



Makokha v China Road & Bridge Corporation (K) & another (Cause E645 of 2020) [2022] KEELRC 1615 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1615 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E645 OF 2020
L NDOLO, J
JULY 28, 2022**

BETWEEN

ZAKAR NAMATSI MAKOKHA CLAIMANT

AND

CHINA ROAD & BRIDGE CORPORATION (K) 1ST RESPONDENT

**CHINA COMMUNICATION CONSTRUCTION COMPANY 2ND
RESPONDENT**

JUDGMENT

1. By his statement of claim dated and filed in court on October 13, 2020, the claimant sued the respondents for unlawful and unfair termination of employment.
2. Despite being duly served, the respondents did not file any reply. The matter therefore proceeded as an undefended claim on May 23, 2022, with the claimant testifying on his own behalf.
3. In the course of trial, the claimant stated that he had no claim on account of his employment contract with the 1st respondent. He therefore abandoned this part of the claim.

The Claimant's Case

4. The claimant states that he was employed by the 1st respondent in the position of Assistant Human Resource Manager. He was deployed at the 1st respondent's Section 6 of the Mombasa–Nairobi and Nairobi–Naivasha Standard Gauge Railway (SGR) Project, effective August 20, 2014. The claimant avers that he held this position until September 2017, when the 1st respondent transferred him to the 2nd respondent, where he was assigned a similar position.



5. The claimant states that on September 15, 2018, while in the course of his duties, he received complaints from his colleagues who sought clarification concerning non-remittance of their statutory deductions (NHIF, NSSF & PAYE).
6. The claimant claims that he was forced to conduct an inquiry to confirm the true position and adds that his preliminary investigations revealed that the statutory deductions on account of about 4,000 members of staff had not been remitted for several months.
7. The claimant avers that before he could discuss his findings with his supervisor on the morning of September 15, 2018, his employment was verbally terminated by his supervisor, one Mr Mi. The claimant states that he was earning a monthly salary of Kshs 52,700 at the time of separation.
8. The claimant avers that he sought to know the reason behind the termination and why due process was not followed as required under the *Employment Act, 2007*. He claims that he was later informed that the termination was on account of redundancy, following completion of the respondent's project in Mombasa.
9. On his part, the claimant maintains that the termination was as a result of the inquiry he had made concerning the non-remittance of statutory deductions for approximately 48,000 members of staff.
10. The claimant alleges that, owing to pressure, he accepted the termination subject to payment of his terminal dues, which was proposed at Kshs 5,000,000.
11. The claimant states that the respondent, through its representative, one Mr. Alfred Syengo, gave him Kshs 50,000 as part payment. He claims that upon receipt of the cash, he was arrested for allegedly threatening his superiors and was held at the Mai Mahiu Police Station before being driven to his home in Mumias, where his mother and wife were also arrested and later released.
12. The claimant lays a claim for unlawful and unfair termination of employment and seeks the following:
 - a. 2 months' salary in lieu of notice.....Kshs 105,400.00
 - b. 12 months' salary in compensation.....632,400.00
 - c) General damages for breach of his constitutional rights
 - d. Exemplary damages.
 - e. Costs plus interest

Findings and Determination

13. There are two (2) issues for determination in this case:
 - a. Whether the claimant has proved a case of unlawful and unfair termination of employment against the 2nd respondent;
 - b. Whether the claimant is entitled to the reliefs sought.

Unlawful Termination?

14. The claimant told the court that his employment was unlawfully and unfairly terminated by the 2nd respondent, after the claimant had made inquiries regarding non-remittance of employee statutory deductions. The 2nd respondent did not bother to respond to the claimant's averments.



15. The claimant availed to the court a contract of employment issued to him by the 2nd respondent. The contract though dated December 28, 2017, was to run for one year from September 20, 2017. Clause 1.10.1 of the contract provides as follows:

“This contract shall become effective from the date it is signed and it will last for duration of one year, (12 months). The contract will be renewed automatically except when a special notice is issued.”
16. According to this clause, the claimant was entitled to an automatic renewal of his contract of employment, unless a special notice was issued, and the court did not see any such notice. Moreover, the 2nd respondent as the claimant’s employer, did not adduce any evidence on the circumstances under which the claimant left employment. The court observed the claimant’s demeanour at the witness stand and found no reason to disbelieve him.
17. In the circumstances, the court adopts the claimant’s testimony that his employment with the 2nd respondent was terminated without justifiable cause and in violation of due procedure.
18. In his written submissions, the claimant states that the termination of his employment did not comply with the mandatory provisions of sections 41, 43 and 45 of the *Employment Act, 2007*. To support his case, the claimant relies on the Court of Appeal decision in *Pius Machafu Isindu v Lavington Security Guards* [2017] eKLR where the requirement to comply with these provisions was underscored.
19. The claimant further contests the notion that his employment came to an end on account of redundancy, which he terms as an afterthought on the part of the 2nd respondent. In any case, even assuming that this was a case of redundancy, there was no evidence of any compliance with the conditions set under section 40 of the *Employment Act* (see *Jane Khalechi v Oxford University Press EA Ltd* [2013] eKLR and *Fatma Ali Dabaso v First Community Bank Limited* [2018] eKLR).
20. Overall, I find and hold that the claimant has proved a case of unlawful and unfair termination of employment against the 2nd respondent.

Remedies

21. In the result, I award the claimant three (3) months’ salary in compensation. In arriving at this award, I have taken into account the claimant’s length of service with the 2nd respondent as well as the 2nd respondent’s unlawful conduct in the termination transaction.
22. I further award the claimant one (1) month’s salary in lieu of notice.
23. The claims for general and exemplary damages were not proved and are dismissed.
24. Finally, I enter judgment in favour of the claimant as against the 2nd respondent as follows:

a.	3 months’ salary in compensation.....	Kshs 158,100
b.	1 month’s salary in lieu of notice.....	52,700
	Total.....	210,800
25. This amount will attract interest at court rates from the date of judgment until payment in full.
26. The 2nd respondent will meet the costs of the case.
27. Orders accordingly.



DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY, 2022.

LINNET NDOLO

JUDGE

Appearance:

Mr Mollo for the claimant.

No appearance for the Respondents.

