



REPUBLIC OF KENYA



KENYA LAW
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**Athman v Fairfax Company Limited (Cause E421 of 2021)
[2023] KEELRC 3384 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3384 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E421 OF 2021
B ONGAYA, J
DECEMBER 20, 2023**

BETWEEN

HUSSEIN KAMAU ATHMAN CLAIMANT

AND

FAIRFAX COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed on 25.05.2021 the Memorandum of claim dated 10.03.2021 through Wetaba, Were & Associates Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the termination of the Claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his Constitutional rights.
 - b. Maximum compensation for wrongful dismissal
 - c. Special damages
 - i. One month's salary in lieu of notice.....Kshs.171,000/-
 - ii. Damages for wrongful dismissal
Kshs.171,000 x 12=Kshs.2,042,000/-
 - iii. Annual leave not granted..... Kshs.513,000/-
April 2018
April 2019
April 2020
 - iv. House allowance Kshs.704,298/- thus April 2017 – November 2020 15% of
Kshs.114,520 = Kshs.17,178/- x 41 months.



- d. Interest on the total
 - e. Certificate of Service
 - f. Costs of the Cause
 - g. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.
2. The Claimant's case is that he was employed by the respondent on 15.04.2019 in the position of an operations manager at a monthly salary of Kshs.114,000/-. He further states that he performed his duties diligently and to the respondent's satisfaction until 16.10.2020 when he was issued with a notice of temporary termination due to downsizing of the respondent company which effectively meant termination of his employment on account of redundancy without due regard to the procedure as laid out in sections 41, 44 and 45 of the *Employment Act*, 2007.
 3. The Claimant states that he was never issued with an employment contract despite the fact that he served the respondent for a period exceeding one year and that he was never issued with a pay slip upon payment of his salary. Further, he neither accorded any leave during his employment contract nor was he paid in lieu of such leave days earned but not taken. The claimant further averred that he was never afforded house allowance during the subsistence of his employment with the respondent contrary to the provisions under section 31 of the *Employment Act*, 2007.
 4. The claimant maintains that his termination was initiated when he followed up on the delay in remitting of the October salaries that was paid on the 15.10.2020. The claimant termed the respondent's action as unlawful, unfair and in complete disregard of the labour laws. He urged the Honourable Court to find his claim with merit and to allow it in terms of the reliefs sought therein.
 5. In response to the memorandum of claim, the respondent filed a statement of defence dated 23.03.2023 through the firm of HMS Advocates Llp, in which it admitted having engaged the Claimant. It however stated that the claimant's engagement was purely contractual and operated on a project by project basis and that his designation was a clerk of works on particular project. The respondent further denied terminating the claimant's employment contrary to the claimant's allegation of frustration as outlined in the memorandum of claim insisting that the claimant was infact declared redundant which was communicated vide the letter dated 16.10.2016 and the claimant issued one month's notice of the redundancy as required under section 35 (1) of the *Employment Act*, 2007.
 6. The respondent maintains that it had been going through financial constraints, loss of clients, stalling of projects and suffered adversely from the effects of the Covid –19 situation forcing it to downsize and scale down its operations. That on October 16, 2020 it invited the claimant for a meeting to explain this issue and informed him of the intended redundancy that was to take effect on November 30, 2020 giving him one month's notice as required by the law.
 7. The respondent further states that it paid all the claimant's dues at the time of their separation thus urging this Honourable Court to find the claim without merit and to dismiss it in its entirety with costs to the respondent.
 8. The matter proceeded for hearing on 9.11.2023 with the claimant testifying as CW1. The respondent on the other hand closed its case without calling any witnesses.
 9. In evidence CW1 reiterated the averments made in his memorandum of claim and urged the Honourable Court to find his claim with merit and to allow it in terms of the reliefs sought therein.



10. Parties thereafter filed their respective submissions to the claim which this Honourable Court has duly considered and returns as follows.
11. To answer the 1st issue there is no dispute that parties were in a contract of service as pleaded for the claimant and admitted for the respondent.
12. To answer the 2nd issue, the Court returns that the contract of service was terminated by the letter of temporary termination due to downsizing dated 16.10.2020. the termination was effective 30.11.2020 and was due to downsizing due to stoppage of work on the site. The letter stated that the claimant was appreciated and he would be recalled back upon need and if he would be available.
13. The 3rd issue is whether the termination was unfair. The claimant testified as follows. He was given one-month notice prior to the termination. The reason for the termination was that the respondent was undergoing difficulties during the Covid 19 situation whereby there had been delay in payment of salaries and the construction works were on and off. The claimant's last salary had delayed up to 15.10.2020. The construction site had a few jobs here and there. While the claimant testified that nothing was shown to him to establish that the respondent had financial difficulties, the Court has taken judicial notice of the manner the Covid-19 situation ruined enterprises and upon the claimant's own evidence the construction works he had been deployed had collapsed. The Court returns that the respondent had a valid reason per section 43 and which was fair per section 45 of the Employment Act to terminate the contract by giving a one-month notice which was permissible under section 35 of the Act. The procedure adopted to terminate the contract cannot be found unfair in the circumstances of the case. The termination was fair both in substance and procedure and the respondent's submissions are upheld in that regard. Compensation for alleged unfair termination is found unjustified. The termination notice was given and pay in lieu of the notice is found unjustified. As submitted for the respondent, the claimant was paid Kshs.114,520 being the agreed consolidated payment with reasonable provision for housing as the Clerk of Works and per section 31 of the Employment Act. The payment was way above the minimum wage under the Regulation of Wages (General) (Amendment) Order, 2018. As submitted for the respondent, the claim is for unjust enrichment. The parties are in agreement that leave accrued and was not taken per section 28 of the Employment Act. It is awarded at Kshs.513,000.00 as prayed for. The claimant is entitled to a certificate of service per section 51 of the Act.

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

1. Payment of Kshs. 513,000.00 by 01.03.2024 failing interest to run thereon at Court rates from the date of filing of the suit till full payment.
2. The respondent to deliver the certificate of service within 30-days from today.
3. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 20TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

