



Gona & another v Athi River Mining PLC (Formerly Known As Athi River Mining Limited) (Cause 336 of 2018) [2023] KEELRC 2947 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2947 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 336 OF 2018
AK NZEI, J
NOVEMBER 16, 2023**

BETWEEN

WILTON KALUME GONA 1ST CLAIMANT

PATRICK KITSAO CHAO 2ND CLAIMANT

AND

ATHI RIVER MINING PLC (FORMERLY KNOWN AS ATHI RIVER MINING LIMITED) RESPONDENT

JUDGMENT

1. The suit herein was filed by the 1st and 2nd Claimants on 21/5/2018 vide a memorandum of claim dated 16/5/2018. The 2nd Claimant’s claim was withdrawn with no order as to costs on 21/11/2022, just before trial on the 1st Claimant’s claim commenced. This judgment is therefore on the 1st Claimant’s claim only.
2. The 1st Claimant pleaded that he was employed by the Respondent as a security guard on 10/4/2012, earning a salary of ksh. 13,780 at the time of termination. The 1st Claimant further pleaded that on 15/8/2017, he was issued with a termination letter on account of redundancy; informing him that the Respondent had reviewed its operational requirements. That the 1st Claimant was not issued with a termination notice, but was issued with a termination letter a day before his employment was to end.
3. It was the 1st Claimant’s pleading that he was unfairly dismissed without any justifiable cause and without following due process as per the law, and without payment of the 1st Claimant’s terminal benefits.
4. The 1st Claimant set out his claim against the Respondent as follows:-
 - a. One month salary in lieu of notice.....ksh. 14,420.90



- b. Underpayment for the years
May 2017 – August 2017
(14,420.90 -13,780X4 months)kshs. 2,563.60
 - c. Days worked upto 16th August 2017
(554x16 days).....ksh. 8,864
 - d. Gratuity (18 days x ksh. 554.18x5 years)ksh. 49,860
 - e. Unpaid leave days (554x21x5 years).....ksh. 58,170
 - f. Severance pay (15 days X ksh. 554x 5 years).....ksh. 41,550
 - g. Compensation for unfair termination
on account of redundancy
(12 months X 14,420.90).....ksh. 173,050.80
Total ksh. 348,476.30
Less paid ksh. 70,000
Total amount payable ksh. 278,476.30
 - h. A declaration that termination of the 1st Claimant’s employment was unfair, unjust and wrongful.
 - i. Costs of the suit and interest at Court rates.
5. Other documents filed by the 1st Claimant alongside the Memorandum of Claim were the 1st Claimant’s written witness statement dated 16/5/2018 and an evenly dated list of documents. The listed document included the 1st Claimant’s NSSF statement, employment Identification Card, Certificate of Service dated 17/8/2017 and a termination of employment letter dated August 2017 informing the 1st Claimant of termination of his employment with effect from 16th August 2017.
 6. The Respondent entered appearance on 28/9/2018 and filed a Statement of Response on 22/2/2022.
 7. The Respondent admitted that the 1st Claimant was its employee, employed on 10/4/2012, and earning ksh. 8,840 at the time of termination, which was subject to statutory deductions.
 8. The Respondent denied having unfairly declared the 1st Claimant redundant and pleaded that a redundancy notice was issued prior to the last working date, that the decision was necessitated by continuing crippling financial challenges resulting from change in market demands. That the 1st Claimant was paid his final dues including one month salary in lieu of notice, in the sum of ksh. 73,576.61, which was paid into his bank account, and that the 1st Claimant is not entitled to gratuity as the Respondent remitted the required amounts to NSSF. That the 1st Claimant was not entitled to any alleged leave not taken after 18 months from the date of any leave earning period.
 9. At the trial, the 1st Claimant adopted his filed witness statement as his testimony, and produced in evidence the documents listed on his list of documents. The 1st Claimant clarified that he was employed by the Respondent in 2012, but not 2010.
 10. Cross-examined, the 1st Claimant testified that the Respondent was remitting his NSSF contributions, and that his daily wage, according to his witness statement, was ksh. 530; that he did not take leave



during the period of employment and that he was paid ksh. 73,576.61 upon termination, though tabulation thereof was not given.

11. The 1st Claimant further testified that although the termination letter issued by the Respondent stated the reasons for termination, the letter was given to him on the last day as he left employment.
12. The Respondent called one witness, Rupa Soni (RW-1), who adopted his filed witness statement and produced in evidence the documents listed on the Respondent's list of documents dated 21/2/2022. RW-1 further testified that he had no evidence to show that the Respondent held any meetings with its employees and the Labour (officer), that the 1st Claimant's termination letter did not have a specific date, and that there was nothing to show when the termination letter was given to the 1st Claimant. That the letter was a termination letter on account of redundancy. That there was no record of the 1st Claimant having taken leave, that the 1st Claimant was terminated on 16/8/2017, and was being paid weekly; that his leave pay was calculated for 64 months and that he was paid ksh. 47,132.16.
13. Having considered the pleadings filed and evidence presented by the 1st Claimant and the Respondent, issues that present for determination, in my view, are as follows:-
 - a. whether termination of the 1st Claimant's employment on account of redundancy was unfair.
 - b. whether the 1st Claimant is entitled to the reliefs sought.
14. On the first issue, Section 40(1) of the *Employment Act* sets out the procedure that must be followed by an employer before termination of an employee's employment on account of redundancy. The Section provides as follows:-

- “(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;



- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
 - (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."
15. None of the parties herein specifically testified to the 1st Claimant having been a member of any trade union. The Respondent made a general allegation of having held meetings with its employees and "the Labour people", but admitted that there was no evidence of such meetings or of any notice having been served. On his part, the 1st Claimant testified that he was given a termination letter on the last day of his employment (16/8/2017), and that ksh. 73,576.61, whose tabulation was not given, was paid into his bank account after termination. The Respondent (RW-1) agreed that the 1st Claimant left employment on 16/8/2017, and that his termination letter did not have a specific date, and had nothing to show when it was given to the 1st Claimant.
16. There was clearly no compliance with Sections 40(1) (a) and 40(1) (b) of the *Employment Act* in the present case. The Court of Appeal held as follows in the case of Thomas De La Rue [k] Ltd -vs- Davind Opondo Omutelema [2013] eKLR:-
- "It is clear to us that Section 40(1)(a) and 40(1)(b) provides for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a trade union, the notification is to the union and the Local Labour Officer at least one month before the effective redundancy date.
- Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer..."
17. The Respondent admitted that it did not serve any notification, and the 1st Claimant denied having been served with any notification prior to his termination on account of redundancy. Further, the Respondent did not tell the Court what criteria it used in settling on the 1st Claimant for redundancy. It was held as follows in FRANCIS MAINA KAMAU -VS- LEE CONSTRUCTION [2014] eKLR:-
- "where an employer declares redundancy, the conditions set out in Section 40 of the *Employment Act* must be observed and where the employer fails to do so, the termination becomes unfair termination within the meaning of Section 45 of the *Employment Act*."
18. The Respondent having failed to adhere to mandatory provisions of the foregoing statute in terminating the 1st Claimant's employment on account of redundancy, the termination was unlawful and therefore unfair within the meaning of Section 45 of the *Employment Act*.
19. On the second issue, and having found that termination of the 1st Claimant's employment on account of redundancy was unfair, and taking into account the circumstances in which the employment in issue was terminated, I award the 1st Claimant the equivalent of ten months salary in compensation for unfair termination of employment. The 1st Claimant pleaded that he was earning kshs. 13,780 at the time of termination. In his witness statement which he adopted as his testimony, however, the 1st Claimant stated that he was earning ksh. 530 per day. On its part, however, the Respondent produced documents indicating that the 1st Claimant was earning a net monthly pay of ksh. 8,840. This figure is



shown to have been the basis of calculating the ksh. 73,576.61 that was paid to the 1st Claimant upon termination.

20. In the absence of candid evidence by the 1st Claimant on what his monthly earnings were at the time of termination, I will adopt ksh. 8,840 as his monthly salary at the time of termination. The equivalent of ten months salary will therefore be ksh. 8,840X10 – 88,400; which I award the Claimant.
21. The Respondent testified that the 1st Claimant was paid total of ksh. 73,576.61 upon termination and that the said sum included one month salary being notice pay (ksh. 8,840), ksh. 30,600 being severance pay (5 years), unpaid leave days (ksh. 47,132.16, travelling allowance and baggage allowance (a total of ksh. 95,572.16 less statutory deductions = 73,576.01). The 1st Claimant admitted in evidence to having been paid the said sum of ksh. 73,576.61. The claims for severance pay, notice pay and leave pay are declined, in view of the aforesaid admitted payment.
22. The claim for underpayment was not proved, and is declined. The claim for gratuity is declined under Section 35(6) (d) of the Employment Act as the 1st Claimant was a member of, and a contributor to NSSF. On the claim for 16 days worked in August 2017, I award the Claimant ksh. 4,715.
23. Having stated all the foregoing, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the 1st Claimant against the Respondent for:-
 - a. Compensation for unfair termination
of employmentksh. 88,400
 - b. Days worked in August 2017.....ksh. 4,715Total ksh. 93,115
24. The 1st Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling 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

Appearance:

.....for Claimant

.....Respondent

