Ondegoh v Plastic and Rubber Industries [2005] Limited & another (Cause 1825 of 2015) [2022] KEELRC 1681 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1681 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1825 OF 2015

K OCHARO, J

JULY 14, 2022

BETWEEN

WILLIAM OJWANG ONDEGOH ..... CLAIMANT

AND

PLASTIC AND RUBBER INDUSTRIES [2005] LIMITED ..... 1ST RESPONDENT

KODISHA KAZI MANAGEMENT LIMITED ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein through his memorandum of claim dated 8th October 2015, impleaded the Respondents jointly and severally for the following reliefs:

    a. A declaration that that the termination and/or dismissal of the Claimant by the Respondents on the 31/3/2014 and or on 3rd February 2015 was unfair, and unlawful.

    b. An order compelling the Respondent to pay the Claimant his terminal benefits and compensation for unfair termination amounting to ksh 751,615.76.

    c. Costs and interest of this claim from the date of filing of the claim till payment in full.

2. Contemporaneously with the filing of his memorandum, he filed a witness statement dated 8th October 2015, and various documents that he intended to place reliance on in support of his case, all filed under a list of documents of the even date.

3. Upon being served with summons to enter appearance, the Respondents filed a joint response to the memorandum of claim, on the 23rd September 2016. In the response, the 1st Respondent denied that at the material time, it was an employer of the Claimant. The 2nd Respondent contended that the Claimant was dismissed from employment procedurally and with justification.

4. The Claimant filed a reply to the Respondent's response on the 28th September 2015. Consequently, there was a joinder of issues, and at the close of pleadings the matter got destined for hearing on merit.

5. The Claimant's case was heard on the 21st September 2021 and the Respondents' on the 21st October 2021. At the close of the parties' respective cases, this Court gave directions for the filing of written submissions which directions they complied with.

The Claimant's case

6. At the hearing the Claimant urged the Court to adopt his witness statement as his evidence in chief and the documents referred to hereinabove as the documentary evidence. The Respondent did not object.

7. It was his case that he came into the employment of the 1st Respondent on the 1st October 2009 on a probationary 1 [one] month contract as a lathe operator [machine operator]. His starting salary was ksh 17,970 per a month.

8. That thereafter he continued working for the 1st Respondent at various times, under various fixed term contracts. The last one being that dated 6th January 2014 with an appointed lapse date of 28th February 2014.

9. He contended that under the various contracts he diligently and continuously worked for the Respondent. His reporting time being 7.30 a.m. and departure time 5 p.m. Whenever he had a night shift he worked from 6.00 p.m. – 7.00 a.m.

10. The Claimant stated that after the lapse of the above stated last contract, he continued working within the 1st Respondent's premises, performing same tasks and as at this time he was earning ksh 25,381.59.

11. The Claimant alleged that in the month of April 2014, he was asked to register with the 2nd Respondent. he declined to since his contract with the 1st Respondent had not been terminated, and his terminal dues paid. Too, it had not been explained to him what his terms of engagement with the 2nd Respondent were to be.

12. He alleged further that he continued working within the premises of the 1st Respondent believing that he was still an employee of the 1st Respondent up to 3rd February 2015, when he was dismissed from work by the 2nd Respondent, which by then was paying him a salary which it had unlawfully reduced to 17,324.25.

13. The Claimant alleged that he was not privy to any contractual arrangement between the 1st and the 2nd Respondents.

14. On the 3rd February 2015, he received a show cause letter requiring him to show cause why disciplinary action would not be taken against him, on account that he was found sleeping during working hours, 11:00 p.m. to 5:50 a.m., on the 29th January 2015. Through his letter of the same day, he responded stating that he was not feeling well. He was under a malarial attack.

15. That he was summarily dismissed from employment on the 3rd February 2015, for sleeping at work. The decision to have him dismissed did not consider his explanations.

16. He stated further that by his letter dated 9th February 2015, addressed to the 1st Respondent he demanded for payment of his terminal dues. The 1st Respondent did not respond. However, on the 25th February 2015, he received a letter from the 2nd Respondent dated 11th February 2015, that required him to visit them and pick his dues.

17. Due to the non-response by the 1st Respondent, the Claimant got constrained to report the matter to the Ministry of Labour. The Ministry invited the 1st Respondent for a conciliation meeting that was fixed for the 18th March 2015, but the 1st Respondent did not attend.

18. The Claimant stated that during his employment with the Respondents he was a member of the Kenya Shoe & Leather Workers Union which had a Collective Bargaining Agreement with the Respondents.

19. Cross examined by counsel for the Respondents, the Claimant acknowledged that he was issued with the termination letter by the 2nd Respondent.

20. Referred to the Application form for employment, at page 44 of the Respondents' documents, the Claimant admitted that thereon obtains the name of his wife, Sabina, Auma, Ondegoh as the next of kin and her mobile number, 0705404300. The primary school reflected on the document was the primary school where he undertook his primary school studies.

21. The Claimant asserted that the 2nd Respondent sent a lady to him to pick the details. He is not the one who put the details on the application form.

22. Shown the application for leave form dated 16th December 2014, the Claimant was positive that he is the one who applied for the leave and that the application was made to the 2nd Respondent.

23. The show cause letter was issued to him by the 2nd Respondent, and his response to the same was addressed to the 2nd Respondent. At no time did he complain that a stranger was demanding that he shows cause.

24. The attempted out of Court settlement that he mentioned in his evidence in chief was between the 2nd Respondent and him.

25. The Claimant admitted that there was no CBA between the 2nd Respondent and the union.

26. He further acknowledged that the pay slips he has presented to Court were issued by the 2nd Respondent not the 1st Respondent. He started receiving pay slips from the 2nd Respondent in the month of April 2014.

27. The CBA that had a life span of 2 [two years] and as at the time he was getting into the employment of the 2nd Respondent, the same had already lapsed.

28. In his evidence in re-examination, the Claimant stated that the commencement date for the CBA was 1st July 2012 for a period of 2 [two] years. It was to be in force till a new one came in. There was none that did.

29. He alleged that the signature on the application for employment form, is not his.

The 1st Respondent's case

30. The 1st Respondent presented on mr Salim Sorathia, its Managing Director to testify in support of its defence to the Claimant's case. The witness urged the Court to adopt his witness statement dated 20th September 2016 as his evidence in chief. He moved the Court to admit the documents that were filed by the Respondents under a list of documents of the even date as the 1st Respondent's documentary evidence.

31. The witness stated that he was not testifying on behalf of the 2nd Respondent as the 2nd Respondent was an entity independent of the 1st Respondent and that the sole proprietor of the former passed on.

32. The witness asserted that the 1st Respondent is a manufacturing company dealing in products which it supplies to other industrial companies. Therefore, its business heavily depends on the economic circumstances of the other industries.

33. This informed its manner of engaging employees. Its employees were engaged on short term contracts, dependent on market demands for its products.

34. The witness stated that the 1st Respondent employed the Claimant on short term contracts. The the 1st contract was a one month's probationary contract of 1st October 2009. The last short-term contract between it and the 1st Respondent was the two months' one that commenced on 1st January 2014.

35. The witness contended that at the end of each contract, the Claimant was given his leave days which he spent before he came back for any new short-term contract.

36. That wherever the Claimant worked for the 1st Respondent for any time beyond the contractual hours, he would be compensated by payment of overtime.

37. That in the year 2014, the directors of the 1st Respondent decided to outsource the Human Resource Management function, as they did not have the capacity to manage its human capital effectively and professionally. The services of the 2nd Respondent were outsourced.

38. At the end of the last short-term contract with the Claimant, the 1st Respondent informed the Claimant of the change in its operations, and advised him to seek employment with the 2nd Respondent if he was keen to continue working.

39. Subsequently, the Claimant sought for employment from, and the 2nd Respondent employed him on the terms and conditions that were agreed between them.

40. He contended that the Claimant was caught sleeping at work, a misconduct that attracted his summary dismissal by the 2nd Respondent.

41. The 1st Respondent was surprised when it received a demand letter from the Claimant, claiming for terminal dues from it. As the Claimant was not its employee, it passed over the letter to the 2nd Respondent.

42. The witness stated that when the 1st Respondent was summoned by the Ministry of Labour officials, it handed over the matter to the 2nd Respondent.

43. Cross examined by counsel for the Claimant the witness testified that the he was not aware that the Claimant was a member of a union. He however, acknowledged that one of the documents filed by the Respondents indicates that Claimant was being deducted union dues.

44. The witness stated that there was a Collective Bargaining Agreement between the 1st Respondent and the union. The CBA provided for a probationary period of two [2] months.

45. The 1st Respondent did not issue letters of confirmation as was contemplated in the agreement.

46. The witness stated that the 1st Respondent started outsourcing the labour in 2014. The last agreement between the 1st Respondent and the Claimant run from 6th January 2014 to 28th February 2014.

47. When the 1st Respondent decided to outsource, it paid all its employees their dues duly.

48. Whenever the Claimant worked at night, he was compensated for the work.

49. The show cause letter was issued to the Claimant on the 3rd February 2015, and he responded to the same on the same day.

50. According to the CBA the Claimant was entitled to an annual leave of 25 days. The pay slips are testament that at the lapse of his contract he was paid all his outstanding leave days.

51. The Claimant was to start working under the 2nd Respondent on the 1st April 2014. This explains why the pay slip for March 2014 was from the 1st Respondent.

52. The claim by the Claimant does not relate to the period when he was in their employment but after.

The 2nd Respondent's case

53. The 2nd Respondent did not present any witness to testify on its defence. Counsel for the Respondent urged the Court to close its case, this notwithstanding.

Analysis and Determination

54. The following issues emerge for determination in this matter, thus;

    a. At the time of determination of the Claimant's employment, under whose employment, was he?

    b. Was the termination / dismissal fair?

    c. Is the Claimant entitled to the reliefs sought or any of them?

At the time of determination of the Claimant's employment under whose employment, was he?

55. Inexplicably, the Claimant couched the 1st prayer of his statement of claims reliefs' section, thus:

> "(a) A declaration that the termination and/or dismissal of the Claimant by the Respondents on 31/3/2014 or on the 3rd February 2015, was unfair and unlawful."

56. There is no contest that the Claimant came into the employment of the 1st Respondent in the year 2009, and thereafter worked under short term fixed contracts, the last such written contract being that which ran from the 6th January 2014 to 28th February 2014. The Claimant's memorandum of claim captures this clearly, thus;

> "4. The contract was renewed on the 1/11/2009 and subsequently the Claimant got about 7 more contracts with the last one being that dated 6/1/2014 which was a two months' contract running up to 28/2/2014.
>
> ....."

57. From the material placed before this Court by the Claimant, there cannot be discerned any that indicates that the determination of the Claimant's employment did occur on the 31st March 2015. From his own evidence, he was summarily dismissed on the 3rd February 2015.

58. The dismissal was through a letter dated 3rd February 2015, by the 2nd Respondent. the summary dismissal letter had been preceded by a show cause letter of the same day. The Claimant responded to the same in his letter that he addressed to the 2nd Respondent. I am not persuaded that the Claimant

would receive a letter of show cause, from a stranger, a person not his employer and decide to respond to the same without any hesitation or protest as he did.

59. The Court notes that all the pay slips that the Claimant received during the period April 2014 to the time of the dismissal, were all issued by the 2nd Respondent. the Claimant in his evidence under cross examination acknowledged this.

60. The Court notes further that after the 27th April 2015, there were a number of correspondences on the subject, "unfair dismissal of William Ojwang Odegoh on 3/2/2015," all between the Claimant's counsel and the 2nd Respondent. There were attempted settlement negotiations between the Claimant and the 2nd Respondent which collapsed on the 8th October 2015, when counsel for the Claimant wrote:

> " RE: Unfair Dismissal Of Our Client – William Ojwang Odegoh on 3/2/2015."
>
> The matter and all previous correspondences resting with ours of 18/9/2015 refers.
>
> Apparently, negotiations have broken down.
>
> Our client's offer of 24/8/2015 is hereby withdrawn.
>
> The Claimant is moving to Court.....".

61. The 1st Respondent took a position that at the lapse of the last short-term contract hereinabove mentioned, the employer – employee relationship between the 1st Respondent and the Claimant determined. The Claimant applied to be absorbed into the employment of the 2nd Respondent, and the 2nd Respondent subsequently employed him. The Claimant attempted to deny the application form for employment. It is only in his evidence in re-examination that he stated that the signature on the form was not his. In essence he was saying that his signature was forged. Forgery is a serious allegation against a person, in fact, it is criminal. It is surprising that the Claimant only raised the issue at the stage of re-examination, notwithstanding that the document was filed on the 23rd September 2016. This was a clear after thought.

62. Considering the contents of the application form most of which are very personal to the Claimant and which must have been given out by the Claimant, the other factors like the ones I have considered hereinabove, I am not persuaded that the Claimant did apply for employment to the 2nd Respondent.

63. The Claimant submitted that the 2nd Respondent was an agent of the 1st Respondent and therefore, the Claimant remained an employee of the latter. To support this point, reliance was placed on the case of *Zacharia Sambay v Narok University College* [2013] eKLR where the Court held;

> " This Court has stated in its past decisions that employees must not be hampered by the different business and legal permutations adopted by employers, in seeking remedies for employment wrongs."

64. Further reliance was placed on the decision of the three Judge Bench decision of this Court in *Wrigley Company [East Africa] Limited v Attorney General & 2 others* [2013] eKLR, where the Court expressed:

> " 39. Before signing off this Judgment we find it necessary to set the parameters of a credible outsourcing program as follows: -
>
> a. Ordinarily employers are not expected to outsource their core functions.

b. An employer will not be permitted to use outsourcing as a means to escape meeting accrued contractual obligations.

c. An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement latter effect; and

d. Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise."

65. The employment relationship between the 1st Respondent and the Claimant is one that thrived on short term contracts. The last contract being that which lapsed by effluxion of time on the 28th February 2014. So, at the time the Claimant was getting into the employment of the 2nd Respondent, there was no employer-employee relationship between the Claimant and the 1st Respondent. The authorities cited by counsel for the Claimant are not very helpful to the Claimant's case therefore.

66. It is imperative for this Court to state that outsourcing is a legally recognised way of acquisition and management of human resource capital by organizations. The same can be challenged however, if the employee is able to demonstrate that the same is riddled with ill faith, fraud and only calculated to aid the employer avoid accrued obligations and or anticipated obligations.

67. In conclusion, I find that at the time of determination of the Claimant's employment, he was an employee of the 2nd Respondent. The employer-employee relationship between the Respondent and the Claimant was not a disguised one.

Whether the summary dismissal was fair.

68. Having concluded as I have hereinabove, I now turn to consider whether the summary dismissal was fair. Often the questions whether a dismissal was substantively fair and/or procedurally fair are intertwined. I propose to deal with both at the same time.

69. The legal burden to prove fairness in the termination of an employee's employment or dismissal of an employee from his/her employment, always lies on the employer. This is a burden that lay on the shoulders of the 2nd Respondent.

70. This Court in its past decisions, has held that Section 41 of the *Employment Act*, 2007 provides the structure for procedural fairness in the Kenyan situation. Procedural fairness entails, Notification – the employer has to notify the employee of his/her intention to determine the employee's employment and the grounds upon which the employer's action is intended to be anchored, Hearing – the employer must give the employee sufficient time to prepare for and make representations on the grounds, Consideration – the employer has to consider the employee's representations before making a decision.

71. Section 41 [2] of the *Employment Act*, 2007 provides;

2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

72. There was no evidence from the 2nd Respondent that the procedure was adhered to. In fact, it is clear from the evidence by the Claimant that it was not. The Claimant was issued with a show cause letter on the 3rd May 2015, required to answer to the same on same day, and got dismissed on that same day.

73. The 2nd Respondent did not discharge its burden under Section 45 of the *Employment Act*, the burden of proving that the dismissal of the Claimant was procedurally fair. The Court of Appeal in the case of *Standard Group Limited v Tenny Luesby* [2018] eKLR, expressed itself on the burden thus;

> "It follows that the Act of summarily dismissing the Claimant without giving her an opportunity to be heard amounted to unfair termination as defined in Section 45 of the Act. The burden was on the Appellant to prove that the employment was terminated in accordance with fair procedure; see *Kenfreight [E.A.] Limited v Benson K. Nguti* [2016] eKLR. As this Court stated in the *CMC Aviation* case [*supra*].
>
> > "Unfair termination involves breach of statutory law. Where there is a fair reason for termination of an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice conflicting to the employment contract.
>
> We summarily so find in this case."

74. By reason of the aforegoing premises, I find that the act of summarily dismissing the Claimant was procedurally unfair.

75. Section 43 of the *Employment Act* places an obligation on an employer whenever a dispute arises as was in the instant matter concerning the termination of an employee's services, to prove the reasons for the termination. however, it is not enough for the employer to only state that the employee's services were determined for this reason or that, he/she has to go further and discharge the twin burdens bestowed upon an employer under Section 45 [2], that the ground[s] upon which the termination or summary dismissal was anchored was valid and fair, and Section 47 [5], that the determination was justified.

76. In a matter where the dispute between the employer and an employee is on a summary dismissal, validity and fairness of the reason[s] for the dismissal cannot be gauged without regard being had to the provisions of Section 44[3] and 44[4] of the *Employment Act*. The employer must demonstrate that the reason[s] is in the nature and gravity contemplated under Section 44[3] and falls under the category of those brought forth in the catalogue under Section 44[4].

77. A person charged with the responsibility to discharge a legal burden can only do so by evidence. The 2nd Respondent having placed no evidence before this Court, cannot be said to have discharged the burden. Consequently, I hold that the summary dismissal was without a valid and fair reason[s]. It was not justified. Therefore, the summary dismissal was substantively unfair.

Of the reliefs

78. The Claimant sought for two months' pay in lieu of notice, contending that he was a member of a union, the Kenya Shoes and Leather Workers Union, and that he CBA that was in existence provided for the notice pay. The Court has not lost sight of the fact that under cross examination, the Claimant did accept that there was no Collective Bargaining Agreement between his union and the 2nd Respondent. Having found hereinabove that liability in this matter can only attach against the 2nd

Respondent, this Court can only at best award notice pay as statutorily provided. It is here that the provisions of Section 35 and 36 of the *Employment Act* come into play. I award the Claimant, one month's salary in lieu of notice, ksh 17,324.35.

79. It is imperative to state that it was the Claimant's testimony that while working for the 2nd Respondent his salary was ksh 17,324.35.

80. The Claimant sought salary for the 3 days worked in the month of March 2015, the 2nd Respondent did not challenge the Claimant's evidence that he was not paid. This Court does award him ksh 1,732.435.

81. The Claimant's claim for leave travelling allowance and night shift allowance cannot hold against the 2nd Respondent as the same is anchored on the CBA, which this Court has found was not applicable to the employer-employee relationship between that Respondent and the Claimant, as the former was not a party to the same.

82. The Claimant seeks against the 2nd Respondent a sum of ksh 109,106.40, terming the same underpayments / unfair deductions. It was submitted that the 2nd Respondent reduced the Claimant's salary from ksh 26,455.55 to ksh 17,360.5 in April 2014. Therefore, for the 11 months, he was in the service of the 2nd Respondent, he was underpaid by ksh 9,094.20 per a month.

83. This Court has found hereinabove that the Claimant applied for an employment opportunity with the 2nd Respondent, and he secured one. It is my view then that the terms and conditions of work were negotiated and agreed upon as between the 2nd Respondent and him under the contract. The contract between him and this Respondent was independent of those short-term contracts that were between him and the 1st Respondent. The terms of the contracts were bound to be different.

84. The Claimant did not contend that the salary that the 2nd Respondent paid him throughout the 11 months was below what they had agreed on. I see no basis of him asserting or believing that he would have continued earning a salary that is equivalent to what he was earning under his former employer.

85. The Claimant further claimed for a compensatory relief for unfair dismissal to an extent of twelve [12] months' gross salary. Having found that the dismissal of the Claimant from employment was unfair and wrongful, I now turn to consider whether he is entitled to an award of the compensation contemplated under Section 49 [1] [c] of the *Employment Act*.

I have considered the manner in which the Claimant's employment was terminated. The evidence that the act of sleeping at the place of work at the material time was because, he was unwell, and the deviation of what the 2nd Respondent from what the law required of them and conclude that the Claimant is entitled to the relief and to the extent of seven [7] months gross salary, therefore ksh 121,340.45.

86. I agree with the counsel for the Respondents' submissions that severance pay as provided under Section 40 of the *Employment Act* only relates to redundancy situations. The situation herein having not been caused by a redundancy, I find the claim unproved. I decline to make an award under the head.

87. The Claimant claimed against the 1st Respondent that during his tenure with it, he was not given an opportunity to proceed for his leave. The Respondents' witness alleged that the Claimant would take his leave at the end of each contract, during the period he was waiting for renewal of the contract. I am not able to understand the reasoning here. Between the time the contract of service ends and coming in of a new one, there cannot be said to be an employer-employee relationship. Therefore, Claimant cannot be said to have taken leave during that period. In sum, the Court finds that the 1st Respondent did not rebut the Claimant's claim that he did not proceed for leave.

88. Considering the provisions of Section 90 of the *Employment Act*, I can only compute the amount awardable under this head at 4 years annual leave days. Four years, considering the 3 years limitation period, and the 12 months' continuous injury period. Therefore, ksh 88,175.16.

89. As the Claimant succeeds wholly against the 2nd Respondent but to a limited extent against the 1st Respondent, the 1st Respondent shall bear costs of the suit only assed on the ksh 88,175.16.

90. In the circumstances, I make the following order:

    a. The Claimant's claim against the 1st and 2nd Respondents that his dismissal was substantively and procedurally unfair only succeeds against the 2nd Respondent.

    b. The 2nd Respondent is ordered to pay the Claimant:

        i. One month's salary in lieu of notice, ksh 17,324.35.

        ii. Unpaid salary for [three] 3 days worked in the month of March 2015, ksh 1,732.40

        iii. Compensation pursuant to the provisions of Section 49 [1] [c] of the *Employment Act*, seven [7] months' gross salary, ksh 121,340.45.

    c. The 1st Respondent is ordered to pay the Claimant:

        i. Unpaid leave, ksh 88,175.16.

        Interest on the awarded amounts at Court rates from the time of filing suit on the sums in [b] [i] and [ii] and [c] [i] at Court rates till full payment. And on [b] [iii] from the date of this Judgment till full payment.

    e. Costs of this suit to be borne by the Respondents in the manner hereinabove brought forth.

READ, DATED, SIGNED AND DELIVERED THIS 14TH DAY OF JULY 2022.

OCHARO KEBIRA

JUDGE

In presence of

Mr. Okeyo holding brief for the Claimant

Mr. Wangila for the Respondents.

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE