



REPUBLIC OF KENYA



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**Wafula v Century Feeds Limited (Cause 186 of 2018)
[2022] KEELRC 1327 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1327 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 186 OF 2018
DN NDERITU, J
JULY 13, 2022**

BETWEEN

PAUL WAFULA CLAIMANT

AND

CENTURY FEEDS LIMITED RESPONDENT

JUDGMENT

Introduction

1. In amended memorandum of claim dated 8th August, 2019 the Claimant prays for the following, in summary:-
 - (a) That a declaration be made to the effect that the Claimant's termination was unlawful and unjustified as the same was not within the ambit of the Employment Act, 2007 and other employment laws.
 - (b) That the Claimant be awarded 12 months compensation for unlawful and unjustified termination as provided for under Section 49(c) of the Employment Act, 2007 totalling Kshs.170,931.16.
 - (c) One month's pay in lieu of notice in the sum of Kshs.14,244.30.
 - (d) Underpayments for the entire period of employment in the sum of Kshs.72,786.04
 - (e) Overtime pay in the sum of Kshs.123,907.23
 - (f) Public holiday pay in the sum of Kshs.16,543.82
 - (g) Annual leave pay in the sum of Kshs.23,010.02
 - (h) Service pay in the sum of Kshs.16,435.73



- (i) A certificate of service be issued
 - (j) Costs of the cause and interest on all the claims above.
2. Along with the memorandum of claim the Claimant filed, as expected, a verifying affidavit, a list of documents and copies thereof dated May 29, 2018, and a witness statement of even date.
 3. The Respondent entered appearance on March 18, 2018 and filed a memorandum of response to the claim on November 13, 2018. The Respondent also filed a witness statement by Kevin Wachira dated November 13, 2019 and a list of documents and copies thereof, dated the same.
 4. This cause came up for hearing first on 17th November, 2021 when the Claimant (CW1) testified, was cross-examined, and he closed his case. Then on 26th January, 2022 Kelvin Wachira Maingi (RW1) testified for the Respondent, was cross-examined, and the Respondent closed its case.
 5. Counsel for both parties addressed the court by way of written submissions with Claimant's Counsel filing on February 23, 2022 and Respondent's on March 31, 2022.

II. Claimant's case

6. Based on the pleadings, the oral and documentary evidence adduced, and the written submissions by his Counsel, the Claimant's case is as hereunder.
7. The Claimant alleges that he was engaged by the Respondent as a turnboy on 4th January, 2016 at an agreed weekly salary of Kshs.1,800/= . He alleges that as at the time of termination on March 3, 2018 the said weekly salary had been raised to Kshs.2,700/= . He testified that he used to sign for the salary on petty cash vouchers as the same was paid weekly in cash. He was not issued with a payslip. He admitted that the petty cash vouchers exhibited by the Respondent are correct and true reflection on how he was paid, when, and how much.
8. The Claimant testified that he was not housed by the Respondent and he was not paid house allowance.
9. He alleged that he worked for six (6) days a week from 8.00a.m. to 6.00pm, including public holidays. He alleged that he was not allowed to go on annual leave and that he was not compensated therefor.
10. The Claimant alleged that he was terminated on November 29, 2017. He stated that the vehicle that he was allocated was involved in a road traffic accident on the said date, as a result of which he sustained serious bodily injuries. He exhibited a P3 form and police abstract to confirm that the accident occurred.
11. He admits that he was paid while on sick leave upto February, 2018. However, he alleges that when he reported back to work the Respondent refused to pay him his salary and he was kicked out for the reason that he had decided to pursue compensation for the injuries that he sustained in the accident alluded to above.
12. The Claimant alleges that nothing was paid to him in terminal dues and that he was not issued with a certificate of service. He emphasized that he did not abscond duty but he could not continue after the Respondent failed and refused to pay his salary and created a hostile environment after he commenced compensation process in respect of the accident.
13. The Claimant emphasized that he was not a casual employee as he worked continuously for the Respondent for a long time of over two years.



14. In cross-examination the Claimant admitted that he had worked for the Respondent as a casual worker between 2014 and 2015. He maintained that he worked on public holidays and overtime as per the claim.
15. He admitted that the Respondent paid for his hospital bills following the accident. He stated that he sued the Respondent for compensation and was awarded compensation. He stated he had no disciplinary issues when working for the Respondent and that he was given lunch allowance whenever he went on trips outside Nakuru.
16. It is on the basis of the foregoing that the Claimant prayed as per the memorandum of claim alleging that he was denied both substantive and procedural fairness.

III. Respondent's case

17. The Respondent is a limited liability company based at Nakuru town specializing in the manufacture and distribution of a variety of animal feeds. The Respondent testified through Kevin Wachira Maingi (RW1) who informed the court that he is a director of the Respondent.
18. From the pleadings filed, oral (RW1) and documentary evidence tendered, as well as the written submissions by its Counsel, the Respondent's case is that the Claimant was its employee from the end 2016 till March, 2018 when he allegedly absconded duty.
19. RW1 testified that after the Claimant was involved in a road traffic accident on November 24, 2017 he was on paid sick leave but failed to report back to duty by the end the February, 2018 as expected.
20. RW1 testified that the Respondent took care of the Claimant after the accident including evacuating him from Kisii to Nakuru, paying his medical bills, and paying his salary when he was away. The Claimant was paid from November, 2017 to March, 2018 notwithstanding that he did not work, RW1 testified.
21. RW1 confirmed that the Claimant had worked for the Respondent as a casual in 2014 and 2015, but then left and rejoined in 2016.
22. RW1 insisted that the Claimant was a casual employee who was not entitled to leave allowance/pay, house allowance, and the other dues as claimed in the memorandum of claim. He alleged that the Claimant had serious disciplinary issues of absenteeism and lost items from store and on delivery.
23. In Cross-examination RW1 admitted that the employment relationship between the Respondent and the Claimant was not reduced into writing. He admitted that the Claimant formally applied for the job. He testified that the Claimant was engaged as a turnboy whose tasks included loading and unloading of goods.
24. RW1 admitted that he could not remember the last pay for the Claimant but stated that the Claimant was paid weekly in cash. He stated that no statutory deductions were made from the salary. He admitted that no house allowance or housing was provided to the Claimant. He insisted that the Claimant worked between 8.00a.m. and 5.00p.m and never worked beyond the statutory hours. He maintained that the Claimant worked for six (6) days a week and that he never worked on public holidays as the Respondent always remained closed on public holidays. He alleged that the Claimant was allowed to take 21 days annual leave and or in the alternative he was paid in lieu of the annual leave.
25. RW1 admitted that the Respondent did not pay into any benefits scheme for the Claimant and that no dues were paid to the Claimant when he left employment of the Respondent.



26. RW1 stated that after the accident on November 24, 2017 the Claimant was supposed to return to work on February 1, 2018 but the Claimant did not return to work. He alleged that he tried to contact the Claimant on phone but the calls went unanswered and that after the last salary payment on 4th March, 2018 the Respondent could not continue to pay salary to an absentee employee.
27. RW1 admitted that the Claimant was not subjected to a disciplinary hearing as he was nowhere to be invited for such hearing. He admitted that no letter of termination was issued to the Claimant and no certificate of service was issued. He insisted that the Claimant was not entitled to any compensation for he absconded duty.
28. For all that RW1 said, and this is very crucial, he admitted that the Respondent kept employment records for the Claimant and the other employees. However, when challenged to produce the same he failed and or refused to avail the same. Such records are as envisioned in Sections 10 and 74 of the *Employment Act* (the Act).
29. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed in its entirety with costs.

IV. Issues for determination

30. From the pleadings filed by parties, the oral and documentary evidence tendered, and the written submissions by Counsel, the following issues commend themselves to this court for determination:-
 - (a) What was the nature of the employment relationship between the Respondent and the Claimant?
 - (b) Was the termination of the Claimant by the Respondent unfair, unjustified, and unlawful?
 - (c) Is the Claimant entitled to the reliefs sought for?
 - (d) Costs.

V. Employment

31. It is by now clear that the Claimant was in employment of the Respondent from sometimes in 2016 to March 4, 2018. From the evidence on record the Claimant worked continuously for that period. There is no evidence to suggest otherwise. In the very minimum the Claimant worked as such employee of the Respondent, as a turnboy, for a period of two (2) uninterrupted years.
32. The Claimant stated that he was employed on January 4, 2016 and remained so employed until March 3, 2018. Section 2 of the Act recognises both written and oral contracts of employment and further provides that such contracts of employment may be express or implied.
33. Section 37(1) of the Act provides as follows:

- “ 37 Notwithstanding any provisions of this Act, where a casual employee –
- (a) Works for a period or a number of continuous working days which amounting the aggregate to the equivalent of not less than one month;
 - (b) Preferred work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months



or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.

34. Section 35(1) (c) alluded to above provides as follows:-
- (c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminated by either party at the end of the period of twenty-eight days next following the giving of notice in writing.
35. Further Section 37(4) of the Act provides as follows:-
- (4) Notwithstanding any provisions of this Act, in any dispute before the industrial court on the terms and conditions of service of casual employee, the industrial court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with the Act.”
36. In view of all the above provisions this court is in agreement with Counsel for the Claimant that there is no other reasonable, logical, or legal way to construe the employment relationship between the Respondent and the Claimant other than that for all intents and purposes the Claimant was a month to month employee with all the attributes, benefits, and obligations appurtenant thereto and it is so declared.
37. The failure by the Respondent to reduce the relationship into writing and its failure to keep records of employment cannot be visited upon the Claimant and hence this court is in full concurrence with Counsel of the Claimant who cited *Caroline L. Musonye v Panari Hotel Ltd* (2017) eKLR to drive this point home.

VI.Termination

38. The parties have given diametrically opposed accounts on how the Claimant left employment of the Respondent. According to the Claimant, he was kicked out after he instructed a lawyer to pursue compensation for injuries that he suffered in an accident in the course of his employment through a traffic road accident as narrated elsewhere in this judgment. On the other hand, the Respondent claims that the Claimant failed or refused to return to work even after recovering from the injuries sustained in the accident and that attempts by RW1 to get in touch with the Claimant yielded to naught.
39. RW1 was not forthcoming on the efforts that he made in tracing the Claimant after the Claimant allegedly failed to report back to work. He did not demonstrate, either by way of documentary or oral evidence, the efforts made to trace the Claimant as alleged. Was anyone sent out to establish where the Claimant was and why he had failed to return to work? Where is the record of the calls allegedly made to the Claimant? Were any letters or memos sent out the Claimant recalling him back to work? Was the Claimant informed or notified that his continued absence from work would attract disciplinary action or termination?
40. This court is persuaded by the decision in *Stanley Omwoyo Onchwari v Board of Management Nakuru YMCA Secondary School* (2015) and *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* (2016) eKLR relied upon by the Claimant’s Counsel. In that regard this court finds that the evidence by the Claimant that he was terminated for reasons of pursuing compensation against the Respondent for the injuries sustained in the road traffic accident is more credible, reliable, and believable as opposed to the allegations by RW1 that the Claimant deserted duty. That story by RW1 is an afterthought that was crafted to mislead the court and it is hereby refused and rejected.



41. Flowing from the foregoing the Claimant was entitled to substantive and procedural fairness as provided for in Sections 35, 41, 43, and 45 of the Act. RW1 admitted that no notice or hearing was accorded to the Claimant by the Respondent. He also admitted that no dues were paid to the Claimant upon termination.
42. This court finds and holds that there was no reasonable cause for the Respondent to terminate the Claimant and no procedural fairness was accorded to him and hence the termination was unfair, unjustified, and unlawful and the same is declared as such.

VII. Reliefs

43. This court has found and held that the termination of the Claimant by the Respondent was unfair, unjustified, and unlawful. This part shall consider the reliefs sought, one by one.
44. Prayer (a) is for a declaration that the Claimant's termination was unlawful and unjustified and that has already been done in the foregoing part of this judgment.
45. Prayer (b) is for twelve months salary in compensation for unlawful termination. Section 49(4) as read with Section 50 of the Act provides a guideline on the factors that this court may consider in determining an appropriate award under this head. The Claimant, as far as the evidence on record goes, did not contribute to his termination in any way. The Claimant worked for the Respondent for about two years, which is not a considerably lengthy period of time. However, were it not for the termination there is likelihood that the Claimant would have continued to work for many more years. After all, the National Identity Card attached to the claim shows that the Claimant was born in 1986 and by 2018, when he was terminated, he was only 32 years old.
46. However, the work that the Claimant was performing as a turnboy is neither skilled nor complex. Such work was as of 2018 probably readily available in the job market.
47. In the same breathe, while the Respondent acted responsibly in meeting the medical expenses incurred by the Claimant, it did not treat the Claimant well upon learning that he was pressing for compensation for the injuries as it terminated him unlawfully without reasonable cause and denied him a hearing. The Claimant testified that he was not able to secure another job ever since.
48. Doing the best that his court can do and in view of the foregoing paragraphs, this court is of the view and holds that this is an appropriate cause for the maximum award in compensation for twelve months of the last gross monthly salary.
49. The records of salary payment as contained in the petty cash vouchers produced as exhibits by the Respondent, and which the Claimant admitted and accepted as genuine, show that the Claimant was earning Kshs.2,300/= per week as of 13th January, 2018 according to the last availed petty cash voucher. For four (4) weeks (a month) the Claimant was thus earning Kshs.2,300/= X 4 weeks Kshs.9,200/= monthly. If house allowance is added at 15% of the basic salary the gross salary per month comes to Kshs.9,200/= + (15/100 X 9,200/=) = Kshs.10,580/=.
50. However, the Claimant has pleaded, and this has not been denied or controverted by the Respondent, that under various legal notices the salary payable to the category of a turnboy in which the Claimant belonged had been adjusted such that by February, 2018 the Claimant's gross monthly salary ought to have been Kshs.14,244.30 inclusive of house allowance.
51. In view of the foregoing the compensation for twelve months comes to Kshs.14,244.30 X 12 months Kshs.170,931.16. This amount is subject to statutory deductions under Section 49(2) of the Act.



52. Prayer(c) is for one month's salary in lieu of notice and this court has no difficulties in awarding the same as in Kshs.14,244.30 X 1 month = Kshs.14,244.30.
53. In view of this court's finding above in respect of the pleaded legal notices mentioned in the memorandum of claim, prayer (d) for underpayments is allowed in its entirety in the sum of Kshs.72,786.04.
54. In respect of prayer (e) on overtime pay, the Respondent failed to produce any records to disapprove the claim by the Claimant that he worked overtime and as such this prayer is allowed as prayed in the total sum of Kshs.123, 907.58.
55. The presumption in law is that upon the Respondent being challenged to produce the employment records of the Claimant and failing to do so, the said records would have been against the Respondent's case – See Section 107 of the *Evidence Act* (Cap 80).
56. In view of the foregoing paragraphs prayer (f) for pay for holidays worked in the sum of Kshs.26,543.82; prayer(g) for annual leave in the sum of Kshs.23,010.02; and prayer (b) for service pay in the sum of Ksh.16,435.73 must also succeed. Prayer (h) for severance pay is denied as severance pay is mostly payable on redundancy under Section 40 of the Act. In any event, prayer (h1) for service pay has been allowed.
57. The Respondent is hereby ordered to issue and deliver a certificate of service to the Claimant in accordance with Section 51 of the Act within 30 days of this judgment, hence prayer (h) is granted.

VIII. Costs

58. Costs ordinarily follow the event and hence the Claimant is awarded costs of this cause based on the awards made.

IX. Disposal

59. In disposal of this cause this court issues and grants orders also follows:
 - (a) A declaration be and is hereby issued that the termination of the claimant by the Respondent was unfair, unjustified and unlawful.
 - (b) The Claimant is awarded the following monetary awards:-
 - (i) Compensation for unfair, unjustified and unlawful termination - Kshs.170,931.16
 - (ii) Underpayments - Kshs. 72,786.04
 - (iii) Notice pay - Kshs. 14,244.30
 - (iv) Annual leave pay - Kshs. 23,060.02
 - (v) Overtime pay - Kshs.123,907.58
 - (vi) Public holidays pay - Kshs. 26,543.82
 - (vii) Service pay - Kshs. 16,435.73

TOTAL-Kshs.421,609/

This amount shall earn interest at court rates from the date hereof till payment in full.



- (c) The Respondent is ordered to issue and deliver a certificate of service to the Claimant within 30 days of the date hereof.
- (d) Costs to the Claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 13TH DAY OF JULY, 2022.

DAVID NDERITU

JUDGE

