



REPUBLIC OF KENYA



**Ochiel v Mijoro & 2 others (Cause 113 of 2019)
[2022] KEELRC 1303 (KLR) (12 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1303 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 113 OF 2019
NZIOKI WA MAKAU, J
JULY 12, 2022**

BETWEEN

ELIJAH OPONDO OCHIEL CLAIMANT

AND

SAMSON MIJORO 1ST RESPONDENT

BENSON OCHIENG 2ND RESPONDENT

**COLMANS AWINO T/A ST. PAUL COMMUNITY MEDICAL
CENTRE 3RD RESPONDENT**

JUDGMENT

1. The Claimant instituted this claim against the Respondents vide a Memorandum of Claim dated 21st February 2019 for unlawful termination of his contract of employment and non-payment of salary arrears and PAYE. He avers that he diligently worked for the Respondents until 2nd January 2019 when his contract of employment was abruptly terminated on allegations of non-performance. The Claimant avers that the Respondents' said action is in contravention of the provisions of the *Employment Act, 2007* and the rules of natural justice because it never informed him of the accusation facing him nor give him an opportunity to respond to the purported accusations before terminating his employment. Furthermore, he was not taken through a disciplinary process as envisaged by law and the termination of his employment was simply a reaction to his demand for payment of his salary arrears. It is the Claimant's averment that the Respondents failed to act in accordance with justice and equity in dismissing him and that the reasons for his dismissal are not valid.
2. The Claimant further avers that at the time of the unlawful termination of his employment, the Respondents owed him Kshs. 200,000/- (net of all deductions), being salary arrears for the months of October, November and December 2018. The Claimant averred that the Respondents also owed him Kshs. 336,989.70 (Kshs.37,443.30 x 9 months), being PAYE deducted from his salary by the



Respondents but not remitted to KRA. He also claims salary arrears for January 2019, service pay, accrued leave days and 12 months' salary as compensation. The Claimant further prays for interest on the aforementioned at court rates and any other order and/or relief that this Honourable Court deems fit to grant in the interest of justice.

3. In his witness statement, the Claimant asserts that the Respondents employed him as the General Manager with effect from 1st May 2018, earning a monthly salary of Kshs. 149,290/- and that he assisted them in setting up the medical centre at Mlolongo. He states that through an email of 21st December 2018, Mr. Ochieng' gave the reasons for the intended termination of his employment as non-performance but did not enumerate instances or circumstances of non-performance on the Claimant's part. That in an email of 24th December 2018, Mr. Ochieng' assured him that all his final dues and salary arrears would be paid in full and that in yet another email of 2nd January 2019, Mr. Ochieng' informed him that the Hospital was working on his salary arrears for the months of October and November 2018 and on his salary for the month of December 2018. He states that he was also informed he would remain an employee of the Respondents until 31st January 2019 and that on 10th January 2019, he handed over his office to Ms. Noreen as had been advised by Mr. Ochieng'. It is the Claimant's assertion that his advocates' demand for payment of his salary arrears did not elicit any response and further states that he did not go on leave for the entire 9 months' period that he worked for the Respondents.
4. The Respondents entered appearance but never filed any response to the Claimant's Memorandum of Claim.

Claimant's Submissions

5. The Claimant submits that his Memorandum of Claim is unopposed as no response has ever been filed and that if the same was ever filed, it has never been served on the Claimant and this Court should strike the same out for failure to comply with Order 10 Rule 3 of the *Civil Procedure Rules 2010*. It is the Claimant's submission that Section 41(1) and (2) of the *Employment Act* on notification and hearing is couched in mandatory terms and Section 43(1) requires proof of reason for termination otherwise the termination shall be deemed unfair. His contention is that the Respondents' failure to respond to this claim makes his termination of employment unfair and submits that he is entitled to the remedies availed in Section 35(1)(c) for notice pay, Section 35(5) for service pay and Section 49 of the *Employment Act* for unfair termination.
6. The Claimant submits that where the terms and conditions of employment are as clear as governed by the law, parting of ways between parties is also clearly defined and that if the employer wishes to arbitrarily end the engagement, the employer bears the consequences as envisaged in the terms and conditions. He submits that the Court in determining the Notice of Motion Application dated 21st February 2019, gave an order for payment of the salary arrears and PAYEE dues on 26th March 2019. That it is incumbent to point out that salary arrears were paid only after filing of contempt proceedings before this Court but the KRA deductions were not paid. He urges this Honourable Court to find and hold the claim as prayed with costs to the Claimant. The Respondents never filed any Written Submissions.
7. The Respondents did not defend this claim despite being aware of the suit. Indeed, the Respondents even responded to the contempt proceedings initiated by making good payments ordered by the Court. It is my finding that the Respondents having failed to attend the hearing, the Claimant's case is uncontroverted as held in the case of *Elijah Kioko Kitavi v Allied Plumbers Limited* [2019] eKLR. In the case, the Court while relying on the case of *CMC Aviation Limited v Cruisair Limited (No.*



- 1) 1978) KLR 103, (1976-80) 1 KLR 835 found that the claimant's claim remained uncontroverted because the respondents had not rendered any evidence in Court.
8. The Claimant proved he was entitled to unpaid salary arrears, the facts of the unlawful dismissal remained uncontroverted and in addition the Respondents have displayed scant regard to payment of taxes. This makes the registration of the Claimant under the National Social Security Fund of no avail to the defence against service pay. In the case of *Abuga Nyabate v Magen High School & Another* [2017] eKLR, the claimant was a member of NSSF but Nduma Nderi J. nevertheless awarded service pay on account of non-remittance by the employer. This would equally apply herein. The Claimant has made out a case for grant of any other relief as shall be evident in the final part of this judgment.
9. In the final analysis I enter judgment for the Claimant against the Respondents jointly and severally for:-
- a. Salary arrears for the month of January 2019 – Kshs. 149,290/-
 - b. Kshs. 336,989.70 (Kshs. 37,443.30 x 9 months) being PAYE deducted but not remitted to KRA.
 - c. Service pay – Kshs. 74,645/-,
 - d. Accrued leave days – Kshs. 111,967.50 being pro rated leave for 1 year.
 - e. 6 months' salary as compensation – Kshs. 895,740/-.
 - f. Interest on the sums in (a), (c), (d) and (e) at court rates from the date of judgment till payment in full.
 - g. Interest at commercial rates on the sum in (b) above from the date of filing suit till payment in full to KRA.
 - h. On any other relief - Issuance of a duly filed P9 for the Claimant within 15 days of payment of the taxes due to KRA.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2022

NZIOKI WA MAKAU

JUDGE

