



Mayieka & 8 others v Royal Group Industries(K) Limited (Employment and Labour Relations Claim 120 of 2018) [2022] KEELRC 1730 (KLR) (17 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1730 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CLAIM 120 OF 2018**

HS WASILWA, J

MAY 17, 2022

BETWEEN

**ISAAC MOMANYI MAYIEKA 1ST CLAIMANT
CHRIS MWANGI WANJIRU 2ND CLAIMANT
SIMON NYANGACHA MONYORO 3RD CLAIMANT
ROLEX SHIKUKU MBUNJIRO 4TH CLAIMANT
TITUS WEKESA WANYONYI 5TH CLAIMANT
STELLA KEMUNTO MARINDA 6TH CLAIMANT
SUSAN WANJIRU 7TH CLAIMANT
DAVID OTIENO 8TH CLAIMANT
SOLOMON KHISA 9TH CLAIMANT**

AND

ROYAL GROUP INDUSTRIES(K) LIMITED RESPONDENT

JUDGMENT

1. The Claimants herein filed this joint claim on the May 7, 2018, Amended on the February 7, 2019 and further Amended on the July 2, 2019, claiming to have been unfairly terminated by the Respondent and seeking to be compensated for the unfair termination.
2. The Claimants therefore sought for the following reliefs.
 - a) A declaration that their termination from employment was unlawful and unfair.



- b) An order for the Respondent to pay the Claimants their terminal dues and compensation totaling to Kshs 6,981,768.76 as pleaded at paragraph 3.8 of the claim.
 - c) An order for the Respondent to pay the Claimants costs of this claim and interest thereon.
 - d) An order for the Respondent to issue the Claimants with certificate of service as is under section 51 of the [Employment Act](#).
3. The background of this case is that the 1st, 2nd, 4th and 8th Claimants were employed as Operation Assistants all earning a salary of Kshs 11,623. The 3rd and the 9th Claimants were employed as crushers earning a salary of Kshs 12,500 and 14,980 respectively. The 5th Claimant was employed as Maintenance personal at a salary of Kshs 20,000 while the 6th and 7th Claimants were employed as Housekeepers at a salary of Kshs 11,623 each.
 4. The Claimants aver that they were employed on various fixed term contracts that were renewed on a yearly basis with the last one being the one issued on the January 4, 2017.
 5. The Claimants state that on the February 1, 2018 they were summoned to the Respondent's Human Resource Manager's office without notice, where the General Manager was present and had a short meeting thereafter they were all placed on compulsory annual leave and forced to sign leave forms and proceed for the said leave which they complied.
 6. On the February 7, 2018, all the Claimants reported back to work however the Human resource office was not around to clear them to work. They returned back to work on the February 15, 2018 only to find the Respondent's accountant, who was now acting as the Human Resource Manager, who directed them to go back home and await communication from the Respondent's Manager. They once again reported to work without summons on the February 26, 2018 and were turned back by the General Manager.
 7. On March 2, 2018 the Claimants were all summoned to a meeting by the Respondent's General Manager who issued them with termination letters dated February 28, 2018 on the basis that they had joined Kenya Building, Construction, Timber and Furniture Employees Union in the year 2017. They were granted 7 days to appeal which they did however that the said appeals have never been handled to date.
 8. The 1st, 2nd, 3rd, 4th, 8th and 9th Claimants seek for payment of underpayments, house allowance, *pro-rata* leave, unpaid public holidays, pay *in lieu* of Notice, service pay, 12 months' salary compensation for the unfair termination, overtime and rest days' pay, the 5th Claimant prays for house allowance, *pro-rata* leave, unpaid public holidays, pay in lieu of Notice, service pay and 12 months' salary compensation for the unfair termination while the 6th and 7th Claimants sought for underpayments, house allowance, *pro-rata* leave, unpaid public holidays, pay in lieu of Notice, service pay and 12 months' salary compensation for the unfair termination.
 9. The basis for termination according to the Claimants was on joining Kenya Building, Construction, Timber and Furniture Employees Union in the year 2017.
 10. The Respondent entered appearance on the July 23, 2019 and filed a response to the claim on even date contending that the Claimants were not unfairly terminated rather that their contract of employment expired and came to an end by effluxion of time save for the 2nd, 3rd, 4th and 5th Claimants whose services were terminated after being subjected to disciplinary hearing and failing to exonerate themselves.
 11. The Respondent then maintained that the termination was fair in the circumstances and the Claimants are not entitled to the reliefs sought in the claim. The Respondent denied more specifically that the



Claimants were underpaid, that they are not entitled to house allowance. It was also stated that all the Claimants utilized their leave days while at the Respondent's employment. The Respondent further avers that the Claimants worked during normal hours and never worked during public holidays as pleaded. On the service pay sought, it was stated that the Claimants were all members of NSSF therefore are not entitled to service pay in line with section 35(6) (d) of the [Employment Act](#).

12. At the time of separation, the Respondent avers that it paid the Claimants salary for days worked in February and One-month salary *in lieu* of Notice, therefore that the Claimants have been paid their rightful entitlements.

Hearing.

13. The 8th Claimant, David Otieno, testified on his behalf and behalf of all the Claimants as CW-1 and adopted a witness statement dated October 12, 2021 and produced the documents as appearing in the list of documents filed on the May 7, 2018 as Claimants exhibits.
14. On cross examination by Owiti Advocate, the witness testified that he was one of the operations assistant earning a salary of Kshs 11,623. He stated that prior to termination they were summoned to the General Manager's office and given their termination letters. That they were given 7 days to appeal which they did but that they have never received any response to the said appeals to date. He then stated that they were not paid their terminal dues.
15. Upon further cross examination, he stated that he was a diligent employee who had no disciplinary issues however that he once wrote an apology letter for fear of losing his job. He further stated that they signed agreement for final dues payments after receiving one-month salary *in lieu* of Notice less statutory deductions. He also stated that they were terminated on February 28, 2018, when their contract expired on the January 4, 2018.
16. The Respondent's General Manager, Tom Oyier, testified as RW-1. He adopted his witness statement dated December 9, 2019 and produced documents dated November 23, 2021. In summary he testified that the 8th Claimant and other Claimants who were operation assistants were general Labourers as per the description of work in the letter of employment who were paid Kshs 11,623 which was inclusive of House allowance in line with legal notice number 117 of 2015. He then testified that, at the time of departure, the Claimants were paid all their dues including Kshs, 13,000 in lieu of notice. He then stated that the Claimant was not working past working hours therefore were not entitled to overtime pay. On the public holidays pay sought, the witness testified that the Claimants never worked for any public holiday. He also stated that the Claimants took and utilized their leave days and any pending leave was paid for. On the service pay prayer, it was stated that the Claimants were members of NSSF and NHIF. Finally, that Mr Otieno just like the other employees had several disciplinary issues.
17. Upon cross examination by Wachira Advocate, the witness testified that the salary paid to the Claimants were inclusive of House allowance and that they never worked any overtime. He further testified that the biometrics submitted indicate the time the employees clocked in and out and confirmed that the Claimants' contracts provide for overtime pay.
18. Upon further cross examination, the witness testified that leave forms produced before Court indicate that the 8th Claimant proceeded for leave in August, 2018 way after the termination on February 28, 2018. Also that at page 13 and 14 shows that the Claimant was on leave for lack of material and gas which factors were not under the control of the Claimant. The witness also testified that the reason for termination according to the pleading was due to lapse of the contract however that the termination letter indicated the reason for termination as misconduct and insubordination.



Claimants' Submissions.

19. The Claimants submitted on three issue; whether the 1st, 6th, 7th, 8th and 9th Claimants' contract lapsed by effluxion of time, Whether the services of the 2nd, 3rd, 4th and 5th Claimants were terminated for lawful cause and whether the Claimants are entitled to the reliefs sought.
20. On the first, issue, it was submitted that the Claimants contract expired on the January 4, 2017 however that they continued working for the Respondent till February therefore that their reason for termination cannot be based on the expired contracts. It was argued that when the Claimant continued rendering their services to the Respondent their employment was renewed by implication and through the actions of the Respondent. To support its argument, the Claimants relied on the case of [*Registered Trustees of Presbyterian Church of East Africa and another V Ruth Gathoni Ngotho-Kariuki*](#) [2017] eKLR where the Court held that; -

“In our interpretation of the contract as a whole, we find that the Respondent was hired for fixed period which was renewable upon expiry. We are guided by the decision in *Ford vs Beech* [1848] wherein the Court stated: “The common and universal principle ought to be applied; namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.”
21. Accordingly, it was argued that once the contract was renewed by conduct of the parties it was important for the Respondent to follow the law in terminating the Claimant's services.
22. On the second issue, it was submitted that the 2nd, 3rd, 4th and 5th Claimants were allegedly dismissed for misconduct, ill behavior and insubordination, without prove of the allegation or being subjected to the disciplinary hearing as provided for under sections 41 and 43 of the [*Employment Act*](#). Further that no notice was given as provided for under section 35 and 36 of the [*Employment Act*](#), therefore that that the termination failed the substantive and procedural fairness.
23. The Claimant then submitted that the Respondent in its supplementary list of document dated November 23, 2021 produced leave forms which were manufactured to show that the 8th Claimant had taken leave for August, 2018 when the Claimant was terminate in February, 2018. Accordingly, that the Respondent ought to be condemned in line with section 75 of the [*Employment Act*](#) for producing such doctored documents in Court.
24. On the reliefs sought, it was argued that the Claimants have proved their case to the required standard and therefore are entitled to the Orders sought.

Respondent's Submissions.

25. The Respondent submitted from the onset that the fixed term contracts for the 1st, 6th, 7th, 8th and 9th Claimants came to an end on the January 4, 2018 as indicated in their respective employment contracts. It is stated that the said contract never provided for notice of expiry of contract neither did it have a renewal clause. In support of its argument the Respondent relied on the case of [*Amatsi Water Services Company Limited V Francis Shire Chachi*](#) [2018 eKLR where the Court while relying on the case of n the



case of *National Water Conservation & Pipeline Corporation vs Jayne Kanini Mwanza*, Civil Appeal No 178 of 2014 (UR), stated as follows:

“The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A Court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the Court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise and in *Bernard Wanjohi Muriuki vs Kirinyaga Water and Sanitation Company Limited & Another* [2012] eKLR, Rika, J, held as follows: - “In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”

26. Additionally, that a fixed term contract cannot be renewed automatically even when the said contract provided for renewal. In this they relied on the case of *Rajab Barasa & 4 others V Kenya Mea Commission* [2016] eKLR.
27. It was further submitted that the Respondent did not at any time make any promises to the Claimants or acted in any way to suggest that the renewal of their contract was automatic, therefore that there was no expectation created by the Respondent on the renewal. The Respondent then cited the case of *Teresa Carlo Omondi V Transparency international –Kenya* [2017] eKLR.
28. The Respondent then submitted that the Claimants upon expiry of contracts were paid their terminal dues including pay *in lieu* of Notice when the same was not mandatory.
29. On whether the 2nd, 3rd, 4th and 5th Claimants were terminated for justifiable reason, it was submitted that the Claimants were terminated for misconduct as captured in their respective termination letters which conduct the 8th Claimant affirmed during hearing that he once wrote an apology letter for absconding duty and that he received a warning letter dated May 27, 2016. It was then submitted that the Claimants under this lot were terminated on justifiable reason and granted chance to appeal which they squandered as no evidence was tendered to confirm the alleged appeals.
30. The Respondent also submitted that all the Claimants signed termination agreements dated March 2, 2018 voluntarily without any coercion absolving the Respondent from any further liability therefore that the same should operate as estoppel on the claim against the Respondent. To support this position, the Respondent, cite the case of *Coastal Bottlers Limited V Kimathi Mithika* [2018] eKLR where the Court of Appeal held that;

“In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the Respondent’s termination. It is instructive to note that the Respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the Respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the



parties. In *Trinity Prime Investment Limited vs Lion of Kenya Insurance Company Limited* [2015] eKLR this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P in *Damondar Jibabbhai & Co Ltd and another vs Eustace Sisal Estates Ltd* [1967] EA 153 that:-

“The function of Courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above *Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others* (*supra*) Lord Justice Beatson stated as follows:-

‘Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”

23. Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the Respondent. This is because the Respondent had waived his rights to make any further claim in relation to his relationship with the appellant.”

31. Accordingly, the Respondent submitted that in absence of any complaints or evidence by Claimants that they were coerced into signing the discharge vouchers, the same ought to be binding on the parties.
32. On the prayers sought, the Respondent submitted that it paid all its employee as per regulation 112 and 117 of 2017 therefore that the prayer for underpayment is without basis. On the notice pay, it was submitted that the same was paid to all Claimant, a fact which CW-1 admitted during hearing. On the overtime sought, it was submitted that the Claimants worked during the required hours therefore are not entitled to overtime pay. In any case that no evidence was tendered to that effect as held in the case of *Reef Hotel Limited V Josephine Chivatsi* [2021] eKLR.
33. On the rest days and leave days sought, the Respondent submitted that the Claimants never worked for 11 hours as pleaded neither did they have leave days that were not utilized and on the service pay sought, it was submitted that the Claimants are members of NSSF as such not entitled to service pay.
34. I have examined the evidence and submissions of the parties filed herein. The exhibits produced by the Claimant show that the Claimants were employed on contracts of different lengths and the last contract exhibited is one dated 4/1/2017 which was for a period of one year. In the contract for each Claimant, the salary payable is indicated and there is no indication that it was inclusive of house allowance.
35. The letters informing the Claimants of the termination of employment were dated 28/2/2018 after the expiry of the contracts on 3/2/2018. It is indicated that the reason for the termination was misconducts, ill behavior and insubordination in the case of the 2nd, 3rd, 4th & 5th Claimants, and for



1st, 6th, 7th, 8th & 9th Claimants the reason assigned is expiry of the contract. The letters were issued 1 month after the expiry which appears as afterthought.

36. As for the 2nd, 3rd, 4th & 5th Claimants, the Claimants aver that they were guilty of some misconduct, there is no indication that they were subjected to any disciplinary processes or were issued any notice.
37. The manner in which they were terminated breached the provision of Section 41 of the [Employment Act](#) 2007 which states as follows;



<p>“41.</p>	<p>Notification and hearing before termination on grounds of misconduct</p> <table border="1"> <tr> <td data-bbox="858 309 1123 1368"> <p>(1)</p> </td> <td data-bbox="1123 309 1390 1368"> <p>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.</p> </td> </tr> <tr> <td data-bbox="858 1368 1123 1995"> <p>(2)</p> </td> <td data-bbox="1123 1368 1390 1995"> <p>Notwithstanding any other provision of this Part, an 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 grounds of misconduct or</p> </td> </tr> </table>	<p>(1)</p>	<p>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.</p>	<p>(2)</p>	<p>Notwithstanding any other provision of this Part, an 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 grounds of misconduct or</p>
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	poor performance, and the person, if any, chosen by the employee within subsection (1), make”.
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38. Even for the Claimants terminated due to expiry of the contract, the expiry would have been silent as per the contract. However the Respondents allowed the Claimants to continue working and then sent them away without any notice.

39. It is my finding that the Claimants were terminated without due process as per Section 45 (2) of the [Employment Act](#) 2007 which states as follows;

“ 45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason-
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure”.

40. I therefore find the Claimants termination unfair and unjustified. In terms of remedies, I find for Claimant and award them as follows;-



1. 1ST Claimant – Isaac Momanyi Mayieka

1. Underpayment of salary being against Legal Notice 117/2015 and No 112/2017 which is = 13,646.40 - 11, 623

$$= 2,023.4 \times 19 \text{ months} = 38,446$$

$$+ 16,102.75 - 11,623 = 4,479.75 \times 10 \text{ months} = 44,797.50$$

$$\text{TOTAL} = 83,242.1/=$$

2. House allowance at 15% of basic pay = 63,045.6

3. Pay *in lieu* of notice = 16,102.75

4. 3 months as compensation for unlawful termination

$$= 3 \times 16,102.75$$

$$= 48,306.25$$

$$\text{TOTAL} = 210,696.70/=$$

Less statutory deduction

5. The claim for overtime, unpaid public holidays and rent days is not proved for all the Claimants in absence of any master roll to establish this fact and without any indication that they sought to have the Respondents to produce these documents and the Respondents declined.

2. 2nd Claimant – Chris Wanjohi

1. Underpayments as per stated Legal Notices 64,325.55/=

2. House allowance not paid 46,302.32/=

3. Pay *in lieu* of notice 16,102.75/=

4. Compensation for wrongful and unlawful termination equivalent to 3 months salary

$$= 16,102.75 \times 3 = 48,306.25/=$$

$$\text{TOTAL} = 175,036.87/=$$

Less statutory deductions

3. 3rd Claimant Simon Monyoro

1. Underpayment of salary as pleaded = 40,449.55/=

2. House allowance not paid = 36,067.43/=

3. Pay *in lieu* of notice = 16,102.75

4. 3 months compensation for unlawful & unfair termination

$$= 3 \times 16, 102.75 = 48,306.25/=$$

$$\text{TOTAL} = 140,925.98/=$$

Less statutory deductions

4. 4th Claimant – Rolex Shikuku Mbunjiro



1. Underpayments as pleaded 50,095.95/=
 2. House allowance not paid = 38,114.39/=
 3. 1 month pay *in lieu* of notice
= 16,102.75
4. 3 months compensation for unlawful and unfair termination
= 3 x 16,102.75 = 48,306.25
TOTAL = 152,619.34/=

Less statutory deductions

5. 5th Claimant – Titus Wekesa Wanyonyi

1. House allowance not paid = 27,000/=
 2. Pay *in lieu* of notice = 20,000/=
 3. 3 months salary as compensation for unlawful & unfair termination
= 20,000 x 3 = 60,000/=
- TOTAL = 107,000/=

Less statutory deductions

6. 6th Claimant – Stella Kemunto Marindi

1. Underpayment as pleaded = 2,730.60/=
 2. House allowance not paid = 101,348.56/=
 3. Pay *in lieu* of notice = 16,102.75
 4. 3 months salary as compensation for the unlawful and unfair termination
= 3 x 16,102.75 = 48,306.25
- TOTAL = 168,490.16/=

Less statutory deductions

7. 7TH Claimant - Susan Wanjiru

1. Underpayment of salary = 2,730.60
2. House allowance not paid = 63,709.9
3. Pay in lieu of notice = 11,926.40
4. 3 months salary as compensation for the unlawful and unfair termination = 3 x 11,926.40
= 35,779.2

TOTAL = 114,146.10/=

Less statutory deductions

8. 8th Claimant - David Otieno



1. Underpayments = 82,701.15/=
 2. House allowance = 87,241.43/= as pleaded
 3. Pay *in lieu* of notice = 25,025.40/=
 4. 3 months salary as compensation for the unlawful termination
= 3 x 25,025.40/= = 75,076.20
- TOTAL = 270,044.18/=

Less statutory deductions

9. 9th Claimant - Solomon Khisa

1. Underpayments as pleaded = 10,104.75/=
 2. House allowance not paid as pleaded = 71,904/=
 3. Pay *in lieu* of notice = 16,102.75/=
 4. 3 months compensation for the unlawful termination
= 3 x 16,102.75 = 48,306.25/=
- TOTAL = 146,417.75/=

Less statutory deductions

The Respondent will pay cost of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF MAY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimunge holding brief for Wachira for Claimants present

Imbwaga holding brief for Owiti for respondents present

Court Assistant - Fred*

