



**Sibota v Audit & Corporate Governance Centre Ltd (Cause 2128 of 2017)  
[2023] KEELRC 2106 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2106 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2128 OF 2017  
JK GAKERI, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**HENRY SIGIRA SIBOTA ..... CLAIMANT**

**AND**

**AUDIT & CORPORATE GOVERNANCE CENTRE LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this suit by a Memorandum of Claim filed on 23<sup>rd</sup> October, 2017 alleging wrongful and unfair termination and non-payment of terminal benefits.
2. It is the Claimant's case that he was employed by the Respondent effective 7<sup>th</sup> August, 2014 as an Office Administrator and Accounts Assistant at a salary of Kshs.22,277/= and served diligently until 11<sup>th</sup> March, 2016 when his employment was terminated by the Respondent without notice, that NSSF deductions were not being remitted and he was not accorded the right to be heard.
3. The Claimant prays for;
  - i. Sum of Kshs.529,251.00.
  - ii. Costs of this suit.
  - iii. Interest in (i) and (ii) above.
  - iv. Certificate of service.
  - v. Any other relief as the court may deem just.

**Respondent's case**

4. In its response filed on 23<sup>rd</sup> October, 2017, the Respondent admitted that the Claimant was its employee from 7<sup>th</sup> August, 2014 as alleged.



5. The Respondent denies owing the Claimant any pay and avers that the employment was for six (6) months only after which he was no longer a regular employee.
6. That the Respondent terminated the employment pursuant to its terms.
7. It is the Respondent's case that the Claimant was aware of the provisions of the termination clause.
8. The Respondent prays for the dismissal of the suit with costs.

#### **Claimant's evidence**

9. The Claimant testified that after he was employed, the Respondent paid him Kshs.20,000/= as opposed to Kshs.22,277.00 agreed upon.
10. That between August 2014 and February 2015, his salary was Kshs.20,000/= and no salary for April – October 2015 but paid in November 2015.
11. The Claimant testified that the Respondent was not remitting NHIF and NSSF deductions.
12. That leave was declined and no leave pay.
13. That he was not paid salary for 9 months.
14. It was the Claimant's testimony that in March 2016, he was requested to visit Vision Plaza as he had the keys to the office which he returned and given 3 weeks off but subsequently the Respondent did not open the office and he gave up.
15. That he was paid Kshs.40,000/= sent by MPESA.
16. On cross-examination, the Claimant confirmed that he worked for 19 months and his employment was terminated on 11<sup>th</sup> March, 2016.
17. That he kept working even after the contract had lapsed.
18. That he was the one paying employees, water, prepare tender documents and file KRA monthly returns after the Manager, one Mr. Jared was fired.
19. The Claimant maintained that he was paid for 10 months only.

#### **Respondent's evidence**

20. The Respondent did not adduce evidence. Its counsel on record confirmed that it would not call a witness.

#### **Claimant's submissions**

21. The Claimant identified several issues for determination relating to dismissal, suspension, breach of contract of employment and the reliefs sought.
22. Counsel submitted that the Claimant prepared petty cash for January 2016 as part of his duties as evidenced by receipts under the name Mutana Holdings Ltd and had also provided a copy of a KRA tax return for 1<sup>st</sup> December, 2016 to 31<sup>st</sup> January, 2016 which was duly signed and stamped.
23. The Claimant further submitted that although the contract of employment empowered the employer to terminate the contract without notice, he did not commit any form of misconduct to deserve dismissal.



24. On the alleged suspension, the Claimant relies on Section 41 of the *Employment Act* and the decision in *Fred Ondari Makori V The Management Committee of Ministry of Works Sports Club* where the court found that although the employer had a good reason to dismiss the Claimant, it did not follow the procedure as prescribed by law.
25. Reliance was also made on the decisions in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* (2014) eKLR as well as *James Kabengi Mugo V Syngenta East Africa Ltd* (2013) eKLR.
26. As regards the reliefs sought, the Claimant submitted that he was entitled to all the reliefs sought as his salary was protected by Part IV of the *Employment Act* and as exemplified by the decisions in *Thomas Sila Nzivo V Bamburi Cement Ltd* (2014) eKLR and *Peterson Ndungu & 5 others V Kenya Power and Lighting Company Ltd* (2014) eKLR.

### **Respondent's submissions**

27. Counsel submitted that the Respondent fell out with the Claimant, his maternal uncle which messed up their relationship and was suspended from work and being a former employee, he could access some of the documents such as receipts and tax returns.
28. That by the time of the Claimant's dismissal, the Respondent was making losses and closed in February 2017.
29. That the Claimant only worked for 6 months and was paid fully and any other time he worked, he was not a formal employee.
30. As regards dismissal, counsel urged that the termination of the Claimant was effected by invocation of the termination clause and the same was explained to the Claimant who was paid Kshs.44,000/= as admitted.
31. That the Claimant was served with a dismissal letter and paid Kshs.40,000/= as salary and pay in lieu of notice.
32. That the documents submitted by the Claimant have no company stamp and were thus unreliable.
33. It was submitted that as admitted by the Claimant, the Respondent had 3 employees at the time and was making losses and were subsequently laid off.
34. As regards the reliefs sought, counsel submitted that the Claimant was not entitled to any as his employment contract expired 6 months after appointment and it was not renewed.

### **Findings and determination**

35. The issues for determination was;
  - i. Whether the Claimant was an employee of the Respondent as at the date of the alleged dismissal.
  - ii. Whether termination of the Claimant's employment was lawful or fair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
36. Before delving into the above issues, it is essential to re-state the law governing undefended suits or where the Respondent is absent.



37. In *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, the court 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 termination of the employment.”
38. Abuodha J. expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR as follows;
- “This burden 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 . . .”
39. These propositions of law are consistent with the provisions of the *Evidence Act* on the burden of proof as dictated by the mantra that he who alleges that a certain state of affairs existed must shoulder the burden of proof.
40. As to whether the Claimant was an employee of the Respondent generally, it is common ground that the two entered into an employment relationship on 10<sup>th</sup> September, 2014 effective 4<sup>th</sup> August, 2014 for a duration of six months. The Claimant was the Office Administrator and Accounts Assistant of the Respondent based at Vision Plaza, Mombasa Road, at a salary of Kshs.22,277.00 per month subject to a probationary period of 3 months.
41. It is also not in dispute that the Claimant served the entire term of the contract due to lapse on 4<sup>th</sup> February, 2015.
42. It is also common ground that the contract was not renewed. However, the Claimant alleges that he remained in employment until 11<sup>th</sup> March, 2016 when his employment was terminated by the Respondent.
43. In support of his allegations, the Claimant attaches a barely legible payslip allegedly for September 2014. The document appears to be part of documents copied together to constitute a single document.
44. A second document is a National Social Security Fund (NSSF) statement dated 23<sup>rd</sup> August, 2016.
45. The other document is a copy of a cheque of Kshs.20,000/= dated 18<sup>th</sup> November, 2015 issued to the Claimant by the Respondent.
46. The next two documents are the Respondent’s KRA tax returns acknowledgment receipt dated 9<sup>th</sup> February, 2016 and 13<sup>th</sup> January, 2016. Another three receipts by the name Mutana Holdings Ltd dated 12<sup>th</sup> October, 2015, 30<sup>th</sup> November, 2015 and 11<sup>th</sup> December, 2015 for monies allegedly received by the company from the Respondent on account of rent and other payments.
47. The receipts have the Claimant’s signature as the tenant but no stamp by the Respondent.
48. The last document is a sheet of paper bearing the Respondent’s name and postal address being the petty cash book for the month of January 2016 prepared by the Claimant.
49. According to the Claimant, these documents are sufficient evidence that he worked for the Respondent from February 2015 to March 2016.



50. Puzzlingly, none of the documents relied upon bear the stamp or signature of the Respondent other than that of the Claimant.
51. Whereas the documents reveal that he had access to the Respondent whether in person or through another person, including the cheque of Kshs.20,000/= in November 2015, they do not establish an employment relationship between the parties.
52. Having been an employee of the Respondent since 4<sup>th</sup> August, 2014, it is possible that the Claimant could access the documents without having been a regular employee.
53. Strangely, apart from the document filed as a payslip for September 2014, no other evidence of payment has been provided for the six months of the contract and thereafter only one cheque payment is provided as evidence of salary.
54. The Claimant's evidence is too scanty on detail as to what his job description was and what he used to do as an employee.
55. In his oral testimony, the Claimant, on cross-examination confirmed that they were paid by voucher or payslip but provided no copy of the voucher or payslip for the entire 2015 and early 2016.
56. In the court's view, the Claimant's allegation that he worked for 19<sup>th</sup> months but was only paid for 10 months is unconvincing as there is no evidence to show payment for the 10 months as alleged.
57. In sum, it is the finding of the court that although the Claimant appear to have rendered certain services to the Respondent after expiry of his contract with the Respondent, it is unclear to the court as to how the parties related with each other. The copies of receipts on record including the payment of Kshs.20,000/= in November 2015 are not sufficient evidence of an employment relationship between the parties after the written contract lapsed.
58. On the alleged termination of the employment, the Claimant tendered no shred of evidence as to the circumstances in which it took place.
59. The Claimant however testified that in March 2016, he was called by the employer to the office as he is the one who had the keys which he passed over to him. That he was given 3 weeks leave but gave up after the Respondent failed to open the office.
60. Although this evidence was uncontroverted, it is unclear to the court why the Claimant had to be called to hand over the keys to the office if he was still in employment. It would appear to the court that nothing was going on at the Respondent's office.
61. The fact that the Respondent sent him Kshs.40,000/= through MPesa on an undisclosed date is not sufficient evidence of termination of employment.
62. It is also surprising that despite the alleged transgressions of the Respondent, the Claimant sought legal advise in May 2017 more than one (1) year later.
63. In the court's view, the Claimant appear to have been declared redundant by the Respondent due to financial challenges. However, the mandatory provisions of Section 40(1) of the *Employment Act, 2007* were not complied with as the Respondent adduced no evidence to show how its relationship with the Claimant ended.
64. The submission that the relationship ended when the contract lapsed in February 2015 was not supported by any evidence.



65. Since the Respondent did not comply with the mandatory requirements of Section 40(1) of the Employment Act, the redundancy transitioned to an unfair termination of employment.

### **Reliefs**

66. Having found that termination of the Claimant's employment was unfair for want of a substantive justification and procedural fairness, the court will proceed to assess the appropriate reliefs as follows;

#### **i. Salary in lieu of notice**

67. The Claimant is awarded the sum of Kshs.22,277.00 as pay in lieu of notice.

#### **ii. NSSF deductions not remitted**

68. Since the NSSF statement on record reveal that no dues were submitted as required by law, the Claimant is awarded the unremitted dues at the rate of Kshs.200/= per month for 6 months, Kshs.1,200/=.

69. The employer's contribution is not recoverable by the employees otherwise than through the NSSF itself.

#### **iii. Annual leave**

70. This claim was unproved and no evidence was adduced to sustain it.  
The prayer is dismissed.

#### **iv. Underpayment for 2014, 2015, 2016**

71. The Claimant has evidentially shown that the Respondent paid him Kshs.2,277/= less than the contractually agreed sum of Kshs.22,277.00.

72. The Claimant is awarded the amount underpaid for the duration of 6 months of the contract on record, Kshs.13,662/=.

#### **v. Salary arrears for 2015**

73. This claim was not evidentiary proven. The written statement is silent on this and other claims and no documentary evidence was provided as evidence of outstanding salary for 2015.

The claim is dismissed.

#### **vi. 12 months compensation**

74. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the Employment Act, 2007.

75. In determining the quantum of consideration, the court has taken into consideration the fact that;

- i. The Claimant was an employee of the Respondent for a fairly short time.
- ii. The Claimant has not demonstrated his wish to continue in the Respondent's employment.
- iii. From the evidence on record, it is clear that as at the date of termination of employment, the Respondent's business appear to have collapsed.
- iv. The Claimant did not appeal the dismissal.



- v. The Claimant did not contribute to the termination of his employment.
  - vi. The Claimant admitted that he was given Kshs.40,000/= as part of the exit package.
76. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair, Kshs.66,831.00.

**vii. The Claimant is entitled to a Certificate of Service by dint of Section 51 of the Employment Act, 2007.**

77. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;
- a. One month's salary in lieu of notice, Kshs.22,277/=.
  - b. Unremitted NSSF deductions, Kshs.1,200/=.
  - c. Underpayment for 6 months Kshs.13,662/=.
  - d. Compensation, Kshs.66,831/=.
- Total Kshs.103,970/=
- e. Costs of the suit.
  - f. Interest at court rates from date of judgement till payment in full.
  - g. Certificate of Service.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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

