Mnyika v Vambeco Enterprises Limited (Cause 77 of 2018)
[2022] KEELRC 1709 (KLR) (19 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1709 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE 77 OF 2018

BOM MANANI, J

JULY 19, 2022

BETWEEN

BENJAMIN DALU MNYIKA ..... CLAIMANT

AND

VAMBECO ENTERPRISES LIMITED ..... RESPONDENT

JUDGMENT

1. This is a claim for unfair termination. The Claimant alleges that the Respondent wrongfully terminated his services on May 17, 2018. As a result, he seeks compensation as more particularly set out in his pleadings.

2. The Respondent has resisted the claim. According to the Respondent, the Claimant was regularly terminated. Accordingly, the claim by the Claimant is without merit and ought to be dismissed with costs to the Respondent.

3. Earlier on, the cause proceeded ex-parte and judgment was entered in favour of the Claimant. This was after it was noted that the Respondent's counsel's Memorandum of Appearance and defense were not on record.

4. However, the Respondent applied to set aside the said judgment. This was on the grounds that the Respondent had entered appearance and filed a defense prior to the time of hearing the cause ex-parte.

5. It is at this point that it was realized that although the Respondent had in fact filed pleadings in the cause, the same had not been placed on the court file at the time of the ex-parte trial. The reasons for this occurrence are yet to be clear to me. The foregoing notwithstanding, the parties agreed to set aside the ex-parte judgment and commence the hearing de novo.

Claimant's case

6. From the Amended Memorandum of Claim (*AMC*) filed in the cause, it is the Claimant's case that he was employed by the Respondent in March 2012 as a security guard. That his starting salary was Ksh. 15,000/= per month. The Claimant contends that he remained in employment until May 17, 2018 when the Respondent terminated his services.

7. According to the Claimant, the termination of the contract of employment by the Respondent was without lawful justification and notice. It was done verbally without first affording the Claimant an opportunity to be heard.

8. That as a result of the alleged unlawful termination, the Claimant alleges that he has suffered loss and damage. The particulars of loss are set out in the AMC. They include the following: -

    a. Salary in lieu of notice for one month Ksh. 15,000/=.

    b. Unpaid leave dues for six years of service Ksh.

        Kshs 63, 000/=

    c. Unpaid house allowance Ksh. 164,000/=.

    d. Service pay for the six years of service Ksh. 45,000/=.

    e. Damages for unlawful dismissal Ksh. 180,000/=.

    f. Pay for public holidays worked Ksh. 384,000/=.

    g. Unremitted NHIF dues Ksh. 14,400/=.

    h. Unremitted NSSF dues Ksh. 26,000/=.

9. The Claimant prays for judgment against the Respondent for a declaration that the termination was unlawful. In addition, the claimant prays for judgment in terms of paragraph eight (8) above. He also prays for an order that the Respondent issues him with a Certificate of Service and pays costs of the case.

Respondent's case

10. The Respondent basically denies liability for wrongful termination of the Claimant. In a very general way, the Respondent pleads that the Claimant's termination was with good cause, within the law and with notice to the Claimant. Curiously, the Respondent gives no details of what comprised good cause or how the Claimant's termination was within the law. This approach to drawing pleadings as would be seen later in the judgment is least desirable. There are various grounds for lawful termination. These include redundancy, dismissal on grounds of poor performance and or physical incapacity and summary termination. An employer who pleads lawful discharge can plead any of these or other grounds for termination. However, whichever ground he pleads, he must be specific to enable the court examine whether the reasons given to justify the ground fit in the band of reasons that would support the ground specifically pleaded.

11. In addition to the aforesaid, the defense also presents some degree of contradictory defenses. For instance, paragraph 3 of the defense denies the Claimant's contention that he was an employee of the Respondent. Yet, at paragraph 5 of the same defense, the Respondent avers that it terminated the services of the Claimant regularly implying that the Claimant was indeed an employee of the Respondent.

12. Be that as it may, I take it that the Respondent in general admits the existence of the employer-employee relation between the parties. However, its contention is that termination of that relationship was regular in terms of the applicable law.

Issues for determination

13. The parties did not file agreed issues at the pre-trial stage. However, they allude to this in their written submissions.

14. To my mind, I think that there are only two issues for determination in this cause. These are: -

    a. Whether the contract of service between the Claimant and the Respondent was lawfully terminated.

    b. Whether the Claimant is entitled to the reliefs sought in the claim.

Analysis, Determination

15. Only the Claimant gave direct oral evidence during the trial of the cause. The Respondent closed its case without calling any witness of its own.

16. Although the Respondent did not lead evidence of its own, it is nevertheless appreciated that its counsel participated in the full trial of the cause. He cross examined the Claimant extensively on the evidence that he had presented while testifying in chief. In this context therefore, it is appropriate to state that some defense evidence was extracted in the process of cross-examination.

17. Further, it is noted that the Respondent filed a list of documents dated 14th June 2021. This list sought to introduce the letter dated 16th May 2018 by which the Respondent terminated the services of the Claimant. Although counsel for the Respondent put this document to the Claimant during cross-examination, the said document was not eventually formally produced as an exhibit. It is therefore part of the court record without having been produced as exhibit.

18. Rule 21 of the*Employment and Labour Relations Court (Procedure) Rules, 2016*provides as follows on documentary evidence before the court: -

> "The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties."

19. On the other hand rule 25 of the rules aforesaid provides as follows: -

> "The Court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall, if appropriate, avoid legal technicalities and formalities."

20. The letter of termination aforesaid even though not formally produced is nevertheless part of the court record having been duly filed through the list of documents aforesaid. In terms of the regulations cited above, the court will comment on this letter for a number of reasons to include: -

    a. Being a claim for termination, the letter of termination forms the foundation of the dispute as it contains details that informed the decision to terminate. This is particularly so that the parties do not deny that there was a termination. The contention is whether the said termination was lawful or unlawful with the parties pulling in opposite directions on this question.

b. The letter was put to the Claimant during cross-examination by the defense. Therefore, a portion of the evidence on record extracted during cross-examination of the Claimant can only be understood with reference to the said document.

21. The evidence of the Claimant essentially reiterated his case as set out in the pleadings. He also produced the documents in his list of documents dated 24th October 2018 as exhibits.

22. On the first (1st) issue, I had noted earlier in the judgment that the Respondent appears to concede the fact of having employed the Claimant. Consequently, I need not go into analyzing whether the parties had an employer-employee relation.

23. However, for what it is worth, I note that the National Social Security Fund (NSSF) statement produced by the Claimant as exhibit indeed shows that the Respondent was the Claimant's employer. And in its defense, the Respondent avers that it terminated the Claimant lawfully, a concession of the fact that the Claimant has indeed since been terminated.

24. The more critical issue is whether the termination was lawfully executed in terms of the dictates of the *Employment Act*. It is perhaps necessary to point out at this point that the law adopts the reverse burden of proof on the question of determining the lawfulness or otherwise of a termination. The burden is on the employer who has been sued to justify the lawfulness of a termination. This proposition is self -evident in the provisions of sections 43 and 45 of the *Employment Act*.

25. The obligation on the employee in such case is to provide evidence to establish a prima facie case demonstrating that there has been a termination and that the termination was irregular. In terms of section 47 of the *Employment Act*, once the employee provides this evidence, he will be deemed to have discharged the evidential burden of raising a case for unlawful termination (see *Muthaiga Country Club v Kudheiha Workers* [2017] eKLR).

26. The burden then shifts onto the employer to demonstrate that the termination was: -

a. for a lawful cause; and

b. was processed procedurally (see *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR, Julius *Ikapes Wasike v Capacity Outsourcing Limited* [2018] eKLR and *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (Civ) (22 October 2021)).

27. According to the Claimant, on May 17, 2018, the Respondent's officials advised him that his contract of employment had come to a close. He was neither told why this was so nor offered a chance to respond to the proposal to send him home. During his cross-examination, this evidence by the Claimant was not controverted. Prima facie, what the Claimant was asserting by these statements is that his termination was unlawfully executed. Did the Respondent offer evidence to justify the termination in terms of sections 43 and 45 of the *Employment Act*?

28. As mentioned earlier in the judgment, apart from the letter of termination by the defense dated 16th May 2018 attached to the list of documents dated and filed on 14th June 2022 and the cross examination undertaken by the defense counsel, the Respondent did not call any other evidence in the cause. A look at the letter of termination indicates that the termination of the Claimant was occasioned by redundancy at his place of work.

29. According to the document, the Claimant's employment was terminated because of cessation of work at the project site where the Claimant had been deployed. Cessation of work is a ground for

redundancy. It is part of what comprises terminations ‘’based on the operational requirements of the employer”contemplated under section 45 (2)(b)(ii) of the *Employment Act*.

30. As I have stated earlier, counsel for the Respondent put the termination letter to the Claimant during cross examination. Although the statement of defense filed does not explicitly refer to redundancy as the ground for termination of the Claimant, this is expressly set out in the letter of termination aforesaid.

31. Surprisingly, in his submissions, counsel for the Respondent appears to take the position that the termination was on account of reasons other than redundancy and that the issue of redundancy was introduced by the Claimant’s Advocates. I think this suggests that counsel did not fully interrogate the termination letter authored by his own client and which he relied on to advance the Respondent’s defense.

32. That said, redundancy is a lawful way of ending the employer-employee relation as long as it is processed within the law. As I mentioned earlier, the Respondent’s defense is that the Claimant’s termination was procedural and lawful. However, no particulars of the reasons for termination are pleaded. It can only be gathered from the letter of termination dated May 16, 2018 that the reason for termination of the Claimant was the emergence of a redundancy situation at the workplace. Therefore, by pleading regular termination, I understand the Respondent to be saying that the redundancy declaration that is mentioned in the letter of termination dated May 16, 2018 was processed in accordance with the applicable law.

33. But even if this is not the defense that was intended, if the Respondent intended to advance a defense other than redundancy as mentioned in the letter of termination, it remains incumbent on it to justify the termination in terms of sections 41, 43 and 45 of the *Employment Act*.

34. The letter of termination aforesaid corroborates the Claimant’s evidence that his contract of service was terminated. Whist it mentions redundancy as the reason for termination, it does not prove that the procedure for termination based on redundancy was followed. Section 45 of the *Employment Act* provides as follows: -

    I. No employer shall terminate the employment of an employee unfairly.

    II. A termination of employment by an employer is unfair if the employer fails to prove: -

        a. that the reason for the termination is valid;

        b. that the reason for the termination is a fair reason;related to the employees conduct, capacity or compatibility; orbased on the operational requirements of the employer; and

        c. that the employment was terminated in accordance with fair procedure.

35. Quite evidently, even where employment is terminated based on the operational requirements of the employer, the employer must justify it. He must prove the operational reasons warranting the decision and demonstrate that he followed the procedure set out in law in processing the redundancy.

36. The general procedure for declaring a valid redundancy is set out under section 40 of the *Employment Act*. The employer must do the following in the process: -

    a. Give a general notice of the proposed redundancy which should be for a period of at least one month before the actual redundancy is declared.The said notice issues to the employees affected by the proposed redundancy directly if they have no Trade Union representation. Where they

are members of a Trade Union, the notice is issued to the union.The notice must be copied to the local labour office.The notice should indicate the reasons and extent of the proposed redundancy.

b. Upon the lapse of the notice aforesaid, the employer should then undertake the selection exercise for the employees to be released. By this, he isolates the employees to be let go. This procedure is guided by the general principle of ''first in last out''. However, the employer may for reasons capable of objective verification select employees based on other indicators such as ability, reliability and skill of employees. This will enable the employer retain staff that are critical even though they may be comparatively junior in the organization.

c. The selected employees must then be paid their exit dues to include: salary in lieu of notice for one month; compensation for unutilized leave days; severance pay; any other payments under the applicable Collective Bargaining Agreement.

37. In my view, the only sensible way an employer can demonstrate compliance with this process is to have it documented. The letter by the Respondent to the Claimant dated 16th May 2018 does not disclose the extent of redundancy. Neither does it comply with the notice requirements alluded to above. Similarly, the letter does not show how the selection of employees to be let go was undertaken.

38. It is therefore clear to me that the redundancy alluded to in the letter of termination dated 16th May 2018 was not processed in terms of the dictates of section 40 of the *Employment Act*. And where a redundancy declaration fails to meet the conditions set out under section 40 of the *Employment Act*, it results in unfair termination (see *Faiza Mayabi v First Community Bank Limited* [2019] eKLR).

39. But even if it were to be assumed that by asserting that it terminated the Claimant lawfully, the Respondent meant that the termination, though not on grounds of redundancy was lawfully executed on other grounds, the same question whether the Respondent has justified the termination in terms of sections 43 and 45 of the *Employment Act* remains.

40. Once the Claimant led evidence establishing the fact of termination and challenging the lawfulness of the grounds and process of termination, it fell on the Respondent to provide evidence to justify the termination. Indeed, this position is confirmed in *Muthaiga Country Club v Kudheiha Workers* [2017] eKLR where the Court of Appeal expressed itself as follows: -

> "…….the fact that the grievants' employment was terminated through summary dismissal was not denied. The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment."

41. Nowhere in the defense filed by the Respondent does it give the exact reasons for terminating the Claimant. The only place the probable reason for termination is given is in the letter of termination dated May 16, 2018. However, although the letter mentions redundancy as the reason for closure of the contract of service between the parties, there is no evidence by the Respondent to justify the ground of redundancy or demonstrate that the procedure for declaring a redundancy was followed.

42. Further, even if redundancy was not the reason for terminating the Claimant's contract, the Respondent does not identify any other reason for sending the Claimant home. And neither does

it demonstrate that it processed the release as contemplated under sections 41, 43 and 45 of the *Employment Act*.

43. In my view, it was not sufficient for the Respondent to merely plead lawful release without more. It had a duty in law to justify the termination by providing grounds for its decision and demonstrating that it followed the procedure set out under the law in releasing the Claimant. This, the Respondent has not done. As a result, the termination of the Claimant by the Respondent is hereby declared unlawful and unfair.

Award

44. The uncontroverted evidence is that the Claimant was engaged by the Respondent in or about March 2012. He remained in the service of the Respondent until May 2018 when he was terminated.

45. During the trial, the Claimant stated that the contract between the parties was orally concluded. The Respondent did not dispute this fact.

46. Under section 9 of the *Employment Act*, a contract of employment whose duration is equivalent to or more than three (3) months must be reduced into writing. And the obligation to have the contract in writing is, by virtue of section 9(2) of the *Act*, on the employer.

47. Under section 10 of the *Act*, details of what is to be set out in the written contract of employment are given. Apart from particulars of the parties to the contract, the terms of the contract relating to, inter alia: place and duration of work; commencement date for the contract; job description; remuneration; leave entitlement; housing; medical provision; public holiday compensation; and pension must be stated.

48. Under section 10 (6) of the *Employment Act*, every employer who is a party to a written employment contract is required to keep a record of the contract for at least five (5) years post termination of the contract. On the other hand, section 10(7) of the *Act* places the burden of proving or disproving disputed terms in a contract of employment that is required to be in writing on the employer.

49. It follows therefore that in the current case the contract between the parties whose duration was over six years was required by law to have been reduced into writing. Further, it was the obligation of the Respondent to ensure that this was done.

50. When the Claimant asserts that he was not afforded: house allowance or housing; leave; and public holidays, he is essentially raising a dispute on these terms of the contract of employment between him and the Respondent. And in terms of section 10(6) and 10(7) of the *Employment Act*, the Respondent, who by law is required to maintain a record of these matters, has an obligation to prove or disprove them by way of production of the written contract or other written memorandum on the matters in dispute. Consequently, if the employer fails in this respect where the employee has presented a prima facie case, the employee is entitled to judgment. I will evaluate the reliefs to be granted to the Claimant with the foregoing in mind. I will also substantially rely on the guide under section 49 of the *Employment Act* to determine what to award.

51. There is evidence that the Respondent was paid some Ksh. 14,000/= in lieu of notice. This is evident from the letter of termination dated May 16, 2018. As indicated earlier, the defense put this letter to the Claimant during cross-examination. It is noteworthy that the Claimant conceded to having received this amount as part of the sum of Ksh. 45,000/= that he confirmed to have received from the Respondent. I will thus decline to award the Claimant pay in lieu of notice as this was paid.

52. The letter of termination also demonstrates that the Claimant's leave pay entitlement at the time of his termination was equivalent to Ksh. 23,625/=. From the said letter, there is no entry of other accrued leave carried forward. In my view, this letter in so far as it sets out details of the Claimant's leave entitlement, satisfies the requirement of section 10(7) of the *Employment Act* that the employer furnishes the court with other written memorandum to prove settlement of a disputed term of the contract between the parties.

53. During cross-examination, the Claimant confirmed having received Ksh. 45,000/= which included the leave dues of Ksh. 23,625/=. I will therefore decline the Claimant's prayer for leave pay as this has been settled.

54. As regards service pay, section 35 (5) (6) of the *Employment Act* provides as follows: -

> " An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed."
>
> ''This section shall not apply where an employee is a member of :-
>
> a. .....
>
> b. .....
>
> c. .....
>
> d. The National Social Security Fund."

55. The NSSF statement produced as exhibit by the Claimant demonstrates that he was a member of the NSSF during the currency of his employment with the Respondent. In terms of section 35(6) of the *Employment Act*, this disqualifies the Claimant from pursuing the claim for service pay.

56. The situation would perhaps have been different if the Claimant had claimed for gratuity under regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1998. Under this Wage Order, an employee who has been in service for at least five (5) years and who has not been summarily dismissed and has attained retirement age or has retired on medical grounds is entitled to gratuity computed at the rate of salary equivalent to eighteen (18) days for every year worked. Thus, subject to meeting the minimums under the said regulation, the Claimant would perhaps have been entitled to gratuity. However, this was not his claim in this cause.

57. The foregoing notwithstanding, it appears from letter of termination that the Claimant was paid service pay of Ksh. 15,000/= despite the fact that the law appears not to have entitled him to this head of damages. Since the Respondent elected to settle this amount, I will consider it as ex-gratia payment and say no more on this aspect of the case.

58. The Claimant has also claimed pay for public holidays worked. However, he did not give specifics of which public holidays he worked and was not paid. This obviously will put the Respondent in great difficulty in responding to the claim. Much as the employer has the duty of providing the court with records on an employee, it must be remembered that the employee retains the duty to place before the trial court prima facie evidence of his claim. Only then does the burden of proof shift to the employer to provide evidence in rebuttal.

59. In my view, evidence to establish a prima facie case for public holidays worked but not compensated would involve the employee giving details of the actual public holidays he worked. Once an employee does this, then it will be for the employer to provide a record showing that those specific holidays

claimed were compensated. I do not understand the Claimant as having done so in this case (see *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR). I will therefore dismiss the claim in this respect.

60. In respect of house allowance, section 31 of the *Employment Act* obligates an employer to either provide physical housing to an employee or pay him a sum of money in addition to his salary that will be applied towards sourcing housing. The latter is what constitutes housing allowance.

61. In his evidence in chief, the Claimant stated that the sum of Ksh. 15,000/= paid to him on monthly basis comprised his basic salary. This sum did not include house allowance. During cross-examination, the Claimant maintained this position. It was his case that the sum of Ksh. 15,000/= paid to him per month was what was agreed between the parties to cover his basic pay.

62. The question whether the Claimant was entitled to house allowance and whether it was included in his monthly salary of Ksh. 15,000/= thus constituted a dispute on the term of the contract between the parties on house allowance. In terms of section 10 of the *Employment Act*, the Respondent was expected to have reduced the contract between the parties into writing and to produce the said agreement in evidence to either prove or disprove the position taken by the Claimant on the issue.

63. The Claimant's role in this respect was to provide the court with prima facie evidence for nonpayment of house allowance. In my view, the Claimant discharged this burden when he led evidence both during his examination in chief and cross-examination contesting ever having been paid this allowance for the duration of his contract. This evidence set out a prima facie case for nonpayment of this allowance.

64. Once the Claimant discharged this burden, the evidential burden shifted onto the Respondent in terms of section 10 (6) & (7) of the *Employment Act* to provide evidence to the contrary. However and as is clear from the record, the Respondent did not call any evidence outside the letter dated 16th May 2018 and the cross-examination of the Claimant. Therefore, there is no evidence to controvert the Claimant's evidence that he was not paid house allowance for the duration of his service with the Respondent. I will therefore enter judgment for the Claimant for House allowance at 15% of his monthly pay - Ksh. 164,250/=.

65. In the preceding section of this decision, I declared the Claimant's termination as unlawful. Therefore, in terms of section 49 of the *Employment Act*, he is entitled to an award for compensation for the wrongful termination.

66. I have considered the guidelines under section 49 of the *Employment Act* in making my determination in this regard. I have considered that the termination was harsh as it was abrupt and without notice to the Claimant. I have also considered that the Claimant did not contribute to his termination through his conduct. There is no indication that he had been involved in any misconduct during the duration of his service. I also take note of the ex-gratia payment of Ksh. 15,000/= made by the Respondent to the Claimant on exit. Taking all these factors into account I award the Claimant compensation equivalent to eight (8) months of his gross salary - Ksh. 120,000/=.

67. The Claimant is also awarded interest on the sums awarded in this judgment at court rates from the date of institution of the suit till payment in full.

68. I award the Claimant costs of the suit.

69. I order that the Respondent issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.

70. I direct that the monetary compensation herein shall be subject to the statutory deductions which are applicable in terms of section 49 of the *Employment Act*.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF JULY, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Philip for the Claimant

No appearance for the Respondent

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE