



REPUBLIC OF KENYA



Maina v Thermopark Limited (Employment and Labour Relations Cause 493 of 2018) [2023] KEELRC 2014 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2014 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 493 OF 2018**

**B ONGAYA, J
AUGUST 4, 2023**

BETWEEN

KEVIN KARANJA MAINA CLAIMANT

AND

THERMOPARK LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on April 10, 2018 through Charles Gomba & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the redundancy of the claimant was unfair to the extent that the respondent did not comply with some of the mandatory conditions in section 40 of the [Employment Act, 2007](#).
 - b. The sum of Kshs 458,178.00 particularized in paragraph 15 of the statement of claim.
 - c. Certificate of service.
 - d. Costs of the suit.
 - e. Interest on the amount awarded at court rates.
2. In paragraph 15 of the statement of claim the claimant claimed as follows:
 - a. One-month salary in lieu of termination notice Kshs 21, 459.00.
 - b. House allowance May 2013 to December 2013 Kshs 17, 280.00; January 2014 to December 2014 Kshs 25, 920.00; January 2015 to December 2015 Kshs 25, 920; January 2016 to December 2016 Kshs 25, 920.00; January 2017 to December 2017 Kshs 30, 789.00.



- c. Annual leave at 480 daily wage x 21 days for each year 2013 Kshs 10, 080.00; 2014 Kshs 10, 080.00; 2015 Kshs 10, 080; 2015 Kshs 10, 080.00; 2016 Kshs 10, 080.00; 2017 Kshs 13, 062.00; and 2017 Kshs 622 x21 Kshs 13, 062.00.
 - d. 12 months' compensation 12 x Kshs 21, 459.00 = Kshs 257, 508.00.
 - e. Certificate of service.
 - f. Sum claimed Kshs 458, 178.00.
3. The memorandum of response was filed on November 29, 2018 through Macharia-Mwangi & Njeru Advocates. The respondent prayed that the claimant's claims contained in the memorandum and the dispute therein be refused with costs to the respondent.
 4. The claimant's case was that he was employed by the respondent as a general labourer at a daily wage of Kshs 480.00 and that his employment had been reduced into a contract of employment, which the respondent retained.
 5. He stated that his salary was paid weekly and was exclusive of house allowance.
 6. The claimant maintains that he executed his duties diligently and as a result the respondent renewed his contract, and his wages increased gradually up until June, 2017 when it was increased to Kshs 622.00 which translates to a monthly salary of Kshs 18,660 exclusive of house allowance.
 7. On or about November 15, 2017 at around 7.30 am, whilst at work, he realised that his phone did not have charge, he decided to take it to the kitchen to charge, as well as to collect some harpic. As he was plugging his phone to charge the production manager Mr William walked in, and was infuriated to find him in the kitchen, and, asked him what he was doing there. The claimant states that he tried to explain to him that he had gone to collect harpic, but the manager declined to listen. In turn Mr William ordered him to go to the reception.
 8. The claimant states that he went to the reception and waited for around 20 minutes after which the human resource manager came. The human resource manager then told him to wait. The human resource manager thereafter held a long discussion with the production manager after which he came and told the claimant to go home and come back the next day to see him.
 9. On November 16, 2017 at 7.00 am the claimant arrived at work and proceeded to change into his overall. As he was walking, he met the human resource manager who told him to go upstairs and remove the overall and thereafter go to his office. At the human resource manager's office, he was told to have a seat after which he was handed a termination letter, and was ordered to sign several forms.
 10. The claimant read the termination letter and states that he informed the human resource manager that his actions were not fair. In reply the human resource manager told him that a decision had already been made and that he should go home.
 11. The claimant states that he was paid Kshs 43,580. It is his case that the respondent never complied with the labour laws that relate to redundancy, and, that the respondent had no valid reason for terminating his employment.
 12. On the part of the respondents it is argued that the claimant did not execute his duties with diligence. However, it was admitted that the claimant was an employee of the respondent, engaged as a general labourer at daily wage of Kshs 622.00 when the claimant would be at the respondent's work station.



13. The respondent denied that the circumstances of severing employment ties with the claimant were motivated by the claimant's encounter with Mr William in the kitchen. Instead, the reason why the claimant was relieved of his duties was contained in the letter dated November 16, 2017, which stated in part:

' Due to lack of work, the company has relieved you from your duties with effect from November 16, 2017. Kindly come for your dues on Friday November 17, 2017.'

14. The parties filed their respective submissions. The court has considered the parties' respective evidence, pleadings, submissions and makes finding as follows.

15. To answer the 1st issue for determination the Court returns that the parties were in a contract of service. The claimant's daily wage was Kshs 622.00 as at termination. The claimant worked for the respondent from 06.05.2013 until termination by the letter dated November 16, 2017 upon the reason stated as due to lack of work and effective November 16, 2017. The termination letter instructed the claimant to collect his final dues on November 17, 2017 at 10.00am.

16. The 2nd issue is whether the termination was unfair. The reason for termination was that there was no work for the claimant to continue in employment. The respondent witness (RW) testified that it was not only the claimant who was terminated. The Court returns that the respondent has failed to demonstrate that it was undergoing difficult economic times and that the office held by the claimant had been abolished at the Ministry of Labour notified per provisions of sections 76, 77 and 78 of the *Employment Act*, 2007. The reason for termination is found not to have been genuine and fair as envisaged in sections 43 and 45 of the *Employment Act*, 2007. The Court further finds that the procedure adopted by the respondent to terminate the employment on account of redundancy was unfair. Provisions of section 40 of the Act on 30 days' notice to the claimant and the area labour officer on the scope and extent of the redundancy, the selection criteria, and generally preparation of the claimant as well as consultations were not carried out at all. The Court returns that the termination was unfair both in procedure and merits. The has considered the factors in section 40 of the Act. The claimant desired to continue in employment. He was abruptly terminated despite his long unbroken service. The respondent nevertheless paid the redundancy dues. To balance justice for the parties, the claimant is awarded 6 months' salaries at the last gross pay being Kshs 7, 464.00 (pay for 15 days per last pay slip) x 2 x 6 = Kshs 89, 568.00 for unfair termination. 2 weeks' notice payment was given at Kshs 7, 464.00 being half month of the 30 days' notice due and a further one month pay per section 40 of the Act upon redundancy and the Court awards Kshs 14, 928.00 as due one month notice pay as prayed for. The Court finds that the claimant is as well entitled to a certificate of service and costs of the suit.

17. To answer the 3rd issue, the Court returns that house allowance and annual leave claimed but there appears no grievance in that regard throughout the claimant's employment. There is no reason to doubt RW's testimony that the pay included house allowance and leave due was paid as it fell due. It must be that the wage agreed included provision for housing because the claimant has pleaded about agreed wage and the claimant also testified that he initially signed a contract but which was not exhibited. The Court returns that on a balance of probability and on material before the Court, the provision for housing was included in the negotiated wage as envisaged in section 31(2) of the Act on consolidated salary as submitted for the respondent. The claimant appears not to dispute that overtime was paid as it accrued and the Court returns that on a balance of probability, annual leave due was as well paid as it accrued in absence of a demonstrated grievance in that regard and prior to the separation.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a. The declaration the termination of the contract by way of redundancy was unfair.



- b. The respondent to pay the claimant Kshs 104,496.00 by October 1, 2023 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- c. The respondent to deliver the claimant's certificate of service within 30 days from the date of this judgment.
- d. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 04TH AUGUST, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

