



**Kithinji v Kenya Conference of Catholic Bishops (Employment and Labour Relations Cause 1334 of 2018) [2023] KEELRC 3230 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3230 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1334 OF 2018**

**BOM MANANI, J  
DECEMBER 7, 2023**

**BETWEEN**

**MOSES KITHINJI ..... CLAIMANT**

**AND**

**KENYA CONFERENCE OF CATHOLIC BISHOPS ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Respondent hired the Claimant as from 12<sup>th</sup> February 2016 to serve in the position of Project Officer. The contract was for a fixed term of one year but could be renewed based on the Claimant's performance. On 7<sup>th</sup> February 2017, the Respondent renewed the contract for another two years until 11<sup>th</sup> February 2019.
2. According to clause five of the renewed contract, the Claimant's monthly consolidated salary was fixed at Ksh. 96,402.74. In addition, he was entitled to annual leave of twenty six days for every year worked.
3. The Claimant contends that on 24<sup>th</sup> January 2018, he received a telephone call from the Respondent's management asking him to arrange to meet its Human Resource Manager. The Claimant avers that the reason for calling the proposed meeting was not disclosed.
4. The Claimant states that he attended the aforesaid meeting on 26<sup>th</sup> January 2018. He contends that during the meeting, the Respondent's management accused him of running private businesses instead of working for the Respondent. The Claimant denies this accusation and avers that the business in question belonged to and was being run by his spouse.
5. The Claimant avers that after the meeting the Respondent issued him with a letter terminating his services with effect from 26<sup>th</sup> January 2018. The letter required him to hand over immediately.



6. It is the Claimant's contention that the Respondent's decision to terminate his contract was unlawful. He avers that the Respondent did not issue him with the requisite notice to terminate the contract.
7. Further, the Claimant contends that the Respondent did not warn him beforehand that the meeting of 26<sup>th</sup> January 2018 was of a disciplinary nature. As a result, he states that he was unprepared for the session.
8. The Claimant argues that the Respondent did not have valid grounds to terminate his contract. It is his contention that the accusation that he was running private business was not proved.
9. In addition, the Claimant has accused the Respondent of not providing him with an enabling work environment during the currency of his contract of service. He contends that he was initially forced to use public transport to get to his work stations. He contends that even after a vehicle was availed, the Respondent did not hire a driver for him. As a result, he was forced to self-drive.
10. The Claimant also states that the Respondent failed to provide him with office space to execute his assignments. Thus, he was forced to work from his house and use his internet to prepare work reports for the Respondent.
11. The Claimant contends that for the duration that he served the Respondent, he was not allowed to proceed on annual leave. It is his case that the Respondent did not approve any of his leave requests.
12. As a result, the Claimant has prayed for a plethora of reliefs. These include: leave pay; driver's salary; reimbursement for using his personal vehicle; cost for use of his house as an office; salary in lieu of notice; severance pay; compensation for unfair termination; and salary for the remainder of the contract period.
13. The Respondent filed a Statement of Defense. However, it did not tender evidence in the cause.

### **Issues for Determination**

14. From the pleadings and evidence on record, the following emerge as the issues for determination:-
  - a. Whether the decision by the Respondent to terminate the Claimant's contract of service was lawful.
  - b. Whether the Claimant is entitled to the reliefs that he seeks through the Statement of Claim.

### **Analysis**

15. According to the Claimant, the Respondent summoned him for a meeting on 26<sup>th</sup> January 2018 without disclosing the purpose for the meeting. The Claimant avers that he only learned that the meeting was meant to discuss alleged work related infractions by him after the session begun.
16. The Claimant asserts that the Respondent's management accused him of running private business whilst he was supposed to be on duty. The Claimant states that the business he was accused of running was neither owned nor run by him.
17. Apart from the bare allegation that the Claimant was running private business contemporaneous with his official work, the Respondent did not provide evidence to back this assertion. It (the Respondent) did not controvert the Claimant's evidence that the business in question was not his and that he was in fact not the one managing it.
18. Sections 43, 45 and 47 of the *Employment Act* require an employer who proposes to terminate the services of an employee to justify the grounds for his decision. Therefore, the Respondent bore the



- duty of proving its assertion that the Claimant was running private business that compromised his commitment to his work.
19. This evidence was not provided. Consequently, I reach the conclusion that the Respondent did not establish that it had valid reason to terminate the Claimant's contract.
  20. Before terminating the services of an employee, the law requires the employer to notify the employee of the infraction that he is accused of in the presence of a co-employee or trade union official, if the employee elects. Further, the employer must allow the employee the opportunity to respond to the accusations.
  21. Under section 4 of the *Fair Administrative Action Act*, the employer has a duty to provide the employee with the particulars of the accusation against him beforehand. In addition, the employer must furnish the employee with information, materials and evidence that he will rely on in making the decision or taking the administrative action against him.
  22. There is no evidence that the Respondent complied with these requirements of statute. There is no evidence that the Respondent furnished the Claimant with the accusation against him before he (the Claimant) was summoned to the meeting of 26<sup>th</sup> January 2018. As a matter of fact, the evidence on record shows that the Claimant was confronted with these accusations at the meeting.
  23. The Respondent did not warn the Claimant that the meeting of 26<sup>th</sup> January 2018 was of a disciplinary nature. Clearly, the Claimant was deprived of the opportunity to adequately prepare his response to the accusations that were leveled against him. As a result, I declare that the process that led to the decision to terminate the Claimant's contract of service was procedurally unfair.
  24. The next issue for determination is whether the Claimant is entitled to the reliefs that he seeks through the Statement of Claim. Some of the reliefs that the Claimant has pleaded fall in the category of special damage claims. These include: reimbursement for airtime, car maintenance and transport; and cost of use of the Claimant's house as an office.
  25. In order to succeed on these claims, the Claimant must provide evidence to support the alleged expenditure on the various vote heads (*Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR). This includes the rent paid for the space that was used as office space.
  26. The Claimant did not provide proof of expenditure on the various items under this head of reliefs. No receipts or other documents were tendered in evidence to show that the Claimant had expended on the foresaid vote heads. Accordingly, the claim in this respect is declined.
  27. The Claimant has prayed for driver's salary of Ksh. 55,000.00 per month to compensate him for the time he allegedly self-drove. However, there is no evidence that he tendered before court to demonstrate that he indeed self-drove for the 19 months for which he asks to be compensated.
  28. Besides, the Claimant did not cogently explain the basis for the figure of Ksh. 55,000.00 per month. During his cross examination, the Claimant asserted that the salary scale for drivers was derived from the Respondent's Human Resource Manual. However, he did not produce the manual in evidence. That said, it is not lost to the court that Human Resource Manuals hardly delve into specific issues such as prescribing salary scales for various job grades at the workplace. They only set out broad policy guidelines to guide the workplace.
  29. Importantly, the employment contract between the parties is silent on whether the Claimant was entitled to a driver. In the premises, the court cannot presume that the Claimant was entitled to this benefit.



30. To urge the court to find that the Claimant was deprived of a driver is to require it (the court) to superimpose an alien term in the contract between the parties. This will amount to the court rewriting the contract between the parties contrary to the age old principle that a court of law has no power to rewrite a contract between parties (*Emo Investment Ltd v Stephanus Petrus Kruger* [2010] eKLR). For the foregoing reasons, I decline to grant the prayer in respect of driver allowance.
31. In addition, the Claimant has prayed for severance pay. However, this remedy only applies to cases of redundancy under section 40 of the *Employment Act*. It is not one of the remedies that is available for unfair termination of employment under section 49 of the *Act*. Consequently, the prayer is declined.
32. The Claimant has also prayed for salary for the remainder of his contract period. In the court's view, such relief can only issue where the parties had, in their contract, affirmed it as one of the remedies to be granted in the event of premature closure of the contract. Absent such agreement, the court has no legitimate grounds to compel an employer to pay an employee for services that have not been rendered.
33. To order otherwise would be tantamount to sanctioning payments for work that has not been done. Such order will be contrary to public policy and good conscience.
34. Commenting on the same matter, the court in *Kenya Wine Agencies Ltd v Murungu* (Appeal E 016 & E 019 of 2021 (Consolidated)) [2022] KEELRC 13413 (KLR) stated as follows:-

“I agree with the observation by Makau J in *Mary Saru Mwandawiro v Kenya Ports Authority* [2016] eKLR that a person alleging to be in the employment of another cannot expect to be paid for work not done. As the court observed, such proposition goes against public policy. It is contrary to the dictates of good conscience.”
35. The Claimant's contract does not have a clause that sanctions payment of salary for the balance of his contractual term in the event that the contract was terminated prematurely. In the premises, I decline to grant the prayer.
36. The Claimant has further prayed for compensation for unfair termination of his contract of service. Section 49 of the *Employment Act* entitles the court to grant this relief subject to a maximum of the Claimant's gross salary for twelve months.
37. At the time that the Claimant's services were terminated, he still had about one year to serve under his 2017 two year fixed term contract. There is no evidence to suggest that his (the Claimant's) conduct contributed to the decision to terminate the contract. Having regard to the foregoing, I am minded to award him compensation for unfair termination of his contract that is equivalent to his gross salary for five months, that is to say, Ksh. 96,402.74 x 6 = Ksh. 482,013.70.
38. Under section 35 of the *Employment Act*, an employee is entitled to notice to terminate his contract of service. If the employer is unable to issue the notice, he ought to pay the employee salary in lieu thereof in terms of section 36 of the *Employment Act*.
39. There is no evidence to demonstrate that the Claimant was either issued with a notice to terminate his contract or paid in lieu of such notice. In the premises, I find that he is entitled to be paid salary for one month in lieu of notice to terminate. As such, I award him salary for one month in lieu of notice, that is to say Ksh. 96,402.74.
40. The Claimant has prayed for accrued leave pay. In the witness statement which he adopted as his evidence, the Claimant contends that despite applying for leave during the currency of his contract, the Respondent did not approve the applications. As a result, he (the Claimant) did not take his annual leave.



41. The Respondent did not controvert the Claimant's case in this respect. The Respondent did not tender evidence to demonstrate that contrary to the Claimant's assertions, he took his annual leave.
42. Although the Claimant was serving on fixed term contracts, these contracts were renewed without a break. The record shows that the Claimant began working for the Respondent on 15<sup>th</sup> February 2016. His first contract was renewed on 7<sup>th</sup> February 2017 just before it could lapse on 11<sup>th</sup> February 2017. As a consequence, the Claimant had to transit into the new contract without a break.
43. The record shows that the Claimant carried on with his duties under the second contract until 26<sup>th</sup> January 2018 when it was terminated. By this time, he had worked for two years.
44. Section 28 of the *Employment Act* entitles an employee who has been in service for a year to proceed on annual leave of twenty one days. Clause eight of the Claimant's two contracts entitled him to minimum annual leave of twenty six working days. The leave period approximates one calendar month every year inclusive of weekends.
45. Having regard to the fact that the Respondent did not controvert the Claimant's case that he did not take his annual leave for the two years of his service, I award the Claimant annual leave for two months to cover the two years. This translates to, Ksh. 96,402.74 x 2 = Ksh. 192.805.48.
46. This award is subject to the applicable statutory deductions.
47. The Claimant is granted interest on the award at court rates from the date of this decision.
48. The Claimant is awarded costs of the case.
49. The Respondent is directed to issue the Claimant with a Certificate of Service.

#### **Summary of the Award**

- a. The Respondent's decision to terminate the Claimant's contract of service is declared unlawful.
- b. The Claimant's prayers for: salary for the remainder of the contractual term; driver's salary; refund for extra costs incurred in car maintenance, transport and airtime; severance pay; and cost of use of Claimant's house as an office are declined for the reasons that have been set out in the decision.
- c. The Claimant is awarded compensation for unfair termination of his contract equivalent to his gross salary for five months, that is to say Ksh. 482,013.70.
- d. The Claimant is awarded pay in lieu of notice to terminate his contract of service of Ksh. 96.402.74.
- e. The Claimant is awarded pay for accrued leave of Ksh. 192.805.48.
- f. The above award is subject to the applicable statutory deductions.
- g. The Claimant is granted interest on the award at court rates from the date of this decision.
- h. The Claimant is awarded costs of the case.
- i. The Respondent is directed to issue the Claimant with a Certificate of Service.

**DATED, SIGNED AND DELIVERED ON THE 7<sup>TH</sup> DAY OF DECEMBER, 2023**

**B. O. M. MANANI**

**JUDGE**



*In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.*

