



Shivanyilu v Kenya Union of Domestic, Hotels Educational Institutions and Hospital Workers (KUDHEIHA) (Cause 137 of 2016) [2022] KEELRC 1237 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1237 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 137 OF 2016**

**L NDOLO, J
JULY 21, 2022**

BETWEEN

MOSES MWANGI SHIVANYILU CLAIMANT

AND

**KENYA UNION OF DOMESTIC, HOTELS EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS (KUDHEIHA) RESPONDENT**

JUDGMENT

1. This is a dispute between a trade union, Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA) and its former employee, Moses Mwangi Shivanyilu.
2. The Claimant pleads his case in a Statement of Claim dated February 1, 2016 and filed in court on February 3, 2016. The Respondent filed a Memorandum of Response dated April 20, 2021.
3. When the parties appeared before me on November 4, 2021, they agreed to dispose of the matter on the basis of their pleadings on record plus witness submissions to be filed by each party. The Court gave directions on the filing of submissions but only the Claimant complied. In reaching its judgment therefore, the Court has taken into account the parties' pleadings and the Claimant's final written submissions.

The Claimant's Case

4. The Claimant states that he was engaged by the Respondent's National Executive Board, through the Secretary General, in the position of Organizing Secretary for Nairobi Branch, effective June 4, 2008.
5. The Claimant further states that he was paid a starting basic monthly salary of Kshs. 4,000, without house allowance. He claims that he was underpaid.



6. The Claimant's salary was progressively increased to Kshs. 11,000 as at January 1, 2014, which salary the Claimant claims was below the minimum wage under the Regulation of Wages (General) Amendment Order, 2013.
7. The Claimant states that he was denied annual leave for 2009/2010. He also claims to have been denied paternity leave for the year 2008.
8. The Claimant avers that at the beginning of the year 2014, he was transferred from Nairobi Branch to Kakamega Branch. The Claimant terms the transfer as arbitrary and accuses the Respondent of failure to facilitate a smooth transition as provided under Clause 21(c) of the Respondent's Code of Ethics and Conduct.
9. In particular, the Claimant states that the Respondent withheld his salary and did not pay him the required transfer allowance. As a result, the Claimant was not able to take up the transfer. He was subsequently dismissed and a circular dated March 18, 2015 issued to that effect. He states that he was not issued with a dismissal letter.
10. The Claimant lays a claim for wrongful and unfair dismissal and seeks the following:
 - a) Salary for 13 months (March 2014-March 2015).....Kshs. 182,000.00
 - b) Underpayments.....398,886.30
 - c) Leave pay for 5 years.....119,955.70
 - d) Leave travelling allowance for 5 years.....15,000.00
 - e) Paternity leave for 2 weeks.....11,195.85
 - f) 2 months' pay in lieu of notice.....34,647.20
 - g) 12 months' pay in compensation.....207,883.20
 - h) General damages.....825,133.50
 - i) Loss of income @ Kshs. 17,324 per month
 - j) Certificate of service
 - k) Costs plus interest

The Respondent's Case

11. In its Memorandum of Response dated April 20, 2021, the Respondent admits having employed the Claimant but denies the Claimant's allegations of wrongful and unfair termination of employment.
12. The Respondent states that the Claimant was issued with a transfer letter on January 12, 2012 deploying him to a new station in Vihiga. However, the Claimant was reluctant to report to the new station and sought to discuss the matter with the Respondent, with a view to putting off the transfer for personal reasons.
13. The Respondent further states that it accommodated the Claimant, although the Claimant had, alongside other employees sued the Respondent in Cause No 211 of 2012. After further discussions and a commitment to continue working, the Claimant withdrew from Cause No 211 of 2012 and resumed his duties.



14. The Respondent avers that as part of normal staff reorganisation and regional expansion, the Respondent and the Claimant had a discussion on December 19, 2013, regarding the opening of a new branch in Vihiga. The Respondent adds that by a letter dated January 7, 2014, the Claimant requested to be transferred to Vihiga Sub Branch.
15. By letter dated January 13, 2014, the Respondent directed the Claimant to proceed to Kakamega Branch. The Claimant was paid his transfer allowance.
16. On June 6, 2014, the Branch Secretary in charge of Kakamega/Vihiga Counties wrote to the Claimant demanding to know the whereabouts of the Claimant as he had not reported to the Kakamega Branch as directed.
17. On June 20, 2014, the Respondent's Secretary General wrote to the Claimant directing him to report to his new station on or before June 30, 2014.
18. On June 24, 2014, the Respondent's Secretary General wrote to the Claimant again noting that the Claimant had applied for his 2013/2014 annual leave, which was granted on the understanding that he would report to Kakamega Branch so as to proceed to open the Vihiga Sub Branch by August 3, 2014.
19. The Respondent states that the Claimant left his place of employment and did not report to the new station as directed. The Respondent maintains that it did not hear from the Claimant and as at the end of 2014, there was no information on his whereabouts.
20. The Respondent further states that it was compelled to inform the Ministry of Labour, the Federation of Kenya Employers and all related employers within Nairobi County that the Claimant was a deserter and was not authorised to represent the Respondent or handle any business on its behalf.
21. The Respondent concludes that having held discussions and consultative meetings over the Claimant's transfer and having given him many chances to be heard for over one year, there was no option left but to terminate his employment.
22. The Respondent denies underpaying the Claimant and further denies that his job fell within the category of General Clerk.

Findings and Determination

23. There are two issues for determination in this case:
 - a) Whether the termination of the Claimant's employment was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Termination

24. On March 18, 2015, the Respondent issued the following circular:

“Circular Letter to Ministry of Labour, F.K.E and all Employers within Nairobi County.

Dear Sir/madam,

Re: Moses Mwangi

We write to inform the Ministry of Labour, F.K.E and all the Employers from the establishment under the scope of our organization that the above mentioned person is no



longer an employee or an officer of this Union. In other words, he ceased to be an Officer with effect from June 30, 2014 upon the Dismissal.

Therefore, he is not authorized to transact any official business or purport to represent any Employee on behalf of Kudheih Workers. Hence whoever is going to entertain him will be doing so at his/her own risk, taking into account that we will not recognize any dealing or be a party to such deals.

We look forward to your understanding and continued cooperation.

Yours faithfully,

(signed)

Albert Njeru

Secretary General

C.C All employees within Nairobi County”

25. This circular implies that the Claimant was dismissed as far back as June 30, 2014. The Court did not however see any dismissal letter and the Claimant states that he did not receive any such letter from the Respondent.
26. From the parties' pleadings, it is discernible that there were issues regarding the Claimant's transfer from Nairobi to Kakamega. The Respondent accuses the Claimant of failing to report to his new station as directed. On his part, the Claimant accuses the Respondent of failure to facilitate the shift.
27. In its Memorandum of Response, the Respondent acknowledges that in the month of June 2014, the Claimant had applied for his 2013/2014 annual leave, which was granted on the understanding that he would report to Kakamega Branch so as to proceed to open the Vihiga Sub Branch by August 3, 2014.
28. It is therefore strange that the Respondent would then go ahead and dismiss the Claimant effective June 30, 2014, while the Claimant was on authorised leave.
29. What is more, even assuming that the Claimant had failed to take up his transfer, the Respondent ought to have given him an opportunity to be heard on this charge, as required under Section 41 of the *Employment Act*.
30. In his written submissions, the Claimant relied on the decision in *Jared Aimba v Fina Bank Limited* [2016] eKLR where the Court of Appeal stated the following:

“...under sections 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to the termination.

In Kenya Union of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR, the Industrial Court, as it was then known held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Act.”
31. In the present case, no evidence was adduced to show compliance with Section 41 of the *Employment Act*. This, coupled with the lack of a termination letter setting out the reason as to why the Claimant's employment came to an end, renders the termination substantively and procedurally unfair.



Remedies

32. Pursuant to the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in the termination transaction.
33. I further award the Claimant two (2) months' salary in lieu of notice, in accordance with Clause 9(b) of the Respondent's Memorandum of Terms and Conditions of Service.
34. I further award the Claimant salary from March 2014 until July 2014, when his authorised leave was scheduled to end.
35. The Claimant bases his claim for underpayment on his averment that his job fell within the category of General Clerk, which averment was not supported by any evidence. The claim for underpayment therefore fails and is disallowed.
36. According to the evidence on record, the Claimant took his annual leave for 2013/2014 in the month of June 2014. The assumption is that all previous leave had been fully utilised and in any event, any claim thereon would be statute barred by dint of Section 90 of the Employment Act.
37. The claims for leave travelling allowance and paternity leave were not proved and are dismissed.
38. No basis was laid for the claims for general damages and loss of income, which are therefore disallowed.
39. Finally, I enter judgment in favour of the Claimant as follows:
 - a) 10 months' salary in compensation.....Kshs. 140,000
 - b) 2 months' salary in lieu of notice.....28,000
 - c) Salary for March 2014 to July 2014.....70,000Total.....238,000
40. This amount is subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant is also entitled to a certificate of service plus costs of the case.
42. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Limo for the Claimant

Mr. Gitonga for the Respondent

