



Lung'atso v Hilwig (Cause 2516 of 2017) [2022] KEELRC 1375 (KLR) (4 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1375 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2516 OF 2017
MA ONYANGO, J
JULY 4, 2022

BETWEEN
ROSEMARY KHASIALA LUNG'ATSO CLAIMANT
AND
ELIN HILWIG RESPONDENT

JUDGMENT

1. By a statement of claim dated 14th December, 2017 and filed in Court on 28th December, 2017, the Claimant seeks the following reliefs:
 - a) An award of Kshs.75,000/- being 3 months' salary in lieu of notice
 - b) An award of Kshs.7,143/- being salary for the days worked in the month of October
 - c) An award of Kshs.12,500/- being gratuity/service pay of 15 days salary for every year of service completed for the 1st year and 1 month worked by the Claimant.
 - d) An award of Kshs.134,400/- being normal overtime allowance at an hourly rate of Kshs.150/- for one year one month worked.
 - e) An award of Kshs.20,222/- being holiday allowance at an hourly rate of Kshs.111.11/- for 7 holidays worked.
 - f) An award of Kshs.48,750/- being unpaid house allowance for 13 months worked at the rate of 15 per cent of the basic monthly salary.
 - g) An award of Kshs.25,000/- being payment for leave days accrued but not taken for the 1 year and 1 month worked.



- h) An award of Kshs.6,500/- being deducted but unremitted NSSF contributions for the entire period worked
 - i) An award for Kshs.4,000/- being deducted but unremitted NHIF contributions for the entire period worked.
 - j) An award of Kshs.300,000/- equivalent to the Claimant's 12 months gross salary as damages for wrongful termination.
 - k) An award of Kshs.400/- being the money used to obtain Mpesa statements for purposes of this suit.
 - l) The Respondent do issue the Claimant with a Certificate of service
 - m) Costs of this suit together with interest
 - n) Any other or further relief that this Honourable Court may deem fit and just to grant.
2. The Claimant avers that she was employed by the Respondent on or about September 15, 2016 at a monthly salary of Kshs.18,000/-.
 3. That the employment contract was later reduced into writing and she was issued with an employment contract dated 30th May, 2017. Her salary was increased to Kshs.23,000/- with an additional Kshs.2,000/- being transport allowance.
 4. The Claimant avers that she performed her duties diligently and to the Respondent's satisfaction until 8th October, 2017 when the Respondent without any lawful cause terminated her employment vide notice of termination dated October 8, 2017.
 5. She contends that the termination was effected after she protested the Respondent's proposal to slash her salary by half on grounds that her youngest child had joined school in September, 2017.
 6. The Claimant further contends that she worked in excess of the recommended 52 hours as she worked for an average of 13 hours a day for six days a week and on public holidays. That she is therefore entitled to overtime payment as pleaded in her statement of claim.
 7. In response to the claim, the Respondent filed a statement of response dated November 7, 2019 in which the Respondent admits that she engaged the Claimant but only from May 30, 2017 at a monthly salary of Kshs.23,000/- with an additional Kshs.2,000/- as transport allowance.
 8. The Respondent admits terminating the Claimant's employment on October 4, 2017 and issuing to her a termination notice dated October 8, 2017 which clearly stated the reasons for termination.
 9. The Respondent denies the Claimant's allegation of intention to reduce her salary by half. The Respondent further denies that termination was unlawful, unjustified and wrongful.
 10. The Claimant avers that it was not possible to give the Claimant a hearing given that she had already absconded duty.
 11. The Respondent pleads that on several occasions she requested the Claimant to register for NSSF to enable her remit the statutory deductions but the Claimant failed to do so. That contrary to the Claimant's contention NHIF contributions deducted were duly remitted to the statutory body as required by law.



12. The Respondent contends that the Claimant had utilized all her leave days during the subsistence of her employment and therefore has no claim as against her under that head.
13. On the issue of house allowance, the Respondent contends that the Claimant's salary was consolidated and included house allowance.
14. With regard to hours of work, the Respondent avers that the Claimant worked for an average of 52 hours a week and any additional hours worked were compensated by overtime payment.
15. In conclusion the Respondent urges this Court to find the claim devoid of merit and to accordingly dismiss it in its entirety with costs to the Respondent.

Evidence

16. At the hearing of the case, both the Claimant and Respondent testified as CW1 and RW1 respectively. Parties were thereafter directed to file and exchange submissions.

Claimant's Case

17. The Claimant, adopted her witness statement dated December 14, 2017 as her evidence in chief. She further relied on her list and bundle of documents also dated December 17, 2017. In her statement she reiterates the averments made in her statement of claim.
18. On cross examination, the Claimant stated that she started working for the Respondent in October, 2016 and that the Respondent's contention that she begun working in January 2017 was not true.
19. She testified that the allegation that she was paid overtime was untrue as no overtime payments were made yet she worked extra hours.
20. The Claimant denied having been advanced a loan of Kshs.10,000/- by the Respondent. She stated that the loan advanced to her was Kshs.5,000/-.
21. On the issue of NSSF registration, the Claimant stated that she did register for NSSF but the Respondent only remitted her deductions for one month despite making monthly deductions on her salary.
22. She further testified that her salary was initially paid by cash but later she received her salary vide Mpesa as evidenced by the Mpesa statement, filed in her bundle of documents.
23. The Claimant urged this Court to find her Claim with merit and to allow it as prayed.

Respondent's Case

24. The Respondent testified as RW1. She adopted her witness statement dated September 17, 2019 as her evidence in chief. She relied on her filed list and bundle of documents. In her statement RW1 reiterated the averments made in the statement of response.
25. RW1 testified that she employed the Claimant from April, 2017 and that the Claimant worked for a short while before they signed the employment contract.
26. She further testified that the Claimant was paid overtime payment for any overtime worked and that she never worked on public holidays as contended.



27. The Respondent denied the Claimant's allegation that she had threatened to reduce the Claimant's salary and maintained that she only sought to know if the Claimant would wish to work for less hours given that all of the Respondent's children were school going.
28. On cross examination RW1 testified that she paid Kshs.150/- per hour as overtime every time the Claimant worked extra hours.
29. She further stated that the Claimant's employment contract provided for three (3) months' notice for termination. She stated that she did not give the Claimant any warning letter prior to serving her with the termination notice. She stated that she notified the Claimant of misconduct via mobile short messaging services in the event of misconduct.
30. She maintained that she remitted all statutory deductions to the relevant statutory bodies as required by the law.

Claimant's Submissions

31. In her submissions the Claimant maintained that she was employed by the Respondent as a nanny from September 15, 2016. That in the absence of any written contract the court should be guided by the provisions of section 9 and 10 of the [Employment Act](#), 2007 and find in her favour noting that the failure to reduce the employment contract into writing was an error on the part of the respondent. For emphasis the claimant relied on the decision in the case of [Edward Isedia Mukasia v Eldo Supermarket Ltd](#) [2015] eKLR where the Court held that the burden of proof of terms of employment lie with the employer.
32. The Claimant further submitted that the termination of her employment on October 8, 2017 was unlawful, unfair and wrongful as the Respondent failed to comply with the mandatory provisions of sections 35, 36, 41 and 45 of the [Employment Act](#), 2007. To buttress this argument the claimant relied on Court of Appeal decision in the case of [Pius Machafu Isindu v Lavington Security Guards Limited](#) [2017] eKLR and the decisions in the cases of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR, [Alphonse Maghanga Mwachanya v Operation 680 Limited](#) [2013] eKLR and [Nicholus Muasya Kyula v Farmchem Ltd](#) [2012] eKLR where the courts held that for a termination to be fair it must comply with the mandatory provisions of section 41 of the [Employment Act](#), 2007.
33. The Claimant submitted that she had proved her case on a balance of probabilities as required under law and is therefore entitled to the reliefs sought. She urged this Court to allow her claim in terms of the reliefs sought therein.

Respondent's Submissions

34. The respondent submitted that she had just cause to terminate the claimant's employment and issued her with a notice dated October 8, 2017. The Respondent relied on the provisions of section 44 of the [Employment Act](#), 2007.
35. The respondent submitted that the claimant is not entitled to the reliefs sought and urged this court to dismiss them with costs to the respondent.
36. On the claim for overtime payment, the respondent submitted that the claimant worked within the mandatory 52 hours a week and that as proved by the evidence before this Court she did not work on public holidays.



37. On the claim for payment of Kshs.7,143/- for four days worked in October, 2017, the Respondent maintained that the monies owed to the Claimant were used to offset a facility of Kshs.10,000/- whose balance at the time of termination stood at Kshs.5,000/-.
38. The Respondent further submitted that the Claimant is not entitled to any house allowance as her salary was negotiated at a consolidated sum and therefore house allowance is not payable separately. To fortify this argument the Respondent relied on the case of *Charity Wambui Muriuki v M/S Total Security Surveillance Limited* (2017) eKLR where the Court held that a consolidated salary is inclusive of the basic salary and all allowances payable to an employee, house allowance being one of them. The Court placed the burden upon the Claimant to demonstrate through the production of payslips that house allowance was not part of the consolidated salary.
39. On the issue of NHIF and NSSF contributions, the Respondent submitted that the two were duly deducted and remitted to the relevant statutory bodies and therefore the Claimant cannot seek for compensation under this head. The Respondent further submitted that such sums are only payable to the statutory bodies and not to individual employees. For emphasis the Respondent relied on the decision in the case of *Hassanath Wanjiku v Vanela House of Coffee* [2018] eKLR where the Court held that if an employer fails to remit statutory deductions the employee would still not be entitled to any refund as both NSSF and NHIF have structures to ensure compliance by defaulting employers.
40. The Respondent further submitted that the Claimant had failed to discharge her burden of proof as required under section 47(5) of the *Employment Act*, 2007 and as such her claim should fail in its entirety. She urged the Court to dismiss the claim with costs to the Respondent.

Analysis and Determination

41. I have carefully considered the pleadings, evidence, the rival submissions presented by both sides and the authorities cited therein. The following are the issues for determination: -
- a) Claimant's date of employment by the Respondent;
 - b) Whether the Claimant was unfairly and unlawfully terminated;
 - c) Whether the Claimant is entitled to the reliefs sought

Claimant's date of employment by the Respondent

42. The Claimant maintained that she was employed by the Respondent with effect from September 15, 2016 and that before her employment contract was reduced into writing, her salary was paid in cash.
43. The Respondent on the other hand maintained that the Claimant was employed in January 2017 and worked without any written contract for a few months before the employment contract was executed in May 30, 2017.
44. The Respondent submits that she could not have employed the Claimant earlier than January, 2017 as she was not in the country at that time. She relied on her passport which indicated that she arrived in the country on 10th January, 2017.
45. Given that the Respondent arrived in the Country on January 10, 2017, it is not possible that the Claimant was under her employment as at September 15, 2016. I therefore find that the Claimant's employment commenced in March 2017 as stated by Respondent and supported by the evidence on record.



Whether termination of the Claimant's employment was lawful and fair

46. Section 45(1) and (2) of the [Employment Act](#) makes the following provisions regarding unfair termination of employment—

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) 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—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.

47. The termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that there were valid reasons and that it complied with fair procedure.

48. The Claimant testified that she was issued with a termination notice on July 8, 2017, after the date of her termination, a fact that was confirmed by the Respondent.

49. The termination notice dated October 8, 2017 reads as follows:

Termination of Contract

By undersigning the below statement, Elin Hilwig & Robert Ramazan (hereinafter referred as 'employer'), and rosemary Khasiala Lung'atso (hereinafter referred to as 'employee') agree to terminate with immediate effect the contract of appointment that both parties entered into on May 30, 2017.

Although not required based upon the earlier mentioned contract or other circumstances, employer will pay employee on her Mpesa account (25420320309) an amount of 25,000/- after a signed copy of this statement has been returned to the employer by the employee. By undersigning this statement employee, Rosemary Khasiala Lung'atso, born 12-12-1967, reaffirms that she will have no financial or other claims whatsoever towards employer having received the amount mentioned in this statement.

Date: 8-10-2017

Employer: Elin Hilwig /Robert Ramazan

(Signed)

Employee: Rosemary Khasiala Lung'atso

(not signed)

50. It is evident from the termination letter that no reason was cited for the termination of the Claimant's employment. Section 43 of the [Employment Act](#), 2007 provides as follows:

43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Procedure followed

51. Section 41 of the *Employment Act* provides for fair procedure it reads as follows: -

41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (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 representations 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.

52. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* (Supra) held:

“There can be no doubt that the Act, which was enacted in

2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

53. In this case the Claimant contended that she was not accorded any hearing prior to termination of her employment. The Respondent confirmed that indeed no hearing took place before the termination. Consequently, I find that the Respondent has failed to prove that a fair procedure was followed before termination of the Claimant’s employment contrary to the mandatory provisions of Section 41 of the *Employment Act*, 2007.

54. Having found that the Respondent has failed to prove a valid reason for terminating the Claimant’s contract, and further failed to prove that a fair procedure was followed, I find that the Claimant’s termination was in fact unfair and unlawful within the meaning of section 45 of the *Employment Act*.

Whether the Claimant is entitled to the reliefs sought

55. The Claimant seeks the following reliefs:

a) An award of Kshs.75,000/- being 3 months’ salary in lieu of notice

56. The Claimant’s employment contract provided for three months’ salary in lieu of notice in the event of termination. No such notice was issued to her. The Respondent terminated her employment with immediate effect. I therefore find that the Claimant is entitled to payment of three months’ salary in lieu of notice. The same is tabulated as hereunder: (Kshs.23,000 x 3 months) = Kshs.69,000/-.



b) An award of Kshs.7,143/= being salary for days worked in the month of October

57. The Claimant testified that the Respondent did not pay her for the days worked in October, 2017 prior to termination, a fact that was not disputed by the Respondent who maintained that the sums were used to offset a loan advanced to the Claimant that was outstanding at the time of termination.

57. The Claimant admitted that she owed the Respondent Kshs.5,000/- which had been advanced to her. Under the law, the Respondent was entitled to recover the outstanding loan from the Claimant's terminal dues.

c) An award of Kshs.12,000/- being gratuity/service pay of 15 days salary for every year of service for 1 year and 1 month worked by the Claimant

58. The Claimant is not entitled to payment under this head as gratuity was not provided for in her employment contract. Further, she worked for less than a year and would not be entitled to service pay which is synonymous with gratuity.

d) An award of Kshs.134,400/- being normal overtime allowance at an hourly rate of Kshs.150/- for 1 year and month

59. This claim fails for want of proof. This being special damages, the claimant was under obligation to plead and prove the same. there is no proof of the days which the claimant worked overtime or the tabulation of the amount claimed.

e) Holiday allowance

60. Similarly, the claim for holiday allowance fails for want of proof. The Claimant did not cite the dates she worked on public holidays but was not paid.

f) An award of Kshs.48,750/- being unpaid house allowance for 13 months at the rate of 15 per cent of the basic salary

61. The Claimant was paid a salary of Kshs.23,000/-. Her contract stated that this would be her gross pay. She did not demonstrate that this amount did not include house allowance. The same being above the statutory consolidated wage for a nanny, I find that the salary was inclusive of house allowance. The claim for house allowance therefore fails.

g) Leave days

62. The claim for leave days earned but not taken fails for want of proof.

h) Unremitted NSSF and NHIF

63. The Claim for unremitted NSSF and NHIF contributions fails as the Claimant did not adduce proof that the same was deducted from her salary and not remitted to NSSF and NHIF. Even if the same had been proved, NSSF and NHIF have mechanisms to recover the same from the Respondent. See *Hassanath Wanjiku v Vanela House of Coffee* (supra).

i) Compensation for wrongful termination

64. Taking into account the circumstances under which the claimant's employment was terminated and the factors set out under section 49(4) of the *Employment Act*, it is my view an award of one month's



salary as compensation under this head is reasonable as from the evidence, the Claimant contributed to the reasons that led to the termination of her employment.

j) Certificate of service

65. The respondent is directed to issue the claimant with a certificate of service for the duration she was under the respondent's employment by dint of the provisions of section 51 of the *Employment Act, 2007*.

k) Costs and interest

66. The Claimant is awarded costs of this suit. Interest shall accrue for the date of this judgment until settlement in full

67. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the following terms:

i. Three (3) months' salary in lieu of notice Kshs.69,000

ii. Compensation (1 month's salary) Kshs.23,000

Total Kshs.92,000

iii. The Claimant to be issued with a Certificate of Service

iv. The Claimant is awarded costs of the suit and interest from the date of this Judgment until settlement in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF JULY 2022

MAUREEN ONYANGO

JUDGE

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 *Civil 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.

MAUREEN ONYANGO

JUDGE

