



**Gasaya v Azu's Leather Limited (Cause 1874 of 2015)  
[2022] KEELRC 1733 (KLR) (16 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1733 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1874 OF 2015  
K OCHARO, J  
MAY 16, 2022**

**BETWEEN**

**RITA BOKE GASAYA ..... CLAIMANT**

**AND**

**AZU'S LEATHER LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. At all material times the claimant was an employee of the respondent as a supervisor having been so employed in the September 1, 2012. The employment relationship lasted till the September 23, 2015, when the claimant was dismissed. The claimant holding that the dismissal was unfair and unlawful, commenced the cause herein against the respondent, through a memorandum of claim dated October 21, 2015, seeking for the following reliefs and orders;
  - a. Principal sum of Kshs 255,286.
  - b. Costs of the suit.
  - c. Interest at court's rates.
  - d. Any further relief that this honorable court may deem fit to grant.
2. The memorandum of claim was contemporaneously filed with a list of documents under which the documents that he intended to place reliance upon in fortification of his case were filed. The documents being, a termination letter dated September 22, 2015, and a demand notice by her counsel addressed to the respondent that was dated October 9, 2015.



3. Upon being served with summons to enter appearance, the respondent did enter appearance and file a memorandum of defence dated the November 30, 2015, wherein it the claimant's claim in toto, and her entitlement to the reliefs sought in the memorandum of claim.
4. At the close of pleadings, there was a joinder of issues, the matter therefore got destined for hearing inter partes on merit. The parties were heard on their respective cases on the November 9, 2021.

### **The Claimant's Case**

5. The claimant testified in court on the above-mentioned date, urging the court to adopt the contents of her witness statement dated May 21, 2018 as part of her evidence in chief, and the above-mentioned documents as her documentary evidence. The respondent did not object to this, the adoption was so done. The claimant however briefly gave an oral testimony, clarifying a few aspects of the witness statement and the documents, which she thought it was imperative to do.
6. The claimant stated that he came into the employment of the respondent on the September 1, 2012, as a supervisor with a starting gross salary of Kshs 20,000. The salary was later on reviewed upwards to Kshs 30,000 an amount that she earned till the date of the termination of her employment.
7. The claimant stated that on the September 23, 2015, she reported to work as usual, and after working for a short while she was given a termination letter. She contended that the termination was without any justification.
8. Cross examined by counsel for the respondent, she stated the claimant stated that she was not give any reason for the termination. However, she acknowledged that the termination letter indicated the reason for the termination as tough economic conditions. The termination was to take effect on the September 23, 2015. With the letter the respondent gave her a cheque of Kshs 49,291. The respondent didn't however indicate to her what that amount was supposed to take care of.
9. She went ahead to state that in the letter, the respondent indicated what the sum was for, thus  
[a]. Salary ..... Kshs 30,000  
[b]. Leave pay.....Kshs 12,298  
The amount was subject to statutory deductions. She stated that she was not given any pay slip alongside the latter.
10. The claimant asserted that it was her responsibility to open the premises in the morning at 6:30 am and close the same in the evening at 6:00 pm She was therefore at all material times working overtime. However, she was never compensated for the overtime worked. She alleged that she was not at any time given an opportunity to proceed on leave.
11. She further stated that during the currency of her employment, her and other employees of the respondent would go for exhibitions at various times, however they were never paid any extra allowance.
12. The claimant denied that she was the one who used to pick her kid from school.
13. In her evidence under re-examination, the claimant asserted that prior to the termination she had not been given any notice. She insisted that she was never paid her terminal dues.



### **The Respondent's Case**

14. The respondent presented one Azhar Tayabali to testify in its defence to the claimant's case. The witness moved the court to adopt her witness statement dated July 11, 2018 that had been filed herein as her evidence in chief, and admit the documents that were contemporaneously filed with the statement of claim as the respondent's exhibits. The claimant did not oppose.
15. The witness stated that the respondent employed the claimant on November, 2012 and posted her to the administration department with a starting salary of 12,000. The salary was increased to Kshs 18,000 in September,2013, then Kshs 20,000 in June,2014 and eventually Kshs 30,000.
16. The witness stated that the claimant worked normal hours 8 am to 5pm, without any overtime and that in most instances she requested and was granted permission to leave work at 4pm so as to pick her daughter Brooke from school. The only instances when the claimant and her colleagues worked overtime was during four weekends in a year when the respondent company held its exhibition fairs to display and market its products. During these exhibitions all employees who participated were given breakfast and lunch and dinner and entertain for the evening and a sum of Kshs 2000 which increased over time to Kshs 3000, as an allowance for the two days worked.
17. The witness stated that upon her termination, the claimant was paid all her dues which namely, Kshs 30,000 basic pay, Kshs 30,000 pay in lieu of notice, and Kshs 12,298 unpaid leave, less statutory deductions.
18. The witness further stated that the claimant left the employment of the respondent without handing over various items belonging to the respondent. The witness boldly stated that one cannot be on sick off forever.
19. Cross examined by counsel for the claimant, the witness reiterated that the respondent used to hold 4 [four] exhibitions annually. During the exhibitions, the claimant and her colleagues would be awarded in the manner she stated in her evidence in chief.

### **The Claimant's Submissions**

20. In his written submissions, counsel for the claimant, heavily reiterated the facts of the matter as the came out in the claimant's pleadings, and witness statement, turned evidence in chief. I will avoid to restate the same here.
21. On the first issue counsel submitted that under section 45 of the *Employment Act*, the time of termination but also that the employment was terminated in accordance with fair procedure.
22. It was argued that the respondent's witness didn't place any evidence before the court to demonstrate that the claimant didn't work overtime. That her evidence under cross examination had an admission that the claimant used to work overtime, therefore the court should grant her the Kshs 187,200, sought under the head overtime in her pleadings.
23. It was further submitted that the respondent asserted that the termination of the claimant's employment was on account of redundancy. The termination was without consideration and adherence to the stipulations of the *Employment Act* on terminations on redundancy.

### **The Respondent's Submissions**

24. The respondent's counsel submitted that the claimant was paid all her dues by way of a cheque, payment which she duly acknowledged. She was paid a total of Kshs 49,291. Section 35 [6] of the



Employment Act precludes an employee who is a member of NSSF from payment of service pay. To buttress this counsel cited the case of Hassanath Wanjiku v Vanela House of Coffee [2018] eKLR.

25. The respondent's counsel submitted that a claim for overtime compensation must be properly proved, and in this case, there was not prove of entitlement to the compensation. The case of Victor Sendeu Omwega v General Timothy Missini Orwenyo t/a GMT Services [2019] eKLR, was cited to buttress the submission.

### **Analysis And Determination**

26. Upon the pleadings, the evidence and material before this court, the following issues commend themselves to me as the issues for determination in this matter, thus;
- a. Whether the dismissal of the claimant was procedurally fair.
  - b. Whether the summary dismissal of the claimant from his employment was substantively fair.
  - c. Whether the claimant is entitled to the reliefs he has sought.
  - d. Who should bear the costs of this matter?

### **Whether the summary dismissal of the claimant from employment was procedurally fair**

27. The respondent pleaded at paragraph 6 of the memorandum of defence that;

“Due to tough economic conditions, the respondent terminated the claimant's service and paid her all her dues as at September 2015.”

And the termination letter which she produced as evidence captured the reason for the termination, thus;

“..... As you may have noticed, business is currently going through tough economic conditions that have necessitated the tough decision of downsizing the business to be able to remain afloat. Should these conditions improve, you will be among the first on our list of persons to be called back”

From the above premises it is not difficult to conclude that the termination of the claimant's employment which took effect on the September 23, 2015, a day after the date of the termination letter, was on account of operational requirements of the respondent company.

28. The respondent was therefore bound to demonstrate by way of evidence that the statutory procedure of on account of redundancy was adhered to in its processes leading to the termination of the claimant's employment. There is now firm jurisprudence that an employer intending to terminate an employment contract of his employee[s], must follow the provisions of section 40 of the Employment Act. In the case Jane I Kbalechi v Oxford University Press EA Ltd (Industrial Court Nairobi 924 of 2010) the court held;

“Court is further guided by the provisions of section 40 the Employment Act; which provisions give the conditions precedent before one is declared redundant: these conditions outlined in the law are mandatory and must not be left to the choice of an employer. Redundancies affect workers 'live hoods' and where this must be done by an employer.”

29. The respondent was supposed to issue two notices, the first notice being a general notice informing her of its intention to right size, and that the same might affect her. It is this notice that would trigger consultations between the claimant and the respondent on the intended redundancy, how the same



could be avoided, and if it wouldn't how the process leading to a declaration of redundancy would be carried out, who among the other employees could be affected too, what selection criteria could be applied to select the to be affected. Second specific letter addressed to the claimant, declaring him redundancy. It goes without say that the termination dated September 22, 2015, cannot be said to be any of those notices envisaged in section 40 of the [Employment Act](#).

30. From the evidence by the respondent, one cannot see any evidence suggesting the criteria that it employed to arrive at those it had let go during the alleged downsizing, section 40 of the [Employment Act](#) sets out a specific criteria and it was the respondent's duty to demonstrate that in selection of the claimant and any other employee[s] affected a specific criteria was used, criteria that ran not counter to that provided in law.
31. It is not difficult to conclude that the termination was preceded with any consultations which the Court of Appeal had an occasion to state are important and a must, as it did in the case of [Kenya Airways Limited v Aviation and Allied Workers Union of Kenya and others](#) [2014] eKLR.
32. The respondent just cited that the termination was by the tough economic times. It is not enough for an employer to cite tough economic times, he or she is enjoined to demonstrate by way of evidence to the requisite standard that indeed a genuine economic reason that prompted the right sizing, in order for him or her to discharge the burden of showing that the termination was fair under section 45 of the [Employment Act](#). By not leading evidence to demonstrate the existence of the economic situation, it failed to discharge the burden.
33. By reason of the premises hereinabove, I conclude that the termination was unfair both procedurally and substantively.

### **The Reliefs**

34. The claimant from the onset pleaded and stated in her witness statement turned her evidence in chief, that she was claiming compensation for overtime worked but that was never compensated for during her tenure with the respondent. The claimant stated that she was the employee charged with the responsibility of opening and closing the respondent's business, reason why she worked daily an extra hour. She elaborately and specifically, brought out the number of hours that she worked overtime, and the amount she was claiming thereon. The respondent was clearly put on notice on the claimant's claim under this head. Considering this, one could reasonably expect the respondent to tender a record before court to discount the evidence. Was there an attendance register, was there a clock- clock system? these the court was not told by the respondent. The claimant's claim for overtime was not sufficiently challenged. I am persuaded to grant the relief, thus Kshs 187,200.
35. Having found that the termination was on an account of redundancy, I am inclined to grant severance pay equivalent to 15 days' salary for the years worked therefore Kshs 51,923.
36. I decline to award the unpaid leave days compensation sought. The claimant didn't challenge the respondent's evidence that that was paid to her.
37. In the upshot, judgment is entered in favour of the claimant in the following terms;
  - I. A declaration that the termination of the claimant's employment was on account of operational reasons of the respondent and that the same was unfair.
  - II. Severance pay Kshs 51,923.
  - III. Overtime compensation, Kshs 187,200.



IV. Interest at court rates, from the date of this judgment till full payment.

V. Costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

In presence of;

Mr Kimathi for the respondent.

Mr Babu for the claimant.

**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 March 15, 2020 and subsequent directions of April 21, 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.

A signed copy will be availed to each party upon payment of court fees.

**OCHARO KEBIRA**

**JUDGE**

