



REPUBLIC OF KENYA



KENYA LAW
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**Kilavu v Karta Singh Drupar and Company Limited (Cause
1234 of 2016) [2022] KEELRC 1438 (KLR) (23 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1234 OF 2016**

JK GAKERI, J

MAY 23, 2022

BETWEEN

MARTIN MUTHANGA KILAVU CLAIMANT

AND

KARTA SINGH DRUPAR AND COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a statement of claim dated June 20, 2016 and filed on June 23, 2016 alleging that although he had served the respondent faithfully and diligently from February 2003, he was dismissed from employment and not paid terminal benefits.
2. The claimant prays for –
 - (i) Payment of Kshs.283,100/- as terminal benefits and leave.
 - (ii) Costs of this suit.
 - (iii) Interest at Court rates
 - (iv) Certificate of service
 - (v) Such orders and directions as the Court may deem fit to meet the ends of justice.
3. The respondent filed a response to the statement of claim on July 26, 2016. It admitted that it engaged the claimant as alleged and that he served diligently. It however denies having unlawfully terminated the Claimant's employment or refused to pay the Claimant's salary. It denies owing the Claimant any monies.



Claimant's Evidence

4. The Claimant adopted the written statement which generally rehashes the contents of the statement of claim but adds that he was given a one (1) month's notice of termination and was not paid severance pay. He testified that he worked for the Respondent for 13 years and was paid Kshs.3,000/- per week. That he was terminated due to shortage of work and was not paid terminal dues.
5. On cross examination, the witness confirmed that he was not employed in 2010 – 2015 as alleged by the Respondent. He further confirmed that the Respondent paid NSSF contributions for about two or three years before his employment was terminated.
6. Surprisingly, the witness was unaware of his monthly pay and relied on the advocate to compute the figures claimed.
7. It was the Claimant's evidence that he worked both Saturdays and Sundays and did not proceed on leave.
8. On re-examination the witness confirmed that he was not given a letter of appointment.
9. CW2 MR. David Okomo Otieno confirmed that he joined the Respondent in 2008 and knew the Claimant. The witness also confirmed that the Claimant is a witness in ELRC Nairobi Cause No. 1236 of 2016 where he is the Claimant and the Respondent herein is also the Respondent in that case. The Court found the evidence of CW2 largely unhelpful.

Respondent's Evidence

10. RW1 Mr. Nirhmal Singh Dhupar testified that the Claimant was employed by the Respondent in 2010 as a carpenter/wood worker. The witness testified that he had produced in Court copies of petty cash vouchers as evidence that the Claimant was employed in 2010 as opposed to 2003.
11. It is the Respondent's testimony that the petty cash vouchers show that it paid all leave dues for the years worked from 2010 to 2015 and no leave pay was due to the Claimant.
12. RW1 further testified that since NSSF payments were made, service pay is not available to the Claimant.
13. On cross examination, RW1 confirmed that the Claimant commended work in 2010 but admitted that he was on list of NSSF contributors in November 2009 and was an employee then.
14. On re-examination, the witness stated that the Respondent issued a termination notice dated 4th February 2016 and NSSF dues were paid from 2009 till 2016 when the Claimant ceased to be an employee of the Respondent.

Claimant's Submissions

15. The Claimant isolates no issue for determination but captures the evidence as adduced by the Claimant, that he was engaged in 2003 and had no documentary evidence to establish that fact as payment was in cash and he had no payslip.
16. That CW2 testified that when he joined the Respondent, the Claimant was an employee as a carpenter and showed him around during orientation and became they friends.
17. That the Respondent did not avail records before 2009 to show that the Claimant was not an employee then.



18. It is the Claimant's submission that the Respondent's witness lied on oath that the Claimant joined the Respondent in 2010.

Respondent's Submissions

19. The Respondent generally addressed two issues namely duration of the Claimant's employment by the Respondent the Claimant's entitlement to the reliefs sought.

20. As regards the date of employment, the Respondent vehemently denies that the Claimant was employed in 2003 as alleged and dissuaded the Court from relying on the evidence of CW2, Mr. David Okumu.

21. It is submitted that since the Respondent reproduced documents that evidence employment from 2009 and the Claimant furnished no documentary evidence to rebut the Respondent's claim, the Respondent's position should be upheld.

22. It is the Respondent's case the payment of NSSF contributions by the Respondent evidence an employment relationship between the parties. That the Claimant's allegations of having worked for the Respondent from 2003 are false and should be dismissed.

23. As regards the Claimant's entitlement to the reliefs sought, the Respondent submits that:

(i) The Claimant was a member of the NSSF as records attest and the Respondent is not liable to pay service by virtue of section 35(6) of the *Employment Act*, 2007 which excludes members of the National Social Security Fund (NSSF) from service pay.

(ii) The Claimant's employment was terminated in accord with the provisions of the *Employment Act*. The Claimant was accorded the request one (1) month's notice as ordained by section 35(1)(c) of the Act. Thus, the prayer for service pay is unsustainable.

(iii) A total of Kshs.92,350/- was paid by the Respondent as leave, excluding the Kshs.25,000/- admitted in the statement of claim. That the Claimant was in fact overpaid for leave and the Respondent is not claiming the same.

(iv) The Respondent submits that even assuming that the Claimant was employed in 2003 (a fact he was unable to establish), the amount outstanding for leave would be Kshs.24,850/-. That as matters stand, no amount is outstanding as leave payment.

24. The Court is urged to dismiss the suit with costs.

Analysis and Determination

25. The issues for determination are: -

- a) When the Claimant was employed by the Respondent;
- b) Whether the Claimant was declared redundant or was unlawfully terminated from employment;
- c) Whether the Claimant is entitled to the reliefs sought.

26. As to when the Claimant was employed by the Respondent, the parties have adopted different dates. While the Claimant submits that he was employed in February 2003, the Respondent initially stated that he was employed in 2010 but appear to have modified its position after RW1 was shown his documentary evidence indicating that the Claimant was an employee in November 2009.



27. Intriguingly, the Claimant has no documentary evidence associating him with the Respondent in any way, not even payment of salary or wage. More surprisingly, the Claimant could not tell the Court how much he used to earn on a monthly basis. The petty cash vouchers on record produced by the Respondent show different amounts and are dated 2010 to 2015. The Claimant testified that salary or wages were payable in cash and the petty cash vouchers would appear to confirm that.
28. Relatedly, the Respondent did not give the Claimant an appointment letter, let alone a payslip as evidence of payment.
29. RW2 Mr. David Okumu Otieno confirmed on cross examination that when he joined the Respondent in 2008, the Claimant was already an employee and that they became friends. While this piece of evidence does not prove that the Claimant was employed in 2003, it lends credence to his assertion that he was employed before 2010 as alleged.
30. Needless to emphasise, it was the duty of the Respondent to maintain records of its employees including their remuneration, date of employment and other particulars as required by the provisions of the *Employment Act*.
31. With a workforce of over 16, it was incumbent upon the Respondent to keep proper records of its employees. There is no reason why the Respondent could not provide its pay roll for the years before 2009 to disprove the Claimant's allegations.
32. Regrettably, and to his detriment, the Claimant made no attempt to secure a statement from the National Social Security Fund (NSSF) or the National Health Insurance Fund (NHIF) as evidence of membership.
33. In the absence of credible and reliable evidence by the Respondent on the date of employment of the Claimant, the Court is satisfied and finds that the Claimant has on a balance of probabilities shown that he was employed by the Respondent sometime in 2008. No credible and dependable evidence on record connects the Claimant to the Respondent even remotely in 2003 or at any other time before 2008.
34. The second issue is whether the Claimant's employment was terminated unfairly or he was declared redundant. The *Employment Act* makes provision for both redundancies and fair termination of employment.
35. As regards redundancy, section 2(1) of the *Employment Act* provides that redundancy "means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;"
36. Section 40 of the *Employment Act* on the other hand prescribes the substantive and procedural parameters to be complied with in a redundancy. The seven (7) requirements set forth by section 40(1) of the Act must be complied with.
37. The Respondent's "Notice of Termination of Work" dated February 4, 2016 stated as follows:

" To Martin Kilavu

RE: Notice of Termination of Work

The reference is made to the above matter and you hereby given the notice of one month due to shortage of work.



We kindly request you to find any other alternative within 30 days as from this letter's date.

Yours Faithfully

Signed

Director

For Kartar Singh Dhupar & Company Limited

Handwritten Date Received:

Signature blank

38. Although the letter is genially styled as termination of work not the employment contract between the parties, the ultimate consequence is separation and had to be in compliance with the law to pass the muster.
39. The letter is in the Court's view a redundancy statement as it was intimating to the Claimant that his services were superfluous and had to search for an alternative means of earning daily bread. The letter is pleading with him to look for an alternative within 30 days from February 4, 2016.
40. Notably, the letter is not copied to any person or office. The Respondent neither pleaded nor proved that it had declared the Claimant redundant but contended that the termination was lawful and fair.
41. It is trite law section 45(2)(a) and (b) of the *Employment Act* provides that for a termination of employment to be deemed fair, the employer must prove that it had a valid and fair reason to do so and the termination must have bene conducted in accordance with fair procedure.
42. In the instant case, the Respondent led no evidence that it was restructuring its work force or that work had declined and it had become necessary to shed off part of the workforce. The Respondent availed no evidence of its circumstances to justify the letter of February 4, 2016. It is unclear whether the Claimant was let off alone or with others, how he was selected and other relevant considerations. The Respondent did not adduce evidence on its workforce, financial status and performance in the recent past to justify the redundancy.
43. In the Court's view, the Respondent did not discharge the burden of proof imposed by section 47(5) of the *Employment Act*, 2007.
44. In addition, in a redundancy the provisions of section 40 of the *Employment Act* are unqualified that:
 1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions ...
45. Section 40(1) of the Act is couched in mandatory terms. For a redundancy to pass muster, it must be conducted in accordance with the provisions of this Section. The seven conditions to be complied with are as follows:
 - a. If the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reason and the extent of the redundancy at least one month before the date when the redundancy is to take effect.
 - b. If the employee is not a member of the union, the employer must notify the employee personally in wiring together with the labour officer.
 - c. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employee.



- d. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union.
 - e. The employer must pay the employee any leave due in cash.
 - f. The employer must pay the employee at least one month's notice or one month's wage in lieu of notice; and
 - g. The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.
46. Regrettably, there is no scintilla of evidence that the Respondent either complied or contemplated compliance with these conditions.
47. As explained by the Court of Appeal in *Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others* [2014] eKLR, an employer has the right to declare redundancies whenever it is convinced that circumstances requiring redundancies have arisen.
48. However, the redundancy must be carried out in the manner prescribed by law. See also *Kenya Airways Corporation Ltd v Tobias Oganya Auma & 5 others* [2007] eKLR and *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR.
49. In this case, it is the finding of the court that the Respondent's letter to the claimant dated 14th February 2016 cannot pass muster as a notice under section 40(1)(b) of the *Employment Act*. It is exceedingly general and does not explain the extent of the intended redundancy.
50. More significantly, apart from his letter which is ineffectual, the Respondent led no evidence of compliance with the provisions of Section 40 of the *Employment Act*.
51. Finally, the Respondent adduced no evidence of compliance with any of these conditions and the Court has no hesitation in finding that termination of the Claimant's contract of employment on account of redundancy was unfair for noncompliance with the substantive and procedural requirements as by law prescribed.
52. Having found that the Claimant's termination of employment was unfair, I will not proceed to determine whether he is entitled to the reliefs sought.

(a) Unpaid leave days for 13 years Kshs.154,050/-

53. Although the Claimant testified that he had not proceeded on leave since employment in 2003, he led no evidence why he did not proceed on leave, his leave entitlement and how many leave days were pending. It is not plausible that the Claimant did not proceed on leave for a single day for the thirteen years as alleged and did not raise the issue with the employer.
54. More significantly, petty cash vouchers in the Claimant's name which he did not contest or deny show that he was paid for leave in:2010, Kshs.8,500/-2011 Kshs.11,500/-2013 Kshs.14,000/-2014 Kshs.14,000/- and2015 Kshs.14,000/-.
55. In the absence of particulars of the number of pending leave days and the years involved, the prayer is declined for lack of proof.



(b) Service pay for 13 years Kshs.154,050/-

56. It is not in dispute that the Claimant was a member of the NSSF and the Respondent made contributions from November 2009 till termination of employment.
57. The Court is in agreement with the Respondent's submissions that the service pay payable by dint of section 35(5) of the *Employment Act* is not applicable to employees who are members of the National Social Security Fund (NSSF). The prayer for service pay is accordingly declined.

(c) Compensation

58. Unfortunately, the Claimant has not prayed for compensation under section 49(1)(c) of the *Employment Act* which is an omission on its part. However, having found that termination of the Claimant's employment contract on account of redundancy was unfair for want of substantive justification and procedural propriety, the Court is persuaded that the Claimant is entitled to some relief by the virtue of prayer (ii) of the statement of claim, which states that "the honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice". In the circumstances, the Court is inclined to award nominal compensation of the equivalent of two (2) months' salary based on the Claimant's monthly average salary during the last year of service.
59. In conclusion judgment is entered for the Claimant against the Respondent in the following terms:
- (a) Equivalent of two months' salary compensation.
 - (b) Certificate of service for the duration.
 - (c) Parties to bear own costs.
60. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF MAY 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

