



**Shikuku v Borderless Tracking Limited (Cause 537 of 2019)
[2023] KEELRC 2735 (KLR) (3 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 537 OF 2019
B ONGAYA, J
NOVEMBER 3, 2023**

BETWEEN

VIOLET SHIKUKU CLAIMANT

AND

BORDERLESS TRACKING LIMITED RESPONDENT

JUDGMENT

1. The Memorandum of claim dated 05.08.2019 was filed on 20.08.2019 through Orego & Odhiambo Advocates. The Claimant alleges that her employment was unfairly and unlawfully terminated by the Respondent herein, a Limited Liability Company.
2. The Claimant stated that she was employed by the Respondent on or about 28.09.2018 in the position of a senior accountant and was earning a monthly net salary of Kshs.120,000/- as communicated in the respondent's appointment letter dated 28.08. 2018.
3. The claimant further pleaded that she worked diligently and to the respondent's satisfaction until 07.05. 2019 when her employment was unfairly, unlawfully and un-procedurally terminated on the alleged ground of downsizing occasioned by scaling down of the respondent's operations.
4. The Claimant maintains that her dismissal by the respondent was unlawful upon the following particulars:
 - a. Purporting to terminate the employment of the claimant on account of downsizing without following due process as laid down in law.
 - b. Terminating the employment of the claimant while in breach of the mandatory requirement to inform the claimant of the intention to downsize in writing and within the prescribed period.
 - c. Refusing or neglecting to issue the claimant with a certificate of service in violation to the provisions of section 51 of the *Employment Act*.



- d. Failing to pay the claimant her terminal dues as provided under the law.
5. The Claimant prayed for judgment for:
- a. A declaration that the respondent's conduct in handling the claimant during the pendency of her employment period amounted to unfair and unlawful dismissal and in breach of the *Employment Act* and principles of employment law
 - b. Damages for unfair and constructive dismissal from employment equivalent to twelve (12) months net salary totalling to Kshs.1,440,000/- with interest thereon at court rates from the date of award until payment in full.
 - c. A declaration that the withholding of the claimant's terminal dues is unlawful, illegal and void ab initio.
 - d. Payment for pending off days.
 - e. Payment for accrued leave days.
 - f. Pending salary for the 7-days worked.
 - g. Payment of one-month salary in lieu of notice.
 - h. Certificate of Service,
 - i. Costs of the suit plus interest thereon from the date of Award.
 - j. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.
6. The Respondent in the memorandum of response dated 22:10.2019 admits having engaged the Claimant as pleaded in the memorandum of claim. It however denies unlawfully and unfairly terminating the Claimant's employment as alleged. It maintained that the reason for termination was downsizing by the respondent occasioned by the harsh economic status and that the termination was done in accordance with the provisions of the employment law of Kenya.
7. The Respondent further denied subjecting the claimant to unfavourable and harsh working conditions as alleged by the claimant.
8. The respondent further denied failure or refusal to pay the claimant her terminal dues. It was urged that all dues owing to the claimant had been processed but remained unpaid as the claimant has failed or declined to clear with the respondent. The respondent pleaded that the dues shall be paid out and a certificate of service issued once clearance is done.
9. The respondent further stated that the claimant's dismissal was on valid ground and due process was followed and as a result the claimant is not entitled to the reliefs sought in her Claim.
10. The respondent stated that the claim is devoid of merit and should therefore be dismissed in its entirety with costs to the respondent.
11. The matter proceeded for hearing on 30.05.2023 with the claimant testifying to support her case. The respondent's case was closed without calling a witness to testify on its behalf.
12. The claimant adopted her witness statement dated 05.08.2019 as her evidence in chief. In her statement she reiterated the averments made in her memorandum of claim. She further urged this Honourable Court to find her claim with merit and to allow it as prayed.



13. Final submissions were filed for the parties. The Court has considered the material on record and returns as follows.
14. To answer the 1st issue, parties are in mutual position that they were in a contract of employment as pleaded for the claimant.
15. To answer the 2nd issue, the Court returns that the contract of service was terminated by the letter of termination due to downsizing dated 07.05.2019. The letter stated that due to hard economic times the respondent was scaling down the operations as it was unable to sustain its work force for lack of work and revenue. The claimant's services were therefore terminated with immediate effect. The claimant was to be paid days worked and a month's salary in lieu of notice. Further there was no alternative vacancy.
16. The 3rd issue is whether the termination was unfair. It is submitted for the claimant that the respondent failed to comply with section 40 of the Employment Act which applies to redundancy. In particular the prescribed a month's notice to the claimant and the area labour officer was not issued as per the section. Further the termination was with immediate effect and the claimant was not prepared or consulted at all. It is admitted for the respondent that the reason for termination was downsizing due to hard economic times. The Court finds that the reason advanced amounted to redundancy as the claimant lost employment for reasons not attributable to the claimant within the definition of redundancy in section 2 of the Act. The Court returns that section 40 applied and the procedure as prescribed on notices was breached. Further, the respondent provided no evidence to show that the downsizing was indeed due to hard economic times. It cannot therefore be that the reason was genuine per section 43 of the Act or fair as envisaged in section 45 of the Act.
17. The 4th issue is on remedies prayed for. The declaration will issue that the termination was unfair and unlawful as already found by the Court. There being no counterclaim against the claimant, there is nothing established to justify withholding of the claimant's final dues. The Court finds that the claimant is entitled to the declaration that the withholding of the final dues was unlawful, illegal and void ab initio. The claimant prays for 12 months' compensation. The Court has considered the factors in section 49 of the Act on award of compensation. The claimant had worked from 28.09.2018 to 07.05.2019 being 7 months and some days. She was denied notice and was not consulted. Thereafter the termination the respondent for unjustified want of clearance whereby the claimant had no debt owing, withheld the final dues. The Court has considered the clean record of service and the aggregate period served and returns that 3 months in compensation making Kshs.120,000 x 3 = Kshs.360, 000.00 will meet ends of justice. The claimant had not served for a year or 12 months envisaged per section 28 of the Act with the consequence that leave days as claimed had not been earned. Salary for 7-days is awarded at $7/31 \times 120,000 = \text{Kshs.}27, 096.80$ the same being established on a balance of probability. Payment of one-month Kshs.120,000.00 in lieu of notice is already found established as is awarded. Certificate of service is due per section 51 of the Act. As the claimant has substantially succeeded, costs are awarded.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination was unfair and unlawful.
2. The declaration that the withholding of the final dues was unlawful, illegal and void ab initio.
3. The respondent to pay the claimant Kshs.507,096.80 (less PAYE) by 31.12.2023 failing interest to be payable thereon from the date of this judgment till full payment.
4. The certificate of service be delivered by the respondent by 01.12.2023.



5. The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 3RD NOVEMBER, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

