



**Ochola v Quickfill Limited (Cause E025 of 2021)
[2023] KEELRC 2611 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2611 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E025 OF 2021
MA ONYANGO, J
OCTOBER 19, 2023**

BETWEEN

NICHOLAS ODUNGA OCHOLA CLAIMANT

AND

QUICKFILL LIMITED RESPONDENT

JUDGMENT

1. The Claimant vide a Statement of Claim filed in court on 5th July 2021 seeks the following reliefs as against the Respondent:
 - i. A declaration that the Respondent did not fully comply with the requirements of sections 40 of the *Employment Act* and Contract of employment issued on 2nd October 2014
 - ii. Terminal benefits of Kshs 1,206.787.88
 - iii. A certificate of Service as per Sections 51 of the *Employment Act*
 - iv. Costs of the suit
 - v. Interest to accrue from 30th June, 2020 Any other award as the honourable court deems fit to grant in the circumstances of this case
2. The Claimant avers in his Statement of Claim that he was employed by Kengas Energy Limited on permanent and pensionable terms as an accountant on 2nd October 2014 a position he held until 30th June 2020 when his services were terminated on account of redundancy.
3. He avers that upon being declared redundant Kengas Energy Limited transferred the Claimant to its sister company Quickfill Limited in the same capacity but unprocedurally, unfairly and unlawfully varied his terms of contract.



4. It was the Claimant's contention that the said contract was unfairly and unlawfully reduced from that of permanent and pensionable terms, to term contract beginning 1st July 2020 to 31st December 2021 which was later renewed for the period 1st January 2021 to 30th June 2021.
5. He stated that the letter of transfer dated 3rd July 2020 from Kengas Energy Limited to Quickfill Limited was categorical that all accrued entitlements as at the date of transfer, 3rd July 2020 was to be taken up as the obligation of Quickfill Limited but the Respondent failed to comply with the requirements of section 40 of the *Employment Act*.
6. According to the Claimant, the termination was unlawful, unprocedural and unfair for reasons that;
 - a. No notice of termination was issued to the Claimant's Union as envisaged under section 40 of the *Employment Act*
 - b. No notice was issued to the Labour Officer as envisaged under Sections 40(b) of the *Employment Act*
 - c. The Claimant was not given his pay in lieu of notice pursuant to sections 36 and 40(f) of the *Employment Act*
 - d. The Claimant was not issued with notices as envisaged under section 40(1)(a) and (b) of the *Employment Act*.
 - e. The Respondent did not comply with Section 40 and Section 49(c) of the *Employment Act*
 - f. The Claimant was not heard prior to termination
 - g. The Respondent violated the contract of employment issued on 2nd October 2014
7. The Claimant therefore sought compensation for the alleged unfair and unlawful termination.
8. The Respondent filed a Statement of Response on 3rd August 2021. In that Statement of Response, it is averred that Kengas Energy Limited is a non-existent entity following successful transfer of all undertakings to Quickfill Limited.
9. The Respondent denied that the Claimant's employment was terminated on account of redundancy and maintained that the Claimant was consulted and he gave his consent to be transferred to the new employer with the new terms of employment and that the Claimant stated that he was willing to move to Quickfill under the renewed terms.
10. According to the Respondent, the transfer of the Claimant from Kengas Energy Limited to Quickfill Limited as well as the varying of his terms of employment was done legally, procedurally and that the Claimant was consulted and he consented
11. The Respondent stated that the Claimant was issued with a non-renewal notice dated 1st January 2021 1 month before the lapse of his fixed term contract and he was further issued with a certificate of service upon the lapse of his contract on 19th June 2021.
12. It was conceded that the Claimant's last gross salary was Kshs 167,447.
13. On the prayer for severance pay the Respondent stated that the Claimant is not entitled to the same as his employment was part of obligations transferred to Quickfill Limited.
14. To sum up, the Respondent contended that the Claimant's final dues as assessed in the final settlement dues agreement had been paid and his claim to 2 months payment in lieu of notice as well as severance



pay are misinformed since he had been served with a non-renewal notice and given his informed consent to the transfer of his employment to Quickfill and to the variation of his terms of employment.

15. At the hearing both parties called witnesses. At the close of the hearing, the court directed parties to file written submissions. The Claimant's submissions were filed on 19th June 2023 while the Respondent's submissions were filed on 29th August 2023.
16. The Claimant testified as CW1 and adopted his witness statement as his evidence in chief. By and large, the Claimant reiterated the averments in his statement of claim.
17. In cross examination, the Claimant admitted that he was invited to a virtual meeting by the Respondent whose agenda was the change of employer and change of terms of employment to fixed contract terms. CW1 stated that he gave his informed consent on change of terms. However, the Claimant stated that he was not given sufficient notice as per his contract with Kengas Energy of 2 months nor was he paid his dues such as leave days, severance and salaries.
18. The Respondent called Pauline Ng'ang'a who testified as RW1 and introduced herself as the Human Resource Manager of Quickfill Limited. RW1 adopted her witness statement recorded on 2nd August 2021 as her evidence in chief together with Respondent's documents filed in court.
19. On being cross examined by the Claimant's counsel, RW1 confirmed that the Claimant was employed on permanent and pensionable terms by Kengas Limited which was later on wound up and its obligations transferred to Quickfill Limited. According to RW1, Kengas Limited paid the employee some money including leave dues. She testified that there were no salary arrears. She stated that certificates of service was also issued to the employee.
20. On re-examination, RW1 stated that upon winding up of the operations of Kengas Limited, all operations were transferred to Quickfill including the staff and the offices.

Determination

21. Upon consideration of the pleadings, the evidence on record and oral testimonies rendered before court, the issues falling for the court's determination are:
 - i. Whether the Claimant was terminated on account of redundancy
 - ii. Whether the change of terms from permanent and pensionable to a fixed term contract was a transfer or a new contract.

SUBPARA iii.

Whether the Claimant is entitled to the reliefs he is seeking.

Whether the Claimant was terminated on account of redundancy

22. Section 2 of the *Employment Act* and the *Labour Relations Act* define redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office and loss of employment.



23. Section 40(1) of the *Employment Act* 2007 provides for the procedure to be complied with in the event an employee is terminated on account of redundancy as:

40 (1) An employer shall not terminate a contract of service on amount of redundancy unless the employer complies with the following conditions:-

- a. Where the employee is a member of a Trade Union, the employer notifies the Union which the employee is a member and the Labour Officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of intended date of termination on amount of redundancy .
- b. Where an employee is not a member of a trade union the employer notifies the employee personally in writing and the labour officer.
- c. The employer has in the selection of employees to be declared redundant had due regard to seniority in him and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy,
- d. Where there is an existence of a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union.
- e. The employer has where leave due to an employee who is declared redundant paid off the leave in cash.
- f. The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice and
- g. The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

24. In the instant case, it is not in dispute that the Claimant was employed by Kengas Energy Limited sometimes in October 2014 as an accountant on permanent and pensionable terms in which capacity he served until 30th June 2020 when Kengas Energy Limited transferred all undertakings to Quickfill Limited.

25. The Claimant admitted that he was invited to a consultative meeting where he consented to being transferred to the new company but under a new fixed contractual term.

26. In view of the fact that the Claimant was previously on permanent and pensionable terms and was being transferred to a new entity on a non-renewable 6 months' fixed contract terms, his permanent and pensionable terms of service were in fact terminated and he was employed on new terms of service. He was therefore declared redundant. The Respondent was obligated to pay him his dues before the transfer to the new employer on new terms.

27. No evidence has been placed before the Court to confirm that indeed the Claimant was paid his dues before the transfer to the new company.



Whether the change of terms from permanent and pensionable to a fixed term contract was a transfer or a new contract

28. On the issue whether the Claimant's term irregularly converted from permanent and pensionable to a fixed term contract after the transfer of the undertaking to Quickfill Limited, it is evident that the Claimant was made aware of the changes in a virtual consultative meeting and he consented to the same vide the consent form signed on 3rd July 2020 which form is attached to the Respondent's bundle of documents.
29. Although in the meeting it was agreed that the employees services were being transferred from Kengas Energy Limited to Quickfill Limited, the contracts issued to the Claimant was a new fixed term contract that did not make any reference to the earlier contract. Paragraph 1.0 thereof reads:
- 1.0. Employment
 - 1.1 The Organisation hereby agrees to employ the Employee and the Employee hereby agrees to serve the Organisation, on the terms and conditions set forth herein, for the period covering Six (6) months' commencing on 1st July, 2020 and expiring on 31st December 2020 (unless sooner termination as hereinafter set forth)
 - 1.2. The Employee understand that this is a fixed term contract and there is no expectation or obligation whatsoever on the part of the Organisation to renew this contract after the expiry of the term.
 - 1.3. The term of this Agreement, may be referred to herein as the "period of Employment"

Whether the Claimant is entitled to the reliefs he is seeking

30. The Claimant in his statement of claim had sought Kshs 1,206,787.88 as his terminal dues comprised of 2 months' pay in lieu of notice, severance pay, salary for June 2021 and leave dues as at 30th June 2021.
- a. Severance pay

The claim on severance pay succeeds as the Court has found that the Claimant's contract with Kengas was in reality terminated on account of redundancy and he was issued with a new fixed term contract by Quickfill Limited.
 - b. 2 month's notice pay in lieu

The Claimant stated that he was not given any notice on the transfer of undertakings and the subsequent change of his terms from permanent to a fixed term contract. Having found that the Claimant's services with Kengas Energy Limited were actually terminated and he was employed under a new contract with Quickfill Limited, he is entitled to the 2 months pay in lieu of notice as provided by his employment contract dated 2nd October 2014 at Clause 12. I award him the same at Ksh334,894.
 - c. Salary for June 2021 and Leave due

The Claimant's contract expired on 30th June, 2021. The Final Dues settlement Agreement at page 14 of the Respondent's bundle of documents shows that he was entitled to the same



together with 8 days leave. The Claimant confirmed that the same was paid by Quickfill Limited.

d. Certificate of Service.

The Claimant prayed for a Certificate of service. The record reflects that the same was issued to the Claimant. This prayer is therefore redundant.

31. In the end, Judgment is entered for the Claimant in the following terms ;

a. 2 months' notice in lieu.....Kshs 334,894

b. Severance pay 2014 – 2020 (6 years) Ksh. 502,341

Total Ksh.837,235

c. Respondent to issue the Claimant with the Certificate of Service

d. Costs of the suit

e. Interest from date of Judgment

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF OCTOBER, 2023

M. ONYANGO

JUDGE

