



**Nduku v Osteria Group (Kenya) Limited (Cause E002 of 2022)
[2023] KEELRC 2699 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2699 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E002 OF 2022
SC RUTTO, J
OCTOBER 27, 2023**

BETWEEN

CHARLES BERNARD OGONDA NDUKU CLAIMANT

AND

OSTERIA GROUP (KENYA) LIMITED RESPONDENT

JUDGMENT

1. By way of a Statement of Claim dated 3rd December 2021, the Claimant avers that based on an oral contract of service, he was employed by the Respondent from 2nd January 2005, as a Bodyguard and was being paid a monthly salary of ksh 60,000/=. He avers that his salary was subsequently reviewed from ksh 60,000/= to ksh 90,000/=. That in March 2017, the Respondent took the unilateral decision to reduce his salary to ksh 60,000/=. He was assured that the difference would be paid in due course.
2. The Claimant further avers that sometimes in July 2020, the Respondent unilaterally changed the terms of employment hence he was paid a weekly salary of ksh 3,000/= which translates to a monthly salary of ksh 12,000/=.
3. It is the Claimant's case that on 10th April 2021, he was verbally informed that there was no work for him, effectively being terminated from employment.
4. To this end, the Claimant seeks against the Respondent the sum of ksh.7,896,000/= being notice pay, leave pay, service pay, unpaid house allowance, unpaid salary and compensatory damages.
5. The Respondent opposed the Claim through a Statement of Response dated 30th June 2022, in which it has denied entering into a contract of employment with the Claimant. According to the Respondent, the Claimant would be called upon on a need by need basis whenever extra security services were required and he would be paid when the task was completed. Terming the Claimant's suit frivolous, bad in law and an abuse of the court process, the Respondent has asked the Court to dismiss the same with costs.



6. On 27th April 2023, when the matter proceeded for hearing, the Claimant testified in support of his case, while the Respondent elected not to call oral evidence. This was despite filing a witness statement sworn by Samuel Okelo Ondiko.

Claimant's Case

7. At the outset, the Claimant adopted his witness statement to constitute his evidence in chief. He further produced the documents filed alongside the Statement of Claim, as his exhibits before Court.
8. The Claimant averred that the Respondent paid his salary haphazardly. That he nevertheless in some instances received cheques which when he presented to the bank, were rejected. He regarded the actions of the Respondent criminal, hence reported the issue to the police.
9. That further, during the period of his employment, the Respondent failed to remit statutory deductions particularly the National Social Security Fund (NSSF) which he claims.
10. He further stated that the Respondent did not grant him leave despite his request for the same.
11. The Claimant further averred that for the period he worked for the Respondent, he had to endure a lot of abuse hurled at him in a racist and vulgar manner.
12. He is further aggrieved by the actions of the Respondent in failing to issue him with a contract of service and further changing the terms of his employment without informing him.
13. That despite serving the Respondent with utmost loyalty and diligence under difficult conditions of abuse, on 10th April 2021, he was verbally informed that there was no work for him. Effectively, he was terminated.
14. As stated herein, the Respondent elected not to call oral evidence hence the trial closed following the Claimant's testimony. Thereafter, directions issued on filing of submissions.

Submissions

15. It was the Claimant's submission that the Respondent did not controvert his statements as it did not call any witnesses or produce the documents it wished to rely upon. In support of this position, the case of *Equity Bank Limited v Bobbin (EPZ) Limited* (2021) was cited.
16. The Claimant further submitted that to prove its case that he was not its employee, the Respondent ought to have placed before Court, employment records like payroll and attendance register. He argued that the employer bears this burden by virtue of its statutory obligation.
17. In further submission, the Claimant stated that the Respondent failed to communicate any reasons in which it wanted to terminate his employment. That further, he was never granted a fair hearing. Placing reliance on the case of *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR, it was the Claimant's submission that there was no substantive reason proved by the Respondent for his termination.
18. On the other hand, the Respondent submitted that the Claimant was a casual employee as the work he did was specific. Therefore, a case for unlawful termination would not ensue as this is not anticipated under Section 35(1) (a) of the *Employment Act*. Referencing the case of *Shadrack Kabungani Mukwana v Wines of the World Limited* (2014) eKLR, the Respondent further argued that it was the Claimant's duty to prove his employment.



Analysis and Determination

19. I have considered the issues arising from the pleadings, the evidence on record as well as the submissions and to my mind, the Court is being called to resolve the following questions: -
- a. What was the nature of the Claimant's employment?
Depending on the answer in (a), was the Claimant unfairly and unlawfully terminated?
 - b. Is the Claimant entitled to the reliefs sought?

Nature of Employment Relationship

20. It was the Claimant's case that he worked for the Respondent from 2nd January 2005 until 10th April 2021 when he was verbally informed that his employment had been terminated.
21. This position has been disputed by the Respondent who avers that the Claimant was called upon on a need by need basis whenever extra security services were required and that he would be paid when the task was accomplished.
22. What I gather the Respondent to be saying is that the Claimant was an employee whose engagement was casual in nature.
23. With regards to the definition of a casual employee, Section 2 of the *Employment Act*, provides as follows:
- “A person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”
24. In essence, a casual employee is engaged daily but no longer than 24 hours at a time. This position is backed by Section 35(1) (a) of the *Employment Act*, which provides that such an engagement is terminable by either party at the end of the day, without notice.
25. In support of his case, the Claimant exhibited copies of his Mpesa statements reflecting payments and copies of bounced cheques issued to him by the Respondent.
26. The Mpesa statement reflects deposits made by a person by the name Corrado Ribolzi, in favour of the Claimant. This is from the month of April 2021 upto September 2021. During cross-examination, the Claimant testified that Corrado Ribolzi was the Respondent's Manager and that he was the one who used to pay him. This position was not controverted by the Respondent. If anything, the Respondent did not lead any evidence to support its position that it engaged the Claimant on a need by need basis.
27. Pursuant to Section 10(7) of the *Employment Act*, the Respondent was bound to prove that the Claimant was a casual employee and that he was engaged intermittently. The aforesaid Section is couched as follows:

10

- (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.



28. This position was reiterated by the Court of Appeal in the case of *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR thus:

“[15]. In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the *Employment Act* to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee.”

29. Applying the provisions of Section 10(7) of the Act to the instant case, the Respondent was required to do more than merely distancing itself from the Claimant. In this regard, it would have availed the necessary evidence before Court, to prove that the Claimant’s engagement was intermittent. For instance, it made reference to a muster roll at the entrance of its premise. The question is, why didn’t it avail the same before Court?

30. In absence of any evidence to support the Respondent’s position, I cannot help but find that it has failed to discharge its burden under Section 10(7) of the *Employment Act* by proving that it engaged the Claimant intermittently or better still, that he was not its regular employee.

31. This being the case, the Claimant was protected from unfair termination in terms of the Employment Act.

Unfair and Unlawful Termination?

32. The Claimant has alleged that he was verbally informed of the termination of his employment. According to the Claimant, he was told that there was no work for him. Under the Employment Act, an employer is required to prove that an employee’s termination was fair substantively and procedurally. Essentially, this is the standard for determining whether an employee’s termination was fair or not. In this regard, Sections 43, 45 and 41 of the *Employment Act*, are key and I will proceed to consider them.

33. Substantive justification entails proof of the reasons which resulted in an employee’s termination. With respect to this, Section 43(1) of the *Employment Act*, requires an employer to prove the reason or reasons for the termination, and where it fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

34. Section 45 (2) (a) and (b) of the *Employment Act* provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee’s conduct, capacity or compatibility; or based on its operational requirements.

35. As regards the limb of procedural fairness, Section 45(2) (c) of the *Employment Act*, provides that for termination to be fair, it ought to be in line with fair procedure. Closely connected to this, Section 41(1) of the *Employment Act* sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

36. In the instant case, the Respondent did not proffer any reason as being behind its disengagement with the Claimant. Its only contention was that the Claimant was engaged on a need by need basis. Therefore, the reasons if any, for termination of the Claimant’s employment, remained largely unknown.

37. The long and short of it is that the Respondent did not present any evidence to prove the reasons for the Claimant’s termination and the validity and fairness thereof as required under Sections 43(1) and 45(2) (a) & (b) of the *Employment Act*.



38. With regards to fair process, the Respondent yet again failed to lead evidence to prove that it subjected the Claimant to the process contemplated under Section 41 of the *Employment Act*. As I have stated herein, the Respondent's sole line of defence was that it engaged the Claimant on a need by need basis. There being no evidence let alone, the slightest indication that the Claimant was subjected to a fair process prior to termination, I can only conclude that no such process was undertaken.
39. In the circumstances, I cannot help but find that the Respondent is at fault for want of procedure.
40. The total sum of my consideration is that the Claimant's termination was both unfair and unlawful in terms of Sections 41, 43 and 45 of the *Employment Act*.

Reliefs?

Notice Pay and Compensation for Unfair Termination

41. Having found that the Claimant's termination was unfair and unlawful, I will award him one (1) month's salary in lieu of notice and compensatory damages equivalent to six (6) months of his gross salary. This award has taken into consideration amongst other aspects, the fact that the Respondent did not prove the reasons for the Claimant's termination and that in so doing, it applied a fair process.

Unpaid Salary

42. The Claimant averred that he was entitled to earn a monthly salary of ksh 90,000/= but the Respondent unilaterally changed his terms of employment thereby reducing his salary to ksh 60,000/= and thereafter to ksh 12,000/=.
43. As it is, no contract of service was exhibited hence the agreed salary between the parties cannot be ascertained therefrom. The Claimant exhibited copies of bounced cheques issued to him by the Respondent. Notably, the said cheques are for varied amounts. For instance, some cheques reflect the sum of ksh 45,000/= while some reflect the sum of ksh 40,000/= and others, the sum of ksh 50,000/=. Therefore, it is not possible to ascertain the actual amount that was due to the Claimant in terms of salary.
44. This takes me back to Section 10(7) of the *Employment Act*, which places the evidential burden of proving or disproving any term of the employment contract on the employer.
45. Therefore, there being no written contract on record, it was the Respondent's burden to prove the Claimant's salary and or disprove his assertion that he was earning a monthly salary of ksh 90,000/=.
46. According to the Claimant, the Respondent owes him the sum of ksh 1,602,000.00 being unpaid salary. On its part, the Respondent did not lead evidence to prove that indeed, it settled the Claimant's salary in full. Needless to say, it did not controvert the Claimant's assertions through evidence. To this extent, the Claimant's claim succeeds.

Leave Pay

47. The Claimant has sought to be paid the sum of ksh 1,008,000/= being outstanding leave for 16 years. In terms of Section 28(4) of the *Employment Act*, the Claimant is only entitled to recover leave for 18 months preceding his exit from the Respondent's employment. Therefore, the Claim for 16 years cannot be sustained. He only gets 18 months.



Compensation for Unfair Labour Practices, Cruel, Demeaning and Degrading Treatment

48. The Claimant has prayed for the sum of ksh 2,000,000/= being compensation for degrading treatment, indignity and unfair labour practices. The Claimant stated that he had to endure a lot of abuse hurled at him in a racist and vulgar manner. Notwithstanding the Claimant's assertions, he failed to adduce evidence in whatever form or manner to back up his claims. Therefore, his claim to that extent was not substantiated.
49. With regards to fair labour practices, it is evident that the Respondent failed to adduce evidence to discount the Claimant's assertions that his salary was not paid in full as and when the same fell due. If anything, the Claimant exhibited copies of bounced cheques issued to him by the Respondent, thereby confirming that the payments made to him by the Respondent through the said cheques, failed to go through. What this means is that with the bounced cheques, his salary remained unpaid.
50. The duty of the employer to compensate an employee for services rendered is a cardinal rule in any employment relationship. This position is aptly captured under Section 17(1) of the [Employment Act](#) and reads as follows;
- Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service...
51. What's more, Section 17 (10) of the [Employment Act](#) provides for a penalty in the event an employer fails to make payment of or to tender wages earned or payable to an employee in accordance with section 17 (1).
52. Flowing from the foregoing, it is apparent that the Respondent not only breached the employment contract when it withheld the Claimant's salary, but also breached a mandatory statutory provision.
53. Further to the foregoing, the Respondent's act of withholding the Claimant's salary constituted an unfair labour practice and in essence, was a violation of Article 41(1) of the [Constitution](#). This is further taking into account the fact that the actions and omissions of the Respondent exposed the Claimant to pecuniary embarrassment and other attendant consequences. Accordingly, the Claimant is entitled to compensation.

House Allowance

54. The Claimant has sought to be paid the sum of ksh 2,484,000/= being unpaid house allowance. From the Claimant's evidence, he was paid in cash or through cheques. As stated herein, no contract of employment was exhibited hence it is not possible to ascertain whether the Claimant's salary constituted house allowance. Further, there was no pay slip exhibited hence it is not possible to ascertain whether the salary paid to the Claimant was inclusive of house allowance.
55. Therefore, this leads me to question how the Claimant was in a position to ascertain that he was not being paid house allowance, without a pay slip or contract of employment to confirm as much. This is further considering that his salary was above the relevant minimum wage prescribed for employees within his category. It is thus presumed that the house allowance was subsumed in his gross pay. For that reason, the claim under this head collapses.



Orders

56. It is against this background that I enter Judgment in favour of the Claimant against the Respondent as follows:
- a. A declaration that the termination of the Claimant from employment was unfair and unlawful.
 - b. A declaration that the Respondent violated the Claimant's right to fair labour practices as guaranteed under Article 41(1) of the Constitution.
 - c. The Claimant is awarded one month's salary in lieu of notice being the sum of ksh 90,000.00.
 - d. The Claimant is awarded the sum of ksh 540,000.00 being compensatory damages equivalent to six months of his gross salary.
 - e. The Claimant is awarded the sum of ksh 94,500.00 being unpaid leave for 18 months.
 - f. The Claimant is awarded the sum of ksh 1,602,000.00 being unpaid salary from March 2017 upto April, 2021.
 - g. The Claimant is awarded the sum of ksh 100,000.00 being compensation for breach of his constitutional right to fair labour practices.
 - h. The total award is ksh 2,416,500.00.
 - i. Interest on the amount in (h) at court rates from the date of Judgment until payment in full.
57. The Claimant shall also be entitled to a Certificate of Service in line with Section 51(1) of the Employment Act. This shall issue within 30 days from the date of this Judgement.
58. The Respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Mwariri

For the Respondent Mr. Kibet instructed by Ms. Mideva

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 had 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.

STELLA RUTTO

JUDGE

