



**Ngetha v The Ark Limited (Cause 115 of 2019)  
[2023] KEELRC 3096 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3096 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 115 OF 2019  
NZIOKI WA MAKAU, J  
NOVEMBER 30, 2023**

**BETWEEN**

**RICHARD K. NGETHA ..... CLAIMANT**

**AND**

**THE ARK LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant's case was that parties herein executed a Contract on 1<sup>st</sup> April 2018 with a specific term that the duration of employment would be two years with effect from 1<sup>st</sup> April 2018 to 31<sup>st</sup> March 2020. That the Letter of Offer dated 9<sup>th</sup> March 2018 had provided for the terms and conditions of employment negotiated between parties. He averred that he duly accepted the Contract and joined the Respondent's employment on the terms stipulated therein until on or about 1<sup>st</sup> February 2019 when he was asked to resign or be terminated from employment. He declined to tender his resignation and on 6<sup>th</sup> February 2019, the Respondent issued him with a termination letter after having worked for it for 11 months.
2. It was the Claimant's contention that he had a clean employment record with the Respondent and only had one warning letter. Further, that he had never been subjected to any disciplinary measures throughout the period he worked for the Respondent in spite of the highly stressful work environment he had to endure. He asserted that the termination was unprocedural, illegal and unlawful within the meaning of the *Employment Act*, 2007 and that the Respondent refused to settle his dues during the process of clearing with it. The Claimant thus claimed against the Respondent for:
  - a. 14 months' salary – Kshs. 150,000x12= 2,100,000/-
  - b. Salary (6) – Kshs. 32,143/-
  - c. Notice pay – Kshs. 150,000



- d. Pending days off (17) – Kshs. 85,000/-
  - e. Payment in lieu of Sick Leave
  - f. Terminal benefits/Gratuity – Kshs. 300,000/-
  - g. Medical Allowance for 2 years
  - h. NSSF clearance
  - i. NHIF clearance
  - j. Clearance certificate
  - k. General damages for breach of contract
  - l. Damages for loss of future expectation
  - m. The Respondent to pay the costs of this claim
  - n. Interest on the above at court rates.
3. In reply, the Respondent averred in its Response dated 19<sup>th</sup> August 2019 that the Claimant’s employment contract was terminated due to non-performance, laxity and failure to satisfactorily perform his obligations as a Reservations and Sales Manager. It thus denied that it asked him to tender his resignation or that the termination was unprocedural as alleged. The Respondent further averred that the Claimant had been warned orally and was eventually issued with two (2) warning letters dated 24<sup>th</sup> August 2018 and 10<sup>th</sup> December 2018 and that his employment record was marred with non-performance and gross laxity. The Respondent averred that the Claimant was issued with a Certificate of Service upon termination of his employment and his dues were tabulated in his termination letter to include salary up to 6<sup>th</sup> February 2019, 17 days pending day offs and 28 days’ notice pay, less any money owed to the company. It also asserted that if there were any dues pending payment, the same was as a result of the Claimant’s refusal to collect the payment from the Respondent. It was the Respondent’s case that it had demonstrated that it did not breach the employment contract as alleged. The Respondent did not admit the jurisdiction of this Honourable Court, averring that the cause of action arose at Nyeri where there is a competent Court that could try and determine the matter herein. It prayed for the suit to be struck out with costs to the Respondent.

## **Evidence**

4. At the hearing, the Claimant testified under cross-examination that his Contract was for 24 months and that the gross salary of Kshs. 150,000/- was subject to NHIF, NSSF and PAYE deductions. That at page 2 para (a) of the Contract, it made provision for termination by the employer or employee giving 28 days’ written notice or payment in lieu of notice and that para (d) provided for ways of summary dismissal. Whereas he admitted to having signed the Contract without duress, he asserted that he signed the letter of 10<sup>th</sup> December 2018 under duress. That the said letter spoke of several verbal and written warning, unsigned letters and his not replying to emails in a timely manner but that he had evidence of contrary position. It was the Claimant’s testimony that customers’ enquiries via email were received by four (4) people and that his work as a Reservations Manager was to supervise. He denied the assertion that he did not respond to emails and stated that even though there were delays, the emails were responded to. The Claimant further stated that he was not given a Certificate of Service. In re-examination, the Claimant affirmed that he came into office and found a previous backlog of emails



from 2017. He asserted that whereas the Termination Letter stated his dues, it did not give concrete figures and that was why he was in court to get payment of his terminal benefits.

5. The Respondent's witness, Ms. Nancy Gichohi (RW1) testified that no payment was to be made until the Claimant had gone to confirm that what was on the termination letter was what he was entitled to. She confirmed that the Claimant was not paid because he sought terminal benefits for months he did not work for and the declined to confirm the Respondent's tabulation. She clarified that the final benefit is done by the finance team together with the employee himself and that the same is not stated until the employee clears.

### **Claimant's Submissions**

6. The Claimant submitted that an employee is entitled to employment and to the right to fair labour practices, as affirmed under Article 47 of *the Constitution* that protects the right not to be unfairly dismissed. That the Respondent did not accord to him the right to be heard before terminating his employment contract and that fair HR practice and universal labour policies call for written warnings, the so-called verbal warnings were illegal, unlawful, wrong and baseless. He contended that even if terminal benefits were calculated after issuance of the clearance certificate, none of his benefits were calculated. The Claimant further submitted that he had proved to this Court that termination of his employment was effected for an invalid and unfair reason and that the same was simply an excuse used by the Respondent to employ another person. He pointed out that in one of the Respondent's email dated 20<sup>th</sup> October 2018, a malicious conspiracy to manufacture a reason to unfairly dismiss him stated as follows:

“Attn K. Amin

I wonder if you could please assist me in putting a fire under someone...”

7. The Claimant further submitted that section 43 of the *Employment Act* provides that in a claim, the employer is required to prove the reason or reasons for termination of a contract and where the employer fails to do so, the termination shall be deemed unfair within the meaning of section 45. That under section 45 of the *Act*, no employer shall terminate the employment of an employee unfairly and a termination of employment is unfair if the employer fails to prove that the reason for the same is valid and fair. It was the Claimant's submission that applicable in the instant case to be used in arriving at the awardable compensation was his gross salary. That section 49(1)(c) of the *Employment Act* provides for compensation the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. That 'gross salary' is the term used to describe all the money the employee has made, which is without any deduction like income tax and that the same is inclusive of bonuses, overtime pay, holiday pay and other differentials. Further, that some components of gross salary would include basic salary, house allowance, special allowance, medical allowance, car allowance and conveyance allowance. That in the instant case, the Court should use his gross salary amount of Kshs. 150,000/- in computing the compensation.
8. The Claimant further submitted that he was also entitled to bonuses for the period of the employment and that the same form part of the Respondent's non-contractual discretionary bonus scheme. He cited the case of *Onesmus Kinyua Magoiya v Prudential Life Assurance Kenya [2022] eKLR* in which the Court held as follows:

“Whilst an employer may operate a non- contractual discretionary bonus scheme, if an employee is regularly awarded a discretionary bonus and has reasonable expectation that he will receive a bonus, he may seek to argue that it has become contractual through custom and



practice. Where an employer has failed to exercise its discretion in good faith an employee can bring a claim for damages, and the damages would be assessed on the level of bonus that would have been awarded had the employer exercised its discretion in good faith. A failure to pay a bonus may lead to discrimination claims in appropriate cases.”

9. The Claimant submitted that in addition he is entitled to general damages of Kshs. 100,000/- for the unfair dismissal as was similarly found and awarded in the case of Onesmus Kinyua Magoiya (supra). It was the Claimant’s submission that this Court should be persuaded to grant him his lawful benefits as prayed for in the Claim.

### **Respondent’s Submission**

10. The Respondent submitted that it followed the law while terminating the Claimant’s employment and that the termination was not unlawful within the meaning of the *Employment Act*. That the Claimant had admitted that the issue of him not responding to emails had severally been raised and he had received a warning letter. That the Claimant had in fact been served with several verbal and written warnings concerning his work in reservations before his employment was terminated. According to the Respondent, the Claimant’s failure to respond to emails from the Respondent’s customers who intended to reserve accommodation fit the conduct provided under section 45(2)(b)(i) of the *Employment Act*, to wit, that the reason for the termination was a fair reason related to the employees conduct, capacity or compatibility. It submitted that in deciding whether it as just and equitable for the Respondent to terminate the Claimant’s employment, section 45(5)(b) of the *Act* provides that the Court has to consider the conduct and capability of the employee up to the date of termination. That in the end, subsequent to the failure by the Claimant to respond to emails from its customers, it acted equitably in terminating his employment. The Respondent submitted that in case the Court is persuaded that the termination was unlawful, then section 49(1)(a) of the *Employment Act* provides that the Claimant is entitled to the wages which he would have earned had he been given the period of notice as per his contract of service. That since the Claimant’s Contract of Employment provided for 28 days, the amount would be Kshs. 150,000/- less the statutory deductions as agreed between the parties as per the Contract. Moreover, that as the Contract provided for the manner of termination, there was no breach of contract to entitle the Claimant to general damages. That the prayer for payment in lieu of sick leave could not be awarded because the requirements of section 20(1) and (2) had not been met and that medical allowance was also not awardable since the Respondent had put in place a medical scheme. It was the Respondent submission that because the Claimant had not demonstrated that there was unfair termination of employment, the claim should be dismissed with costs.
11. The Claimant was entitled to terminal dues the Respondent has deliberately withheld. Even before this Court, the Respondent has declined to reveal what the dues are precisely. The Claimant was terminated in a manner that did not accord with section 41 of the *Employment Act*. No hearing was held and no due process was followed. As such, the dismissal was *ipso facto* unfair and unlawful for not according the Claimant the safeguards in the *Employment Act*. The Claimant sought a raft of reliefs some of which are untenable. NHIF and NSSF clearance are unknown to this Court. If the Claimant wants to ascertain whether the Respondent was remitting statutory deductions, the simplest way would be through a request to either of these statutory bodies for his statement. There is no provision for payment in lieu of sick leave. The Claimant sought 14 month’s salary which is not clarified in any of his pleadings or his testimony. The Claimant was not paid for 17 days of pending leave, notice pay (one month), salary for 6 days worked. There was no indication of any severance pay.
12. The Claimant is therefore entitled to:-
  - a. Salary for 6 days worked in February 2019 – Kshs. 32,143/-



- b. Notice pay – Kshs. 150,000
- c. Pending days off (17 days) – Kshs. 85,000/-
- d. 6 months salary as compensation for the unfair and unlawful manner of termination – Kshs. 900,000/-.
- e. Costs of the suit.
- f. Interest on a), b) and c) above at court rates from the date of filing suit till payment in full.
- g. Interest on d) above at court rates from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**NZIOKI WA MAKAU**

**JUDGE**

