



Ndungu v International Center for Policy and Conflict (Cause 580 of 2018) [2023] KEELRC 2015 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2015 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 580 OF 2018
B ONGAYA, J
AUGUST 4, 2023

BETWEEN

JACKLINE WANGU NDUNGU CLAIMANT

AND

INTERNATIONAL CENTER FOR POLICY AND CONFLICT ... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on April 20, 2018 through Charles Gomba & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the termination of the claimant by the respondent was wrongful, unfair and unlawful ab initio and in violation of the claimant's fundamental right under article 41(1) of the *Constitution of Kenya*.
 - b. A declaration that the respondent's adamant refusal to pay up the claimant's dues as per their contract amount to unfair labour practices.
 - c. An order that the respondent do pay the claimant compensation in the total sum of Kshs. 6,592,020 itemized as follows:
 - i. A 12 months' salary for unfair and unlawful termination amounting to Kshs 3,600,000.
 - ii. Kshs 2,692,020 being unpaid or withheld salary for twelve months.
 - iii. Kshs 300,000 being the equivalent of the claimant's one month pay in lieu of termination notice.
 - d. An order that the respondent do issue the claimant with a certificate of service.
 - e. An order that the respondent do pay the costs of this cause.



- f. The respondent does pay the claimant interest on (3) and (6) above.
2. The memorandum of defence was filed on March 28, 2019 through Suyianka Lempaa & Company Advocates. The respondent prayed that the court finds that the claimant's fixed contract was not terminated as alleged or at all, and dismiss the claim with costs to the respondent.
 3. The claimant's case was that she was employed by the respondent sometimes in 2011 as a Programme Officer-Communication and Public Affairs and served in the same capacity for six years.
 4. That her contract was renewed, through contract of employment dated and executed on January 4, 2017. As per the renewed contract, the claimant was to work in the same capacity as the Programme Officer-Communication and Public Affairs for a period of one year, with a monthly gross salary of Kshs 300,000/=.
 5. The claimant states that she was paid a gross salary of Kshs 75,665 as the gross monthly salary instead of Kshs 300,000, and no explanation was given to her. On seeking clarification from the respondent, the claimant states that discussions on the matter were postponed with false promises of ensuring the resolution of the same.
 6. On December 8, 2017 the claimant received a letter from the executive director, terminating her employment, citing gross underperformance, as the reason for terminating the employment.
 7. The claimant states that she was never notified of any underperformance, gross misconduct or any wrongdoing relating to her responsibility as the Programme Officer-Communication and Public Affairs of the respondent.
 8. The claimant alleges that the letter came when she started demanding for part of her monthly salary, that the respondent was withholding without justifiable reasons.
 9. On December 8, 2017 the claimant wrote to the Executive Director of the respondent and sought clarification on the termination letter. However, she states that she never received a response or clarification to the same.
 10. The claimant states that she served the respondent with diligence, loyalty and without any disciplinary incident throughout her employment, and without full pay until when she received the termination letter. She states that she has taken up debts with third parties with a view to settle her needs, and, her personal status and reputation is continually being injured, due to her inability to pay her debts.
 11. It is the claimant's case that she was not given a chance to defend herself as regards the allegations stated in the termination letter, nor was she issued with any notice to show cause as regards the purported underperformance.
 12. On the part of the respondents it is argued that all employees of the respondent served under one-year contracts, and, would be paid their salaries in full subject to availability of donor funding. In the event of a shortage, the employees would take a fraction of what was available.
 13. It was stated that the claimant's salary was contributed to by two donors, Uraiah and Diakonia, which combined could not cover her full salary and as a result she was paid Kshs 75,000/-, which was the second highest salary after the director's salary, who earned Kshs 94,000/=.
 14. That the partial payment of salary was understood within the organization.
 15. It was stated that the claimant's contract was for the period January, 2017 to December of the same year, and that her contract was not renewed once it expired. That the Executive director informed her



of the non-renewal, who allowed her to stay on the payroll until February, to give her the benefit of her leave days and also as a measure of good faith to cushion her against financial hardships as she sought other openings.

16. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
17. To answer the 1st issue for determination the Court returns that parties were in a contract of service and per the signed contracts of service on record. The claimant was in the respondent's employment from 2011 till termination in 2017. The last of the one-year fixed term contract was signed between the parties on January 4, 2017 and the agreed monthly gross salary was Kshs.300,000.00. The duration was from January 1, 2017 to December 31, 2017.
18. The 2nd issue for determination is whether the termination was unfair. There is no dispute that the contract of service was terminated by the letter dated December 8, 2017. The reasons given were two, namely: considering the funding status of the respondent and gross underperformance of the claimant. The claimant was to proceed to terminal leave from December 15, 2017 and would be on paid leave until February 15, 2018 if the existing funding allowed. The claimant admitted that the contract was terminated on December 8, 2017 being three weeks to the lapsing date on December 31, 2017 (the contract providing for three weeks' termination notice) but lamented that the termination letter invoked gross underperformance which was not established in a due process. The Court finds that indeed, under section 41 of the *Employment Act*, 2007, the claimant was entitled to a notice and a hearing about the alleged gross underperformance. The Court finds that indeed, the respondent has failed to establish the gross underperformance per sections 43 and 45 of the Act as a valid and fair reason for termination and the procedure adopted by the respondent to terminate the contract of service was unfair. It was an unfair termination both in procedure and substance.
 - a. The 3rd issue for determination is on the remedies. The Court returns as follows. The claimant prays for a 12 months' salary for unfair and unlawful termination amounting to Kshs 3,600,000. The claimant testified and is submitted for the respondent that the agreement between the parties was that the maximum gross salary was Kshs.300,000.00 per month. Further, in any case the organization had insufficient funds the officer was to be paid a percentage of the gross salary according to the funds available. The claimant testified that she never complained about the payment of Kshs.75,665.00 per month. The Court returns that the claimant by her own evidence has confirmed that she knew that to be the due monthly salary owing to the respondent's donor funding at the material time. In the claimant's letter to the respondent's Executive Director dated December 8, 2017 the claimant stated in part thus, "Do not forget that I, alongside my colleagues, have genuinely, willingly and under no duress given up our salaries once or twice, to offset office rent and pay off debts incurred by previous finance office holder and those incurred by your office. This I have done without asking questions because I know what this organisation can achieve and help its staff and partners, achieve too. I believe the rest of the staff share my sentiments.... If I may conclude, I wish to state that I'm very much aware of existing funding status and donors and thus, the issue of ".... if existing funding allows" should not arise." By that exposition, it is the finding by the Court that the claimant willingly accepted Kshs.75,665.00 per month as due pay in view of the prevailing donor funding. The claim for Kshs 2,692,020 being unpaid or withheld salary for twelve months will therefore be declined. The Court has considered the sacrifices the claimant made to serve with dedication and willingly accepting pay cuts for survival of the respondent. The Court has also considered the pay to the claimant up to February 2018. In those considerations per factors in section 49 of the Act including the aggravating factor of the unfair termination, the claimant is awarded 10 months' gross salaries making Kshs.756,650.00 for the unfair termination. The Court has considered that the contract was lapsing on December 31, 2017 and the



respondent paid up to February 2018 and the prayer for pay in lieu of termination notice is found unjustified. The claimant is entitled to a certificate of service per section 51 of the Act plus costs of the suit.

19. In conclusion judgment is hereby entered for the claimant against the respondent for:
- a. The declaration that the termination of the contract of service was unfair.
 - b. The respondent to pay the claimant a sum of Kshs.756,650.00 by October 1, 2023 failing interest to be payable thereon at court rates from the date of this judgment until the date of full payment.
 - c. The respondent to deliver the claimant's certificate of service by September 1, 2023.
 - 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

