



Onduto v Health Management & Consulting Group Limited (Cause 1943, 1944, 1945 & 1946 of 2017 (Consolidated)) [2023] KEELRC 1684 (KLR) (12 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1684 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1943, 1944, 1945 & 1946 OF 2017 (CONSOLIDATED)**

**JK GAKERI, J
JULY 12, 2023**

BETWEEN

LAWI OTIENO ONDUTO CLAIMANT

AND

HEALTH MANAGEMENT & CONSULTING GROUP LIMITED RESPONDENT

JUDGMENT

1. The Claimants initiated this claim by Memorandum of Claims filed on 29th September, 2017 alleging wrongful and unfair termination of employment by the Respondent and non-payment of terminal benefits.
2. All the Claimants allege that they were employees of the Respondent employed as follows;
Lawi Otieno 16th February 2016, Pauline Ng'endo 28th August 2007, Jomo Atika 2nd July, 2016 and Ambooka Ambundo 1st January, 2013, a fact the Respondent admits at Kshs.25,000/=, Kshs.25,000/=, Kshs.25,000/= and Kshs.15,000/= per month respectively.
3. They aver that they served diligently until 28th March, 2017 when their employment was terminated by the Respondent without reason or notice.
 1. Lawi Otieno prays for Kshs.405,000.00 as one month's notice, service pay, leave pay, salary arrears for February & March 2017 and compensation.
 2. Pauline Ng'endo prays for Kshs.693,600.00 being one month's salary in lieu of notice, unremitted NSSF deductions as follows;
January to March 2008 Kshs.1,200/=
December 2009 Kshs.400/=
November 2011 Kshs.400/=



April, June – December 2013 Kshs.2,800/=

January, March, July–December 2016 Kshs.3200/=

Total Kshs.11,600/=

Leave pay Kshs.157,500/=

Salary arrears April, May, July-September 2015 Kshs.125,000/=

January – March 2017 Kshs.75,000/=

Compensation Kshs.300,000/=

3. Wilfred Jomo Atika prays for Kshs.430,000/= being one month's notice, service pay, leave pay, salary arrears January – March 2017 and compensation.
4. Albert Ambooka Ambundo prays for Kshs.368,000/= as follows;
One month's salary
Unremitted NSSF deductions 2014, 2015 and 2016 Kshs.11,200/=
Leave pay Kshs.42,000/=
Salary arrears April, May July, August, September 2015 Kshs.75,000/=
January – March 2017 Kshs.45,000/= and
Compensation at Kshs.180,000/=.

The Claimants also pray for certificate of service, costs of the suit and interest on the sums awarded.

Respondent's case

4. In its Memorandum of Response filed on 30th October, 2018, the Respondent admits that the Claimants were indeed its employees engaged on diverse dates from August 2007 to July 2016.
5. The Respondent avers that it was a tenant of Magana Holdings Ltd under a lease agreement under which the landlord enhanced the rent payable from Kshs.698,872/= to Kshs.1,024,512/= per year in April 2015 and the Respondent complied until 28th March, 2017 when the Landlord without notice sent Garam Auctioneers who attached the Respondent's property including medical equipment and locked the premises and patients on admission were forced out of the premises, their conditions notwithstanding.
6. That the Respondent lost all its computers and records including payroll, goodwill and reputation and closed shop.
7. It is the Respondent's case that it did not terminate the Claimants' employment and some of them witnessed the events of the day and that there is an on-going suit CMC MISC APP No. 299 of 2017 on the forceful eviction, but now operates from KEMU Hub.
8. The Respondent denies owing the Claimants unpaid salaries or dues. It avers that it remitted all NSSF and NHIF dues for all Claimants.
9. That should the situation improve, it will re-engage the Claimants.
10. The Respondent prays for dismissal of the suit.



Claimant's evidence

11. The 4 Claimants' undated written statements are identical in all respects and generally pray for similar reliefs.
12. None of the Claimants provided evidence of salary arrears or unpaid salary.
13. The statements lack essential factual detail.
14. On cross-examination, Lawi Otieno Onduto confirmed that on 28th March, 2017, auctioneers descended upon the Respondent and carried away everything and locked the premises and attempts to reach the Respondent failed and it did not contact him on the way forward until they opened a new branch and promised to pay salary arrears.
15. The witness confirmed that he was an employee for a period of one (1) year and 6 months, that NSSF dues were paid and he proceeded on leave and was owed 2 months salary at Kshs.25,000/= per month.
16. That the employer was a medical doctor.
17. The witness denied the authenticity of the letter availed by the Respondent allegedly from the NSSF dated 2016 confirming that dues had been paid.
18. On re-examination, the witness testified that the Respondent was not remitting statutory dues.
19. Pauline Ng'endo confirmed that the employer's goods were taken away by an auctioneer though she was not there on the material day and found the place closed at 4.00 pm.
20. The witness confirmed that she attended College for 3 years and only worked on night shift. That her NSSF dues had been paid by the employer but some months in 2015 and 2016 had not been paid.
21. It was her testimony that the employer did not call her but when she called she was promised payment but was not paid.
22. Mr. Albert Ambooka Ambundo confirmed that he was in the night shift and found the place closed on the material day and was appraised by the security guard. That he visited the Respondent's new place of business in 2017 and was promised payment but was not paid. He testified that his NSSF statement was dated 2017.
23. Finally, Mr. Wilfred Jomo Atika testified that he was employed on 6th February, 2016 as the pharmacist on night shift and found the premises closed on 28th March, 2017 and Mr. Karakacha informed him about the challenge the Respondent was facing and promised to update him but did not. That he had not been paid for 2 months.
24. The witness testified that his NSSF statement dated 8th February 2016 showed that NSSF deductions had not been paid but had not perused the Respondent's letter from the NSSF.
25. On re-examination, the witness testified that the Respondent ought to have called its employees but did not.

Respondent's evidence

26. RWT's Mr. Livingstone Karakacha's written statement and filed on 30th October, 2018 is neither authenticated nor dated. However, on cross-examination, the witness confirmed that the Claimants were employees of the Respondent earning a salary of Kshs.25,000/= per month except Mr. Ambooka whose salary was Kshs.15,000/= per month.



27. That the Respondent's property was confiscated by an auctioneer in March 2017 and it had to search for another premises as it has running contracts with service providers.
28. That it received a letter from Kituo Cha Sheria on the Claimants' complaint but did not file it.
29. That the new premises were opened in September/October 2017 and had approached Kituo Cha Sheria on the issue.
30. RWI was categorical that the Claimants were not declared redundant or dismissed and the Respondent was in the process of communicating with them on their employment. The witness testified that the Claimants were paid their salaries for February and March 2017 but had no evidence of payment.
31. That the Respondent's clinic was still in operation.
32. On re-examination, the witness testified that the auctioneer took away all computers and documents and he had none to file in court as the auction was unexpected as evidenced by the Affidavit in CMC. MISC NO. 299 of 2017 dated 28th July, 2017.
33. That the goods were never recovered.
34. The witness testified that after the clinic was re-opened in October 2017, the Respondent reached out to the Claimants for re-engagement and the NSSF confirmed that all deductions had been paid.
35. The witness was unsure of the salary arrears and the Respondent was ready to settle the matter out of court and had made an offer.

Claimants' submissions

36. Counsel isolated two issues for determination, namely; whether termination of employment was unfair and entitlement to the reliefs sought.
37. On termination of employment, counsel urged that for a termination of employment to pass the fairness test in law, it must be substantively and procedurally fair as ordained by the provisions of the [Employment Act, 2007](#).
38. That although the Respondent's business premises was closed by auctioneers, they looked for premises after 2 months but did not call the Claimants or update them on their employment status even after the clinic was re-opened although they had served the Respondent diligently and with loyalty.
39. Counsel relied on the provisions of Section 43(1) and 41 of the [Employment Act, 2007](#) to urge that the Respondent had failed to prove that it had a valid reason for termination of the Claimants' employment or adopted a fair procedure.
40. Reliance was also made on the decision in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR as were the decisions in Jared Aimba V Fina Bank Ltd (2016) eKLR and Shankar Saklani V DHL Global Forwarding (K) Ltd (2012) eKLR on notice and hearing under Section 41 of the [Employment Act, 2007](#).
41. Counsel submitted that the Claimants were not notified of their dismissal from employment or accorded an opportunity to defend themselves and thus the termination of employment was unfair.
42. On the reliefs sought, counsel relied on the provisions of Section 18(2)(4) and (5) to urge that the Claimants were entitled to the relief sought at Kshs.405,000, Kshs.693,000/=, Kshs.430,000/= and Kshs.368,000/= respectively.



Respondent's submissions

43. Counsel addressed issues on whether the Claimants' employment was terminated, re-opening and resumption of the Respondent's business and the current status.
44. On termination, counsel submitted that the RWI testified that the Claimants' employment was not terminated as the events of 28th March, 2017 left everyone stranded. Counsel urged that since the place of business was closed by an Auctioneer, a fact the Claimants were aware of and it was not the Respondent's intention to separate from the Claimants.
45. On re-opening and resumption of operations, counsel submitted that since the Respondent had running contracts with 3rd parties, it was essential that it resumed operations and had obligations to its employees and RWI was requested to scout for premises and the Respondent had to start the business from scratch.
46. Counsel submitted while some former employees resumed duty, others expressed unwillingness to do so. Counsel did not provide evidence to substantiate this submission.
47. Strangely, counsel submitted that since the Respondent lost its documents, it was not possible to recall all its employees.
48. On the current status, counsel urged that six (6) years after the fateful day, the Respondent was still unable to recall all past employees. That an offer by the Respondent to settle the suit out of court was declined. No evidence was adduced to buttress this submission.
49. Finally, counsel submitted that the Respondent did not dismiss the Claimants, it made efforts to reach out to them, they did not respond and it was not possible to reach all of them and attempts to make amends were rejected.

Findings and determination

50. It is common ground that the Claimants were employees of the Respondent serving in various capacities until 28th March, 2017 when Garam Auctioneers took away all the Respondent's property and closed the premises.
51. It is unclear to the court why the eviction took place. However, the Respondent admits that it was a tenant of Magana Holdings Ltd.
52. It is also not in dispute that the Respondent re-opened the business sometime in September/October 2017. While all the Claimants testified that they made attempts to contact the Respondent on the way forward, RWI tendered no evidence that he or anyone else made attempts to contact the Claimants or update them on the Respondent's status. They learnt of the resumption of operation through their ingenuity or enquiries.
53. Relatedly, although RWI acknowledged that the Respondent had running contracts with 3rd parties and time was of the essence. Puzzlingly, he did not expressly acknowledge that employees were part of the matrix.
54. If the evidence of RWI is to be believed that the Respondent reached out to the Claimants and its calls were not responded to, how did the Claimants ascertain that the Respondent had re-opened its business and how come all the Claimants could not be reached. To push this argument to its logical conclusion, it is noteworthy that the Respondent tendered no evidence as to who was reached or who



- resumed duty and when or even when its calls were not responded to by the Claimants or who made the calls.
55. The absence of evidence to demonstrate the steps taken by the Respondent to update the Claimants on its status and status of their employment bespeak of an employer who failed to appreciate that it had binding obligations to the Claimants as its employees as the contracts of employment could not be wished away. It behoved the Respondent to contact the Claimants and explain to them the efforts it was expending to resume operations or pay their dues if re-engagement was not possible. An amicable separation would have been the best option.
 56. With no place of work or update about their employment by the Respondent, particularly after the re-opening of business, the Claimants were entitled to assume that the Respondent had unilaterally decided that it was no longer bound by the terms of the contract it had entered into with the Claimants.
 57. In the court's view, they were entitled to surmise that their employment had come to an end at the instance of the employer, a species of constructive or indirect redundancy.
 58. Puzzlingly, the Respondent's witness testified that the Claimants were not declared redundant nor terminated from employment. The salient issue which the Respondent did not address is why the Claimants remained jobless from September 2017 to the present yet it has been in operation.
 59. The Respondent appears to be suggesting that the Claimants' employment came to an end on 28th March, 2017 on account of closure of its business and it is not to blame for the separation.
 60. Similarly, the retort that the Claimants rejected its offer to settle the matter out of court is not supported by any letter or proposal.
 61. Section 2 of the *Employment Act*, 2007 defines redundancy as;

“ The loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practices common known as abolition of office, job or occupation and loss of employment.”
 62. Analogous to other forms of termination of employment, for a redundancy to pass muster, it must be substantively justifiable and procedurally fair as mandated by the provisions of Section 45(2) of the *Employment Act*, 2007.
 63. In determining whether a redundancy is fair, the court is guided by the provisions of Section 40(1) of the *Employment Act*, 2007 which prescribes seven (7) mandatory conditions to be complied with by the employer, including notice to the trade union, or the employee(s) to be declared redundancy, if not member of the union. The notice must be copied to the Local Labour Officer and must be sent to the respective persons at least one month before the effective date of redundancy.
 64. Since Section 40(1) of the *Employment Act*, 2007 is couched in mandatory terms and fulfilment of the 7 requirements is an imperative.
 65. In this case, it is evident that none of the conditions was complied with and the termination of employment was thus unfair.
 66. It is unclear to the court for how long the Respondent expected the Claimants to await its action as exemplified by its non-responsiveness.



67. RWI admitted that the Respondent received the Claimants letter from Kituo Cha Sheria dated 13th June, 2016 but did not respond.
68. Whereas the incident on 28th March, 2017 at the Respondent's premises was regrettable, the Respondent's handling of the Claimants was lukewarm.
69. The absence of a status update or any direction on what the Respondent intended to do with the Claimants' employment was a kin to abandonment by the employer.
70. The foregoing comports with the provisions of Section 47(5) of the Employment Act, 2007 which provides that;

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.
71. The Respondent tendered no evidence to justify termination of the Claimant's employment.
72. The court is in agreement with the Claimants counsel's submissions that the Respondent failed to prove that termination of the Claimants employment was substantively justifiable and procedurally fair.
73. For the foregoing reasons, it is the finding of the court that termination of the Claimants employment was unfair.
74. On entitlement to the reliefs sought, the court proceeds as follows;

One (1) month's salary in lieu of notice

75. From the evidence on record, it is clear that the Respondent did not accord the Claimants the requisite notice or any at all. The Claimants are awarded one month's salary in lieu of notice.

Service pay

76. Evidence reveals that all the Claimants were members of the NSSF as follows; Lawi Otieno Onduto, Member No. 616487924, Pauline Ng'endo Kihui, Member No. 962750816, Wilfred Juma Atika, Member No. 036470929, Albert Ambooka, Member No. 2001209829.
77. In addition, other than Mr. Wilfred Jomo Atika whose statement revealed that no NSSF deductions had been paid, the other Claimants deductions had been remitted irregularly in certain cases.
78. Section 35(6)(d) of the Employment Act, 2007 excludes employees who are members of the NSSF from service pay.
79. The Respondent's letter dated 16th February, 2018 which is an inspection report by the National Social Security Fund (NSSF) lacks authentication and is unreliable as evidence that the Respondent had paid all its NSSF dues as at 16th February, 2018.
80. More significantly, the National Social Security Fund Board is mandated by the National Social Security Fund Act (NSSF Act) to ensure that employers deduct and remit NSSF contributions and has an enforcement mechanism.
81. As a consequence, the claim for service pay for Lawi Otieno Onduto, Pauline Ng'endo Kihui, Wilfred Jomo Atika and Albert Ambooka is unsustainable and is declined.



82. The foregoing applies to any claim for unremitted NSSF deductions.

Leave pay

83. Neither the written statements of the Claimants nor the oral testimony adduced in court provided the relevant particulars as the outstanding leave days.

In the absence of particulars, the prayer for leave pay is unproved and is declined.

Salary arrears for February and March 2017

84. Although RWI testified that the Respondent paid the Claimants their salaries for February and March, 2017, he had no evidence to prove the fact of payment.

85. Relatedly, none of the Claimants indicated in their witness statement or by oral testimony that they had any other outstanding salary or indeed that the Respondent had financial challenges and their salaries for months other than February and March had not been paid.

The Claimants are awarded salary arrears for February and March 2017 only.

Compensation for unfair termination

86. Having found that termination of the Claimants employment was unfair for want of justification and procedural fairness, the Claimants are entitled to the relief provided by the provisions of Section 49(1) (c) of the *Employment Act*, 2007.

87. The court has taken into account the fact that; The Claimants were employees of the Respondent for various periods as follows;

Lawi Otieno Onduto 1 year, 1 month

Pauline Ng'endo Kihui 10 years, 5 months

Wilfred Jomo Atika 8 months

Albert Ambooka 4 years, 2 months

The Claimants did not exhibit their wish to continue in the Respondent's employment as none wrote to the Respondent. The Claimants were free from blame and expected to remain in employment as evidenced by Pauline Ng'endo's evidence that she was in school for 3 years while serving the Respondent. The circumstances in which the separation took place though unfortunate could have been ameliorated had the Respondent been more engaging and forthright on the plight of the Claimants.

88. In the circumstances, the court is satisfied the Claimants be paid equivalent of their gross salary as follows;

Lawi Otieno Onduto 1 month

Pauline Ng'endo Kihui 3 months

Wilfred Jomo Atika 1 month

Albert Ambooka 2 months.

Certificate of service

89. All Claimants are entitled to certificate of service by dint of Section 51 of the *Employment Act*.



90. In the upshot, judgement is entered for the Claimants against the Respondent as follows;
- a. Equivalent of one month's salary in lieu of notice.
 - b. Compensation;
 - (i) Lawi Otieno Onduto 1 month's salary
 - (ii) Pauline Ng'endo Kihui 3 months' salary
 - (iii) Wilfred Jomo Atika 1 month's salary
 - (iv) Albert Ambooka 2 months' salary
 - c. Salary arrears for February and March 2017
 - d. Certificate of service.
 - e. Costs of this suit.
 - f. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

