



**Werunga v Foremost Limited (Cause 52 of 2020)
[2022] KEELRC 1142 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1142 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 52 OF 2020**

B ONGAYA, J

JUNE 24, 2022

BETWEEN

THEOPHILA WANGILA DOPHEL WERUNGA CLAIMANT

AND

FOREMOST LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 21.09.2020 through Messrs Kitoo & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a) A declaration that the respondent unfairly terminated his contract of employment.
 - b) 6-months' salary for unpaid leave (6xKshs.220, 000.00) Kshs.1, 320,000.00.
 - c) 1-month's salary in lieu of notice Kshs.220, 000.00.
 - d) Leave of 25 days Kshs.220, 000.00.
 - e) 12 months' compensation for unfair termination 12 x Kshs.220, 000.00 Kshs. 2, 640, 000.00.
 - f) Payment of remainder of the contract term from 16.11.2017 to 02.11.2019 (24-months x Kshs.220, 000.00) Kshs. 5, 280, 000.00.
 - g) Total claimed Kshs. 9, 591, 850.15.
 - h) Costs of the claim and interest thereon at Court rates.
2. The respondent filed the response to memorandum of claim on 10.02.2021 through M/s Akanga Alera & Associates. The respondent prayed for dismissal of the suit with costs.
3. There is no dispute that the respondent employed the claimant by the contract of service commencing 02.11.2016 to 02.11.2019 with a probation period of 6-months and being a 3-years fixed term contract.



The contract of employment was issued on 28.10.2016. The agreed basic monthly salary was Kshs. 191, 304.00 with a house allowance of Kshs. 28, 696.00 making a monthly gross salary of Kshs.220, 000.

4. Further, by the memo dated 20.05.2017 to all staff the respondent conveyed thus, “This is to notify you that Mr. Dophel Werunga who was the group Human Resource and Administration Manager has been sent on leave for six Months from 17th of May 2017 and does not have the authority to deal on or for the behalf of the Company”.
5. Further, the respondent issued the letter dated 16.11.2017 addressed to whom it may concern being a letter of recommendation for the claimant. The letter conveyed that the claimant had been the respondent’s Group In-charge of Human Resource and Administration Department since 02.11.2016 to 16.11.2017 as the Group Human Resource and Administration Manager. It further conveyed while working for the respondent he was resourceful, creative and solution-oriented person who would come up with new and innovative approaches to his assigned tasks or projects; he functioned well as a team member under the directives of the respondent’s Managing Director Kassam Dada and the other directors. the letter described the claimant as a self-starter, detail oriented and hardworking. It concluded by unreservedly recommending the claimant to any prospective employer or anyone who may require his services and that for any further information the respondent was ready to provide clarification.
6. The respondent issued another letter of recommendation dated 20.05.2017 confirming that that the claimant had worked for the respondent from November 2016 to 20.05.2017. Further, following a financial crisis at the respondent’s group of companies, the claimant was on unpaid leave for six months and he was being recommended to any prospective employer or anyone requiring his services. Further, a certificate of service dated 15.11.2017 issued confirming that the claimant had worked for the respondent from 02.11.2016 to 16.11.2017 as the Group Human Resource and Administration Manager.
7. The parties signed the letter dated 16.11.2017 titled termination of contract of service of the claimant issued on 28.10.2016. The letter addressed to the claimant was signed by the claimant and the Managing Director and it stated as follows,

“Dear Dophel,

Further to our joint meeting this morning in the boardroom of Foremost Limited between yourself and two directors of Foremost Limited namely Kassam Dada and Mehboob Abbas,

We hereby terminate your above named contract of service from today 16th Nov 2017.

Reason for termination stands at lack of work for the past twelve months. You shall be paid one-month Termination Notice and leave days accumulated at 2 days per month for twelve and half months as 25 days leave.”

8. The record further shows that the parties signed an agreement on 15.05.2017 whose salient points of agreement were as follows:
 - a. The respondent to pay salary arrears for the claimant from United Nations Invoice No. 102 and 103 due any and the salary arrears including:
 - i. For December 2016 Kshs.28, 484.87.
 - ii. For January 2017 Kshs.143, 872.65.
 - iii. For February 2017 Kshs.158, 220.15.



- iv. For March 2017 Kshs. 100, 000.00.
 - v. Balance for March 2017 Kshs.58, 220.15.
 - vi. Balance for April 2017 Kshs. 158, 220.00.
 - vii. Balance for May 2017 Kshs.121, 302.00.
- b. The claimant to be paid in three equal monthly instalments from end of June 2017.
 - c. The claimant to handover and go for an unpaid leave of six months from 17.05.2017.
 - d. Both parties signed to agree to the terms of the agreement.
9. The record further shows that on 16.11.2017 parties held another meeting and they agreed that the respondent to pay the claimant Kshs.158, 220.00 and leave of 25 days Kshs.131, 850.15 totalling Kshs. 290, 070.30 at the end of February 2017.
 10. Despite the foregoing agreements, the claimant pleads that he expected to serve his full contractual term of 3 years. His further case was that despite the agreement of 16.11.2017, the respondent had failed to pay him the agreed money. He alleges that the termination was on account of redundancy when he lost his employment for the reason that the respondent was facing some financial challenges in paying its obligations due to lack of timely income from its projects at the material time. He prays as already set out in this judgment.
 11. The respondent has pleaded that the claimant’s termination was based on the status of the respondent well known by the claimant and the termination was a joint decision of the parties at the meeting held on 16.11.2017. The respondent denies the claimant’s claims and prayers.
 12. The claimant testified to support his case and the respondent’s witness (RW) was the Director, Kassam Dada. The final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.
 13. The 1st and main issue for determination is whether the respondent terminated the contract of employment on account of redundancy or it was on account of agreement on 16.11.2017.
 14. The claimant testified that he knew the respondent had financial problems and further, “I left on 16.11.2017. I was promised final payment. I did not receive full promised amount.” The claimant also confirmed that he signed all the documents or agreements as enumerated. While alleging that he was forced to sign for 6 months’ unpaid leave, his other evidence is that indeed the respondent had been running on financial difficulties and he testified in cross-examination, “I was not the last of the employees to leave. I oversaw a process of employees like 20 of them left. I calculated their dues and paper work was not filed.” He also testified that he asked for the recommendation letter of 20.05.2017 because he was going on a long period of unpaid leave. RW testified that at the time of the claimant’s taking of unpaid 6 months’ leave he had a job opening at a flower farm in Nakuru and he requested for a recommendation letter which was issued. He secured that employment in Nakuru and parties met on 16.11.2017 when the claimant requested the matters be concluded on that day because he had to report back to work in Nakuru. Thus parties concluded the agreement of 16.11.2017.
 15. The Court has considered the evidence and the submissions. As submitted for the claimant, the *Employment Act* in section 2 defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job, occupation and loss of employment. It is also true that



the reason leading to the separation was the respondent's financial challenges and which the evidence shows indeed existed as at the time of the termination as envisaged in section 43 of the Act. However, the Court finds that the termination was not at the sole initiative of the respondent because, first, the claimant agreed and signed on 15.05.2017 to go on the unpaid 6 months leave, and, second, he signed on 16.11.2017 agreeing that the contract of service terminates upon the terms and conditions set out therein. The Court finds that in the circumstances the parties are bound by those agreements they signed voluntarily and the contract of service ended not on account of redundancy but on account of the voluntary agreements and particularly the one of 16.11.2017. The respondent's pleadings and submissions are upheld in that regard.

16. The 2nd issue is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:
- a) The Court has found that the termination of the contract of service was on account of parties' voluntary agreement and not redundancy and thus the claimant is not entitled to a declaration that the respondent unfairly terminated his contract of employment.
 - b) The Claimant has prayed for 6-months' salary for unpaid leave (6xKshs.220, 000.00) Kshs.1, 320,000.00. The evidence is that on 15.05.2017 the claimant voluntarily signed agreeing to handover and go for an unpaid leave of six months effective 17.05.2017. The claimant is bound by that agreement and the prayer will collapse.
 - c) The claimant prays for 1-month's salary in lieu of notice Kshs.220, 000.00. This was agreed upon in the separation agreement signed on 16.11.2017 and at Kshs. 158, 220.00. The claim will fail except to the extend if the respondent has not paid the full separation dues and which point the Court will revert to later in this judgment.
 - d) The claimant prays for leave of 25 days Kshs.220, 000.00 but which was agreed upon at Kshs. 131, 850.00 and which will collapse except if the respondent has not paid the full separation dues and which point the Court will revert to later in this judgment.
 - e) The prayer for 12 months' compensation for unfair termination 12 x Kshs.220, 000.00 Kshs. 2, 640, 000.00 will collapse the termination being by agreement and not unfair or unlawful.
 - f) The claimant prayed for payment of remainder of the contract term from 16.11.2017 to 02.11.2019 (24-months x Kshs.220, 000.00) Kshs. 5, 280, 000.00. The Court finds that parties separated by mutual voluntary agreement and there is nothing attributable to the respondent or the contract of service to entitle the claimant to the prayer as made. It will fail.
17. Turning back to the whether the respondent paid all dues under the terms of separation, the Court finds as follows. The claimant has pleaded that he was not paid Kshs. 290, 070.30 agreed as signed in the agreement dated 16.11.2017. RW testified with reference to the exhibited documents showing that the amounts as was agreed on 15.05.2017 and then on 15.11.2017 had been paid to the claimant – the computation being at page R11. The Court therefore returns that the one-month notice payment as well as 25 leave days as claimed had been paid by the respondent as per RW's testimony and the documents on the payment exhibited for the respondent.
18. The respondent's submissions are upheld in that regard. While the claimant testified that he had not received the cheque of Kshs, 402, 092.80, he did not exhibit his bank account statement to rebut the respondent's evidence that the cheque had issued. Further, he did not in his evidence offer an account for a claim adding up to the Kshs. 402, 092.80 and the Kshs.290, 070.30 allegedly not paid of the agreement of 16.11.2017. The Court finds that on a balance of probability, the respondent has established that all the agreed amount of money was paid.



19. The Court has considered all circumstances of the case including that the claimant worked for the respondent for a considerable period of service without pay until he was belatedly paid the outstanding salary arrears per the agreement of 15.05.2017 and returns that each party to bear own costs of the suit.
20. In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim dated 05.03.2020 and filed on 21.09.2020 with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 24TH JUNE, 2022.

BYRAM ONGAYA

JUDGE

