



**Kariuki & another v Multi Packaging Limited t/a Print Pak (Cause 1030 of 2018) [2023] KEELRC 3129 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3129 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1030 OF 2018  
NJ ABUODHA, J  
NOVEMBER 10, 2023**

**BETWEEN**

**JUDY RINDI KARIUKI ..... 1<sup>ST</sup> CLAIMANT**

**JACINTA WANGUI NJOGO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**MULTI PACKAGING LIMITED T/A PRINT PAK ..... RESPONDENT**

**JUDGMENT**

1. The Claimants filed their statement of claim on 21<sup>st</sup> June, 2018 pleaded inter alia as follows:-
  - a. The 1<sup>st</sup> Claimant was employed by the Respondent as a sorter at the Respondent's finishing department located at Likoni Road, Nairobi on or about 1996 at a starting salary of Kshs 100/= per day payable on a fortnight basis exclusive of house allowance and worked for the Respondent until on or about 31<sup>st</sup> October, 2017 when the Respondent terminated her services without any notice.
  - b. The 2<sup>nd</sup> Claimant was employed by the Respondent as a sorter at the Respondent's finishing department located at Likoni Road, Nairobi on or about 1997 at a starting salary of Kshs 100/= per day payable on a fortnight basis exclusive of house allowance and worked for the Respondent until on or about 31<sup>st</sup> October, 2017 when the Respondent terminated her services without any notice.
  - c. The Claimants averred that the decision to terminate their employment was wrongful as there was no valid reason for the said termination as the Claimants had only raised genuine concerns as to their terms of employment and that they were never given opportunity to show cause why they should not be terminated contrary to the basic principles of natural justice and section 41 of the *Employment Act*, 2007.



d. The Claimants further averred that after termination they went to labour offices where a demand letter was done and the Respondent's officers summoned but failed to attend the meetings and that the termination being unlawful the Respondent is bound to pay them their terminal dues and compensate them for unlawful loss of employment.

e. The Claimants in the upshot prayed for the following against the Respondent;

1. 1<sup>st</sup> Claimant

a. One Month's Salary in lieu of Notice  $17,447.15 + 2,617.07 \dots 20,064.22$

b. Underpayments

May 2015-October 2017  $17,447.15 - 11,818 = 5,629.15 \times 29 \text{ months} \dots 163,245.35$

May 2013-April 2015  $13,201.55 - 7,575 = 5,626.55 \times 24 \text{ months} \dots 135,037.2$

c. House Allowance for the period April 2015-October 2017 (15% of 11,818) x 30 months  $\dots 53,181$

d. Service pay for 9 years 1996-2005  $(15/30 \times 13590.7) \times 8 \text{ years} \dots 61,155$

e. 12 months gross salary compensation  $12 \times 20,064.22 \dots 240,770.64$

Total Amount  $\dots 673,453.41/=$

2. 2<sup>nd</sup> Claimant

i. One Month's Salary in lieu of Notice  $17,447.15 + 2,617.07 \dots 20,064.22$

ii. Underpayments

May 2015-October 2017  $17,447.15 - 11,818 = 5,629.15 \times 29 \text{ months} \dots 163,245.35$

May 2013-April 2015  $13,201.55 - 7,575 = 5,626.55 \times 24 \text{ months} \dots 135,037.2$

iii. House Allowance for the period April 2015-October 2017 (15% of 11,818) x 30 months  $\dots 53,181$

iv. Service pay for 8 years 1996-2005  $(15/30 \times 13590.7) \times 8 \text{ years} \dots 54,362.8$

v. 12 months gross salary compensation  $12 \times 20,064.22 \dots 240,770.64$

Total Amount  $\dots 666,661.21/=$

2. The Claimants prayed for orders that

a. The Claimants' termination be declared unlawful, wrongful and unfair

b. The Claimants be paid their terminal dues as illustrated above

c. Costs and interest at court rates.

3. The Respondent filed its statement of response dated 26<sup>th</sup> July, 2018 and they averred inter alia;



- i. The Respondent denied the contents of the claim and averred that the Claimants were employed on casual basis in 1996 and the terms of employment were changed to contractual from 1<sup>st</sup> October, 2006 and that they did not terminate the Claimants' services as the Claimants were issued with the contracts of employment like all other general workers to sign but instead declined to sign the new contracts on or about September, 2017 upon expiry of the previous ones but instead demanded to be employed permanently and never turned up for work the following day and they did not give notice to the Respondent.
  - ii. The Respondent also averred that the salary paid to the Claimants was inclusive of House Allowance as per the minimum wage General orders of that time and reiterated that the Claimants left work on their own volition after they declined to sign the contracts of employment.
  - iii. The Respondent further averred that upon receipt of the letter dated 21<sup>st</sup> December, 2017, its human Resource Manager called one Mr. Kimeu from Labour office and they agreed to discuss the issue in January 2018 as offices were being closed for Christmas Holidays.
  - iv. The Respondent further averred that it further received a letter dated 9<sup>th</sup> January, 2018 from Kenya Union of printing, Publishing, paper Manufacturers, pulp and packaging Industries (KUPRIPUPA) to which the Claimants are members inviting them to discuss the Claimants' case where the Respondent attended but the Claimants did not show up where the union promised to contact them and call the Respondent who has never being called to date.
4. Both the Claimant's case and Respondent's case was heard on 8<sup>th</sup> June, 2023 where each had one witness.
  5. CW 1 the 2<sup>nd</sup> Claimant testified with authority from the 1<sup>st</sup> Claimant and adopted the documents filed before the court as evidence in chief.
  6. CWI testified that they were never given any contract to sign in 2017 and the ones they signed were for 2013 which was for two years and they were expunged from the system without being given any reason and she wrote a letter asking the reasons for the same which was never responded to.
  7. CW1 testified that they reported the matter to labour office where the Respondent was invited for a meeting and never turned up. The labour office requested for the underpayments, house allowance as they were not housed, service pay from 1996 to 2005 since they were not registered for NSSF.
  8. In cross examination CW1 testified that before 2006 they did not have contracts and after that they were given contracts which used to expire and got renewed and after 2015 when their contract expired they never refused to sign any new contract. It was the 1<sup>st</sup> Claimant's evidence that when she was issued with a certificate of service she knew the Respondent was done with them and she reported the matter to Labour office. She did not go to the union and was not aware of their letter as she was not a member of the union. She did not know the union went to the Respondent's premises to defend them.
  9. CW1 testified that she attended labour office on 15<sup>th</sup> and 26<sup>th</sup> January and the Respondent never showed up and that she was never given a certificate of service but the 1<sup>st</sup> Claimant was given and that they never reported the issue to the police station. She further states that their contracts did not have specific provisions on house allowance.
  10. CW1 testified that their contracts ended in 2015 and they refused to work without contracts and in 2017 they could not access work place after being fired by production officer Mr. Kundu and the contracts were to be signed in the office.



11. On re-examination, CW1 confirmed that she was working at the machine area and she had a pay slip between 1996-2005 where she was paid monthly and her last contract was 2015 which was not signed by the parties and that the produced contracts referred to different employees and not her and that she did not ask for the certificate of service after termination.
12. CW1 confirmed that she did not have any issue with signing any contract and she was not warned or taken through disciplinary process for failure to sign a contract.
13. The Respondent on the other hand called its first witness one Jitu Savani RW1, its Managing Director who testified. He had recorded his statement which he adopted as his evidence in chief.
14. RW1 testified that the Claimants were sorters of labels and there were no machines and conveyers in the said department as the Claimants never operated any machines and did not agree that the Claimants were terminated. According to him, all employees had contracts. Everyone was called to sign contracts but the two Claimants refused to sign. Those who signed remained at work. The contracts were signed at HR Department.
15. RW1 further averred that he never refused to attend at the labour office meetings as the HR person attended all meetings and received a letter from the union saying the Claimants were members and that Claimants reported the matter to Kitui Police station.
16. RW1 testified that the Claimants were never underpaid as they followed the gazetted wages, house allowance was included in the salary and it was stated in the contracts. He further denied the claimants were entitled service pay. He stated that the Claimants refused to sign new contracts and that the meeting was about signing new contracts not termination
17. On cross examination, RW 1 disagreed that the Claimants worked without contracts from 1996 to 2006 and stated that there were no contracts in court but there were pay slips showing the Claimants were paid monthly. He further stated that there was no show cause letters before the court and that contracts existed but the Claimants never signed them. He did not produce any minutes that showed the claimants refused to sign contracts. He also stated that no disciplinary hearing/process or action was taken on the Claimants.
18. RW1 testified that the Claimants continued to work despite not signing any contract. That the claimants were classified as casual workers. It was his evidence that contracts were signed at HR Office. The Claimants met at the Production Manager's office and there was no response from them on signing of the contracts.
19. RW1 confirmed that they had a different form of certificate of service and that they never housed the staff. On reexamination RW1 confirmed that it was not a must contracts be signed at HR.
20. The Respondent called its second witness Stephen Otete who adopted his documents, statements filed in court as his evidence in chief and testified that he had worked for the Respondent for long, he knew the Claimants as they worked together and that the Respondent wanted to employ them on permanent basis but things were not okay so the Respondent requested them to renew their contract which everyone did but the two claimants refused saying they needed to be employed permanently and said they would not come to work anymore until they were made permanent employees. In Cross examination RW2 confirmed that the claimants were to sign the contracts on 1<sup>st</sup> September, 2017. In Reexamination RW2 stated that the employees were to sign the contracts at their own comfortable times not at once.



## Claimants' Submissions

21. The Claimant filed written submissions dated 20<sup>th</sup> June, 2023 and on the issue of Claimants absconding duty on their own the Claimants submitted that they had worked for the Respondent for over 20 years and they could not just walk away because of signing of contracts when the last contract expired in 2015 and they continued working without contracts and that they never refused to sign any contracts.
22. The Claimants submitted that if at all they refused to sign the 2015 contracts, why did the Respondent not take any action against them? No show cause letter was issued or disciplinary action taken over the Claimants' conduct. Further, prior to dismissal, the respondent never gave them a chance to be heard and despite receiving the Claimants letters of complaint they did not respond.
23. On the reason for termination the Claimants submitted on section 43 and 45(2) of the Employment Act concerning the validity of reason for termination and fairness. Despite the Claimants protests the Respondent did not address their concerns and on 1<sup>st</sup> November, 2017 the claimants could not access their work place and the guards informed them that they could not enter the premises.
24. Their termination on the grounds of absconding duty and failure to sign contracts was unfair since it was not illustrated when they refused to sign
25. On the issue of fair procedure the Claimants submitted on requirements of section 41 and relied on the case of Liz Ayany v Leisure Lodges Limited (2018) eKLR. According to Counsel, the Claimants were not taken through the mandatory process since the last thing they heard from the Respondent was the meeting at production manager on 31<sup>st</sup> October, 2017 that they would be expunged from the system and the next day they could not access the premises.
26. On the reliefs sought the Claimants submitted that they were entitled to one month's notice pay, underpayments, house allowances, service pay, compensation for unlawful termination and costs of the cause as prayed.
27. The Respondent on the other hand filed its submissions on 11<sup>th</sup> July, 2023 and submitted that the Claimants were never terminated by the Respondent but left employment on their own volition and without notice. This according to Counsel for the respondent, was a classic case of voluntary negation and absconding from duty. Counsel relied on the case of Joseph Njoroge Kiama vs Summer Ltd(2014) eKLR. The Claimants refused to sign the 2015 contracts yet the respondent retained them and when those contracts expired in 2017 they were given another contract for 6 months and still refused to sign claiming they needed permanent jobs and left without notice.
28. On the issue whether the termination was unfair and unlawful the Respondent submitted that even though the burden lies on the employer under section 47(5) of the Employment Act, the Claimants did not prove unfair termination of employment had occurred. This, according to counsel was a burden cast upon an employee. He relied on the case of Banking, insurance & Finance Union(Kenya) v Barclays Bank of Kenya Ltd(2014) eKLR and Boniventure Lubembe v Alba Petroleum Ltd (2016) eKLR on absconding of duty and submitted that the Claimants did not prove the case of unfair termination hence their claim should be dismissed.
29. On the Reliefs sought by the Claimants, the respondent submitted that the Claimants were not entitled to the reliefs sought after absconding duty and relied on the case of Patrick Wambasi Mutoro v Moi University (2018) eKLR.



30. On the underpayments the Respondent submitted that this was not true as Claimants were employed as sorters not machine operator's hence general laborers for purposes of computing salaries payable. Respondent relied on Regulation of Wages (General)(Amendment) Order 2012 provides for daily rate of Kshs 412.80/- for general workers yet the Claimants were getting Kshs 440/- daily above the given rate.
31. On notice pay, the Respondent submitted that the Claimants were not entitled to notice pay after leaving work on their own volition and on service pay the Respondent submitted that the Claimants were members of NSFF and relied on the case of Hassanath Wanjiku V Vanela House of Coffees (2018) eKLR and further submitted that once the contracts the claimants' were engaged in had lapsed the Claimants could not claim on them.
32. On house Allowance the Respondent submitted that the pay was inclusive house allowance as per the Regulation of wages (General) Order and exempted pursuant to section 31(2) of the *Employment Act* and the contracts signed stated the salaries were inclusive of house allowance and relied on the case of Stephen O. Edewa v Lavington Security Limited (2019) eKLR.
33. On damages for unfair termination the respondent submitted that this should fail since the Claimants were never terminated and if the court finds otherwise then this court should not exercise its discretion capriciously and take in to account misconduct of the Claimants as was held in OI Pejeta Ranching Limited v David Wanjau Muhoro(2015), GMV vs Bank Of Africa Kenya Limited, Naomi Ruwa v Peter Odote(2018) eKLR and Benard Mutunga Kii & Charcles Mutuku Mbatha v Kenya Aerotech Limited(2015) eKLR the courts granted less amounts taking in to account conduct of Claimants.
34. The Respondent urged the court to exercise the discretion on awarding costs judiciously under Rule 28(1) (e) of the Employment and Labour Relations Court (procedure) Rules 2016.

#### **Determination**

35. OI have reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. I have also considered authorities relied on by Counsels.
36. I have I have come up with three main issues;
  - i. Whether the Claimants' were terminated from Employment or they left on their own volition
  - ii. Whether the reason for the Claimants' termination was fair and the process procedural
  - iii. WhetherWheWhether the Claimants are entitled to the reliefs sought.

#### **Whether the Claimants were terminated from Employment or they left on their own volition**

37. It was the Respondent's case that the Claimants left work on 31<sup>st</sup> October 2017 without notice and never to returned the following day claiming they needed permanent employment after refusing to sign the 2017 contract of six months.
38. Whereas the Claimants have maintained that they were called at production Manager's office and fired the Respondent has not rebutted that fact but only stated that the reason for the meeting was to sign the new contracts. During hearing it became apparent that the contracts were to be signed at HRs office although not a must as RW1 testified.
39. I also note that the Claimant's letter of the said date of the meeting seeking clarification of what transpired in the morning went unanswered and I do not think this was the best way the Respondent could treat Claimants who had worked for it for over 20 years.



40. There were no warning letters given by the Respondent to the Claimants over the years alleging the said habit of absconding of duties and the Court is not convinced that the Claimants who continued to work with the Respondent up to 2017 despite their contract expiring in 2015 could just wake up and leave work unless there was a compelling reason. The Claimants have alleged that the security guards denied them entry in the Respondent's premises and they were told they will be expunged from the Respondent's system.
41. There being no conclusive evidence that the Respondent did not fire the Claimants I am convinced that the Respondent terminated the Claimants employment on 31<sup>st</sup> October, 2017 and proceeded to issue 1<sup>st</sup> Claimant with certificate of service.

### **Whether the reason for the Claimants' termination was fair and procedural**

42. The court has stated previously that it is not within its realm to over-analyze the reason for which employment has been terminated. The test usually is the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss?" If the answer be in the affirmative, the court will not interfere.
43. In this case, as stated above I am not convinced that the Claimants left work on their own volition and the reason given by the Respondent that they absconded work is not convincing. No evidence was led to show any effort was made to contact the claimants to return to work at the risk of termination in default. Further, there were no warnings given to the Claimants for failing and or refusing sign the contracts if any from 2015 when their contract expired. The Court does not believe that the Claimants just wake up in 31<sup>st</sup> October, 2017 and decided to just abscond duties when they willingly worked for the Respondent in 1996 to 2006 without contracts and from 2015 without signing the contract.
44. The Respondent produced unsigned contracts which the Claimants stated they did not have issue with signing and the same were never given to them. RW1 testified that he was not aware when the Claimants refused to sign the 2017 contracts yet the same was supposed to be signed on 1<sup>st</sup> September, 2017. It begs the question the respondent waited for two months to raise the issue. Section 44 (4) (g) of the *Employment Act*, 2007 provides on what amounts to gross misconduct and absconding of duties is one of them however this has not been proved by the respondent. In this regard the court finds that the termination of. the claimants' employment was not substantially justified as there was no valid and fair reason for termination.
45. Regarding procedural fairness, it was held in the case of Walter Ogal Anuro -vs- Teachers Service Commission (2013) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness. Further, the court is guided by section 41 of the *Employment Act* which requires notification and hearing before a termination on grounds of misconduct. The employee must be explained to in a language such employee understands, the reason for which termination or dismissal is being considered and the employer to consider the representations by such employee who should have an employee of his choice present.
46. The Respondent's witness acknowledged that they did not give the Claimants an opportunity to be heard by convening a disciplinary hearing or even giving them any show cause letter to respond to the allegations as per the requirements of the Act. The Claimants were never given any warning letters on their conduct despite this conduct dating back to 2015 when the contracts they signed in 2013 expired and they allegedly refused to sign the 2015 one. Under section 47(5) of the *Employment Act*, the burden of proving and justifying the grounds of dismissal/termination of employment is on the



employer. On this score the Court takes the view that the Claimants termination was procedurally flawed hence unfair within the meaning of section 45 of the Employment Act.

**Whether the Claimants are entitled to the reliefs sought.**

47. Considering the manner of termination, the prayer for payment of one month's salary in lieu of notice is allowed since the reason for the termination of the Claimants' employment have been found to be substantially unjustified and procedurally flawed.
48. The Prayer for underpayments the Claimants claimed that they were operating the machines but the Respondent denied this assertion and claimed that they were general laborers which fact was confirmed during hearing. Furthermore the claimants never produced any evidence of any skilled training they underwent as machine operators to justify their claim that they were employed as such. The Regulation of wages provided had House Allowance provision. The respondent did not prove or show that it housed or provided the claimants with housing allowance. The Court therefore awards the same as follows; May 2013-April 2015 the Claimants were paid Kshs 7575 while the regulation of wages (general) (amendment) order 2013 provided for Kshs 9,780.95 add 15% house allowance (1,467.14)=11,248.09 -7,575=3,673.09 x 24 months=Kshs 35,905.2 for each Claimant May 2015-April 2016 salary was Ksh 9,605 while the Regulation of wages (general) (Amendment) order 2015 provides for 10,954 add 15% house allowance(1,643.1)=12,597.1-9605=2,992.1 x 12 months=35,905.2 for each Claimant May 2016-April 2017 salary was 9,605 while the Regulation of wages (general) (Amendment) order 2016 provides for 12,926.55 add 15% house allowance(1,938.98)=14,865.53-9605=5,260.53 x 12 months=63,126.39 for each Claimant May 2017-October 2017 salary was 11,818 while Legal Notice 112 the Regulation of wages (general) (Amendment) order 2017 provides for 12,926.55 add 15% house allowance(1,938.98)=14,865.53-11,818=3,047.53 x 6 months=18,285.19 for each Claimant
49. On the prayer for service pay for 9 years, the respondent did not show that the claimants were registered for NSSF. Service pay will therefore be awarded at the rate of 15 days' pay for each complete year of service.
50. The claimants were general labourers and possessed no special skills that they could claim to have lost employment opportunity for upon termination. They could be hired to do any general work but having worked for the responded for approximately nine years, an award of eight month's salary would adequately compensate them for unfair termination of service.
51. The Claimants are entitled to certificate of service as envisaged by Section 51 of the Employment Act.
52. In conclusion the Claimants' claim is allowed as follows:
  1. Judy Rindi Karuiki
    - i. One month's salary in lieu of notice Kshs.11,818
    - ii. Underpayment plus house allowance Kshs.117,316.78
    - iii. 8 months' salary as compensation for Unfair termination Kshs. 94,544  
Kshs. 223,678.78
  2. Jacinta Wangui Njogu
    - i. One month's salary in lieu of notice Kshs. 11,818
    - ii. Underpayment plus house allowance Kshs. 117,316.78



- iii. 8 months' salary as compensation for Unfair termination Kshs. 94,544  
Kshs. 223,678.78
- iv. The claimants' shall further have cost of the suit.
- v. This award shall where applicable be subject to taxes and statutory deductions

53. It is so ordered.

**DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**ABUODHA NELSON JORUM**

**JUDGE**

