



**Sitienei v Sirgoi Holdings Ltd & another (Cause 26 of 2019)  
[2023] KEELRC 2369 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2369 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 26 OF 2019  
CN BAARI, J  
OCTOBER 5, 2023**

**BETWEEN**

**HOSEA K SITIENEI ..... CLAIMANT**

**AND**

**SIRGOI HOLDINGS LTD ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF DIRECTORS SIRGOI HOLDINGS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant lodged this claim vide a Memorandum of Claim dated 13<sup>th</sup> March, 2019, seeking orders for payment of a sum of Kshs.7,680,000, comprising of salary in lieu of notice, salary for the months of August, 2018 to February, 2019, salary for the remainder of contract, accrued leave, gratuity and 12 months in compensation for wrongful termination.
2. The Respondents entered appearance on 2<sup>nd</sup> April, 2019, and filed a Response to the Claimant's Memorandum of claim on 23<sup>rd</sup> April, 2019.
3. The Claimant's case was heard on 23<sup>rd</sup> January, 2023. The Claimant testified in support of his case, adopted his witness statement and produced documents filed in the matter.
4. The Respondents presented a Mr. Nathan Chuma, to testify on their behalf, and who similarly adopted his witness statement and produced documents filed in the matter in support of the Respondents' case.
5. The Claimant filed submissions in the matter and which have been duly considered.
6. The Respondents did not file submissions.



## **The Claimant's Case**

7. The Claimant states that he was an employee of the Respondents from 1<sup>st</sup> January, 2018 to 31<sup>st</sup> July, 2018, having been issued with a contract of employment duly signed on 15<sup>th</sup> December, 2017, appointing him to the position of Managing Director.
8. It is his case that his appointment was for a term of three (3) years, and which period was renewable subject to satisfactory performance.
9. The Claimant avers that it was a term of his contract that he would be paid a basic monthly salary of Kshs.150,000.00 per month and a house allowance of Kshs.20,000.00 per month.
10. The Claimant avers that the Respondents unlawfully, arbitrary, unduly, and without just cause nor reasons, and in breach of his employment terms and conditions, terminated his employment through a termination letter that was signed by a stranger.
11. In his testimony before court, the Claimant (CW1), told Court that he took up his position with the Respondents on 2/1/2018, having applied, interviewed and appointed to the post in December, 2017.
12. It is his case that at the time of appointment, he did not hold any other employment and that his appointment at the service of the Respondent, was on a full time basis.
13. The Claimant further told Court that he previously worked with the University of Eldoret, but that his services were terminated on 16/2/2016. He further states that though he sued the university for unfair termination, his suit was dismissed and that he filed an appeal, which was allowed by the Court of Appeal.
14. It is his testimony that although the Court of Appeal found his termination unfair, the University of Eldoret did not reinstate, but appealed instead to the Supreme court.
15. It is his evidence that he never went back to the university of Eldoret since his termination. He further told court that the High Court ordered him to step aside under Petition No. 12/2018, filed by a shareholder of the 1<sup>st</sup> Respondent named Abdul Rotich, which he did in July, 2018, and resumed duty on 21/11/2018, when the court lifted the order.
16. It is his case that his attempt to resume duty were thwarted by the Respondents who terminated his services, through a letter dated 26/9/2018. He avers that he was not paid salary for the two months he had stepped aside.
17. The Claimant states that the Respondents were aware that the court lifted the order requiring him to step aside as their Advocates were present in court when the orders were lifted.
18. It is the Claimant's testimony that he was not taken through any disciplinary action prior to his dismissal. He further states that minutes of the 2<sup>nd</sup> Respondent authorizing his termination were not supplied and the termination letter was signed by an unauthorized party.
19. On cross-examination, the Claimant admitted receiving payment in lieu of termination notice.
20. He prays that the Court awards him the reliefs listed in his statement of claim.



### **The Respondents' Case.**

21. The Respondents state that the Claimant applied for the position of Managing Director vide a letter dated 15<sup>th</sup> November, 2017, and was offered the position vide a letter dated 15<sup>th</sup> December, 2017 on a salary of Kshs. 150,000.00 per month together with other allowances offered by the 1<sup>st</sup> Respondent.
22. It is their case that the Claimant understood, accepted and executed the terms and the conditions provided in the letter of employment dated 15<sup>th</sup> December, 2017. They further state that he was employed on a three (3) year contract effective 1<sup>st</sup> January, 2018, and which was to expire on or about 1<sup>st</sup> January, 2021.
23. It is the Respondents' case that the contract between them and the Claimant was vitiated by misrepresentation that he was not in any other gainful employment, and concealment of material facts about his employment with university of Eldoret, more so, the litigation with the university.
24. In his oral testimony, Mr. Nathan Chumo (RW1) told this Court that the Claimant was invited to a meeting on phone, but indicated that he was not available.
25. On cross-examination, RW1 told the Court that the Claimant was entitled to gratuity at one month salary for each year served. He further confirmed that the decision of the Court of Appeal declaring the Claimant's termination unfair, was rendered on 18/10/2018.
26. It is his further evidence on cross-examination that he was not sure the Claimant was in another employment and also not sure if he was drawing a salary from the other employer.
27. RW1 further stated that the Claimant performed his duties, and no issues related to his performance of duty arose during his employment. He further confirmed that the Claimant was not issued a show cause letter and that the reason he was terminated is only because his contract provided for termination, and that he was paid Kshs. 249,287.46/- in lieu of the termination notice.
28. It is RW1's evidence that the Claimant was paid his last salary on 31/7/2018, for the month July. He confirmed that the Respondents were aware that the order barring the Claimant from performing his duties was lifted.
29. RW1 again stated that the reason for the Claimant's termination is because he was in a parallel employment. He states that termination was sanctioned by the Respondent's board/2<sup>nd</sup> Respondent.
30. The Respondents' prayer is that the Claimant's claim be dismissed with costs.

### **Analysis and Determination**

31. I have considered the pleadings, the witnesses' oral testimonies and the Claimant's submissions. The issues for determination are:
  - i. Whether the Claimant was unfairly terminated.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Who bears the costs of the suit.

### **Whether the Claimant was unfairly Terminated**

32. The Claimant was ordered to step aside from his duties by an order of the court on a petition by a shareholder of the 1<sup>st</sup> Respondent. He stepped aside as ordered until November, 2018, when the step



aside order was lifted. Meanwhile, the Respondents reached a decision to terminate his service effective 26/9/2018.

33. The question that begs answer is whether the termination was fair, lawful and procedural. To determine fairness, the Court needs to interrogate both the procedure adopted in the termination and the reason(s) that informed the termination. The two limbs are both Constitutional and Statutory requirements, and the absence of either, renders the termination unfair and hence unlawful.
34. An employer is required to adhere to the provisions of Sections 41, 43, and 47(5) of the *Employment Act*, 2007, on procedural fairness and substantive justification for the termination/dismissal. Section 41 of the *Employment Act* states thus on procedural fairness: “41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
35. Weighing the process adopted by the Respondents when terminating the Claimant against the provisions of Section 41, will lead this Court to a conclusion on whether or not the law was adhered to in the termination in question.
36. RW1 told this Court that the Claimant was not issued with a show cause letter or in any other way notified that his termination was under consideration. Further, it is the Claimant’s evidence, and which was confirmed by the Respondents’ witness (RW1), that he was only called on his telephone line, and informed that he was required to attend a meeting with the Respondents the following day.
37. Both witnesses testified that the Claimant did not attend the meeting, with the Claimant explaining that it was not made clear to him what the meeting was about, and that his counsel wrote to the Respondents vide a letter dated 10/9/2018, informing them that the Claimant will not attend the meeting due to a court order that barred him from participating in the Respondents activities, coupled with the fact that the notice was too short.
38. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the Court had this to say on Section 41 of the *Employment Act*:
  27. “To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.
  27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.
39. In *Philip Kimosop v Kingdom Bank Limited* (2022) eKLR, the Court held that the Respondent’s action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure.
40. By all indication, it is crystal clear that the Claimant was neither issued a show cause letter, asked to respond to any charges nor heard in relation to the issues informing his termination, which renders the termination procedurally unfair, and I so hold.



41. On whether the Respondents had valid reasons to terminate the Claimant, the Respondents' through RW1 told the Court that they terminated the Claimant on account of conflict of interest, for having served as an employee of the Respondents while at the same time being in the service of the University of Eldoret.
42. RW1, in his testimony told Court that he was not sure whether the Claimant was in the service of University of Eldoret, or whether he received any salaries from the university. The Claimant on his part, produced a letter of termination terminating his employment with the University of Eldoret and further evidence showing that the cases he lodged against his termination with a result in his favour, was only pronounced by the Court of Appeal on 18/10/2018.
43. The Court in the case of John Jaoko Othino v Intrahealth International [2022] eKLR , while relying on the test of reasonableness set out by Lord Denning in the case of British Leyland UK Ltd vs Swift (1981), held that the test of reasonableness would be to answer the question, was it reasonable for the employer to dismiss the employee? And proceeded to state that if no reasonable employer would have dismissed the employee, the dismissal would be unfair, but if a reasonable employer might reasonably dismiss him, then the dismissal would be fair.
44. Applying the test of reasonableness herein explained, the admission by RW1 that he did not know whether the Claimant served two employers or received double salary at the same time, coupled with the prove that the Claimant was indeed terminated from the service of the University of Eldoret as at the time of his appointment to the position of Managing Director of the 1<sup>st</sup> Respondent, goes to confirm that the reasons upon which the Claimant's termination was premised, is neither fair, valid nor justified.
45. Section 45 of the *Employment Act*, provides that a termination is unfair if the employer fails to prove that the reasons for termination are valid and fair. Further, the ILO Convention 158 of 1982, provides that an employee shall not have his contract terminated unless there is a valid reason.
46. From the foregoing analysis, it is clear that the Claimant's termination was not based on valid and fair reasons, and which pursuant to Sections 43, 45 and 47 renders the termination substantively unfair.
47. Consequently, I find and hold that the Claimant's termination is both procedurally and substantively unfair and unlawful.

#### **Whether the Claimant is entitled to the reliefs Sought**

48. The Claimant vide his memorandum of claim seeks orders for payment of a sum of Kshs.7,680,000, comprising of salary in lieu of notice, salary for the months of August, 2018 to February, 2019, salary for the remainder of his contract, accrued leave, gratuity and 12 months in compensation for wrongful termination.

#### **Salary in Lieu of Notice**

49. RW1 told this Court that the Claimant was paid a sum of Kshs. 249,287.46/- in lieu of termination notice. The Claimant on cross-examination, admitted receiving payment in lieu of termination notice paid to him through a cheque issued by the 1<sup>st</sup> Respondent.
50. This claim thus fails on this account and is dismissed.



### **Salary for the months of August, 2018 to February, 2019**

51. The Claimant stepped aside from his duties from August, 2018 until November, 2018, owing to an order issued by the High Court requiring him to do so. It was not clear whether the Claimant stepped aside with or without pay and the Respondents did not adduce evidence to show that the Claimant was away from duty without pay, considering that the order was obtained by one of the 1<sup>st</sup> Respondent's shareholders.
52. I therefore return that the order having been lifted and the Claimant allowed to resume his duties, is a pointer of his vindication and which in my view, entitles him to payment of his salary for the months of August to September, 2018, being the month, his termination was effected.
53. The claim for salary for the months of October, 2018 to February, 2019, is not justified as the Claimant was no longer in the service of the Respondents.

### **Salary for the remainder of Contract**

54. Salary for the remaining term of contract is not a relief known to Section 49 of the *Employment Act*. Further, the Claimant has also sought compensation for unfair termination which if both are allowed, will amount to this court unjustly enriching the Claimant. The claim fails and is dismissed.

### **Accrued leave**

55. The Claimant was in the service of the Respondent for a total of 9 months. His contract with the claimant entitled him to 28 days of leave per year. It thus follows that he earned leave days in his 9 months of service and his claim of 14 days leave is allowed.
56. The Claimant did not serve the Respondents in the year 2019, and hence could not earn leave for this year, and the claim in respect of leave for the year 2019 is dismissed.

### **Gratuity**

57. Gratuity is a benefit conferred to an employee by a contract of service held with the employer. The Claimant's contract did not provide for payment of gratuity. The claim fails on this account.

### **Compensation for the unfair termination**

58. A return of an unfair termination, entitles an employee to compensation per Sections 49 and 50 of the *Employment Act*. Having found the Claimant's termination unfair and unlawful, I have then to proceed to make award of compensation on this account.
59. In *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR the Court held that in determining an award of compensation the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act*.
60. Further, in *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR the Court cited the case of *D.K. Marete v Teachers Service Commission Cause No. 379 of 2009* where it was held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, they are meant to redress economic injuries in a proportionate way
61. Guided by the requirements of Section 49(4) of the *Employment Act*, 2007, and the foregone decisions of the Court, I deem an award of six (6) months' salary sufficient compensation for the unfair termination of the Claimant, and is hereby awarded.



62. In whole, I make orders as follows:
- a. That the Claimant's termination is unfair and unlawful.
  - b. That the Respondents jointly and severally, pay the Claimant salary for the months of August and September, 2018 at Kshs. 340,000/-
  - c. Payment of Kshs. 70, 000/- on account of accrued leave.
  - d. Six (6) months' salary as compensation for the unfair termination at Kshs. 1,020,000/-
  - e. Costs of the suit and interest until payment in full.
63. Although the Respondents filed a counter-claim, the same was not pursued as no evidence was led in support or to prove the Counter-claim. Moreover, the counter-claim was premised on the allegation that the Claimant was in two parallel employment and receiving two salaries which was not proved.
64. The counter-claim is dismissed with costs to the Claimant.
65. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

**CHRISTINE N. BAARI**  
**JUDGE**

