



REPUBLIC OF KENYA



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**Kariuki v H. Young & Company [E.A.] Limited (Cause 1808 of 2016)
[2022] KEELRC 79 (KLR) (21 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 79 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1808 OF 2016
K OCHARO, J
APRIL 21, 2022**

BETWEEN

DANIEL KARIUKI CLAIMANT

AND

H. YOUNG & COMPANY [E.A.] LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant through a memorandum of claim herein dated 2nd September 2016, sued the Respondent seeking the following orders and reliefs: -
 - a) A declaration that the Respondent's action of sacking the claimant is illegal, and/or unlawful, that the claimant is entitled to severance pay, terminal benefits, 3 months salary in lieu of notice, unpaid leave, salary underpayments, transport allowance and gratuity all totalling to about Kshs. 3,902,500.00 as particularized in paragraph 6 hereinabove.
 - b) General damages for wrongful dismissal as the Court shall assess.
 - c) Costs of this suit and interest.
 - d) Any other relief that this Honourable Court may deem fit and just to grant.
2. Upon being served with summons to enter appearance, the Respondent filed a memorandum of appearance on the 15th September 2016, and a statement of defence on the 28th September 2016. In the statement of defence, the Respondent denied, that the claimant's employment was determined in the manner put forth in the memorandum of claim, any cause of action against it by the claimant and the reliefs sought.



3. Contemporaneously with their pleadings, the parties did file witness statements and documents that they intended to place reliance on as their evidence at the hearing of the matter.
4. When the matter came up for hearing on the 30th November 2021, neither the Respondent's witness nor its counsels were in attendance of Court. Satisfied that service had been effected for the hearing and that their absence was without any explained reason, the Court ordered that the matter proceeds their absence notwithstanding.

The claimant's case.

5. At the hearing the claimant urged the Court and the Court allowed to have his witness statement, and documents that he filed under the list of documents dated 2nd September 2016, as part of his evidence in chief and documentary evidence respectively.
6. The claimant testified that he was employed by the Respondent in the year 2013, as a draughtsman. The employment was through a letter of appointment dated 8th January 2003.
7. The claimant testified that he worked for the Respondent for 13 years and on the 5th March 2016, his employment was terminated.
8. The claimant contended that the termination was without any reasonable cause and/or justification. It was unilateral.
9. He alleged that the Respondent did not give him any reason why he was being terminated. That he was not given an opportunity to defend himself before the termination and that the Respondent failed to adhere to the stipulations of the *Employment Act*.
10. He further stated that at the time of the termination he was earning a monthly salary of Kshs. 105,000. [One hundred and five thousand].
11. He consequently sought that the termination be declared wrongful and unlawful and that the Court grants him those reliefs he sought in his memorandum of claim.

Analysis and Determination

12. From the very onset, it is imperative to state that the Respondent did not present a witness to testify on its behalf in support of the defence to the Claimant's claim. This Court has held before that in such a scenario, any statement of defence or response to claim, filed, remains just a statement with no evidential value, for pleadings cannot be a substitute for evidence. This is how this Court shall treat the statement of defence that was filed herein by the Respondent. However, it is imperative to state sight must not be lost of the view that where such a statement of defence or response raises a point of law which goes to the root of the matter, for instance limitation of time and res judicata, it shall be an abdication of the Court's duty to fail to consider the same. Secondly that such a treatment of the Respondent's pleadings cannot be an automatic pass for the Claimant's success in his or her litigation.
13. As indicated hereinabove, the Claimant contended that the termination of his employment was arbitrary and without any reason being accorded for the same. This contention obtains on the memorandum of claim, and the witness statement, turned part of his evidence in chief. However, in contradiction to this, in his oral testimony in Court, he stated that he was terminated because the Respondent had completed most of its major projects.
14. The claimant did place before the Court a document captioned "Addendum to Existing Employment Contract" dated 13th December 2013. The detailed document, provided the terms and conditions of



work in a more elaborate manner than did the letter of appointment dated 6th January 2003. Clause 15 of the document provided for “Termination of Employment” in the following manner.

- “ 1. Either party may terminate this employment contract for any lawful and justifiable cause after probationary period by giving 1 [one] months’ notice in writing or 1 [one] month’s pay in lieu of notice. Nothing in this contract shall prevent either party from issuing the termination and enforcing it. No damage can be claimed or be due to either party should the above notice condition be fulfilled.
2.”

15. There is no doubt that the claimant’s employment was determined through a notice of termination of employment dated February 5, 2016. The contents of this letter should be interrogated to determine whether it was in accord with the postulations of the contract document hereinabove mentioned and the *Employment Act*. The letter led in part: -

“ This is a notice of the company’s intention to terminate you from your position as Draughtsman in a month’s time following completion of majority of the company’s projects. We advise that your services will be terminated with effect from the 5th day of March 2016 pursuant to the termination provisions of the *Employment Act*, 2007 and the termination agreement set between yourself and the management”.

16. Section 35 [1] of the *Employment Act*, 2007.

- “ 1. A contract of service not being a contract to perform specific work, without reference to time or undertake a journey shall, if made to be performed in Kenya be deemed to be –
 - a) Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice.
 - b) Where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing or;
 - c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”

17. It is not difficult to conclude that the notice that was issued was in accordance with the employment contract and the provisions of the *Employment Act*, 2007.

18. Section 35 [4] [a] opens the pathway for any employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with section 46 of the Act. I do not get the claimant as assailing the lawfulness or fairness of the notice in accordance with section 46.

19. The claimant contended that he was not given any reason for the termination, however, counter to this, the termination letter was clear on the reason for termination. The claimant made a bold assertion that the termination was not justified without supplying any material from which the Court can discern the destituteness in justification. Section 47[5] of the Act, placed a legal obligation upon the claimant to



prove that an unfair termination for employment occurred. No doubt the claimant has not discharged this burden. The material he placed before the Court is too far insufficient and generalized.

20. The claimant has not been able to demonstrate that the reason as was given in the termination notice was not justified under the circumstances put forth in the notice. Courts of law act on the material presented before it, it cannot in any way venture into the realm of speculation or appear to be holding brief for a party.
21. To this end, I am not persuaded that the termination was, without reason as alleged, arbitrary, not justified, and in breach of the stipulations of the *Employment Act*.
22. Now I turn to the reliefs sought. Inter alia a certificate of service. A certificate of service pursuant to the provisions of section 51 of the *Employment Act* is an automatic entitlement to an employee upon termination of his or her employment. There is no evidence that it was ever issued to the Claimant. I direct that it be.
23. The claimant has further sought for 3 months salary in lieu of notice. I do not see any basis for this claim. The termination was with notice, there is no contention about it. Secondly the contract of employment provided for a one month's salary in lieu of notice, if it happened that the notice was not issued.
24. Having found that the termination was neither wrongful nor unlawful, I am unable to award the damages sought by the claimant.
25. The claimant placed before this Court, an email correspondence dated 9th February, 2016, correspondence which was in reaction to his inquiry over his terminal benefits. In the correspondence, he was informed that he was entitled to: -
 - (i) Salary earned up to and including his final work day at the company.
 - (ii) Leave days earned but not taken.
 - (iii) Severance pay at the rate of 15 days for each year of completed service.He further tendered as his evidence, a pay slip of March 2016 titled "Terminal dues pay slip." It has not lost my sight that among the items that are clearly captured in that slip is that of "Leave encashment" of Kshs. 143,879. The claimant in his evidence did not suggest that what was offered here was not what he was entitled to as his outstanding leave pay. He led no evidence to disabuse this figure and justify the figure of Kshs. 1,365,000 that he has sought under the head, "Leave days for years worked."
26. The pay slip has also an item termed Gratuity/Compensation for Kshs. 568,751. A quick calculation will reveal that this amount is borne out of 15 days salary for every year worked. No doubt this item is that which the email correspondence hereinabove mentioned cited as severance pay at the rate of 15 days for each year of completed service.
27. The claimant's claim was not to the effect that though his terminal dues were computed by the Respondent, they were either wrongly computed and/or not paid at all. Since there is no prove that the computed severance pay and leave pay were either mis-computed and/or not paid. I find considerable difficulty to understand the basis that was for the claimant's claim. I decline to award the same.
28. In the upshot, the claimant's claim substantially fails. I only order that, the Respondent issues the certificate of service to the Claimant within 30 days of this Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF APRIL, 2022.



OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Mwangi for the Claimant.

No appearance 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.

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OCHARO KEBIRA

JUDGE

