



**Kamau v Eureka Electrosoft Solutions Ltd (Cause 2213 of 2017)
[2023] KEELRC 2592 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2592 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2213 OF 2017
JK GAKERI, J
OCTOBER 25, 2023**

BETWEEN

FRANCIS MUNGAI KAMAU CLAIMANT

AND

EUREKA ELECTROSOFT SOLUTIONS LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 7th November, 2017 alleging unfair termination of employment and non-payment of terminal dues.
2. It is the Claimant's case that he was employed by the Respondent on 15th January, 2015 as a driver at Kshs.23,000/= per month and served the Respondent diligently until 15th July, 2017 when his services were terminated.
3. The Claimant avers that the Respondent informed him that his services would no longer be needed during electioneering period from 15th July, 2017 for 3 months and thereafter and was neither paid salary in lieu of notice nor other dues.
4. It is the Claimant's testimony that he had obtained an advance of Kshs.50,000/= from the Respondent who was recovering the same monthly since September 2016.
5. The Claimant prays for;
 - a. A declaration that termination of his employment was unfair.
 - b. A declaration that the Respondent breached statutory obligations, the *Constitution* of Kenya, 2010 and the *Employment Act*, 2007.
 - c. Payment of the sum of Kshs.340,169.84 comprising;
 - i. Salary in lieu of notice Kshs.23,000.00



- ii. Compensation Kshs.276,000.00
- iii. Service pay Kshs.18,169.84
- iv. Salary arrears July Kshs.23,000.00
- d. An order directing and compelling the Respondent to issue a certificate of service.
- e. Costs of this suit at court rates since the date of filing of the claim.
- f. Any other relief as the court may deem just and expedient to grant.

Respondent's case

- 6. Despite service of summons and the Memorandum of Claim on 13th November, 2017, the Respondent did not file a response to the claim or participate in the proceedings notwithstanding service of mention and hearing notices.

Claimant's evidence

- 7. The Claimant's written statement rehashes the contents of the Memorandum of Claim and other than the loan advance, bank statement and recommendation letter, no other documentary evidence was availed.
- 8. The Claimant was not cross-examined.

Claimant's submissions

- 9. Counsel isolated two issues for determination, namely;
 - i. Whether termination of the Claimant's employment was unfair and
 - ii. Whether the Claimant was entitled to the reliefs sought.
- 10. As regards termination of employment, counsel submitted that since the Respondent terminated the Claimant's employment on the premise that he was leaving the country and when he returned he would not require the Claimant's services, thus personal reasons and had the option of declaring the Claimant redundant or pay him in lieu of notice and other dues but failed to do so, the termination was unfair for want of a valid and fair reason.
- 11. Reliance was made on the sentiments of Byram Ongaya J. in *Enos Ireri v David Tours & another* (2021) eKLR where the court expressed the view that the fact that the Claimant's services were no longer needed amounted to termination on account of redundancy but in contravention of Section 44 of the *Employment Act, 2007*.
- 12. Counsel urged the court to find that termination of the Claimant's employment was unfair.
- 13. As regards the reliefs sought, counsel urged that the Claimant was entitled to all the orders sought.
- 14. The decisions in *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR and *Kenfreight (EA) Ltd v Benson K. Nguti* (2019) eKLR were cited to urge that the Claimant was entitled to the reliefs under Section 49 of the *Employment Act, 2007*.
- 15. The Respondent did not file submissions.



Determination

16. 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.
17. Before delving into the issues identified herein above, it is essential to restate the principles that govern an undefended suit and/or when the Respondent is absent.
18. In *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, 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.”
19. Abuodha J. expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR.
20. In the instant suit, the Claimant alleges that the employment agreement between him and the Respondent was oral but relies on 3 documents in support of his claim.
21. The first document is a copy of a document signed by one Haravtar Singh dated 29th March, 2017 stating that he employed the Claimant ID No. 6037810 at Kshs.23,000/= per month and the Claimant had taken an advance of Kshs.50,000/= which he was repaying at Kshs.5,000/= per month effective October 2016 and by March 2017 the amount due stood at Kshs.20,000/=.
22. The second document is a recommendation letter dated 13th December, 2016 by the Respondent. It is signed by the Respondent's Human Resource Manager, one Monica Etemesi.
23. The last document is a copy of the Claimant's Equity Bank, Kiambu Branch statement for the period 1-2-2016 to 31-3-2016. The statement reveals two deposits by the Respondent on 5th February, 2016 and 2nd March, 2016.
24. Based on the three documents, the courts is satisfied that they constitute sufficient evidence to establish the fact that the Claimant was an employee of the Respondent on the terms stated in the Memorandum of Claim.
25. As to whether termination of employment was unfair, it is incumbent upon the Claimant to prove that the termination of employment by the Respondent was unfair as ordained by the provisions of Section 47(5) of the *Employment Act*, 2007.
26. The Claimant's uncontroverted evidence is clear that on 15th July, 2017, the Respondent informed him that his services would no longer be needed for at least 3 months during the electioneering period and would not be necessary thereafter.
27. The Claimant's evidence would appear to suggest that the Claimant's services had become superfluous which implicates termination of employment on account of redundancy.



28. If the Claimant's testimony is to be believed, the Claimant was declared redundant without compliance with the provisions of Section 40 of the *Employment Act*, 2007.
29. There was neither a redundancy notice nor notification of the local Labour Officer.
30. The foregoing finding is consistent with the sentiments of Ongaya J. in *Enos Ireri v David Tours & another* (Supra), cited by the Claimant's counsel as follows;

“ . . . Third, accordingly, the court returns that there is no reason to doubt the Claimant's account that on 04.01.2017 RW told the Claimant that his services were no longer needed.

The court finds that the Claimant's termination on account that his services were no longer needed amounted to termination on account of redundancy but in contravention of the procedure in Section 40 of the *Employment Act*, 2007. Further, the Claimant has established that by that termination there was no valid reason for termination as envisaged in Section 43 of the Act . . .

The court returns that the termination was unfair both in procedure and substance. As submitted by the Claimant the procedure was unfair contrary to Section 45(2) of the *Employment Act*, 2007.”

31. These sentiments apply on all fours to the facts of the instant case as the Respondent used a similar reason to terminate the Claimant's employment and did not comply with the requirements of Section 40 of the *Employment Act*, 2007.
32. In sum, termination of the Claimant's employment was not conducted in accordance with the provisions of the *Employment Act* and was accordingly unfair.

Appropriate reliefs

33. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to various reliefs.

a. Declaration

34. Having found as above, a declaration that termination of the Claimant's employment is unfair is merited.

b. Payment of Kshs.340,169.84

i. Salary in lieu of notice Kshs.23,000.00

35. Since the Respondent gave no requisite notice or pay in lieu of notice under Section 36 of the *Employment Act*, 2007, the prayer for one month's salary in lieu of notice is awarded Kshs.23,000.00.

ii. Service pay Kshs.18,169.84

36. The Claimant's uncontroverted evidence is that the Respondent did not remit National Social Security Fund contributions.

The court is as a consequence inclined to award service pay of Kshs.18,169.84.



iii. Salary arrears for July

37. The Claimant testified that he was not paid any dues after termination on 15th July, 2017 and is accordingly awarded the sum of Kshs.13,000/= being salary for the 15 days worked in July 2016.

iv. Compensation

38. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation under the provisions of Section 49(1)(c) of the Employment Act, 2007 up to 12 months gross salary.

39. In determining the quantum of compensation, the court has taken into consideration the following;

- i. The Claimant was an employee of the Respondent for about 1 year 6 months, a fairly short period.
- ii. The Claimant did not express his wish to continue in the employment of the Respondent.
- iii. The Claimant did not contribute to the termination of employment.
- iv. The Claimant did not appeal the Respondent's decision.

40. In the circumstances, the court is satisfied that the equivalent of 2 months gross salary is fair, Kshs.46,000.00.

c. Certificate of service

41. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.

42. In conclusion, judgement is entered in favour of the Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- b. One month's salary in lieu of notice, Kshs.23,000.00
- c. Service pay for 1¹/₂ years, Kshs.18,169.84
- d. Pay for days worked in July 2017, Kshs.11,500.00
- e. Equivalent of 2 months' salary compensation, Kshs.46,000.00
Total Kshs.98,669.84
- f. Certificate of service
- g. Costs of this suit
- h. Interest at court rates from the date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF OCTOBER 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

