



**Otunga v Mombasa Continental Resort (Cause 40 of 2018)
[2022] KEELRC 1245 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1245 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 40 OF 2018**

**B ONGAYA, J
JULY 22, 2022**

BETWEEN

MAURICE OTUNGA CLAIMANT

AND

MOMBASA CONTINENTAL RESORT RESPONDENT

JUDGMENT

- 1 The claimant filed the memorandum of claim on 19.01.2013 through Omondi Waweru and Company Advocates. The claimant made claims against the respondent in damages for unlawful termination as follows:
 - a. 12 months' salary for wrongful termination at Kshs.55, 000.00 x 12 months = Kshs. 660, 000.00.
 - b. Two months' salaries in lieu of notice Kshs. 110, 000,00.
 - c. Severance pay Kshs. 660, 000.00.
 - d. Two days' salary for March 2017 Kshs.3, 600.00.
 - e. 12 prorated leave Kshs. 23, 000.00.
 - f. Service charge October 2016 – January 2017 Kshs. 25, 000.00.
 - g. Grant claim Kshs. 1, 481, 600.00.
- 2 The claimant prayed for payment of the claimed sum of money, certificate of service, costs, and, interest.
- 3 The claimant's case and testimony was that he was employed by the claimant as a Debt Collector in the Finance Department initially from 2014 for 3 years, extended for 14 months, and the employment



- ended on 30.04.2015. Thereafter the terminal dues were calculated and duly paid. Further, on 26.09.2016 he received a phone call from the respondent's General Manager to resume duties as a Debt Collector at a monthly salary of Kshs. 55, 000.00. He states that he worked for more than 14 months without any formal contract of service and he was entitled to convert to permanent service.
- 4 He further alleges as follows. On 02.03.2017 at 6.00pm the General Manager terminated the claimant's contract of service without notice and a hearing. Later, the claimant received the termination letter dated 28.02.2017. The letter stated that having reviewed the claimant's work during his contract period, it had been decided that the services to the respondent would not be extended any further. The letter thanked the claimant for his contribution and he was wished the best in his future endeavours. The claimant's case was that under the *Employment Act*, 2007 he was entitled to one-month payment in lieu of notice. Further, he had not been given any reason for the unfair termination.
 - 5 The respondent filed the memorandum of claim on 17.10.2018 through Oluga & Company Advocates. The respondent admitted that it employed the claimant as pleaded for the claimant and the termination letter issued. The respondent further case was as follows. The employment was per letter dated 29.09.2016 upon an offer to earn 10% commission or Kshs. 55, 000.00 per month and the claimant opted for the monthly salary. The respondent's further case was that the claimant worked for only 5 months and not 15 months as claimed. Further, prior to the termination on account of poor performance, the respondent had issued two warning letters the last one being dated 14.12.2016 so that the claimant had been given an opportunity to explain himself. He was paid up to the last day worked having been employed on 29.09.2016 to 28.02.2017 (being five months only) so that under section 45(3) of *Employment Act*, 2007 he is not allowed to allege unfair termination. Further 12-months' compensation and two-months' notice payment are not available. The termination was procedural and cannot be declared unlawful.
 - 6 The claimant testified to support his case. The respondent's witness (RW) was Crispus Mwamidi, the Acting General Manager. The Court has considered the material on record and returns as follows.
 - 7 To answer the 1st issue, the Court returns that the parties were in a contract of service. The employment was by the letter dated 29.09.2016 with an option of 10% commission or a retainer of Kshs. 55, 000.00 per month. Per the respondent's pleading, the claimant's own pleading and the evidence, the claimant opted for Kshs. 55, 000.00 per month. The duty was to collect the long overdue debts owed to the respondent.
 - 8 To answer the 2nd issue, the contract of service was terminated by the letter dated 28.02.2017 upon the reason that upon the review of the claimant's work for the period he had served, the contract would not be extended.
 - 9 The 3rd issue for determination is whether the termination was unfair or unlawful as alleged for the claimant. The claimant's evidence was that the General Manager summoned him on 02.03.2017 and gave him the termination letter. Prior to that there had been no notice and hearing. The claimant does not deny receiving the warnings prior to termination as alleged for the respondent. The Court finds that as per RW's evidence the claimant received the warnings prior to the termination the last of which was dated 14.12.2016 and on account that the claimant was not giving expected results. The warning No. 2 as dated 14.12.2016 addressed to the claimant stated as follows:

“Dear Morris Otunga,

NON PERFORMANCE – WARNING 2

Following on the emails I am copied in from your team leader, it is evident that tasks allocated to you are not accomplished and no explanation is provided for failure to



accomplish. Your team leader shared with you the goals for the month of November which have not been accomplished without a word from you.

I have also sat with you in teams, and had started weekly progress meeting that I stopped because each week the situation was the same, it did not yield any progress. We are in the same position we were at since the audit of 2014. The audit of 2015 has revealed there was no progress made either and the Management letter from the auditors confirms it too.

For this reason, I am forced to issue you with a written warning the first was verbal during our meeting where no progress was being reported. I expect the work that was scheduled to be done by end of November is accomplished by end of this week – Saturday 17th Midday and copied to me.

Signed

Mary Stevens

General Manager”

- 10 The Court finds that in view of that letter which the claimant does not deny was issued or deny receiving, the Court finds that in absence of any other material before the Court, the respondent has established that the claimant’s performance was not satisfactory. The situation of his performance appears not to have changed as at the time the termination letter issued on 28.02.2017. The respondent has shown that the unsatisfactory performance alluded to in the termination letter was genuine per section 43 of *Employment Act*, 2007 and it was the reason justifying the failure to extent the month to month contract and as envisaged in section 45 as read with section 47(5) of the Act. The Court finds that the procedure adopted to dismiss the claimant was not unfair because the evidence was that he had been in meetings to be assisted to improve, he had been heard at those meetings about the unsatisfactory performance, and the letter being waning 2 had issued and been received. The Court considers that contrary to the submission as made for the claimant, the respondent had substantially complied with the need for the claimant to be heard about the unsatisfactory performance and he had failed to improve prompting the respondent to fail to extent the month to month contract. In that sense the Court returns that the immediate or primary reason of termination was failure to extent the contract but rooted in the secondary review that established the unsatisfactory performance. The parties being in a month to month contract of service, such termination was permissible under section 35 of the Act provided a month’s notice or payment in lieu had been effected.
- 12 It is submitted for the claimant that in the letter of the warning 2 he was being blamed for the respondent retaining the position in 2014 and the audit of 2015 which had revealed no progress while, he had been employed on 29.09.2016. However, the claimant by his own evidence testified thus, “On 26.09.2016 the Hotel Chief Accountant Sammy called me to resume my duties as a debt collector. I requested a day on 28.09.2016 and I met General Manager and Chief Accountant. I was assigned to reconcile accounts (old and new) from 2009 to 28.09.2016 and to collect debts and ensure steady cash flow.” By that testimony, the Court finds that it was not out of step with the contractual duties assigned when the respondent measured the claimant’s performance against the respondent’s relevant position in 2014 and also against the audit report of 2015 towards determining if at all the claimant was adding value by delivering on the agreed goals.
- 13 To answer the 4th issue the Court finds that the claimant has failed to establish the unfair and unlawful termination as was alleged. However, the contract being month to month, under section 35 of the Act the claimant is awarded Kshs. 55, 000.00 being one-month salary in lieu of the termination notice. The claimant is also awarded Kshs. 3, 600.00 for two days worked in March 2017. The claimant did not serve



for 12 consecutive months and pro rate leave as claimed had not accrued as per section 28 of the Act. Similarly, and as submitted for the respondent, it was not a case of redundancy under section 40 of the Act and severance payment is not due as the claim is found not justified at all. The claimant is entitled to a certificate of service. The Court has considered parties' margins of success, previous relationships including a two times employment contracts and, the claimant is awarded only 50 % of the costs of the suit to be agreed upon or taxed in the usual manner.

- 14 To answer the 5th issue, the Court returns that the claimant could not be precluded from alleging unfair termination merely on account of section 45(3) of the Act and as was pleaded and urged for the respondent. The Court follows its opinion in *Ali Abdullabi Idow –Versus- Sifa Investments Limited* ELRCC No. 366 of 2018 at Mombasa [2022]eKLR thus, “While making a finding of unfair termination on account of redundancy, the Court has considered the opening submissions by counsel for the respondent at the hearing that the claimant had served for only 10-months and he was not entitled to allege unfair termination. Counsel appears to have been alluding to section 45(3) of the *Employment Act*, 2007 which states, “(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.” The Court finds that the section is in plain English and it is permissive and not prescriptive or prohibitory in its terms. It plainly says that those who have been in continuous employment for not less than 13 months have a right to complain of unfair termination and, it does not prohibit those who have not been in such continuous employment not to complain. The Court considers that the section being permissive rather than prescriptive and prohibitory, it does not take away the right of an employee who has worked for any tenure or holding a concluded prospective contract of service which is terminated from complaining of unfair termination as may be appropriately urged on the basis of such relevant constitutional, statutory, contractual and lawful practices applicable on case to case basis. The Court further considers that to the extent that the section is permissive and not prescriptive and prohibitory, the same is not concise on the mischief it sets out to curb. The Court further considers that the section asserts a right for employees to complain about unfair termination while mentioning the instances of a tenure of not less than 13 months of continuous service but, without excluding other tenures of service – particularly, not excluding actually served tenures of less than 13 months or even futuristic tenures where a concluded contract of service is terminated prior to the employee reporting to embark on its performance. The section appears to amount to a content incoherency or incompleteness in legislative drafting and whose consequence appears to render the section dispensable for all practical purposes in its application to cases of alleged unfair termination. It is a vestigial statutory provision.”
- 15 In any event the Court recalls that that section has previously been declared unconstitutional by the Courts.

In conclusion the suit is hereby determined with orders:

1. The respondent to pay the claimant a sum of Kshs.58, 600.00 by 01.09.2022 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
2. The respondent to deliver the certificate of service in 30 days from the date of this judgement.
3. The respondent to pay the claimant's 50% costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND JULY, 2022.

BYRAM ONGAYA

JUDGE

