



**Nyawa v Njuka Consolidated Limited (Cause 399 of 2018)
[2023] KEELRC 3015 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3015 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 399 OF 2018
AK NZEI, J
NOVEMBER 23, 2023**

BETWEEN

JULO NGWARU NYAWA CLAIMANT

AND

NJUCA CONSOLIDATED LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a statement of claim dated 4/6/2018 and pleaded that he was employed by the Respondent as a manson in February 2009 and worked until 4/6/2016 when the Respondent terminated his contract without any notice, having worked for 7 years and 3 months, though his employment contract was never reduced into writing.
2. The Claimant further pleaded:-
 - a. that on 4/6/2016, while at work at the Respondent's Miritini site, he was instructed by the Respondent's Site Manager to immediately take leave as work had reduced, and that when he went back to work on 6/6/2016, he was instructed to clear with the Respondent's relevant departments, upon which he was issued with a recommendation letter and a clearance form. The Claimant further pleaded:-
 - b. that he later realized that the Respondent was hiring, and that he (the Claimant) had been unlawfully terminated by the Respondent who never followed the lawful procedure and did not give valid reasons for the termination.
 - c. that at the time of termination, the Claimant was earning ksh. 18,200 at the rate of ksh. 650 per day for 28 days each month.



- d. that for the 7 years and 3 months that the Claimant was employed by the Respondent, he was not accused of any misconduct, and was not accorded weekly rest days due to the Respondent's nature of work, and claimed ksh. 426,47 for all Sundays worked.
 - e. that the Claimant was not allowed to go on leave, for if one took leave, they were not allowed back to work, hence the Claimant had no choice but to work through out, and claimed ksh. 114,012.50 as unpaid leave.
 - f. that the Claimant worked on public holidays, and claimed ksh. 96,715.32 in that regard.
 - g. that the Claimant claimed ksh. 55,300 as service pay.
 - h. that the Claimant claimed ksh. 218,400 being 12 months salary as compensation for unfair termination of employment.
3. The Claimant sought the following reliefs:-
- a. a declaration that termination of the Claimant's employment was unfair.
 - b. 2 months salary in lieu of notice.....ksh. 36,400
 - c. 4 days pay for the month of November 2017...ksh. 16,572.92
 - d. unpaid overtime for working on Sundays..ksh. 426,475.
 - e. leave allowanceksh. 114,012.50
 - f. holiday allowance.....ksh. 96,715.32
 - g. service pay.....ksh. 55,300
 - h. compensation for unfair termination (12 months' pay)..ksh. 218,400
 - i. certificate of service
 - j. costs of the suit and interest.
4. Other documents filed by the Claimant alongside the statement of claim included his written witness statement dated 14/6/2018 and an evenly dated list of documents listing 4 documents. The listed documents included copies of the Claimant's identity card, a recommendation letter by the Respondent dated 6/6/2016, staff clearance form and a demand letter dated 30/5/2018.
5. The Respondent entered appearance on 10/8/2018 and filed a Memorandum of defence on 23/11/2018. The Respondent denied the Claimant's claim and pleaded:-
- a. that the Claimant was employed by the Respondent on 1/6/2014 as a mason as evidenced by an NSSF statement exhibited by the Respondent.
 - b. that the Respondent did not terminate the Claimant, but the Claimant stopped showing up for work.
 - c. that the recommendation letter exhibited by the Claimant did not emanate from the Respondent's offices.
 - d. that the clearance form held by the Claimant was fabricated.
 - e. that the Claimant was earning ksh. 650 per day as at 2016.
 - f. that the Claimant was entitled to one off day per week, and never worked in Sundays.



- g. that the Respondent had a strict policy that required all employees to take annual leave in any given year; and that the Claimant did not work on public holidays.
 - h. that the Claimant is not entitled to any dues.
 - i. that a declaration should be made to the effect that the Claimant was not unlawfully dismissed, but deserted work.
6. Other documents filed by the Respondent along with its defence included a witness statement of one Gitonga Mwangi dated 17/11/2018 and an evenly dated list of documents listing 2 documents, the Claimant's NSSF statement and an extract from what the Respondent referred to as "built capture system for 2014 to 2016."
7. On 23/9/2019, the Respondent filed another witness statement of Gitonga Mwangi dated 10/9/2019 and yet another list of documents (evenly dated) listing 5 documents. The listed documents included the Claimant's NSSF statement, "genuine" specimen stamp of the Respondent, Built Capture System Excerpt for 2014 to 2016, Employment Manual and specimen clearance form of the Respondent.
8. When the suit was virtually called out for hearing on 13/6/2023, only the Claimant appeared, and being satisfied that a hearing notice had been served on the Respondent as ordered on 20/2/2023, I ordered the hearing to proceed. The Claimant testified and adopted his witness statement dated 14/6/2018 as his testimony; and produced in evidence the documents referred to in paragraph 4 of this judgment; which the Court marked as the Claimant's exhibit nos. 1-4. The Claimant closed his case, and prayed that the Respondent's case be closed as well.
9. The Court closed the Respondent's case and directed the Claimant to file and to serve written submissions. The Claimant's submissions are shown to have been filed on 4/7/2023.
10. It is to be noted that the Respondent did not testify and did not call any witness. The evidence adduced by the Claimant stands unchallenged, and therefore unrebutted. The Respondent's memorandum of defence, witness statements and documents referred to in paragraphs 6 and 7 of this judgment are mere unsubstantiated statements of fact that cannot be considered by this Court in determining the Claimant's claim herein.
11. Having considered the Claimant's pleadings and evidence presented thereon, issues that fall for determination, in my view, are as follows:-
 - a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
12. On the first issue, the Claimant pleaded and testified that he was employed by the Respondent in February 2009 and worked until 4/6/2016 when his employment was terminated by the Respondent's Site Manager without any valid reason and without any notice. Section 45(2) (a) of the *Employment Act* states that termination of an employee's employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid. Further, termination of an employee's employment without notice pursuant to Section 35(1) (c) of *Employment Act* is unfair. The Claimant pleaded and testified that his employment was terminated without notice. His evidence was not rebutted by the Respondent. I find and hold that termination of the Claimant's employment was unfair.
13. On the second issue, and having found that termination of the Claimant's employment was unfair, and having taken into account the circumstances in which the Claimant's employment is shown to



have been terminated, I award the Claimant the equivalent of nine month's salary being compensation for unfair termination of employment. That is ksh. $650 \times 28 \times 9 =$ ksh. 163,800.

14. I also award the Claimant ksh. 18,200 being one month salary in lieu of notice pursuant to section 35(1) (c) of the *Employment Act*.
15. The claims for overtime and 4 days worked in November 2017 were not proved and are declined. The claim for unpaid leave is allowed at 21 days' pay for each complete year served ($650 \times 21 \times 7$) = ksh. 95,550. The claim for unpaid holidays worked was not proved, and is declined. The claim for service pay is disallowed pursuant to Section 35(6) (d) of the *Employment Act* as the Claimant was a member of and a contributor to NSSF. The claim for issuance of a certificate of service is allowed.
16. Ultimately, and having considered written submissions filed by the Claimant, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. Compensation for unfair termination of employmentksh. 163,800
 - b. Payment in lieu of notice.....ksh. 18,200
 - c. Unpaid leaveksh. 95,550Total ksh. 277,550
17. The Respondent shall issue the Claimant with a certificate of service pursuant to Section 51(1) of the *Employment Act* within thirty days of this judgment.
18. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

