



REPUBLIC OF KENYA



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**Njenga (Suing as legal representative of the Estate of Njenga Thuku
Kuibitah) v G Issaias & Company (Kenya) Limited (Cause 882 of 2017)
[2023] KEELRC 2511 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2511 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 882 OF 2017
JK GAKERI, J
OCTOBER 18, 2023**

BETWEEN

**JEDIDAH MBAIRE NJENGA (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF NJENGA THUKU KUIBITAH) CLAIMANT**

AND

G ISSAIAS & COMPANY (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Statement of Claim filed on 11th May, 2017 alleging unfair termination of employment.
2. The Claimant prays for;
 - i. A declaration that termination of employment by the Respondent was unjustified.
 - ii. 2 months' salary in lieu of notice Kshs.1,500,000/=
 - iii. Unutilized leave days Kshs.4,000,000/=
 - iv. Service pay for 3 years.
 - v. Reimbursement of school fees Kshs.3,080,250/=.
 - vi. 12 months compensation Kshs.9,000,000/=.
 - vii. Costs of the suit and.
 - viii. Any other relief as this Honourable Court may deem fit and just to grant.



Claimant's case

3. The Claimant (deceased) avers that he was employed by the Respondent from 1st May, 2012 initially for a period of 2 years stationed at Wiyumiririe-Nyahururu Road and Nyeri-Tetu Mission B5 at a salary of Kshs.750,000/= per month, 26 working days paid leave, children's fees up to UK Pounds 20,000 per annum. The contract was terminable by 2 months notice.
4. That he served the Respondent diligently until the contract lapsed on 1st May, 2014 but was renewed by word of mouth until 15th December, 2015 when the same was terminated without prior notice and two months salary was outstanding.
5. It is the Claimant's (deceased's) case that his performance was beyond reapproach and had incurred costs amounting to Kshs.3,080,250.00 on his child's education.

Respondent's case

6. In its response filed on 7th February, 2020, the Respondent confirmed that the Claimant's contract lapsed on 1st May, 2014 but denies having renewed it verbally or having dismissed the Claimant casually. That the employment lapsed after two years and notice was served.
7. It is the Respondent's case that the Claimant had 34 days leave pending at Kshs.850,000/=.
8. That the Claimant did not furnish evidence of the amount spent as school fees.
9. The Respondent prayed for dismissal of the Claimant's suit with costs.

Claimant (Deceased's) case

10. The legal representative of the deceased's Estate, M/s Jedidah Mbaire Thuku's written statement which she adopted in court rehashes the contents of the statement of claim.
11. The witness confirmed on cross-examination that the deceased's contract of employment ended after 2 years but he continued working on similar terms. That she had availed bank statements on amounts spent on the child's education.
12. It was her testimony that the deceased's entire salary and taxes were paid for the 2 year period.
13. On re-examination, the witness testified that when the deceased's contract ended in 2014, he continued working until his employment was terminated in December 2015.

Respondent's evidence

14. Mr. Collin Scott, RWI adopted the written statement and confirmed that after the 2 year contract ended, the deceased continued working for the Respondent till December 2015 and was being paid under a verbal agreement.
15. The witness confirmed that he had no evidence of the meeting he had with the deceased when he explained the reasons for termination of employment, that his company had been taken over by another and the letter had no specific reason for termination.
16. That the deceased was paid 2 months' notice. The witness could not tell whether there were salary arrears for October and November 2015 and had no documentation.
17. The witness admitted that he had no evidence of unutilized leave days.



18. That he had authorised an out of court settlement.
19. On re-examination, the witness testified that for one (1) year 7 months, the deceased's employment contract was unwritten and he was unsure of how long the same would last.
20. That Intex Construction did not require the deceased and the separation was mutual and 2 months in lieu of notice was contractual and the Respondent was ready to pay the sum due for the 2 months. The witness testified that contract remained the same during the extension.
21. The witness admitted that fee reimbursement was contractual but could not confirm whether the Respondent paid the amount demanded by the University in Netherlands having received a fee structure and there was an unpaid balance for 4 months.

Claimant's submissions

22. Counsel isolated two issues for determination namely;
 - i. Whether termination of the deceased's employment was unfair; and
 - ii. Entitlement to the reliefs sought.
23. On termination, counsel submitted that after the fixed term contract ended, the Claimant was in a month to month open contract and the provisions on termination of employment were applicable.
24. Reliance was made on the sentiments of the court in *Sandra M. Waswa v Article 19: Global Campaign for Free Expression* [2022] eKLR and *Denbard Dendeche v Africa Pearl Hotel Ltd* [2018] eKLR to reinforce the submission as well the decision in *Patrick Kalu Lewa v Mackenzie Maritime E.A. Ltd* [2020] eKLR on renewal of contract by conduct.
25. According to counsel, termination of the Claimant's employment was unfair for want of reason and procedure under Section 43 and 45 of the *Employment Act*, 2007.
26. On the reliefs sought, counsel submitted that the deceased was entitled to 2 months' pay in lieu of notice as admitted by RWI.
27. That based on the email dated 10th November, 2015, the deceased had 34 unutilized leave days and did not proceed on leave.
28. As regards fees reimbursement, and by March 2016, the amount due was UK Pounds 27,750 and the Respondent did not deny the same or that its computation was incorrect.
29. Finally, counsel urged that the deceased was entitled to 12 months compensation.

Respondent's submissions

30. Counsel identified four issues for determination including costs, namely;
 - i. Whether there was a contract of employment between May 2014 and December 2015.
 - ii. Whether the deceased was wrongfully terminated from employment; and
 - iii. Entitlement to the reliefs sought.
31. As to whether the parties had a contract of employment, counsel submitted that the terms of the contract were verbal, that the deceased would remain in employment as long as his services were needed



and be terminated from employment thereafter. That the position would become redundant as verbal contracts were enforceable under the *Employment Act*, 2007.

32. On dismissal, counsel cited the provisions of Section 43(2) and 45(2) of the *Employment Act*, 2007 to urge that the Respondent had a reason for termination of employment based on operational requirements as the Claimant's position became redundant when the project ended as his services were no longer required.
33. Reliance was also made on Section 47(5) of the *Employment Act*, 2007 to underscore the burden of proof of the parties to urge that the reason for termination was valid.
34. As regards the prayers sought, counsel submitted that the declaration sought by the Claimant was unmerited as his dismissal was in accordance with the verbal agreement that his position became redundant.
35. Counsel submitted that the deceased had not demonstrated entitlement to the 2 months' salary in lieu of notice.
36. According to counsel, the deceased had unutilized leave days as he proceeded on leave on 10th November, 2015 to December 2015 and in 2012 – 2014 and there was the Christmas holidays and the General election.
37. Counsel submitted that no service pay was due by dint of Section 35(5)(d) of the *Employment Act*, 2007.
38. On reimbursement of fees, counsel submitted that the deceased had not provided evidence to substantiate the prayer, while the Respondent showed that it had paid for the 2014 – 2015 academic year.
39. That the prayer for compensation was unsustainable as termination was in accordance with the law.
40. Counsel invited the court to find that termination of the Claimant's employment was fair and dismiss the suit.

Determination

41. It is common ground that the deceased was an employee of the Respondent from 1st May, 2012 to 1st May, 2014 under a 2 year fixed term written contract.
42. It is also not in dispute that after the written contract lapsed, the Claimant remained in employment under similar terms of employment under a "verbal agreement" until his employment was terminated by letter dated 15th December, 2015.
43. According to the Respondent, the contract was coming to an end and the company had been taken over and the reasons were explained to the deceased orally.
44. The issues for determination are;
 - i. What were the terms of the contract of employment between the Claimant and Respondent from 1st May, 2014 to December 15th 2015?
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.



45. As regards the terms of the contract between the parties, parties have adopted different positions. While the Respondent's counsel submitted that the relationship was founded on oral terms, the Claimant's counsel submitted that the Claimant was on month to month contract or the employment had been renewed by conduct of the parties.
46. Evidently, it is common ground that Claimant and the Respondent had an employment relationship pursuant to the provisions of Section 2 and 8 of the *Employment Act*, 2007. However, the parties adopted divergent positions on the terms of the contract.
47. The Respondent's argument that the terms of the contract were verbal cannot avail the Respondent as the alleged terms were not proved by evidence. Moreover, RWI confirmed on cross-examination that he had no record of the meeting he had with the Claimant. RWI was unambiguous that the Claimant continued working until his employment was terminated in December 2015. There was no discontinuation in the Claimant's employment.
48. According to CWI, the terms of the contract remained unchanged and RWI confirmed the same on re-examination. RWI referred to the contract as an extension and was categorical that the 2 months' salary in lieu of notice was contractual.
49. Since the Claimant continued working with implied consent of the Respondent who continued paying the salary under the previous contract, it would appear to the court that the parties renewed or extended the employment contract by conduct as was the case in *Patrick Kalu Lewa v Mackenzie Maritime E.A. Ltd* (Supra) where Ndolo J. stated as follows;
- “The Respondent did not bother to explain under what circumstances the Claimant continued to work beyond November 30th 2015. The only inference I will draw is that the Claimant's contract was renewed by conduct of the parties and the Respondent's defence that the claimant's employment to an end by effluxion of time cannot stand.”
50. These sentiments apply equally to the facts of the instant case.
51. In sum, the Claimant and the Respondent had an employment relationship based on the terms of the previous agreement as both acknowledge.
52. As to whether termination of the employment relationship was unfair, counsels have adopted contrasting positions. While the Claimant's counsel submitted that the termination was unfair for want of a fair reason and procedure, counsel for the Respondent submitted that it was fair as the road project was completed and the Claimant's services were no longer needed. That he was declared redundant.
53. The provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act* are explicit that for a termination of employment to pass muster, it must be proven that the employer had a substantial justification for the termination and conducted it in accordance with a fair procedure as exquisitely put 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 but also procedural fairness . . . ”
- Reasons for termination**
54. In this case, the letter of termination dated 15th December, 2015 makes no reference to the reason(s) for termination and RWI confirmed as much.



55. Section 43(1) of the *Employment Act*, 2007 provides that it is the obligation of the employer to prove the reason or reasons for the termination of employment failing which the termination is deemed to be unfair within the meaning of Section 45 of the *Employment Act*, 2007.
56. RWI confirmed on cross-examination that the Claimant had no disciplinary issues. Although the witness testified that the termination letter made reference to oral discussions with the deceased, he did not disclose the nature of the discussions made reference to. Even assuming that the discussions related to a mutual separation, RWI did not explain why it had to be a termination and the letter was not worded otherwise to reflect the alleged mutuality or consensus.
57. RWI's allegation that the employment was coming to an end and Intex Construction did not require the deceased's services and the termination was mutual is not borne by facts.
58. The attempt by the Respondent's counsel to explain the reason for termination in his submission cannot avail the Respondent for the simple reason that submission are neither pleadings nor evidence. They are generally the parties "marketing language" as held by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR. (See also *Nancy Wambui Mwangi Gacheru v Peter W. Wanjere Ngugi* HCCC No. 36 of 1993.)
59. More significantly, even assuming that the project ended and the deceased's position became superfluous, the law prescribes the attendant processes for separation under Section 40 of the *Employment Act*, 2007 which the Respondent did not comply with.
60. For the above-mentioned reasons, it is the finding of the court that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

61. As held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, Section 41 of the *Employment Act*, 2007 set out an elaborate mandatory and process to be complied with by the employer before terminating the employment of an employee.
62. The specific tenets of procedural fairness under Section 41 of the *Employment Act* include notice of the grounds on which termination of employment was being considered, explanation of the grounds in a language understood by the employee, right to be accompanied by another employee of the employee's choice, employer is bound to hear and consider the representations made by the employee or his representative or both.
63. In this case, it is evident that the Respondent did not comply with the requirements of Section 41 of the *Employment Act*, 2007 and the termination was conducted in contravention of the provisions of the Act rendering it unfair for want of procedural propriety.

Appropriate reliefs

- i. Two months' salary in lieu of notice
64. The Respondent's witness admitted that this was a contractual entitlement and the Respondent was ready to pay.
The same is merited and is awarded as prayed.
- ii. Unutilized leave days



65. RWI testified on cross-examination that he had no evidence of utilized leave days or other evidence. He acknowledged that a balance of 34 days had been mentioned though he was unaware of how the days were arrived at.
66. Although CWI testified that the deceased had accumulated leave days, she did not testify that he did not proceed on leave pursuant to his email dated 10th November, 2015 at least up to 15th December, 2015, when his employment was terminated.
67. In the absence of controverting evidence, the court is persuaded that the deceased had at least 34 outstanding leave days and is awarded pay in lieu of leave for 40 days since his employment was terminated before his leave ended.
- iii. Service pay for 3 years Kshs.1,125,000.00
68. Granted that the deceased was a member of the National Social Security Fund as evidenced by copies of his payslips on record, service pay is unsustainable by dint of Section 35(6)(d) of the [Employment Act, 2007](#).
The prayer is dismissed.
- iv. Reimbursement of fees, Kshs.3,080,250/=
69. Under the Letter of Appointment dated 19th March, 2012, the Respondent had undertaken to meet the deceased's children's education abroad upto a maximum of UK Pounds 20,000 per annum.
70. The deceased had to avail invoices from the University or College for the Respondent to pay the fees.
71. Records reveal that the Respondent requested I&M Bank to pay the sum of Kshs.1,934,205/= or Euros 16,350 to Fontys University of Applied Sciences at ING Bank Nieuwstraat 1, 5611 DA Eindhoven Netherlands to the credit of Sophia Njeri Njenga. Strangely, the Remittance Application Form is dated 13th August, 2014.
72. The witness adduced no evidence of any fees paid by the deceased and which the Respondent had not reimbursed.
73. It is unclear to the court how the sum of Kshs.3,080,250.00 was arrived at as the witness did not avail any documentary evidence in support of the claim.
74. In the court's view, there ought to be sufficient documentation to show the fees payable and the application for transfer of the funds to the University's account.
75. In the absence of supportive documentation, the prayer is not sustainable and is dismissed.
- v. 12 months compensation
76. Having found that termination of the deceased's employment by the Respondent was unfair, the deceased is entitled to compensation as ordained by the provisions of Section 49(1)(c) of the [Employment Act, 2007](#).
77. In determining the quantum of compensation, the court has taken into consideration the fact that;
- i. The deceased was an employee of the Respondent for a period of 3 years and 8 months.
- ii. The deceased did not contribute to the termination of his employment.
- iii. The deceased did not indicate whether he wished to continue in the Respondent's employment or appeal the decision.



- iv. The deceased was aware of the circumstances in which his employment was terminated.
78. In the circumstances, the court is satisfied that the equivalent of five (5) months gross salary is fair.
79. In the end, judgement is entered in favour of the deceased against the Respondent as follows;
- a. Two (2) months' salary in lieu of notice.
 - b. 40 unutilized leave days.
 - c. Equivalent of 5 months' gross salary.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH 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

