



Muri v East Africa Cables Limited (Employment and Labour Relations Cause 154 of 2019) [2023] KEELRC 3412 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 154 OF 2019
K OCHARO, J
DECEMBER 20, 2023**

BETWEEN

KIRAGU KIAI MURI CLAIMANT

AND

EAST AFRICA CABLES LIMITED RESPONDENT

JUDGMENT

Introduction

1. This claim was initiated through a Memorandum of claim dated the 4th of March 2019. The claimant seeks against the respondent the following reliefs;
 - a) Severance pay for 29 years at 15 days' salary for every completed year of service at a total of Ksh.4, 916, 515.00
 - b) Cost of the cause
 - c) Any other relief the court may deem appropriate to grant.
2. The Statement of the claim was file contemporaneously with the claimant's witness statement and a list of documents that he intended to place reliance upon as his documentary evidence in support of his case.
3. Upon being served with the summons to enter appearance the respondent filed a memorandum of appearance on 26th September 2019, and subsequently a Memorandum of reply on 30th September 2020 denying the claimant's claim and his entitlement to the reliefs sought.
4. After the close of the pleadings, the matter was heard inter-parties on merit on 4th October 2022.
5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents admitted as their documentary evidence.



The claimant's case.

6. The claimant states that he first came into the employment of the respondent on 18th December 1989 as a Machine Operator. He was later promoted to the position of Assistant storekeeper on 29th November 1995, a position which he served until 17th March 2003 when he was promoted to the position of store controller. Further, he was later promoted to the position of production assistant on 2nd October 2003.
7. It is the claimant's case that on 26th January 2008 the respondent issued him with a show cause letter asking him to show cause why a disciplinary action could not be taken against him. Through its letter dated 18th February 2008, the respondent terminated his employment. Aggrieved by the decision to terminate his employment, on 21st February 2008 he wrote to the Group Human Resource Manager appealing his termination.
8. The claimant states that after the termination he went without salary between February and April 2008 but his salary payments resumed in May 2008. The respondent did however continue making the NHIF, NSSF and Pension scheme to which the claimant was registered on his behalf during the period when he was not receiving salary.
9. It is stated that the respondent wrote a letter to the claimant on the 20th of August 2008 informing him that he had been reassigned to the new role of Production Supervisor and that his salary had been increased from KShs. 65,283 to KShs. 70,283. The letter was dated 6th October 2008. The letter was backdated because he had already been reinstated and his salary enhanced.
10. The claimant states further that on or about the 18th of October 2008, the respondent wrote him a letter indicating that it had decided to give him a final warning over the disciplinary issues that were facing him and reemploy him. He was later appointed in an acting capacity as the Production Manager on 9th November 2011 and confirmed to the position of Production Manager on 9th January 2014.
11. Lastly it is averred that he continued working for the respondent until 24th August 2018 when he and the respondent entered a mutual separation agreement. It was agreed between him and the respondent that he was to be paid severance pay for the 29 years he was in the service of the respondent continuously. However, the respondent tabulated his severance pay from the period of 2008-2018 instead of 1989-2018. Therefore, employing 10 years instead of 29 years in the computation.
12. It was his testimony in chief that he worked for the respondent for twenty nine (29) years without interruption.
13. When cross-examined, it was his testimony that he had not produced any documents to show the specific remittances of the NSSF and the NHIF.
14. He was not paid his salary for the period between February- April 2008. In this suit, he has not claimed the unpaid salary. Even when he was re-employed, he did not claim the payment for these months.
15. The letter dated 6th October 2008 was backdated. He received the letter in October and as at this time, he had been moved to a position different from that mentioned in the letter. Even the salary had changed. Asked on the date 5.5.2008 appearing next to his signature on the letter, the claimant stated that he could not tell the person who wrote the same thereon. The letter for re-employment was the only letter he received after the termination letter.
16. On re-exam, it was his testimony that the re-employment letter was his final warning. The letter implied that.



The respondent's case.

17. The respondent's case was presented by Esther Lulonde its Human Resource and Administration Manager. The witness states that the claimant was first offered employment by the respondent as a Machine Operator (Helper) in its wire drawing section with effect 3rd July 1989 and the said employment was subject to the respondent's Human Resource Manual in place, standing orders and administrative circulars as could be given from time to time.
18. The witness stated further that the claimant was confirmed into employment on permanent terms following the successful completion of three months probationary period on 18th December 1989. Subsequently, the claimant had a series of promotions at the respondent's company propelling him to serve in various positions at various times.
19. It is the respondent's position that the claimant was issued with a notice to show cause letter dated 26th January 2008 in respect to an allegation of revealing sensitive information. Subsequently, his services were terminated vide a letter dated 18th February 2008 whereupon he was issued with a Certificate of Service.
20. It is averred that contrary to the claimant's assertions, the respondent ceased making contributions to its staff provident fund on behalf of the claimant for the period between February and June 2008.
21. It is further stated that through a letter dated 6th October 2008, the claimant was reemployed. This was a fresh engagement between the claimant and the respondent. This couldn't be deemed a reinstatement or continuation of the employment terms that commenced in 1989. The respondent's Human Resource Manual expressly dictates so.
22. The witness states that on or about the 29th of August 2018, the respondent and the claimant entered into a mutual separation agreement which took effect 20th of August 2018. His terminal dues were computed and paid out, thus; one month's salary in lieu of notice; salary for the period up to 20th August 2018; leave allowance prorated up to 20th August 2018; and severance pay of 15 days for every year worked up to 20th August 2018. The severance pay was computed from 2008 to 2018 which was equivalent to 10 years' service. The claimant was paid his terminal dues as agreed in the mutual separation agreement.
23. The claimant's severance pay was based on 10 years of continuous service. The 10 years were on the basis that his employment was interrupted in 2008. His severance pay was rightfully computed at KShs. 1,695,350.
24. The witness testified that at the point of mutual separation, the claimant was earning a gross pay of KShs. 339,070.
25. When cross-examined, it was her testimony that following the termination, the claimant's terminal dues were computed. However, he had no proof that the same was paid out to the claimant.
26. The re-employment letter expressly stated that the claimant was entering into a new employment relationship.
27. The witness testified further that certificates of service were issued to the claimant for the 10 years, 20 years and 25 years of service. The certificates were not misleading at all.
28. It was the testimony of the witness that the Mutual Separation Agreement did not expressly indicate that the computation of the claimant's severance pay was to be anchored on 10 years of service. It is



possible therefore that the claimant was not aware that the respondent was to employ 10 years. The tabulation was not availed to him at the time of execution of the separation agreement.

29. Questioned by the Court, the witness asserted that the claimant got back to work neither as a result of an appeal nor an application by him. The witness stated however that he was not in the employment of the respondent when the claimant got back, thus she could not be able to certainly state the circumstances under which he did. Before he received the letter of re-employment he had worked for some months after getting back.

The claimant's submissions

30. The claimant submitted that he executed the separation agreement with the belief that his severance pay was to be computed on all those years that he had worked for the respondent. The separation agreement only indicated the rate of payment and not the period. The tabulation was done on the 30th of August 2018, and when he realised that the same was based on the years, he declined to acknowledge the same and insisted that a review be done so that the computation could be premised on the 29 years.
31. The claimant submitted that the mutual separation agreement was a result of the economic turndown of the respondent company and the fact that he and other employees were performing the same duties. In essence therefore the separation was influenced by a redundancy situation. Consequently, the issue of service pay as raised by the respondent would not hold water. What was applicable was severance pay which could not be affected by the termination that occurred.
32. The claimant submitted that he appealed against the decision to terminate his employment, consequently he was reinstated with a final warning. As a result, his employment was continuous contrary to the respondent's argument. The respondent's position that due to an interruption in the continuity of his employment, he lost the benefit of severance pay to its full extent lacks foundation.
33. It was further submitted that in the letter of re-employment wrongly dated 6th October 2006 rather than 2008, which was issued almost 6 months after he had resumed duties, there was no express provision that there was fresh employment. The letter served as a final warning. Final warning can only be issued to an employee who is in employment.
34. Lastly it was submitted that the respondent was aware of the claimant's tenure at the Company and that he was entitled to severance pay for 29 years he had served. The mutual separation agreement should have expressly provided for the number of years worked to ensure that the claimant made an informed decision before executing the same. There was clearly an element of mischief on the part of the respondent while presenting the mutual separation Agreement to the claimant.

The respondent's submissions

35. The respondent filed its submissions on 22nd January 2023 distilling two issues for determination thus:
- i. Whether the claimant's fresh engagement with the respondent commencing 5th May 2008 was deemed a reinstatement or continuation of employment that commenced on 3rd July 1989.
 - ii. Whether the claimant was entitled to severance pay for 29 years of service or 10 years of service.
36. On the first issue the respondent submitted that by a letter dated 6th October 2008, the claimant was re-employed. The Court should particularly note that the reemployment was effective May 5th 2008. No doubt, this was a fresh engagement between the claimant and the respondent and did not constitute reinstatement or continuation of the employment. The position that the re-employment was not a



re-internment is further fortified by the fact that the claimant didn't claim for the unpaid salary for February, March and April 2008.

37. Lastly it was submitted that the respondent's witness tendered uncontroverted evidence that the respondent's Human Resource Manual was clear of the position of reemployment in the following terms:

“Notwithstanding, the provisions of this guideline, an employee who leaves the services of the company and later is re-employed shall be considered a new employee, his previous years of service prior to the termination shall not count when determining his period of service.”

38. On the last issue the respondent submitted that the Certificates of long years of service that were issued to the claimant were a motivational tool and do not depict that he was in continuous service as alleged by the claimant. Further, Certificates for long service are not contractually binding and have no basis in law as they are issued at the employer's discretion for motivational purposes.
39. It was lastly submitted that it is neither unusual nor are employers barred legally from reemploying their previous employees for various reasons such as the one laid out in this case and thus the reemployment in this case should not be deemed to be a reinstatement or a continuation of the terms of the letter of engagement dated 23rd June 1989. Consequently, this court ought to dismiss the claimant's claim with costs.

Analysis and determination

40. From the material placed before me, the evidence on the record as well as the respective submissions by the parties, the following issues present themselves for determination thus: -
- i. Whether the claimant's employment with the respondent was continuous.
 - ii. Whether the claimant is entitled to the relief sought
 - iii. Who should bear the cost of the suit?

Whether the claimant's employment with the respondent was continuous or interrupted

41. As regards whether the claimant's employment was continuous between the time he first came into the employment up to the time of separation or not, the parties were not in agreement. In my view, the disagreement was fuelled by the parties' assumption that a finding on continuity or non-continuity will affect the Court's decision to award or not to, the relief sought.
42. It is not in dispute that the claimant herein was employed by the respondent in 1989 as a Machine Operator (Helper) whose employment was guided by the respondent's Human Resource Manual in place, standing orders and the administrative circulars as indicated in the letter of engagement. Throughout his employment at the respondent's, he received a series of promotions until 18th February 2008 when his services were terminated on an allegation of revealing sensitive information. and was further issued with a certificate of service.
43. The claimant contended that he was reinstated to employment following an appeal against the decision to terminate his employment. On its part, the respondent asserted that he got back to employment not as a result of a successful appeal. He was re-employed. As a result, a new engagement was birthed.
44. The claimant produced as evidence a lengthy letter that he wrote on the 21st of February 2008, that was addressed to the Group Human Resource and Administration Manager. I have no doubt in my mind that through this letter he appealed against the decision to terminate his employment. The



respondent's witness did not in any manner contest the fact that the appeal was done and received by the Manager. She didn't bother to tell this Court whether or not the claimant's plea as contained in the letter was considered or not, and if it was what the verdict was. All that the witness said was that the claimant resumed duty not as a result of the Appeal. In my view, in the circumstances of the matter, a reasonable and candid employer could not just stop at saying that the return was not a result of an appeal.

45. The respondent argued that through a letter dated 6th October 2008, the claimant was re-employed. Consequently, a new employment relationship was commenced. To agree or disagree with this position taken by the of the respondent requires a keen consideration of the contents of the letter, and that much this Court shall render. Further, conclusions must be made on vital issues that were not attended to by the respondent.
46. Assuming for a moment that there was a re-employment, the question that will shoot up is, how was the process of re-employment initiated by an employee whose employment had been terminated on disciplinary grounds? The respondent's witness deliberately failed to give any details. She only afforded to state that the re-employment was not as a result of an application or appeal. In my view, the witness deliberately decided to be mean in her evidence to the Court.
47. The Court notes that the letter made reference to a previous discipline issue and discussion between the claimant and the respondent's senior management team that was held on 2nd May 2008. Again, no explanation was given on how the meeting and deliberations were triggered. How did an employee who had been dismissed almost three months earlier find himself in the meeting? The letter further suggested that the management had reviewed the claimant's disciplinary issues and considered re-employing him. The question that pops up is, under what circumstance other than an appeal or request for review could the management sit to review the issues after the termination?
48. The Court has not lost sight of the fact that the letter was issued at a time when the claimant had been in the respondent's service after the termination and apparently after resuming duty. There was no other evidence adduced to explain how he resumed duty other than that of the claimant that it flowed from his success in the appeal. Further, the letter was backdated.
49. No doubt, the letter captioned "reassignment" dated 20th August 2008 preceded the above stated "re-employment" letter. It read in part;

"As previously discussed with the undersigned, I would like to inform you that effective 1st August 2008, you are reassigned to the new role of Production Supervisor reporting to the Production Manager. Effectively, your Gross salary has been adjusted from Kshs.65,283 to 70,283 as follows; -

Basic Salary ...59,348

House Allowance- 10,935

All the other terms and conditions of service remain the same. [emphasis mine].

Undeniably, the terms and conditions that were being referred to are those that were set out in the letter of engagement of 23rd June 1989. Without explanation that there was a shift from the reconfirmed position, and when, why and how, the respondent's argument that that there was a re-employment, with great respect makes no sense."

50. By reason of the premises, I am persuaded by the claimant that he was reinstated into employment following his appeal. The Court notes that the term "re-employment" was used in the above-stated



letter, however, it is important to state that its true meaning in the context it was used cannot be deduced without considering the contents of the letter as a whole. It is such consideration that has led this Court to conclude that the term was used synonymously with reinstatement. His employment was therefore continuous.

Is the sought relief grantable?

51. It is common cause that the parties entered into a mutual separation agreement on the 24th of August 2018. The claimant contended and the respondent didn't dispute that the separation was triggered by the financial turndown of the respondent company. In essence, he was stating that there was a redundancy situation. I have carefully considered the terms of the separation agreement and note that it provided for severance pay not service pay. Severance pay is provided for under section 40 of the *Employment Act*, a section wholly dedicated to redundancy situations. Service pay is provided for under section 35 of the Act which provides for termination other than by way of redundancy. It is by reason of this premise that I agree with the claimant that the separation agreement was entered into with a redundancy situation in the mind of the parties.

52. The respondent contended that under clause 11.3. [v] the claimant cannot be entitled to severance pay, the sub-clause provides;

“An employee whose services have been terminated under paragraph [i] [a] of these guidelines shall be entitled to the following: -

- a) A notice period or salary in lieu as is stipulated in the employee's contract of service or collective Bargaining Agreement;
- b) Salary and applicable allowances up to the last day worked;
- c) Pro-rated leave up to the date of termination.

Notwithstanding the provisions of these guidelines, an employee who leaves the services of the company and is later re-employed shall be considered a new employee. His previous years of service prior to the termination shall not count when determining his period of service.”

53. The respondent's argument must fail for the reasons; that the sub-clause relied upon does not apply to termination of employment as a result of a redundancy situation; this Court has already found that the claimant's employment was continuous, he was not re-employed; and section 40 of the Act is very express and couched in mandatory terms, an employee is entitled to severance pay for each year worked. The entitlement cannot be out-contracted.

54. The separation agreement did not indicate at all that the severance pay was to be computed on 10 years and not 29 years. This much the respondent's witness admitted. The witness further admitted that the purported computation by the respondent of the claimant's severance pay was done after the execution of the separation agreement and without the involvement of the claimant. In my view, there was no meeting of the mind on this aspect.

55. By reason of the foregoing premises, I am not persuaded by the respondent's position that the claimant was only entitled to severance pay for only 10 years worked. I find that he is entitled to service pay for the 29 years of service, Ksh. 4, 916, 515.00

Who should bear the cost of this suit

56. The cost of the suit to be borne by the respondent herein.



57. The upshot, judgment is hereby entered for the claimant against the respondent in the following terms:
- a. Severance pay for the 29 years of service.....Kshs. 4,916,515.00.
 - b. Interest at court rates from the date of the delivery of this judgment till payment in full.
 - c. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA

JUDGE

In presence of;

Ms. Gachinga for the claimant

Ms. Cherono for the respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

