



REPUBLIC OF KENYA



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**Lekwa v Kotecha Wholesalers Ltd (Cause 544 of 2016)  
[2022] KEELRC 1477 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1477 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 544 OF 2016**

**AK NZEI, J  
MAY 19, 2022**

**BETWEEN**

**AHMED LEKWA ..... CLAIMANT**

**AND**

**KOTECHA WHOLESALERS LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant's suit herein was instituted on July 4, 2016 vide an undated memorandum of Claim. The Memorandum of Claim was filed together with the Claimant's evidential documents, being a letter of appointment dated September 21, 2013, a certificate of Service dated April 1, 2016 and a demand letter dated May 6, 2016. On December 8, 2016, the claimant filed a detailed witness statement dated December 7, 2016.
2. The claimant pleaded:-
  - a. that vide a letter of appointment dated September 21, 2013, the claimant was employed by the respondent as a driver at a monthly salary of ksh 21,834.
  - b. that during the period of employment, the Claimant did not receive any warning, and no complaint was levelled against him.
  - c. that on April 1, 2016, the claimant was given a note indicating that his employment was effectively terminated on March 31, 2016.
  - d. that the respondent terminated the claimant's employment unilaterally, without prior notice and without giving reasons for the termination.
  - e. that the respondent did not follow due process in terminating the claimant's employment.
3. The claimant sought the following reliefs:-



- a. Unpaid salary for the month of March 2016 .....ksh 21,384.
- b. One month salary in lieu of notice.....ksh 21,384.
- c. Unpaid leave .....ksh 11,404.
- d. Severance pay for years worked.....ksh 32,076.
- e. Damages for wrongful termination (21,384x12)....ksh 256,608

**Total ksh 342,856**

4. The respondent entered appearance on August 9, 2016 and filed a Memorandum of defence on the same date. On July 6, 2021, the respondent sought, and was granted leave to amend its pleadings. On July 13, 2021, the respondent filed an Amended Response to the Memorandum of Claim. The respondent pleaded:-
  - a. that it admitted having employed the claimant vide an employment contract dated September 21, 2013, which had an express term that the claimant could be transferred anywhere within the respondent's franchise territory.
  - b. that the claimant's engagement was marred with misconduct, and he was issued with two warning letters dated May 27, 2014 and May 25, 2015.
  - c. that the respondent closed down the Mombasa branch on March 31, 2016 due to hostile business environment and issued a letter of transfer to the claimant on March 1, 2016 prior to closing of the said branch.
  - d. that all the respondent's employees signed the letter of transfer save for the claimant who refused to do so and to report to Kisumu branch by April 1 2016.
  - e. that the claimant filed a complaint with the Ministry of Labour Social Security and Services and pursuant to a consensus with the Claimant at the labour offices, the Respondent offered the Claimant another chance to report to Kisumu by June 1, 2016 but the Claimant failed to comply.
  - f. that the Respondent deposited a cheque for ksh 41,660 with the Ministry of Labour Social Security and Services which included all the pending leave days and salary for the month worked upto March 31, 2016, which the Claimant refused to collect.
  - g. that the Claimant absconded duty sometime in April 2016 and refused to abide by the agreement reached at the Ministry of Labour Social Security and Services.
  - h. that the Claimant absconded duty without prior notification to the employer, and that this was actuated by malice and was meant to sabotage the Respondent's business and operation.
    - i. that the Claimant's employment was not unlawfully terminated as the Respondent informed him of closure of its Mombasa branch and gave him another opportunity to report to the Respondent's new branch in Kisumu but the Claimant refused.
    - j. that reliefs sought by the Claimant are not available to him, and are not merited.
5. The Respondent filed a witness statement by one James Otieno Kiyaka dated July 7, 2021 and a list of documents dated the same date, listing some seven documents. The listed documents included the letter of employment dated September 21, 2013, the Respondent's letter to the Ministry of Labour



- Social Security and Services dated May 20, 2016, the Ministry's letter to the Respondent dated May 30 2016, the Respondent's letter to the Ministry dated June 6, 2016 and the Respondent's letter to the Claimant's Advocates dated June 28, 2016.
6. When the trial opened on January 21, 2022, the Claimant adopted his filed witness statement as his evidence in chief and produced in evidence the documents referred to in paragraph 1 of this judgment. Cross examined, the Claimant testified:-
    - a. that he was employed on September 21, 2013 and his salary was subsequently raised to ksh 21,384.
    - b. that the Claimant was being issued with payslips and deductions on his salary included PAYE, NSSF and NHIF.
    - c. that the Respondent closed their Mombasa branch and the Claimant was given a letter on March 30, 2016 stating that he should not go to work as from April 1, 2016 until he received a call to go and collect his salary.
    - d. that the Respondent continued operating from its main business at Luanda in Vihiga.
    - e. that after the Respondent relocated, the Claimant went to the Labour Office and the Labour Officer wrote to the Respondent but the Respondent never responded and never went to the Labour Office.
    - f. that the Respondent sent a cheque to the Labour Office in June 2016 but the Claimant never collected it as he was told to sign two Memoranda of understanding, one to the effect that he was abandoning the case. That he was not told what the other memorandum was about. That the Claimant had at that time engaged a lawyer.
    - g. that on May 24, 2016, the Labour Officer called the Claimant over a letter to Luanda send to the Labour Office by the Respondent, which the Labour Officer read to the Claimant, but which the Claimant did not take as he already had a letter terminating his employment.
  7. The Respondent's witness, James Otieno Kiyaka (RW-1), adopted his witness statement referred to in paragraph 5 of this Judgment as his sworn evidence and produced in evidence the documents referred to in the same paragraph.
  8. The Respondent's witness further testified that the letter dated April 1, 2016 (exhibited by the Claimant) was written by the Respondent's HR and was a Certificate of Service. That only one of the Respondent's employees moved to Luanda because he was (from) just next to Vihiga.
  9. Cross-examined, RW-1 testified that the Respondent had not exhibited the Claimant's transfer letter and that the Claimant's dues had not been paid.
  10. Parties herein did not file a joint statement of agreed issues.
  11. Upon considering the pleadings filed and evidence adduced by both parties, issues that emerge for determination are as follows:-
    - a. whether the Claimant's employment was terminated by the Respondent.
    - b. whether termination of the Claimant's employment was unfair.
    - c. whether the Claimant is entitled to the reliefs sought.
  12. On the 1<sup>st</sup> issue, the Claimant testified that the Respondent closed its Mombasa branch and on March 30, 2016, the Claimant received a letter stating that he should not go to work as from April 1, 2016 until he received a call to go for his salary. The letter dated April 1, 2016 was exhibited by the Claimant,



and the Respondent (RW-1) testified that the said letter was written by the Respondent's HR and was, indeed, a Certificate of service. The said letter, which is on the Respondent's letter head reads:-

“ To Whom It May Concern”

This is to certify that Ahmed Lekwa of Id No. 22681855 was engaged with us as a Driver from September 21, 2013 to March 31, 2016.

Ahmed is a hardworking and honest person. He is a Self Starter, a team player and endeavors to give all the necessary support towards achievement of the company goals.

He always worked to the best of his ability and is recommended for a suitable position to any prospective employer.

We wish him all the best in his future endeavors.

Yours faithfully

For: Kotecha Wholesalers Ltd

.....

A. Chotai

(HR Manager)”

13. Section 51(1) of the *Employment Act* states as follows:-

“An employer shall issue to an employee a Certificate of Service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.”

14. Both parties were in agreement that the Claimant was employed by the Respondent on September 21, 2013, and remained in employment until March 31, 2016. The Claimant testified that his employment was terminated by the Respondent on March 31, 2016 upon closing its Mombasa branch. The Respondent issued the Claimant with a Certificate of Service on April 1, 2016, a day after the said date of termination. Under Section 51(1) of the *Employment Act*, a Certificate of Service can only issue upon termination of employment; and the Certificate of Service issued to the Claimant by the Respondent on April 1, 2016 confirms termination of the Claimant's employment and recommends the Claimant to prospective employers for employment.

15. The Respondent's pleadings and testimony that the Claimant absconded duty sometime in April 2016 cannot, in view of paragraph 13 and 14 of this Judgment, stand. I accept the Claimant's testimony that his employment was terminated by the Respondent on March 31, 2016. I so find and hold.

16. The Respondent's letters to the Labour Office dated May 20, 2016 and June 6, 2016 respectively were written in reaction to a complaint made to the Labour Office, Mombasa, by the Claimant who was seeking payment of his dues. Indeed, in the letter dated May 20, 2016, the Respondent acknowledged receipt of the Labour Officer's letter dated May 9, 2016 on the Claimant. Vide the letter dated June 6, 2016, the Respondent informed the Labour Officer that it had computed the Claimant's final dues at a total of ksh 41,660 and enclosed a cheque for the said sum. The Claimant testified that he did not take the said cheque from the Labour Officer, and the Respondent (Rw-1) testified that the Claimant's dues have not been paid.

17. It was not shown that parties entered into a fresh employment contract after termination on March 31, 2016 of the contract entered into on September 21, 2013, and the Respondent did not demonstrate



how an employee, whose employment contract had already been terminated, could subsequently be transferred to a new work station, and how such an employee could be accused of absconding duty after termination.

18. It was held in the case of *Elizabeth Washeke & 62 Others vs Airtel Networks (K) Ltd & Another* [2013] eKLR as follows:-

“the issuance of a Certificate of Service is indicative of the end of employment for the noted duration in the Certificate as the date when the employee ceased being in the employ of the employer must be noted in this Certificate. It creates a closure of the relationship. Any other engagement will open a new relationship. As indicated in Section 51(1) of the Act, failure to issue this certificate, an employer faces criminal sanctions as failure to comply one commits an offence...In this case, the 1<sup>st</sup> Respondent in compliance of these requirements issued this certificate to the Claimant on January 31, 2011... To go back, they had to be on a new contract of service/employment.”

19. On the second issue, Section 41 of the *Employment Act* 2007 sets out a mandatory procedure which an employer contemplating termination of an employee’s employment must adhere to. The Section provides:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

20. In the case of *Kenfright (E A) Limited vs Benson K Nguti* [ 2016] eKLR, the Court of Appeal held as follows:-

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial judge, that the termination of the Respondent’s contract of service in the circumstances was unfair, the payment in lieu of notice notwithstanding...”

21. The Respondent is not shown to have complied with the mandatory procedural requirements of Section 41 of the *Employment Act* before terminating the Claimant’s employment on March 31, 2016.
22. The Court of Appeal further held in the case of *Janet Nyandiko vs Kenya Commercial Bank Limited* [2017] eKLR that failure to comply with the mandatory requirements of Section 41 of the *Employment Act* renders termination of an employee’s employment unfair. In the present case, the Respondent was not shown to have in any way complied with the mandatory requirements of Section



41 of the Act in terminating the Claimant's employment. It is my finding that termination of the Claimant's employment by the Respondent was unfair, and I so hold.

23. Before considering the third issues, it is to be noted from the Claimant's contract of employment that his salary upon employment was ksh 19,100. The Claimant pleaded that his monthly salary was ksh 21,384. At the trial, the Claimant testified that his salary was eventually raised to this figure (ksh 21,384). This evidence was not rebutted by the Respondent. Indeed the Respondent, who was obligated under Section 20 of the Act to issue the Claimant with a pay statement/payslip, did not produce the Claimant's last payslip in rebuttal of the Claimant's evidence on his salary at the time of termination.
24. On the third issue, and having found that termination of the Claimant's employment was unfair, and the Respondent (RW-1) having testified that the Claimant's final/terminal dues were not paid, I allow the Claimant's claim for one month salary in lieu of notice. I also allow the claims for leave pay and salary for the month of March 2016. These claims are shown to have been admitted by the Respondent in its letter to the Labour Office dated June 6, 2016, wherein the Respondent quantified the Claimant's twelve days leave pay at ksh.6,216. The claim for severance pay for years worked is shown to have been admitted by the Respondent and quantified at ksh.16,568 vide the said letter dated June 6, 2016. I however disallow this claim as termination of the Claimant's employment is not shown to have arisen from redundancy.
25. On the claim for damages/compensation for unfair termination of employment, I award the Claimant nine months' salary being compensation for unfair termination of employment. I have taken into account the circumstances in which the Claimant's employment was terminated and the fact that the Claimant did not in any way contribute to termination of his employment on March 31, 2016.
26. Ultimately, and having considered written submissions presented by Counsel for both parties, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-
- a. One months salary in lieu of notice .....ksh 21,384.
  - b. Leave pay .....ksh 6,216
  - c. Salary for March 2016.....ksh 21,384.
  - d. Nine months' salary being compensation for unfair termination of employment .....ksh.192,456
- Total ksh 241,440
27. The Claimant is also awarded costs of the claim and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MAY 2022**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

In view of restrictions on physical Court operations occasioned by the Covid-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**



**Appearance:**

..... for Claimant

..... for Respondent

