



Chepng'otie v Kenya Kazi Security Services (Employment and Labour Relations Cause 36 of 2017) [2023] KEELRC 2868 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2868 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 36 OF 2017
MA ONYANGO, J
NOVEMBER 10, 2023**

BETWEEN

PETER MARU CHEPNG'OTIE CLAIMANT

AND

KENYA KAZI SECURITY SERVICES RESPONDENT

JUDGMENT

1. Vide his Memorandum of Claim dated 4th May 2017 and filed in Court on 5th May 2017, the Claimant avers that his employment was unfairly terminated by the Respondent and that he was not paid his terminal benefits.
2. The Claimant states that he was employed by the Respondent as a security guard with effect from 20th May 2011 on permanent terms and that as at the time he left employment, he was earning a gross salary of Kshs 16,000.
3. It is the Claimant's case that he served the Respondent with loyalty, diligence and full dedication until 31st May 2014 when the Respondent unlawfully terminated his services and refused to pay his terminal dues.
4. According to the Claimant, the termination of his employment was unfair as he had requested to be allowed to remain in his Eldoret station after being transferred within short intervals to several other stations.
5. The Claimant averred that he the Respondent unlawfully and unprocedurally posted him to Naivasha without notice and without being accorded an opportunity to explain himself or given time to resettle his family. That when he requested for more time to report to his new station, his employment was terminated.
6. The Claimant seeks the following reliefs:



- i. A declaration that his services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the claimant is entitled to compensation of his terminal dues as outlined in the statement of claim.
 - ii. The sum of Kshs 531,691.19 as particularized in the statement of claim
 - iii. Certificate of service
 - iv. Costs of this suit and Interests at court rates from time of filing the suit until payment in full
 - v. Any other relief the Honourable court may deem fit and just to grant.
7. The Respondent in its Reply to the Memorandum of Claim dated 24th July 2017 and filed in court on 23rd August 2017 denied terminating the Claimant's employment and averred that the Claimant resigned from the Respondent's employment on his own volition without notice as contemplated in the service agreement.
8. The Respondent avers that following the loss of the Respondent's business at Raiply Limited, Eldoret, where the Claimant had been deployed, the Claimant together with 80 other officers were posted to various positions, and that instead of the Claimant reporting for duty at the new station he opted to resign from the Respondent's employment vide a letter dated 31st May 2015.
9. It is the Respondent's contention that there is no claim arising against the Respondent and the Claimant's claim should be dismissed as it is an abuse of the court process.

Claimant's Case

10. The Claimant testified on 21st March 2023 as CW1. He reiterated the averments he made in his Memorandum of Claim.
11. The Claimant stated that at the time he was transferred to Naivasha from Eldoret, he had a sick father and requested to be retained to take care of the parent.
12. He testified that he was only given two options by the Respondent, to resign or go to Naivasha. He further stated that he was given a letter to stop working with immediate effect and compelled to write a resignation letter. He maintained that he was not issued with a notice nor was he paid his terminal dues. He further stated that he never went on leave in 2014 and that he used to report to work from 6am to 6pm but was not paid overtime.
13. The Claimant further stated that he did not resign voluntarily. He urged the Court his allow his claim as prayed.
14. On cross examination the Claimant stated that he had earlier been transferred from Kakamega to Eldoret after he requested for a transfer vide a letter dated 29th November 2011. He further stated that sometimes in 2014, he was given a transfer which he declined as he was attending to his sick father. He stated that he wrote a letter of resignation which was accepted by his employer.
15. He confirmed that the pay slips of October and November 2011 showed that he had been paid overtime. He also confirmed that he did not give notice before he resigned from employment.
16. On being re-examined, the Claimant stated that he did not know if he was paid overtime after 2011 as he was never issued with pay slips save for those of October and November 2011.



Respondent's Case

17. RW1, Christine Mudanji, the Respondent's Human Resources Officer, Western Region adopted her witness statement recorded on 22nd November 2021 and the Respondent's documents dated 24th July 2017 as her evidence in chief.
18. On cross examination, RW1 confirmed that the Claimant was the Respondent's employee from 2011 working in Eldoret for a client by the name Raiply Limited. She stated that the Respondent lost business with Raiply in 2014 and as a result all the employees including the Claimant were informed one month in advance by the operations manager that they would be assigned elsewhere.
19. RW1 further testified that the Claimant was transferred to Naivasha but declined and opted to resign. RW1 conceded that the Claimant stated that he was not able to relocate and requested that his position be held until an assignment for Eldoret arose. She admitted that the Claimant worked from 6am to 6pm and stated that employees were paid a standard overtime though she did not have proof that the said overtime was paid. RW2 stated that she could not confirm if the Claimant received his pay slips. She stated that the Respondent paid NSSF and NHIF
20. RW1 stated that the Claimant was paid his terminal dues, that his salary was calculated less one month's notice as he did not give notice.

Submissions

21. The Claimant's submissions were filed on 3rd August 2023. The Claimant submitted that he was an employee of the Respondent as evidenced by the service agreement dated 20th May 2011 which formed part of the Claimant's documents.
22. It is the Claimant's submission that upon being informed that he had been transferred to Naivasha from Eldoret, he informed his staffing officer, Mr. Fred that he would not be able to go on the transfer immediately as he needed more time to resettle his family and also that his father was unwell and depended on him for support. It was submitted that the Respondent gave the Claimant only two options, that he either report to Naivasha or resign.
23. The Claimant submitted that since he could not go to Naivasha immediately, he involuntarily resigned vide a resignation letter dated 31st May 2014. That the fact that the Respondent accepted the resignation letter on 31st May 2014 without addressing the concerns raised by the Claimant on his inability to go to Naivasha indicates that the termination was malicious and ill-willed.
24. The Claimant submitted that there was need for him to be served with a show cause letter on why he should not be transferred to Naivasha and also accord him a hearing and that the Respondent should have come up with mechanisms that would accommodate the Claimant's situation as expounded in the case of *Henry Ochido v NGO Co-ordination Board* [2015] eKLR. The Claimant submitted that due process was not followed in transferring him to Naivasha which eventually led to his involuntary resignation. The cases of *Geoffrey Mworira v Water Resources Management Authority & 2 others* [2015]eKLR, *Mary Nyanagasi Ratemo & 9 others vs Kenya Police Staff Sacco Limited & Another* [2013] eKLR were relied on.
25. The Claimant submitted that the Respondent unfairly and unlawfully terminated his employment through creating a hostile environment making it difficult for him to continue working.
26. The court was urged to award the Claimant compensation for unfair termination as prayed.



27. The Respondent on the other hand filed its submissions on 26th September 2023 in which it maintained that the Claimant is misguided in his allegations that he was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent since the Claimant voluntarily resigned.
28. According the Respondent, from the Claimant's resignation letter, he intended to terminate the employment agreement as the said letter was not challenged by the Claimant at any point in these proceedings. The Respondent thus submitted that the Claimant had failed to prove unfair termination of his employment.
29. With respect to the reliefs sought by the Claimant, the Respondent submitted that the Claimant resigned without giving his employer notice, that the tone of his resignation letter did not reflect any anguish against the Respondent and that in the letter the Claimant even thanked the Respondent for giving him employment and requested that if at all there would be any available vacancies in future within Eldoret, he should be considered.
30. The Respondent contended that the Claimant is not entitled to receive compensation for unfair termination as his employment was not unfairly terminated.
31. The court was urged to dismiss the claim with costs to the Respondent.

Determination

32. Upon considering the pleadings herein, the evidence of the respective parties, the submissions and the authorities cited, I find that the issues for determination are: -
 - i. Whether the Claimant's employment was unlawfully terminated or he voluntarily resigned from employment,
 - ii. Whether the Claimant is entitled to the remedies sought.
33. The resignation letter of the Claimant is reproduced hereunder:

Kenya Kazi Services
Box 6658,
Eldoret Branch
31st May 2014
The Operations Manager,
KKSecurity Ltd
Eldoret Branch
BOX 6658
Eldoret.
Dear sir
Re: Resignation

I do humbly request the above raised issue due to my status at home ground over the given transfer to a new working station. My target will be affected over my entire family that they normally have great difference and that is why I am unable to travel together or left back



home since the living standard will be affected. And therefore my last date will be on 31st May 2014.

May I take this chance to say thank you for the last three years serving as a guard and also if in case a vacancy happened to be found within Eldoret you consider me.

Thanks in advance

Signed

Peter Maru Chepngotie

34. Upon receipt of the said resignation letter, the Respondent wrote to the Claimant a letter of acceptance of resignation on the said date which read:

May 31, 2014

Peter Chepngotie Maru

Security Officer

Kenya Kazi Security Ltd

Operations Department

Eldoret

Dear Peter,

Re: Acceptance of Resignation

We acknowledge receipt of your resignation letter dated 31st May 2014. As a company, we have no objection in accepting your resignation. Your employment with the company has therefore ceased with immediate effect.

Endevour to surrender all company possession in your custody for clearance purposes to facilitate timely payment of your terminal dues (if any) that are subject to deduction of any outstanding amount you owe the company

The management would like to take this opportunity to reiterate its appreciation to the services rendered while in employment and wish you success in all your future endeavours.

Yours sincerely,

Signed

Nicodemus Mbatha

Branch Operations Manager

cc. County Labour Officer-Uasin Gishu

Chief shop stewards

Personnel file

Human Resources manager-KK Kenya

35. According to the Claimant, the termination was deliberately intended by the Respondent to maliciously dispose of him. He contended that despite justifying his inability to go on transfer, the Respondent immediately accepted the resignation without inviting the Claimant for a discussion on how the challenges raised by him would be mitigated, prompting his involuntary resignation.



36. The Respondent has maintained that the Claimant resigned voluntarily from employment and that he was paid his terminal benefits.
37. In *Mariana Onica and Another v Sky Aero Limited*, Cause No.1815 of 2014 the Court held:
... in bringing such a dispute, it is for the employee to prove that the employer was responsible for introducing the intolerable condition, and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that he did.
38. In this case, the Claimant submitted that he was forced to resign after his request not to be transferred was declined. He further stated that even after he resigned and cited his reasons for doing so, the Respondent did not make any effort to mitigate his situation.
39. A transfer is a prerogative of the employer. However, this is only so if the terms of employment provide for the same. In the Claimant's letter of appointment there is no provision for transfer. Paragraph 1 of the Claimant's service contract dated 20th May 2011 reads:
1. Nature of Employment
The Company (KK Security) hereby offers employment to Maru Chepngotie Peter C/NO 14442 to serve as a guard in Eldoret subject to the terms and conditions set hereunder.
40. The other terms in the service contract are:
2. Nature of Duties
 3. Remuneration
 4. Commencement
 5. Leave
 6. Termination of Agreement
 7. Special Instructions
 8. Dispute Resolution
 9. Confidentiality
 10. Interpretation
41. Under Interpretation the service contract provided that the agreement shall be interpreted and take effect in accordance with the relevant Laws of Kenya for all purposes and in particular the provisions of the [Employment Act](#) 2007 and orders made thereunder.
42. The service contract did not contain any provisions such as the procedure for transfer, notice, facilitation upon transfer or appeals against transfers. The Respondent did not issue the Claimant with a letter of transfer to change the terms of his contract to provide for him to work elsewhere other than Eldoret as provided in section 13 of the [Employment Act](#) for change of employment particulars. The Respondent did not produce any terms of employment or employment policies that provided for transfer of staff from one town to another.
43. In the letter of resignation the Claimant clearly stated the reason for his inability to go on transfer; that he had family obligations that did not allow him to go on transfer. By giving him only two options, to



go on transfer to Naivasha or resign, the Respondent was forcing the Claimant to choose between his family and his job. The Respondent did not state that there were no assignments in Eldoret or nearer Eldoret that the Claimant could be relocated to. The Claimant testified that he discussed his situation with his supervisor before he wrote the letter of resignation.

44. I find that the Respondent constructively dismissed the Claimant by giving him no option other than to resign or go to Naivasha when his service agreement did not provide for transfer. The resignation was therefore not voluntary. The fact that it was accepted immediately and that the Respondent deducted pay *in lieu* of notice from the Claimant's terminal dues would justify the Claimant's averment that the Respondent probably wanted to get rid of him, perhaps because it had lost the contract where the Claimant was deployed.

45. The next issue for consideration is whether the Claimant is entitled to the reliefs sought in his prayers.

i. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated

As I have already found above, the Claimant was constructively dismissed. I therefore declare that the resignation was involuntary and therefore amounted to an unfair termination.

ii. The sum of Kshs 531,691.19 comprised of:

a. One month' notice

The Claimant is entitled to one month's salary in lieu of notice and I award him the same. The Claimant's basic salary according to the tabulation of the Respondent which I have confirmed was based on the statutory minimum rates gazette in 2013 was Kshs 10912. With 15% house allowance the Claimant's consolidated pay was Kshs 12,549 which I award him.

b. Compensation for unfair termination

The Claimant is entitled to compensation as he was unfairly terminated. Taking into account his length of service and the circumstances under which his employment was terminated and all other relevant factors under section 49(4) of the *Employment Act* I award the Claimant 6 months' salary as compensation in the sum of Kshs 75,294.

c. Service Pay/Gratuity

d. The Claimant sought payment of Ksh 16,000 as service pay. He is not entitled to the same as he confirmed that he was a member of NSSF. He had not worked for 5 years to qualify for gratuity under the Regulation of Wages (Protective Security Services) Order under the *Labour Institutions Act*.

e. Leave pro-rate

It was the Claimant's evidence that he never proceeded on leave in 2014. This evidence was not controverted by the respondent's witness. I therefore award the Claimant Kshs 4,666.67 as prayed.

f. Overtime dues

Both the Claimant and RW1 were in consensus that the Claimant worked from 6am to 6pm. The same is also provided for under the Claimant's service contract. I have noted from the Respondent's tabulation of terminal dues that the same is reflected therein. The Claimant testified that he earned Kshs 16,000 per month which I believe was inclusive of the overtime.



The pay slip for exhibited by the Respondent also reflects that payment was made for public holidays. I therefore award the Claimant Kshs 3,153 which was due for the month of May 2014.

i. Certificate of service

The Claimant is entitled to a certificate of service and the Respondent is therefore directed to issue the Claimant to him.

iii. In conclusion judgment is entered in favour of the Claimants as against the Respondent in the following terms:

a. 1 months' salary *in lieu* of notice Kshs 12549

b. Leave pro-rata Kshs 4,666.67

c. Overtime Kshs 3,153

d. Compensation Kshs 75,294

Total Kshs 95,662.67

d. Certificate of Service

46. The Claimant is awarded costs and interest which shall accrue at Court rates from the date of Judgment until payment in full.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 10TH OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

