



REPUBLIC OF KENYA



KENYA LAW
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Rotiken v Olekina (Cause E165 of 2021)
[2023] KEELRC 2177 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2177 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E165 OF 2021
JK GAKERI, J
SEPTEMBER 26, 2023

BETWEEN

ZAKAYO ROTIKEN CLAIMANT

AND

HON. SENATOR LEDAMA OLEKINA RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim filed on 23rd February, 2021 alleging unfair termination of employment by the Respondent. The Claimant avers that the Respondent terminated his employment without notice, reason, or justifiable cause and his of dues were not paid.
2. The Claimant avers that he was employed by the Respondent on 1st September, 2017 as a Constituency Co-ordinator and the Respondent terminated his employment on 7th September, 2020 and was not paid salary for the months of July and August 2020 and 7 days of September 2020 in addition to other salary arrears dating as far back as 2018.
3. The Claimant prays for;
 - a. Damages pleaded in paragraph 8 of the claim comprising;
 - i. Salary arrears as per minutes 3/9/20 Kshs.152,945.25
 - ii. One month's salary in lieu of notice Kshs.40,473.00
 - iii. Salary for September 2017 Kshs.37,491.00
 - iv. Salary for October 2017 Kshs.37,491.00
 - v. Salary for July 2020 Kshs.40,473.00
 - vi. Salary for August 2020 Kshs.40,473.00



- vii. 7 days worked in September 2020 Kshs.9,443.00
 - viii. Gratuity as per Clause 7 Kshs.451,678.00
 - ix. 12 months compensation Kshs.485,677.00
- Total Kshs.1,296,143.95

- b. Costs of this suit.
- c. Interest on (a) and (b) above at court rates.

Respondent's case

- 4. Despite service of the suit and notices by the Claimant's counsel as evidenced by the Affidavits of Service on record dated 10th September 2021, 13th September 2021, 9th November 2021, 1st December 2021 and 9th December 2021 and 21st January, 2022, the Respondent neither filed a response nor participate in the proceedings in any way.

Claimant's evidence

- 5. The Claimant's written statement dated 17th February, 2021 rehashes the contents of the Memorandum of Claim.
- 6. In his oral testimony, the Claimant testified that he was employed by the Respondent on 1st September, 2017 by a written contract of service at a consolidated salary of Kshs.45,000/= per month and worked till 7th September, 2020.
- 7. It was his testimony that he was not paid the salary for September and October 2017, April 2018, September and December 2019 as well as July and August 2020.
- 8. The witness testified that when he requested for payment, the Respondent retorted that the Claimant could not take him anywhere and terminated his employment.
- 9. That the Respondent was very hostile in August 2020 and did not respond to a demand letter dated 29th September, 2020 served via his Respondent's email address.
- 10. The Respondent did not adduce evidence or cross-examine the Claimant.

Claimant's submissions

- 11. Counsel for the Claimant identified three issues for determination on whether termination of the Claimant's employment was unfair and unlawful, entitlement to the reliefs sought and costs.
- 12. On termination, counsel relied on the provisions of Article 41 of *the Constitution* of Kenya, 2010 and the provisions of section 43(1) and 45 of the *Employment Act*, 2007 to underline the elements of a fair termination of employment.
- 13. The sentiments of the court in *Felix Mwalimu V Nairobi Safari Club* (2022) and *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR were relied upon to reinforce the submission on the essential elements of a fair termination of employment.
- 14. Counsel submitted that termination of the Claimant's employment was unfair for want of reason and procedural propriety and urged the court to hold as much.



15. As regards the reliefs sought, counsel relied on the sentiments of the court in *Elizabeth Kioko V Beyene Haire Warde & another* (2018) eKLR to urge that the Claimant was entitled to the reliefs sought including a certificate of service.
16. On costs, counsel urged that they follow the events and ought to be awarded to the Claimant.
17. The Respondent was accorded 14 days to file submissions but did not.

Findings and determination

18. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
19. Before delving into the issues isolated herein above, it is imperative to restate the principles that govern undefended suits as articulated in previous decisions.
20. Although the Claimant's evidence remain uncontroverted, the Claimant shoulders the burden to proof his case to the requisite standard as prescribed by the provisions of the *Evidence Act*.
21. In *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, Maureen Onyango J. stated as follows;

“In the case of *Monica Kanini Mutua V Al- Arafat Shopping Centre and another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
22. Similarly, in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2018) eKLR, Abuodha J. stated;

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings which are not backed by any evidence and expect the court to find in his or her favour.”
23. The court is in agreement with these sentiments.
24. In the instant suit, it is common ground that the Claimant was an employee of the Respondent from 1st September, 2017 to 7th September, 2020 as the Letter of Appointment and dismissal respectively show.
25. The Claimant additionally availed a signed copy of the confidential agreement he had signed with the Respondent, though it bore the date of termination.
26. Finally, the Claimant provided a copy of minutes of a meeting held on 3rd September, 2020 with Mr. Lekaton and Geoffrey Ngayo duly executed by the attendees including the Claimant.
27. The foregoing is sufficient evidence that the Claimant was an employee of the Respondent.
28. As to whether termination of the Claimant's employment was unfair, counsel submitted that it was unfair for want of a substantive justification and procedural fairness.



29. Needless to belabour, both the provisions of the *Employment Act*, 2007 and case law are emphatic that for a termination of employment to pass muster, there must be both substantive justification and procedural fairness as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

30. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017 eKLR.

31. I will now proceed to apply the foregoing propositions to the facts of the instant suit.

Reasons for termination

32. The letter of termination of employment dated 7th September, 2020 stated in part;

“ This is to inform you that I have terminated your services with immediate effect.”

33. The letter makes no reference to the reason(s) for the termination and the Respondent adduced evidence to show why he terminated the Claimant’s employment on 7th September, 2020.

34. However, minutes of the meeting held on 3rd September, 2020 would appear to provide a background of the termination.

35. Although the main issue for discussion was the Claimant’s salary arrears for April 2018, September 2019, December 2019 and June 2020, a total of Kshs.152,945.25, the meeting also discussed alleged insubordination and rudeness of the Claimant to the Respondent, an allegation the Claimant denied alleging that it was the Respondent who was indeed rude to him.

36. From the minutes, it is clear that the Claimant and the Respondent had had an encounter which was far from cordial.

37. The question of termination of the Claimant’s employment was also discussed. The minutes show that the Claimant was requested to write to the Respondent to explain why his employment should not be terminated.

38. From the minutes, there is no indication that the subsequent termination was based on the Claimant’s insubordination or rudeness.

39. In the circumstances, the court is satisfied that the Respondent has not demonstrated that he had a valid and fair reason to terminate the Claimant’s employment.

Procedure

40. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (Supra), the procedure of termination prescribed by Section 41 of the *Employment Act*, 2007 is mandatory and non-compliance renders a termination procedurally flawed.

41. Evidently, there is no documentary evidence before the court to show that the Respondent took the Claimant through a fair disciplinary process consistent with the provisions of Section 41 of the



Employment Act, 2007. The inescapable finding is that termination of the Claimant's employment was not conducted in accordance with a fair procedure. Without a notice to show cause, Claimant's response, invitation to a disciplinary hearing and minutes of the meeting, it is difficult to find that termination of the Claimant's employment was fair.

42. From the foregoing, it is the finding of the court that termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness.

Reliefs

i. Salary arrears 2017, 2018, 2019 and 2020

43. According to the minutes dated 3rd September, 2020, availed by the Claimant, which evidence is uncontroverted, the Respondent owed the Claimant the sum of Kshs.152,945.28 in salary arrears for April 2018, Kshs.37,490.75, September 2019, Kshs.37,490.75, December 2019, Kshs.37,490.75 and June 2020, Kshs.40,473.00.

44. Since the minutes were duly signed by the three attendees and there is no evidence to the contrary, the amount claimed was owing and is accordingly awarded.

45. It is unclear to the court as to why the Claimant did not include the salaries for July and August 2020 if they were owing as at 3rd September, 2020, barely 4 days before termination of employment.

46. However, the demand letter dated 29th September, 2020 reveals some details on payment. The letter states that the Claimant was paid salary arrears for April 2018, September and December 2019 and June 2020 and the arrears were for July, August and September 2020, the sum of Kshs.90,389.7 which the court hereby awards.

ii. One month's salary in lieu of notice Kshs.40,473.00

47. Puzzlingly, the letter of termination makes reference to payment of the salary for September 2020 and one month's salary in lieu of notice.

48. The Claimant adduced no evidence that the amount promised by the letter including leave allowance for pending days was not paid.

49. The written statement makes no reference to what transpired after the letter.

50. From the demand letter dated 29th September, 2020, it is clear that the Claimant was paid some money which he has not admitted in court, a clear indication of lack of good faith. The letter makes no reference to any unpaid pay in lieu of notice.

In the circumstances, the prayer for pay in lieu of notice is declined.

iii. Gratuity

51. The Claimant prays for gratuity as provided by Clause 7 of the Contract of Employment dated 1st September, 2017. Clause 7 provides for gratuity at 31% of the total salary paid to the employer if the employment was terminated otherwise than pursuant to the provisions of Clause 4, 5(2) or 5(3) of the Agreement.

52. Since the provisions of the Agreement were not followed, the Claimant is entitled to gratuity at the rate of 31% of the total salary paid for the period of employment.

53. It is unclear to the court how the sum of Kshs.451,678.00 claimed as gratuity was arrived at as the Claimant has not provided evidence of the total salary for the entire duration.



54. The court is persuaded that the Claimant qualifies for gratuity under Clause 7 of the Agreement.
55. The amount payable to be computed on the basis of actual total amount paid to the Claimant for the duration served.
 - iv. 12 months compensation
56. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007.
57. In determining the quantum of compensation, the court has taken into account the following;
 - i. The Claimant was an employee of the Respondent for a fairly short period of about 3 years.
 - ii. The Claimant had no record of misconduct or indiscipline.
 - iii. The Claimant did not express his wish to continue in the Respondent's employment.
 - iv. The Claimant did not appeal the Respondent's decision.
 - v. The Claimant contributed to the termination of his employment as evidenced by the minutes dated 3rd September, 2020.
58. In the circumstances, the court is satisfied that the equivalent of 2 months salary is fair, Kshs.80,946/=.
59. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;
 - a. Salary arrears Kshs.90,389.70.
 - b. Gratuity computed at 31% of the actual amount paid to the Claimant for the duration served.
 - c. Equivalent of 2 months salary, Kshs.80,946/=.
 - d. Costs of this suit.
 - e. Interest at court rates from the date hereof till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF SEPTEMBER 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

