



Mutiso v Endmor Steel Millers (Employment and Labour Relations Cause 698 of 2018) [2023] KEELRC 3042 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3042 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 698 OF 2018
AN MWAURE, J
NOVEMBER 24, 2023**

BETWEEN

AMBROSE MULI MUTISO CLAIMANT

AND

ENDMOR STEEL MILLERS RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 26th February 2018.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent on or about February 2016 as a mechanical fitter earning a daily wage of Kshs 1,000/-.
3. The Claimant avers that he worked continuously and diligently with the Respondent for one year five months before his employment was terminated.
4. The Claimant avers that under section 37(1) (a) of the *Employment Act*, a casual contract of employment is converted to term contract after working for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month.
5. The Claimant avers that his employment was therefore converted by operation of law to a term contract employment under section 37(1) (a) of the *Employment Act*.
6. The Claimant avers that the Respondent never issued him with an employment contract and failed to give him a statement of disciplinary rules.
7. The Claimant avers that on 4th July 2017, the Respondent gave him a letter of termination without any reason or requisite notice.



8. The Claimant avers that he used to work overtime but was underpaid for the hours worked. He worked from 7am to 7pm for 7 days a week inclusive of public holidays and paid Kshs 1,500- instead of Kshs 1,750/-.
9. The Claimant avers that he was not provided with signed minutes and further the he was never given a rest day while working with the Respondent.

Respondent's Case

10. In opposition, the Respondent filed a statement of response dated 21st June 2018.
11. The Respondent avers that it received a notice on 29th March 2017 from Kenya Bureau of Standards of the stoppage of twisted bars production which meant that the mechanical twisting fitter and the twisting machine was no longer to be used in the company anymore.
12. The Respondent avers that it advised its workers in the affected department to shift to other departments that were not affected via an internal memo as it did not want to lay off its workers.
13. The Respondent avers that it did not terminate the Claimant as he claims; the Claimant did not wish to move to other departments as advised and instead he opted for an early retirement via a letter dated 6th June 2017.
14. The Respondent avers that it accepted the Claimant's request vide a letter on the same day and advised him to fill the clearance form and return all the company assets in his possession after which his final dues were computed and paid. The Petitioner signed a voucher upon receiving his dues and confirmed he had no further claims against the Respondent.

Evidence in Court

15. The Claimant testified and produced his witness statement dated 26th February 2018 as his evidence in chief and list of documents dated 21st July 2017 as his exhibits.
16. During cross examination, the Claimant testified that he used to be paid Kshs 1,000/- that used to be paid weekly at Kshs 6,000/- via Mpesa.
17. The Claimant testified that he got a termination letter which he was forced to sign so as to be paid his dues, however, he admitted the same has not been produced in court.
18. The Claimant testified that he signed the resignation letter dated 6th June 2017, however he was forced to write it.
19. The Claimant testified that he did not agree to separate with the Respondent and was forced to.

Respondent's evidence in court

20. The Respondent's witness (RW1), James Mbogo who is the company's Human Resource Manager, testified; he produced and adopted his witness statement dated 9th June 2023 as his evidence in chief and list of documents dated 21st June 2018 as exhibit 1-6.
21. RW1 testified that the Claimant voluntarily resigned as he was told he would be redeployed to another department after the twisting work ceased.



Submissions

22. The court considered claimants submissions dated 25th August 2023 and respondent's submissions dated 5th September 2023.

Analysis and Determination

23. There is no dispute that the Claimant was the Respondent's employee working as a mechanical fitter.
24. The main issue for determination is whether the Claimant voluntarily resigned or was unlawfully and unfairly terminated.
25. The Respondent submitted that there is no evidence of the Claimant's termination as the Claimant voluntarily decided to part ways with the Respondent by early retirement.
26. The Claimant testified that he was issued with a resignation letter by the Respondent's Human Resource Manager to sign failure to which he was not going to be paid his salary. He further testified that he signed the letter under duress. What amounts to coercion and/or duress? In *Steve Mutua Munga v Homegrown (K) Limited & 2 others* [2013] eKLR, Hon. Justice Byram Ongaya defined coercion and duress as follows:

“As submitted for the respondent, by duress is meant the compulsion under which a person acts through fear of personal suffering as from injury to the body or from confinement actual or threatened (*Halsbury's Laws of England* 4th Edition Vol. 9 Paragraph 296). As further submitted for the respondent, coercion means compulsion by physical force or threat of physical force (*Black's Law Dictionary* 8th Edition).

Thus, as submitted, coercion and duress are substantially one and the same thing and the court further finds that the claimant has failed to establish the same in the circumstances of this case.”

27. In *Reuben Lucheleli Shikuri v Eldoret Packers Ltd* [2015] eKLR the court observed:

“In my view, the tone of the Claimant's resignation letter does not suggest he was coerced into resigning from work. An employee who is coerced to resign would in one way or the other mention the fact of coercion or duress in the letter, but each case should be determined on its own peculiar circumstances.”

28. In *Aristide Marege Nyang'au vs Lavington Security Limited* [2021] eKLR the court held:

“The Claimant having not pleaded coercion, cannot be allowed to rely on it to defeat the Respondent's defence. In any event, the Claimant totally failed to establish the fact that there was coercion and any or all of the ingredients of coercion as was captured in the case of *Steve Mutua Munga v Homegrown Kenya Ltd & 2 Others* [2013] eKLR.

Assuming that the Claimant had a right to raise the issue and rely on it, right which I have concluded he had not under the circumstances he tried to, section 109 of the *Evidence Act* placed a burden of proof on him to prove the fact. He never discharged this burden.

An allegation of coercion from the nature of its definition, is not a light matter. It must be pleaded with clarity and established with precision.”



29 I am not in agreement with Counsel for the Claimant that Section 107 of the Evidence Act, placed the onus of proving that coercion did not occur on the Respondent. What would shift to the Respondent was the evidential burden if the Claimant had discharged his burden under Section 109 of the Act.”

30. The burden of proof to prove that the Claimant signed the resignation letter under duress lies on the Claimant as elaborated under section 107 and 109 of the Evidence Act which states:

“ 107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

31. The Claimant has failed to prove that he signed the resignation letter seeking early retirement under duress. The letter was clearly written by him and does not express anything that may lead this court to believe that the Respondent coerced him to draft and execute the same.

32. The Claimant submitted that he was never accorded an opportunity to move to other departments as alleged by the Respondent. However, this court observes that in evidence and in his pleadings the Claimant did not deny the authenticity of the Respondent’s internal memo dated 2nd May 2017 informing all employees working under the twisting department that they should forward their names to HR and indicate the section they would prefer to be deployed. This was after the government ban of twisted metal bars and so there was no more work in that department.

33. In view of the foregoing, this court holds that the Claimant voluntarily resigned from his employment and was not unlawfully or unfairly terminated as claimed.

34. Having established that the Claimant voluntarily resigned, he is not entitled to payment in lieu of notice because he is the one who resigned.

35. However, I am inclined to award him leave days as the respondent did not table records to prove for the one year or so the claimant worked for him he gave him leave days. He is awarded kshs 36,000/- for leave not taken equivalent to one month plus interest at court rates from date of judgment till full payment.

36. Each party will meet their respective costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 [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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

