



**Ngono v Docwide Business Centre [K] Ltd (Cause 662 of 2015)
[2022] KEELRC 1148 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1148 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 662 OF 2015**

**AK NZEI, J
APRIL 28, 2022**

BETWEEN

CHRISTOPHER ONYANGO NGONO CLAIMANT

AND

DOCWIDE BUSINESS CENTRE [K] LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for unfair termination of employment and failure to pay terminal dues vide a Memorandum of Claim dated 31st August 2015 and filed in Court on 2nd September 2015 and pleaded, inter alia:-
 - a. that the Claimant was employed on 31ST January 2014 to 14th April 2015 as a tractor driver on casual basis but retained continuous and uninterrupted employment throughout the period of employment.
 - b. that the Respondent paid the Claimant a standard sum of ksh.25,000 per month as at the time of termination of employment, but neither paid house allowance nor issued payslips indicating deductions made on the Claimant's pay.
 - c. that on 14th April 2015, the Claimant received a text message by the Respondents supervisor, Dennis Wawire, instructing the Claimant to immediately proceed on unpaid leave until further notice.
 - d. that the Claimant was later informed by Dennis Wawire that the Respondent had decided to lay off all its employees and to re-employ them on contract basis and that since the Claimant had not been offered a contract, he was no longer an employee of the Respondent.



- e. that before termination, the Claimant and many other employees of the Respondent had just joined a trade union and immediately thereafter, the Respondent embarked on termination of all the employees who had decided to join the trade union.
 - f. that the Claimant believed that the reason for his termination was his decision to join a trade union.
 - g. that a decision to join a trade union was not a reason enough to sack the Claimant employee, and that there was no discussion or dialogue between the Claimant and the Respondent before termination.
 - h. that the Claimant was never registered under a pension or provident fund under the Retirement Benefits Act, gratuity service scheme established under a collective agreement, the National Social Security Fund or any other scheme established by the Respondent, and was therefore entitled to service pay at the rate of not less than fifteen (15) days for every year worked; the same not having been paid on termination of employment.
 - i. that the Claimant was never allowed to go on annual leave and was forced to work seven (7) days a week without one rest day in a period of seven days.
2. The Claimant sought the following reliefs against the Respondent: -
- a. one month notice (salary) pay, that is ksh. 25,000 plus house allowance at 15% of basic payksh.31,250
 - b. payment in lieu of annual leave accruedksh.30,540.87
 - c. unpaid house allowance at 15% of ksh.25,000 for the period of employment being ksh.6,250x14.5 monthsksh.90,625.
 - d. maximum compensation for wrongful dismissal and unfair termination of employment contract (ksh.31,25x12)ksh.375,000
 - e. punitive damages to act as punitive measures to curb employers from unilaterally and unfairly terminating employees without due regard to the employment/labour laws
 - f. Certificate of Service.
 - g. costs of the cause and interest.
3. The Claimant filed his written witness statement dated 25th July 2015 and a list of document dated 31st August 2015, listing one document (a demand notice dated 17th August 2015), both of which accompanied the Memorandum of Claim.
4. The Respondent entered appearance on 7th October 2015 and on 24th November 2015 filed Reply to the Claimant's Memorandum of Claim. The Respondent admitted having engaged the services of the Claimant on casual basis as a tractor driver, and further pleaded: -
- a. that the Claimant requested for seven (7) days sick off leave to go to Kenyatta National Hospital for backgrowth operation but never reported back, and never notified the Respondent's management of his whereabouts.
 - b. that consequently, the Respondent wrote a letter to the County Labour Office notifying the Labour Officer of the Claimant's absence from work without permission and informing him that the Claimant was deemed to have deserted work, and copied the letter to the Claimant.



- c. that the Respondent deserted work and thereby voluntarily terminated his engagement with the Respondent without prior notice to the Respondent contrary to labour laws.
 - d. that the Claimant's desertion or absence from work amounted to gross misconduct which warranted his dismissal from the Respondent's employment.
 - e. that in terminating the Claimant's employment, the Respondent adhered to all the procedural requirements as laid down in the Employment Act, 2007 and that the issue of unfair termination, issuance of notice or payment in lieu did not arise.
5. The Respondent denied the Claimant's assertion that he was dismissed from employment because of his decision to join a trade union, and further pleaded that the Respondent paid the Claimant's house allowance monthly; and that the Claimant, having taken all leave days and/or payment in lieu, had no further claim against the Respondent.
 6. The Respondent filed a list of documents dated 23rd November 2015 listing one document, the Respondent's letter to the County Labour Officer dated 19th March 2015. On 19th February 2020, the Respondent filed a second list of documents dated 17th February 2020, listing six documents. The six documents include a copy of the Court's Judgment in Mombasa ELRC 265 of 2016, list of Membership of Kenya Long Distance Drivers and Allied Workers Union, a Memorandum of Agreement between the Respondent and the said Union, a Return to Work formula dated 22nd April 2015, letters of appointment for some of the Respondent's employees and the Memorandum of Claim in Mombasa ELR Cause No. 265 of 2016.
 7. The Respondent also filed a witness statement by Michael Mwakio, dated 6th May 2016 and filed in Court on 19th August 2016.
 8. When the trial opened on 7th October 2021, the Claimant adopted his witness statement referred to in paragraph 3 of this judgment as his evidence in chief and produced in evidence the listed document.
 9. The Claimant testified and basically reiterated the averments made in the Memorandum of Claim. He further testified: -
 - a. that he was never taken ill while working for the Respondent.
 - b. that the Respondent was paying NSSF for the Claimant.
 - c. that the Claimant was not an employee of the Respondent as in 2016, thought he remained a member of Long Distance Drivers and Allied Workers Union, and that he could not have been a party to this Court's Case no. 265 of 2016 as he was dismissed on 14th April 2015.
 - d. that the Claimant was still working with the Respondent as on 19th March 2015.
 - e. that when the Claimant was employed by the Respondent, he gave his telephone number and postal address to the Respondent, that the Respondent never communicated with the Claimant on 19th March 2015 as alleged, and that the postal address shown on the letter dated 19th March 2015 was not that of the Claimant.
 10. On its part, the Respondent called one witness, Michael Mwakio (RW-1), who adopted his filed witness statement and produced in evidence the documents referred to in paragraphs 6 and 7 of this judgment. RW-1 basically reiterated the averments made in the Respondent's Reply to the Memorandum of Claim and further testified:-



- a. that when the Claimant failed to return to work in March 2015, and upon being advised by the County Labour Officer that the Claimant was still their employee, he computed his dues and March 2015 salary and paid the Claimant through the bank.
 - b. that the Claimant was not send on unpaid leave by Dennis Wawire who was the Respondent's Operations Manager.
 - c. that after the Claimant failed to return to work on 11th March 2015, RW-1 tried to reach him without success and even send someone to check on him where he lived, and that after sometime, he was told that the Claimant had been seen driving a different tractor to the Port of Mombasa.
 - d. that the Respondent never received any application for leave from the Claimant.
 - e. that the Claimant was being paid ksh.25,000 but no payslips were issued as the money was being send to the bank.
11. Upon considering the pleadings filed and the evidence presented by parties, issues that emerge for determination, in my view, are as follows:-
- a. whether the Claimant was an employee of the Respondent and the date of such employment.
 - b. whether the Claimant's employment was terminated by the Respondent or whether the Claimant left employment voluntarily by absenting himself therefrom.
 - c. whether termination of the Claimant's employment was unfair.
 - d. whether the Claimant is entitled to the reliefs sought.
12. On the first issue, it is common ground from the pleadings filed and evidence tendered, that the Claimant was employed by the Respondent as a tractor driver, earning a monthly salary of ksh.25,000. The Claimant pleaded that he was employed on 31/01/2014 and worked upto 14/4/2015 when his employment was terminated by the Respondent. Both parties testified that the Claimant was not given a written contract. The Respondent did not plead the date of the Claimant's employment.
13. Under Section 9 of the *Employment Act* 2007, an employer is responsible for causing the contract of service to be drawn up, stating particulars of employment. Under Section 10(2) of the Act, particulars of a contract of service include the date of employment. Section 10(7) of the *Employment Act* 2007 provides:-
- “If in any legal proceedings an employer fails to produce a written contract, or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
14. The Claimant pleaded 31/1/2014 as the date of commencement of employment. The Respondent, who did not cause the contract of service and the particulars thereof to be drawn up, did not disapprove the said date by stating and proving another date to have been the date of commencement of employment. I find and hold 31/1/2014 to be the date of commencement of the Claimant's employment by the Respondent.
15. On the second issue, the Claimant pleaded and subsequently testified that he worked continuously from 31/01/2014 to 14/4/2015 when his employment was terminated by the Respondent.



16. On its part, the Respondent pleaded and subsequently testified (RW-1) that the Claimant requested for a seven (7) days sick leave from 5th March to 11th March 2015 to go to Kenyatta National Hospital but never reported back to work after the sick leave. This becomes a situation of the employee's word against the employer's word.
17. The Respondent, being the custodian of all employment records, did not produce in Court any record and/or work attendance registers to show that indeed, the Claimant did not report on duty at any time as from 5th March 2015, and that he was not on duty on 14th April 2015 when the Claimant alleged to have received a text message from Dennis Wawire asking him to proceed on unpaid leave until further notice. Michael Mwakio (RW-1) testified that Dennis Wawire was the Respondent's Operations Manager.
18. If, indeed, the Claimant had failed to report back to work after the alleged seven days' sick leave, this would have amounted to gross misconduct which is a ground for summary dismissal. Such a scenario would have entitled the Respondent to invoke the provisions of Section 41 of the Employment Act and to commence termination proceedings against Claimant.
19. It is my finding that on a balance of probability, the Claimant proved that his employment was terminated by the Respondent on 14th April 2015. The Respondent pleaded at paragraph 10 of its Reply to the Memorandum of Claim as follows:-

“the Respondent further states that in terminating the Claimant's employment, it adhered to all the procedural requirements as laid down in the Employment Act 2007. In the circumstance, the issue of unfair termination from employment and the issue of issuance of notice or payment in lieu of notice does not arise.”
20. Parties are always, and will forever be bound by their own pleadings.
21. On the third issue, Section 41 of the Employment Act sets out mandatory procedural requirements that must be complied with by every employer contemplating termination of an employee's employment. The said Section provides:-

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
22. The Respondent did not demonstrate that it in any way complied with the foregoing mandatory provisions of the statute. Termination of the Claimant's employment was, therefore, unfair. I so find and hold.
23. On the fourth issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant eight-months' salary being compensation for unfair termination of



employment. I have taken into account the circumstances in which the Claimant's employment was terminated.

24. Before addressing the Claimant's claim for house allowance, it ought to be noted that the Respondent never issued the Claimant with any itemized pay statement in accordance with Section 20 of the Employment Act 2007. The Claimant pleaded and testified that he was not paid house allowance by the Respondent. The Respondent, on the other hand, did not demonstrate in any way that the ksh. 25,000 monthly salary paid to the Claimant was inclusive of house allowance, either by producing an itemized pay statement or a written contract of service indicating that the Claimant's salary was consolidated. It is my finding that under Section 31 of the Employment Act, the Claimant is entitled to the claim for house allowance, and the same is allowed.
25. The claim for payment in lieu of annual leave accrued during the period of the Claimant's employment is the Claimant's entitlement under Section 28 of the Employment Act. The same is allowed.
26. The Claim for service pay is declined. The Claimant testified under cross examination, that the Respondent used to pay NSSF for the Claimant. Section 35(5) of the Employment Act, 2007 excludes members of NSSF, among others, from payment of service pay.
27. The claim for punitive damages is not allowable under Section 49 of the Employment Act 2007, and is declined. The claim for a Certificate of Service is allowed. The Claimant is, by dint of Section 51(1) of the Employment Act, entitled to be issued with a Certificate of Service. The Claim for one month salary in lieu of notice is allowed.
28. In sum, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-
- a. Eight months' salary being compensation for unfair termination of employmentksh. 200,000
 - b. Outstanding house allowance at 15% of ksh.25,000 for the period of employment being ksh. 3,750x14.5 monthsksh.54,375
 - c. Payment in lieu of annual leaveksh.30,540.87
 - d. One month salary in lieu of notice
(inclusive of house allowance).....ksh.28,750
Totalksh.313,665.87
29. The Respondent shall issue the Claimant with a Certificate of Service within 30 days.
30. The Claimant is awarded costs of the claim and interest at Court's rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI



JUDGE

Appearance:

Miss Wanyama for Claimant

N/A for Respondent

