



Mutai v Okwara t/a Coporate Media Communications Ltd and the Noble Conference Center Ltd & 2 others (Cause 242 of 2018) [2022] KEELRC 1754 (KLR) (20 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1754 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 242 OF 2018
NJ ABUODHA, J
MAY 20, 2022**

BETWEEN

KENNEDY K MUTAI CLAIMANT

AND

**KEVIN OKWARA T/A COPORATE MEDIA COMMUNICATIONS LTD AND
THE NOBLE CONFERENCE CENTER LTD 1ST DEFENDANT**

CORPORATE MEDIA COMMUNICATIONS LTD 2ND DEFENDANT

NOBLE CONFERENCE CENTER LTD 3RD DEFENDANT

JUDGMENT

1. The claimant pleaded that he was on February 7, 2015 employed by the respondents as film production technician/mass communications officer on contract. His monthly salary was stated as Ksh 30,000/= which according to him was irregularly paid. In the month of February, 2015, he was paid Ksh 23,571/= instead of the agreed salary of Ksh 30,000/=. In the month of April, 2015, he was once again paid ksh 26,154.
2. According to the claimant he served the respondent with dedication and commitment from the date of employment but the respondent frustrated him by failing to pay him his entitled salary for the months of April, May and June, 2015. As a result, the claimant opted to resign and gave the respondent thirty days' notice. The claimant therefore left at the end of June, 2015.
3. The respondents entered a joint statement of defence in which they averred that the claimant was there employee and at the salary alleged. The respondents further denied paying the claimant less than the agreed salary.
4. The respondent further averred that the claimant was dismissed as a result of misconduct, absenteeism and breach of terms of employment.



5. At the oral hearing the claimant adopted his statement filed on February 17, 2018 as his evidence in chief as well as his documents filed on the same date. According to the claimant he was never issued with written contract and that his monthly salary was Ksh 30,000/=. The claimant however stated that the respondent never paid him as agreed.
6. It was further his evidence that he started working in February, 2015 and worked until May, 2015 but was not paid so he resigned due to frustrations. Concerning payment of his salary he stated that it was paid through the bank and once by cheque and that his salary never included house allowance and further that the respondent never paid NSSF.
7. The claimant denied absenting himself from work and further denied failure to perform his work. He was never issued with any warning about the allegations of misconduct pleaded by the respondent.
8. In cross-examination he stated that he was not given any letter of appointment and that the respondent promised to give him one but never did. He further stated that he used to work for Sayare TV and that he resigned to join the respondent.
9. Regarding salary, he stated that he produced bank statements from credit bank and further stated that he was paid for the three months worked but not the agreed salary. The amount paid was less. He further stated that he resigned because he had not been paid for two months. He worked for 5 months but was only paid for three months.
10. The respondents never called any witness and opted to close their case.
11. Under section 47(5) of the *Employment Act*, the burden of proof that a wrongful dismissal or unfair termination has occurred is on the employee while the burden of proof of reasons or justification for the termination is on the employer.
12. The claimant herein alleged that he resigned from his employment out of frustration since the respondent failed and or ignored to pay him the agreed salary or never at all. According to the claimant, the agreed salary was Ksh 30,000/= yet the respondent in the month of February, paid him Ksh 23,571. In the month of March, Ksh 21,034 and in April Ksh 26,154/=. The claimant produced his bank statement and payslip to demonstrate this.
13. It was common ground that no contract of employment was issued to the claimant.
14. The claimant filed his claim on February 17, 2017 and attached with the claim the document the documents in support of the claim including the bank statements, payslip and resignation letter. the respondent on the other hand filed a response on May 31, 2017 denying the claimant's claim and further alleging that the claimant was guilty of misconduct and breach of terms of employment particulars of which the respondent set out in their response. The respondent however never attached any letter or memorandum to support the allegations against the claimant contained in the memorandum of response. Further the respondent never called any witness to vouch for the allegations contained in the statement of response.
15. Under section 9(2) of the *Employment Act*, it is the responsibility of an employer to draw the contract of employment setting out the terms of employment. Failure to do so places an employer at a disadvantage in the event of a dispute concerning the terms of employment. Further section 74 of the *Employment Acts* places an obligation on an employer to keep employment records of its employee. The respondent herein neither caused the claimant's contract to be reduced to writing nor produced any records to controvert the claimant's allegations.



16. In the above regard the claimant succeeded in displacing the evidential burden placed on him to show unfair termination occurred while the respondent failed to do so and the court so finds and holds.
17. Under section 31 of the *Employment Act*, an employee is entitled a house at the expense of the employer or a housing allowance. This allowance is not payable where the salary or wages is stated as consolidated.
18. Regarding leave, the claimant had only worked for 5 months hence did not qualify for leave.
19. In conclusion the court awards the claimant as against the respondents plainly and severally as follows:
Ksh
 - a) One month's salary in lieu of notice for termination 30,000
 - b) Balance of underpaid salary for February, March and April, 2015 19,241
 - c) Salary arrears for June and July 60,000
 - d) Two months' salary for unfair termination of service 60,000
169,241
 - e) Costs of the suit
 - f) Items (a),(b),(c) and (d) is subject
To taxes and statutory deductions.
20. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF MAY, 2022

Abuodha Nelson Jorum

Judge ELRC

