



**Njenga v Ombi Rubber Rollers Limited (Cause 1593 of 2016)
[2022] KEELRC 1146 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1593 OF 2016**

J RIKA, J

MAY 27, 2022

BETWEEN

JAMES NGOTHO NJENGA CLAIMANT

AND

OMBI RUBBER ROLLERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 10th August 2016.
2. He states, he was employed by the Respondent sometime in 2008, as a Security Guard. His contract was terminated by the Respondent with effect from 1st February 2016. His last salary was Kshs. 11,024 monthly.
3. He was advised that the Respondent had decided to outsource the security role, from 1st February 2016. He, alongside other Guards, was issued dismissal letter dated 25th January 2016.
4. Termination was unfair. No notice was issued. The Claimant did nothing wrong to warrant termination. No valid reason was communicated to the Claimant. Redundancy law was not followed.
5. The Claimant prays for Judgment against the Respondent on the following terms: -
 - a. 1- month salary in lieu of notice at Kshs. 11,024.
 - b. House allowance for the entire service period at 15% of Kshs. 11,024 x 8, total Kshs. 158,745.
 - c. Severance pay at 15 days' salary for 8 complete years of service at Kshs. 158,745.
 - d. Underpayment of salary from 1st May 2012 to 1st June 2012 at Kshs. 12, 519.
 - e. Underpayment from 1st June 2012 to 1st May 2013 at Kshs. 17,186.
 - f. Underpayment from 1st May 2013 to 1st May 2015 at Kshs. 44,064.



- g. Unpaid leave over the period of service at Kshs. 88, 192.
 - h. Compensation for unfair termination equivalent of 12 months' salary at Kshs. 132,288.
Total... Kshs. 622,764.
 - i. Declaration that termination was unfair.
 - j. Certificate of Service to issue.
 - k. Costs and interest.
6. The Respondent filed its Statement of Response on 11th October 2016. Its position is that it reorganized its business in 2016, outsourcing security requirements. The Claimant's contract was terminated with effect from 1st February 2016. The Respondent offered to facilitate the absorption of the Claimant in the outsourced company. He was paid all terminal benefits. He was not dismissed by the Respondent. He is not entitled to any of his prayers.
 7. The Claimant testified and closed his case, on 8th July 2021. Respondent's Managing Director, Eric Muchai, testified and closed the hearing on 26th November 2021. The dispute was last mentioned on 28th January 2022, when the Parties confirmed filing of their Submissions.
 8. The Claimant adopted in his evidence, his Witness Statement and Documents on record. He restated his employment history with the Respondent, and the terms and conditions of that employment. He was informed that the Respondent was restructuring its business and outsourcing security services. He was paid salary Kshs. 9,500. He was not advised on the breakdown. His monthly salary of Kshs. 11,024, was below the statutory wage floor. He was denied annual leave.
 9. On cross-examination, he told the Court that he received the letter of termination, dated 12th January 2016. It was stated that he would be paid notice of 1 month. It was paid. He was paid pension. He was not told that the Respondent was outsourcing security services. The letter indicated the Respondent was outsourcing. The letter advised the Claimant he would be given priority on employment by the outsourcing company. He did not apply. The new company was offering him a monthly salary of Kshs. 9,000, less than he earned at the time. He signed clearance form. He discharged the Respondent. He read and understood the form. Redirected, he told the Court that notice was for about 2 days. The outsourcing firm brought its own Guards.
 10. Muchai similarly adopted in his evidence, his Witness Statement and Documents filed by the Respondent. He restated that his company decided to outsource. The outsourcing company offered to take existing Employees on board. The Claimant declined to work under the new company. He was paid all terminal dues by the Respondent, and discharged the Respondent. The Respondent had a Pension Scheme operated by Britam. The Claimant was paid pension. His salary was consolidated. He did not complain about underpayment during his employment.
 11. Cross-examined, Muchai told the Court that the letter of termination issued on 25th January 2016. Termination was effective on 1st February 2016. There was notice of 4 days. Reasons were given. The Respondent was upgrading security services. He was paid net terminal dues of Kshs. 9,539. His salary was consolidated at Kshs. 11,024. Terminal dues paid reflect this. Pay slip does not capture house allowance. He was paid Kshs. 102,000 in pension. It represents severance pay. The basic wage was about Kshs. 10,000. Termination was not unlawful.
 12. The issues are whether the Claimant's contract was terminated fairly, in accordance with Sections 40, 41, 43 and 45 of the *Employment Act*; and whether he merits the prayers sought.



The Court Finds: -

13. The Claimant concedes that upon termination of his contract on 1st February 2016, he was offered re-employment by the outsourcing company, which was taking over the provision of security services at the Respondent.
14. He also concedes that he declined re-employment because the salary offered by the new company was inferior to what he was earning.
15. The Court does not think that termination was therefore unfair. The Claimant declined the opportunity to continue working. He opted to cease working, while the Respondent had interceded for him, to continue working.
16. The Court does not think that there was a redundancy situation, where the role of Security Guard, was phased out. The role remained. It was only that the Respondent reorganized its business, outsourcing the role to a 3rd Party. The Claimant was offered the opportunity to continue discharging the role. He declined and cannot be heard to complain that his role was declared redundant. There was no redundancy.
17. Upon his refusal to continue working, the Claimant was paid pension and terminal dues. He argues that terminal dues, paid at Kshs. 9,539 after deductions, is not reflective of his base rate salary of Kshs. 11,024 monthly. This may well be so, but the Claimant executed discharge on 8th February 2016. He acknowledged what was paid to be his final dues, confirming that he had no further claims against the Respondent. Cross-examined on this discharge, the Claimant told the Court that: he discharged the Respondent; and that he read and understood what he was signing. He does not claim that discharge was executed involuntarily.
18. Why then does he make an about-turn, and make further claims against the Respondent?
19. The Court upholds his discharge of the Respondent. The Claim has no merit.

It is Ordered:-

- a. The Claim is declined.
- b. No order on the costs.

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

JAMES RIKA

JUDGE

