



**Ngulusi v Euro Petroleum Limited (Cause 2056 of 2015)  
[2022] KEELRC 1100 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1100 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2056 OF 2015**

**J RIKA, J**

**MAY 27, 2022**

**RIKA J**

**COURT ASSISTANT: EMMANUEL KIPRONO**

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**WANGIRA OKOBA & COMPANY ADVOCATES FOR THE CLAIMANT  
GARANE & ASSOCIATES, ADVOCATES FOR THE RESPONDENT**

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**BETWEEN**

**MBATHA NGULUSI ..... CLAIMANT**

**AND**

**EURO PETROLEUM LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 19<sup>th</sup> November 2015.
2. He states, he was employed by the Respondent between 1989 and August 14, 2014 as a Turn man.
3. On or around August 14, 2014, he was with other Employees deployed at Unifresh Limited to carry rice. When he and his colleague Evanson Njeru returned, they were told by Respondent's Directors to leave the workplace with immediate effect. They pleaded with Supervisor Raju, to allow them to continue working. He told them that he did not how to pardon. Their contracts were thus terminated.
4. There was no notice, letter of suspension, complaint, or letter to show cause. The Claimant was not paid terminal dues, after 26 years of service. He was denied his Certificate of Service. He prays for Judgment as follows: -



- a. 1-month salary in lieu of notice at Kshs. 12,750.
  - b. Untaken leave of 26 days per year for 26 years, at Kshs. 331,500.
  - c. Leave pay for 26 years at Kshs. 331,500.
  - d. 12 months' salary in compensation for unfair termination at Kshs. 153,000.
  - e. Overtime of 3 hours per day, for 26 years at Kshs. 1,721,250.
  - f. House allowance for 26 years at Kshs. 596,700.
  - g. Public holidays for 26 years at Kshs, 243,100.
  - h. Severance at Kshs. 165,750.
  - i. Off-duty days at Kshs. 663,000.  
Total...3,519,000.
  - j. Declaration that dismissal was unfair and unlawful.
  - k. Declaration that the Claimant is entitled to terminal dues and compensation as pleaded.
  - l. The Respondent to remit N.S.S.F contributions from 1989 to May 2013,
  - m. Certificate of Service to issue.
  - n. Costs and interest.
5. The Respondent filed its Statement of Response, on 17<sup>th</sup> February 2016. It concedes to have employed the Claimant. It did not deploy him at Unifresh. The Directors did not ask him to leave, upon return. He absented himself from the workplace on or around 14<sup>th</sup> August 2014, without the leave of the Respondent, or other lawful cause. He had absented himself severally, on previous occasions. The allegations he makes against Raju are untrue. He was paid Kshs. 9,7890 as notice through a cheque. He declined the cheque without explanation. He had several warnings. He was dismissed fairly and lawfully. His salary was Kshs. 10,200 at the time of dismissal, not Kshs. 12,750.
  6. He was entitled to 21 days of annual leave. He did not have any pending annual leave days on dismissal. He was paid for all excess hours worked, including on Public Holidays. N.S.S.F contributions were always remitted. Certificate of Service was offered but declined by the Claimant. The Claim is extortionist. The Respondent prays the Court to dismiss the Claim with cost.
  7. The Claimant gave evidence and rested his case, on 23<sup>rd</sup> July 2019. Respondent's Legal Officer, Gibson Kabue, gave evidence on the same date and on November 25, 2021 when hearing closed. The dispute was last mentioned in Court on February 23, 2022, when Parties confirmed filing and exchange of Closing Submissions.
  8. The Claimant adopted his Witness Statement and Documents on record. He narrated his employment history with the Respondent, which started off in 1989, in the position of a Turn Man [an older version of Turn Boy]. He would travel at night with the Respondent's Driver, transporting Respondent's oil. They were not paid for excess hours on the road. He was not issued any invitation to a disciplinary hearing. Termination was arbitrary. He was offered payment of terminal dues through a cheque, which he rejected, on the ground that it did not include leave entitlement, service pay and house allowance.
  9. The Legal Officer told the Court that the Claimant had several warnings before his exit. He was a serial absentee. He was informed about the charges against him and allowed to respond. He explained



himself before he was summarily dismissed. House allowance was consolidated with the basic salary. The Claimant utilized his leave days. Cross-examined, the Legal Officer told the Court that warnings were all oral. There was no written letter to show cause. The Claimant was invited to the disciplinary hearing orally. The hearing was not recorded. Termination was communicated orally to the Claimant. There was no document to show that house allowance was consolidated. The Claimant was initially employed on casual terms. There were no records of overtime paid. N.S.S.F was remitted.

10. The issues are whether the Claimant's contract was terminated fairly under Sections 41, 43 and 45 of the [Employment Act](#); and whether he merits the remedies pleaded.

#### **The Court Finds:-**

11. The Claimant was employed by the Respondent as a Turn Boy. He prefers to use the term Turn Man, but the term commonly known in the labour market is a Turn Boy.
12. He states that he was employed in 1989. The Respondent disputes this, pleading that it would put the Claimant to strict proof, on his date of employment. The Respondent did not give an alternative date about when, it employed the Claimant.
13. The date of commencement, in a contract of employment, is a particular of employment. The Employer has the legal obligation under Section 10 of the [Employment Act](#), to supply this particular. In event there is a legal dispute on the particular, it is the responsibility of the Employer, to prove or disprove the date of employment. The Respondent has not proved the date of employment, or disproved the date advanced by the Employee- 1989. The Court upholds 1989 as the date of employment. The Claimant worked for 26 years.
14. On the rate of pay, the Respondent explained that the Claimant's salary was Kshs. 10,200 monthly. The Claimant pleads Kshs. 12,750 monthly. This again is a term of the contract of employment, which must be established or disproved by the Employer, in event of a legal dispute, in accordance with Section 10 of the [Employment Act](#). Section 20 of the [Employment Act](#), 2007, requires Employers to issue their Employees itemised pay statements. Only Employees on casual or piece-rate contracts of less than 6 months, are excluded from this requirement. It was therefore for the Respondent to prove or disprove the salary payable to the Claimant. The Respondent did not do so, and again, the Court must uphold the rate claimed by the Claimant, at Kshs. 12,750 monthly.
15. It is not clear why the Claimant pleads untaken leave, and leave pay, at Kshs. 331,500 each. The items represent the same benefit. If one does not take leave, one is compensated in cash. If the Claimant did not go on leave, he was at work, receiving his regular pay monthly. He would only be entitled to compensation for unutilized leave. There is no justification is pleading leave pay, and untaken leave, for the same period of leave entitlement. This is irregular.
16. The Claimant has not shown that he was entitled to 26 days of annual leave. The [Employment Act](#) gives a minimum of 21 days. If he was granted 26 days, he ought to direct the attention of the Court to the clause or provision in contract, law, collective agreement or policy, where this was granted. The prayer has not been established.
17. Similarly, there is no evidence of overtime pay computed at Kshs. 1,721,250. The Claimant was a Turn Boy, with flexible hours of work. It is not likely that he was on the road throughout, 7 days a week, delivering the Respondent's products, for 26 years. The Respondent states, that the Claimant set of as a casual Employee. The nature or the work undertaken by the Claimant, did not require him to do excess 3 hours daily, for 26 years. Turn boys have flexible hours. He has not exhibited a work schedule,



- showing that he did these excess hours, and that he was instructed by the Respondent, to do excess hours. The prayer is not persuasive. It is declined.
18. The prayers for untaken Public Holidays and Off-duty are declined for the same reasons. There is no evidence of particular work carried on during Public Holidays. The Claimant does not say on which Particular Public Holiday he worked, making deliveries of the Respondents products, from the Respondent's warehouses to different destinations. These prayers are without foundation and are declined.
  19. He submits at paragraph 15 of his closing Submissions that the Regulation of Wages Order of 2013, entitled him to a basic salary of Kshs. 10,563 without the house allowance. He pleads however, that he was paid a monthly salary of Kshs. 12,750, which in the view of the Court, would indicate house allowance was included to the basic salary of Kshs. 10,563. He does not claim underpayment of the basic. There is no support for the prayer for house allowance in arrears for 26 years, at Kshs. 596,700.
  20. Severance is paid under Section 40 of the Employment Act, on redundancy. There is no pleading from either Party, disclosing or suggesting, that the Claimant exited on redundancy. The item is declined.
  21. If the prayers pleaded by the Claimant are established, then there is no point in asking the Court to grant a declaratory order " that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded." Prayer 13 [b] of the Statement of Claim, is redundant.
  22. The prayer for remittance of N.S.S.F contributions from 1989 to May 2013 is best pursued at the N.S.S.F. It is not clear if there were deductions made before the Claimant was registered. The Statement of Account exhibited by the Claimant indicates date of employment as 1<sup>st</sup> June 2013. The Court has no material to justify an order directing the Respondent to remit unproven deductions, made from 1989, while the Claimant became known to the N.S.S.F in 2013. The prayer is best pursued by the Claimant at the N.S.S.F, through the enforcement mechanism available under the N.S.S.F regime.
  23. Was the Claimant's contract terminated unfairly? Legal Officer Kabue, told the Court that the Claimant was a dedicated absentee Employee. He had been issues several warnings. There was no document supporting this position, exhibited before the Court. There was no attendance register, or letters of warning, supplied to the Court by the Respondent. The Legal Officer told the Court that everything was communicated orally. Invitation to the disciplinary hearing was oral. There was no letter to show cause or charges reduced in writing. Everything was oral. There were no minutes of the disciplinary hearing, and eventually summary dismissal was communicated orally.
  24. Section 74 of Employment Act, requires the Employer to keep a record of among others, warning letters or other evidence on misconduct of an Employee. Record of the warnings and the disciplinary proceedings ought therefore to have been maintained by the Respondent. If the actions taken by the Respondent were oral, they too ought to have been recorded, and retained by the Respondent. Without a record, there is no evidence.
  25. There is no evidence that he Claimant had been warned, repeated the offence of absenteeism, and that he was eventually taken through a disciplinary process, and dismissed for absenteeism.
  26. Termination was unfair under Sections 41, 43, 45 and 47[5] of the Employment Act.
  27. The Claimant worked for 26 years. The Respondent offered him 1-month salary in lieu of notice, at Kshs. 9,780 as terminal dues. He did not play a part in the circumstances leading to termination of his contract. Allegations of existing warnings in his record were not established. He expected to go on working. He merits and is allowed the prayer for compensation for unfair termination, equivalent of his 12 months' salary, at Kshs. 153,000.



28. He was offered notice pay at the wrong rate, which he declined. He is granted notice of 1 month at Kshs. 12,750.
29. The Respondent shall release the Claimant's Certificate of Service through his Advocates.
30. Costs to the Claimant.
31. Interest allowed at court rates, from the date of Judgment till payment is made in full.

**In Sum, it is Ordered: -**

- a. Termination was unfair.
- b. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs. 153,000; and notice at Kshs. 12,750 – total Kshs. 165,750.
- c. Certificate of Service to issue through the Claimant's Advocates.
- d. Costs to the Claimant.
- e. Interest allowed at court rates, from the date of Judgment till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27<sup>TH</sup> DAY OF MAY, 2022.**

**JAMES RIKA**

**JUDGE**

