



**Weche v Imara Steel Limited (Cause 1551 of 2015)
[2022] KEELRC 1674 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1674 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1551 OF 2015
MA ONYANGO, J
MAY 25, 2022**

BETWEEN

SOLOMON WECHE CLAIMANT

AND

IMARA STEEL LIMITED RESPONDENT

JUDGMENT

1. *Vide* a statement of claim dated 2nd September 2015 and filed in Court on 3rd September 2015, the Claimant avers that he was unfairly dismissed by the Respondent.
2. He further avers that he was subjected to double taxation in respect of a motor vehicle registration No. KBW 542 Honda CR-V that he was in the process of buying from the Respondent at the time of dismissal but which the Respondent opted to retain and refund to the Claimant all the money that had been deducted from his salary in respect thereto.
3. The Claimant prays for the following reliefs:
 - (a) A declaration that the Claimant's dismissal was unlawful and unfair.
 - (b) Maximum compensation by way of damages for wrongful and/or unlawful dismissal.
 - (c) Certificate of Service to issue.
 - (d) Payments with interest of the particulars below
 - i 12 months compensation for unfair/unlawful dismissal Kshs.4,200,000
 - ii Leave days (33.25 days – 25 days = 8.25 days)



350,000 X 8.25 days

(30 days) Kshs.96,250

iii Refund of double tax on the car payments (car payment was at the source). The Respondent remitted payment less tax) Kshs.144,000

Total Kshs.4.440.250

- e. Costs of this suit with interest
- f. Any other relief that the Court shall deem fit and just to grant.
4. The Respondent filed a reply to the statement of claim dated 30th September 2015 in which it admits that the Claimant was an employee of the Respondent and was paid salary as pleaded in the claim. The Respondent denies all the other averments in the statement of claim.
5. The Respondent specifically denies that the dismissal of the Claimant was malicious and further denies the particulars of the malice set out at paragraph 9 of the statement of claim.
6. The Respondent also denies the particulars of special loss at paragraph 10 of the statement of claim. It avers that it entered into negotiations with the Claimant in respect of this matter pursuant to which the matter was settled and the Claimant fully paid after he executed a discharge voucher.
7. The Respondent states that the suit herein is frivolous and vexatious, that it is calculated to embarrass the Respondent and unjustly enrich the Claimant. It prays that the suit be dismissed with costs.

Evidence

8. The case was heard on 27th July 2021. The Claimant testified on his own behalf and was cross examined by Counsel for the Respondent. The Respondent however did not file any documents in support of its defence. It also did not file witness statements as at the date of hearing. Its case was therefore closed without calling any evidence.
9. The Claimant testified that he was employed by the Respondent as Human Resource and Administration Manager on 1st October 2013. As part of his employment terms, he was entitled to a motor vehicle. He was issued with motor vehicle registration KBW 542 make Honda CR-V. Because he liked the motor vehicle, he and the Respondent agreed that he would buy off the car at Kshs.1.6 million and pay for it at Kshs.40,000/- until payment in full. The payment was to be made through direct deduction from his salary from 1st January 2014.
10. In the witness statement dated 2nd September 2015 which the Claimant adopted together with his bundle of documents as part of his evidence. The Claimant states that on 4th March 2015, the Respondent's CEO sent him an email stating that the Claimant should live with his way of working or resign. That on 21st April 2015, the CEO stormed his office, took away the laptop he was working with and ordered him to surrender all keys for office and file cabinets. The CEO then forcefully evicted him from the office and ordered him to vacate the company premises.
11. The evidence of the Claimant was not rebutted even during cross examination by the Counsel for the Respondent.
12. The only issue for determination is therefore whether the facts as narrated by the Claimant in his witness statement amount to unfair dismissal and whether he is entitled to the reliefs sought in the statement of claim.



13. The *Employment Act* provides for fair termination under Section 45 of the *Employment Act*. A termination of employment would be valid if the employer complied with Section 41 on fair procedure which requires that the employee be informed of the reasons for termination and be given an opportunity to defend himself. That if the employee so wishes he should be accompanied by either a colleague of his choice or a union official.
14. Under Section 43 of the Act, the employer is obligated to prove the grounds of termination, which can be any of the grounds set out in Section 44(4) of the Act.
15. In the instant case the Claimant was neither informed of the reason for termination nor given an opportunity to defend himself. The termination of his employment was therefore unfair within the meaning of Section 45(2) of the Act.
16. On remedies, the Claimant has prayed for refund of the double taxation in respect of the deductions from his salary towards repayment for motor vehicle registration number KBW 542 Honda CR-V, the deductions having been made after taxation of the salary, the Respondent ought not to have taxed the same again at the time of refund.
17. In respect of compensation, the Claimant has prayed for a maximum of 12 months' salary. Taking into account the length of service and the manner in which the termination occurred, the humiliation of eviction from the office without a hearing and without being given reason for termination as well as the failure of the Respondent to call any witness at the hearing, I will award him ten (10) months' salary as compensation.
18. The Respondent has in its submissions stated that there was agreement for settlement and that the Claimant received payment and signed a discharge voucher. The Respondent has reproduced contents of letters allegedly exchanged between the parties in its written submissions.
19. The attempt to adduce evidence through submissions must fail. It is trite law that submissions cannot constitute evidence. There is a long list of cases where this has been stated among them *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* [2015] eKLR; *Erastus Wade Opande v Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007; *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993; *Ngang'a & Another v Owiti & Another* [2008] 1KLR (EP) 749; *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR; *Avenue Car Hire & Another v Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 and *Muchami Mugeni v Elizabeth Wanjugu Mungara & Another* Civil Appeal No. 141 of 1998.
20. Specifically in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR the Court held:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
21. The Court of Appeal in *Avenue Car Hire & Another v Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules* [now Order 18 Rule 2 of the *Civil Procedure Rules*]. The same Court in



Muchami Mugeni v Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

22. The Respondent had opportunity to file its documents and witness statements which would have been basis for cross examining the Claimant on the documents. It did not. It squandered its chance. It cannot adduce evidence in its submissions. There is no discharge voucher on record. There is no evidence of any payment of the Claimant's dues on record.
23. In conclusion, judgment is entered for the Claimant against the Respondent as follows:
 - (a) Compensation Kshs.3,500,000
 - (b) Leave days (8.25 days) Kshs.96,250
 - (c) Refund of double taxation Kshs.144,250Total award Kshs.3,740,500
24. The Respondent shall pay the Claimant's costs.
25. Interest at Court rates of 12% per annum from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2022.

MAUREEN ONYANGO

JUDGE

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 Civil 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.

MAUREEN ONYANGO

JUDGE

