination and that the payments were not founded on racial discrimination but on the particular level and job specifications and contract of the position held by the other employees.

38. Accordingly, the claim of discrimination lacks merit and is dismissed.

39. The Court is fortified in this regard by the decision of the Court of Appeal in the case of [Ol pajata Ranching Limited –vs- David Wanjau Muhoro \[2017\]](#) eKLR where the bench of P.N. Waki; Asike Makhandia and M’Inoti JJA cited with approval a decision of the South African Labour Court in Louw-vs- Golden Arrow Bus Services (Pty) Ltd [1999] ZALC 166 as follows:-

“It is not an unfair Labour practice to pay different wages for equal work or for work of equal value. It is however an unfair Labour practice to pay different wages for equal work or work of equal value if the reason or motive being the cause for so doing is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g. race or ethnic origin.”

40. In the present case, there is no tangible evidence adduced at all that the stated employees did equal work or work of equal value with the claimant nor is there any tangible evidence adduced by the claimant that the salaries paid to the three named employees were based on the fact that they were of Asian Origin only or that the said salaries were not justified by the nature and content of the positions they held.

41. The Court is satisfied that the claimant was paid all terminal benefits upon resignation and the claim for payment of terminal benefits including one month salary in lieu of notice; and payment in lieu of leave days not taken; have not been proven and lack merit.

42. The claimant also did not demonstrate with any tangible evidence that he had at any one time in the seven year period he served the respondent claimed for payment of overtime worked. The contract of employment between the claimant; and the respondent did not provide for any such payment. The claimant did not adduce any time data to demonstrate how many hours he had worked at any one particular day in his seven (7) years tenure of service with the respondent.

43. The claim for payment of overtime has therefore not been proved on a balance of probabilities in terms of Sections 108 and 109 of the [Evidence Act](#), Cap. 80 Laws of Kenya. The same lacks merit and is dismissed.



44. Furthermore, following the finding that the claimant resigned and his employment was not unlawfully terminated by the respondent, the claim for compensation fails.
45. Equally, I have found that the claim of discrimination on account of race has not been proved. The claim for payment of differential salary between the claimant and other named employees lacks merit and is also dismissed.
46. In the final analysis, the suit by the claimant as against the respondent lacks merit and is dismissed in its entirety.
47. The claimant had a mutual separation with the respondent and ought not to have filed this suit without due consideration to the respondent. However, given that the claimant and the respondent had a long mutually beneficial relationship for a period for over seven (7) years, we deem this an appropriate case for each party to bear their own costs of the suit.

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

Mathews N. Nduma

Judge

Appearances

Mr. Onyony for claimant

Mr. Muimi for Respondent

Ekale: Court Assistant

