



**Miruka v Presbyterian University Of East Africa (Cause 518 of 2017)
[2022] KEELRC 12706 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12706 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 518 OF 2017
M MBARÚ, J
JUNE 30, 2022**

BETWEEN

ROBERT NYANGWANSA MIRUKA CLAIMANT

AND

PRESBYTERIAN UNIVERSITY OF EAST AFRICA RESPONDENT

JUDGMENT

1. On September 1, 2011 the respondent employed the claimant as a lecturer in the School of Law at a monthly salary of KSh 98, 000 with allowances. The salary was not paid as due for several months as noted by the Vice Chancellor's letter dated November 15, 2016.
2. The claimant had taken a personal loan from National Bank on June 3, 2011 amounting to Ksh 656,122.60 and later on May 7, 2012 a top up loan of Ksh 443,877.40 all being ksh 1,100,000 which the respondent undertook to deduct from his salary and remit to the bank monthly as the claimant guarantor.
3. The respondent commenced salary deductions from the claimant's salary toward the repayment of the loan while the claimant was in employment but did not credit the monies deducted to the loan account and which loan accrued to huge interests to the loss and damage of the claimant.
4. The claimant worked for the respondent until March 14, 2017 when his employment was unfairly terminated and the letter backdated to January 2, 2017.
5. Employment terminated after the claimant started demanding for payment of his salary arrears which had accrued for 12 months and non-remittance of loan arrears which arrears run into 3 years despite the respondent making deductions form the claimant's monthly salaries. Termination of employment was unlawful and unfair. There was no justification or reasonable cause and the claimant was not given a hearing.



6. The respondent failed to pay the due salary arrears or refund the monies deducted and not remitted towards the loan account and the claimant is seeking the following dues;
- a. Salary arrears for 15 months ksh 667,982.15;
 - b. Loan arrears Ksh 809,538.41;
 - c. 3 months' notice pay ksh 294,000;
 - d. 5 months' salary in lieu of taking leave for 6 years Ksh 588,000;
 - e. Compensation for 12 months' salary Ksh 1,176,000;
 - f. Gratuity Ksh 1,700,000;
 - g. Costs of the suit and interests on the awards.
7. The claimant testified in sport of his case that upon employment by the respondent he worked diligently but the respondent failed to pay his salaries for over years. The claimant secured a loan facility guaranteed by the respondent and payable through check off from his salary but the respondent would affect the deduction but failed to remit to the National bank which had offered the loan facility.
8. The claimant testified that upon his demand for the salary due and the reasons his loan facility was not being paid for despite the deduction, on March 14, 2017 he was served with letter dated January 2, 2017 terminating his employment. There was no notice, hearing or any reasons given to justify such action and the respondent failed to pay the owing terminal dues or the salary deduction not remitted to National Bank which has caused loss and damage to the claimant and the claims made should issue.

Response

9. In response, the respondent's case is that the claimant was an employee and the sum of Ksh 98, 000 paid in salary was inclusive of ksh 35, 000 house allowances.
10. The respondent's responsibility to the claimant regarding the loan was to deduct the loan instalments from the claimant's salary and remit it to the National Bank of Kenya which payment were effected as evidenced from the payment statements of account.
11. Employment separated on January 2, 2017 and the claims made are without justification. The claim for leave for 6 years is baseless as the claimant applied for and was granted leave on February 23, 2017 and had nil leave balance days. The claim for loan arrears is not justified since the respondent regularly paid to the National Bank in instalments and the suit should be dismissed with costs.

The respondent filed work records.

12. The respondent remained absent at the hearing and therefore called no evidence.
13. At the close of the hearing, only the claimant filed his written submissions.

Determination

14. In a letter dated March 14, 2017 the respondent terminated the claimant's employment with effect from January 2, 2017. No reason(s) is given for termination of employment.
15. The failure to assign a reason leading to termination of employment is an unfair labour practice.



16. The rationale is section 47(5) of the *Employment Act*, 2007 (the Act) that where there is unfair termination or wrongful dismissal, the burden of proving the ingredients of unfairness and wrongfulness lies with the employee.

Section 47(5) states:

- (5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

17. On a complaint of unfair termination of employment, the employer has the burden of justifying the grounds for termination of employment. Therefore, without assigning any reasons leading to termination of employment, the employer effectively fails the mandatory provisions of the law.
18. In such a scenario, all what an employee is required to do in order to discharge the burden of proof on him is to place before the court *prima facie* evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a *prima facie* case, the burden of proof shifts onto the employer to justify the termination. See *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.
19. In the case of *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, the court held that; Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a *prima facie* case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.
- Without giving any cause or making any attempt to justify such action or that the claimant was given a hearing and a chance to defend his employment as required under section 41 of the Act, the respondent is hereby found to have unfairly terminated the claimant's employment.
20. Notice pay and compensations are due remedies pursuant to section 35, 45 and 49 of the Act.
21. Clause 15 of the contract of service required 3 months' notice or payment in lieu thereof. The respondent in terminating employment through letter dated March 14, 2017 backdated it to take effect on January 2, 2017. Such conduct is not acceptable in employment and labour relations. Employment termination took effect on the date the claimant was notified of the same. He is entitled to 3 months' notice pay all at ksh 294, 000.
22. Other than the notice pay due, the respondent terminated employment through letter of March, 2017 and backdated the same to January 2, 2017.
23. Salary pay for the period of January to March, 2017 is due if not paid. This is awarded at Ksh 241, 733 for January and February, 2017 at full salary and 14 days pay for March, 2017.
24. Compensation is also due and a payment of 3 months is hereby found appropriate all at Ksh 294, 000.
25. On the claim for deducted and unremitted loan amounts to National bank of Kenya, the claimant attached a demand letter from the bank following non-payment of the loan facility.
26. The respondent in response does not deny the arrangement that the claimant had secured a loan and which was to be repaid from his salary deductions. The respondent attached the claimant's bank statements with National Bank of Kenya with various credits of ksh 20, 721 or Ksh 20, 657 or Ksh 20,



672 and in general the amounts paid above ksh 20, 000 oscillates between Ksh 600 to Ksh 750 with each payment.

27. The respondent has attached the payment statement for the claimant for the month of December, 2016 and part of the deductions is a payment to the National Bank of Kenya at ksh 28, 295.
28. On the bank statement filed by the respondent, this deduction from the payment statement for December, 2016 is reflected in January, 2017.
29. On the claim by the claimant that the respondent failed to remit deducted loan repayments from his salary, he shall synchronise the bank statements and establish what is legally due. On the records filed by the respondent, the statements filed are evidence of monthly remittances.
30. Any deducted salaries which are not remitted as directed by the claimant, the respondent shall repay back to him with interests pursuant to the provisions of section 17 and 19 of the Act.
31. With regard to leave pay, the employer is the custodian of work records. The respondent filed the leave application form for the year 2016 which show the claimant had nil leave days' balance. Such shall suffice.
32. On the claim for payment of gratuity, the claimant was serving under contract terms. In his first contract dated January 3, 2011 clause 11 of the Employment Contract gave the benefit of gratuity upon the claimant completing 3 years term at the rate of 30% of this annual basic pay.
33. The 2nd contract is dated August 31, 2011 and is without clause 11 as set out in the earlier contract.
34. The claimant has attached the contract dated August 31, 2011 which is without the benefit of a gratuity.
35. Even in a case where the claimant were to rely on the earlier contract dated January 3, 2011 such contract lapsed on its terms and to claim for gratuity benefits in the claim filed on March 16, 2017 such claim is barred by operation of the law pursuant to section 90 of the Act.
36. The benefit such as gratuity must be secured through a written contract, agreement or other private treaty between the parties.
37. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
 - a. Declaration is hereby issued that the respondent terminated the claimant's employment unfairly;
 - b. Compensation awarded at ksh 294,000;
 - c. Notice pay ksh 294,000;
 - d. Pay for January to March 14, 2017 at Ksh 241,733, if such salary was not paid;
 - e. The claimant shall assess the loan repayments statements and the remittances by the respondent and what is due shall be paid with interests as addressed above;
 - f. The respondent shall pay costs.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE



In the presence of:

Court Assistant: Peter Kigotho

..... and

