



Kiganane v Kenya Institute of Studies in Criminal Justice (Employment and Labour Relations Claim 229 of 2017) [2022] KEELRC 4105 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4105 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CLAIM 229 OF 2017
DN NDERITU, J
SEPTEMBER 29, 2022**

BETWEEN

ELLY OYALO KIGANANE CLAIMANT

AND

KENYA INSTITUTE OF STUDIES IN CRIMINAL JUSTICE RESPONDENT

JUDGMENT

Introduction

1. The claimant, through Tombe & Company Advocates, commenced this claim vide a statement of claim dated May 25, 2017 claiming for the following:-
 - a) One month's salary in lieu of notice - Kshs 18,000.00
 - b) Unpaid wages for January-March, 2017 -Kshs 54,000.00
 - c) Annual leave allowance for 6 years
- $6 \times 21 \times 18,000 / 21$ - Kshs 87,230.70
 - d) Un-paid house allowance From April to December, 2011
Actual wage Kshs 8,000.00 per month
Kshs 8,000 x 9 months x 15% - Kshs 10,800.00
From January, 2012 to August 2012
Actual wage Kshs 10,000.00p.m
Period-8 months x 15% - Kshs 12,000.00
From September, 2012 to March, 2017
Actual wage Kshs 18,000.00pm



Period – 56 months

Kshs 18,000x56 monthsx15% - Kshs 151,200.00

- e) Service gratuity for 6 years (6yrs@
5 days x 18,000/26) - Kshs 62,307.60
 - f) Compensation for unlawful
dismissal (18,000 x 12months) -Kshs 216,000.00
- total amount due - Kshs 611,538.30

2. As expected, the claim is accompanied with a verifying affidavit by the claimant, a witness statement, and a bundle of documents.
3. Upon service of the statement of claim and the other materials listed in paragraph 2 above the respondent did not respond to the claim. There is an affidavit of physical service upon the respondent on record. The respondent was served on May 29, 2017 and acknowledged receipt by way of official stamping on summons.
4. This cause came up in court for hearing and February 21, 2022 and again there is an affidavit on record that the respondent was served with a hearing notice, notwithstanding that it had failed to enter appearance and or file a response to the claim.
5. On February 21, 2022 the claimant (CW1) testified alone in support of his claim. He based his testimony on the statement of claim and his filed witness statement. He produced as exhibits the documents filed with the claim.

II. Claimant's Case

6. Based on the pleadings, the oral and documentary evidence that he adduced in court, and the written submissions by his counsel, the claimant's case is that he was engaged by the respondent as a logistics officer vide a letter of appointment dated April 11, 2011.
7. His starting salary was agreed at Kshs 8,000/= and the commencement date was agreed to be April 11, 2011. The claimant testified that as at the time of his dismissal on March 27, 2017 his monthly salary had risen to Kshs 18,000/=.
8. The claimant testified that on March 27, 2017 he together with his co-workers approached the College principal of the respondent to enquire about salary arrears for the period between January and March, 2017. He testified that instead of the principal listening to their grievances the claimants and his co-workers were sent away and summarily dismissed.
9. The claimant reported the matter to the County Labour office Nakuru vide a letter dated March 29, 2017 and the respondent was summoned to attend a reconciliation meeting on April 13, 2017. The respondent did not respond to the invitation and did not attend the meeting.
10. Subsequently, the claimant instructed his Counsel on record to demand for his terminal dues and compensation which Counsel did vide a letter dated April 19, 2017. The claimant testified that the respondent did not respond to the said demand letter.
11. The claimant then instructed his counsel to file this cause in court. He produced as exhibits all the documents mentioned in the foregoing paragraphs and he prayed that judgment be entered in his favour as prayed in the statement of claim.



III. Issues for Determination

12. From the foregoing the following issues commend themselves to this court for determination:-
- (a) Was the dismissal of the claimant by the respondent wrongful, unfair, and unlawful?
 - (b) If (a) above is in the affirmative, is the claimant entitled to the reliefs sought?
 - (c) Costs.

IV. Termination

13. The claimant testified that he was denied both substantive and procedural fairness. He testified that together with his co-workers they were orally dismissed after approaching the college principal of the respondent on March 27, 2017 enquiring about salary arrears. The claimant testified that together with his colleagues they were simply sent away by the college principal with no explanation on the salary arrears or notice.
14. As noted elsewhere in this judgment the respondent opted not to take part in these proceedings notwithstanding that it was properly served. In the circumstances, there is no evidence on record to rebut, contradict, or controvert that from the claimant.
15. This court (ELRC) has held severally that an employer ought to follow the law and afford an employee both substantive and procedural fairness before dismissing or terminating such an employee -See *Mary Chemweno v Kenya Pipeline Company Limited* (2017)eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
16. In this cause, the respondent did not afford the claimant a hearing and did not offer a reason or explanation for the summary dismissal. No notice was issued, no disciplinary hearing was held, and no dues were paid to the claimant. the respondent violated sections 41, 43, 44, 45, and 47(5) of the *Employment Act* (the Act). The respondent further violated articles 41 (Fair Labour Practices) and 47 (Fair Administrative Action) of the *Constitution* among others. The respondent denied the claimant natural justice as envisaged in the *Fair Administrative Action Act* and all other relevant laws of the land.
17. This court finds and holds that the summary dismissal of the claimant by the respondent was wrongful, unreasonable, and unlawful. It is so declared.

IV. Reliefs

18. This court shall now consider each of the reliefs sought for by the claimant as hereunder:-
19. Prayer (a) is for a declaration that the dismissal was wrongful, unfair and unlawful. This issue has already been found in the affirmative in the foregoing part of this judgment.
20. Prayer (b) is for judgment against the respondent in the total sum by Kshs 611,539.30. The components of that amount are as pleaded in paragraph 12 in the statement of claim. This court shall consider each item as hereunder.
21. In respect of one month's salary in lieu of notice in the sum of 18,000/= the same is granted as such notice or payment *in lieu* thereof is clearly provided for in the letter of appointment dated April 11, 2011.



22. On salary arrears for three (3) months from January to March, 2017 this court grants the same in the sum of Kshs 54,000/=. There is no evidence contrary to that of the claimant to the effect that the same is due and payable.
23. Annual leave allowance for six (6) years in the sum of Kshs 87,230.70 is granted as the respondent has not availed employment records to discount the evidence by the claimant to the effect that he did not take annual leave for the entire period that he worked for the respondent from April, 2011 to March, 2017. The respondent is obligated under sections 10 and 74 of the Act to keep employment records but it failed to produce the same in court.
24. The other component is arrears of house allowance in the sum of Kshs 151,200/=. The claimant did not avail any pay-slips to help this court in making an informed decision on whether the gross salary of Kshs 18,000/= as at the time of the dismissal, included a component of house allowance. The letter of appointment dated April 11, 2011, is also silent on whether the starting salary of Kshs 8,000/= included a component of house allowance. Was the gross salary all inclusive?
25. The claimant failed to prove that the respondent owes him house allowance in arrears. It is not enough for a party to state its case to court. He who alleges must prove - see section 107 of the *Evidence Act* (Cap 80). The claim for house allowance in arrears is hence denied.
26. The other component claimed is “service gratuity.” This court (ELRC) has held severally that gratuity is not a right. If gratuity is not provided for in the contract then an employer cannot be called upon to pay for the same against its will as that would offend the principle of privity of contract. For the foregoing reasons, the claim for gratuity is denied.
27. The last component is compensation for the wrongful and unlawful dismissal. The claimant has prayed for the maximum award of 12 months gross salary at Kshs 216,000/=.
28. This court has considered the factors that it should take into account under section 49(4) of the Act. The claimant has not sought for reinstatement or re-engagement. The respondent’s actions in dismissing the claimant were unreasonable, inconsiderate, wrongful, unfair, and unlawful. From the evidence on record, the claimant did not contribute in any way to his dismissal. The claimant testified that he did not get another job after the dismissal. He was denied both substantive and procedural fairness and the respondent did not pay any final dues to the claimant.
29. Putting into consideration all the factors and parameters in section 49(4) of the *Act* this court is of the considered opinion that this is a suitable case for the award of the maximum compensation of 12 months gross salary. The same is awarded as Kshs 18,000/= x12 = 216,000/=. This award is subject to statutory deductions.

VI. Costs

30. The claimant is awarded costs of this cause. The same may be agreed on or taxed in the usual manner.

VII. Disposal/orders

31. This court issues the following orders –
 - (a) A declaration be and is hereby issued that the summary dismissal of the claimant by the respondent was wrongful, unreasonable, unfair, and unlawful.
 - (b) The claimant is awarded the following:
 - (i) One month’s salary in lieu of notice



- Kshs 18,000.00

(ii) Salary arrears for January, February and March 2017 @Kshs 18,000/= per month - Kshs 54,000.00

(iii) Annual leave allowance for six (6) years - Kshs 87,230.70

(iv) Compensation for wrongful and Unlawful dismissal - Kshs 216,000.00

Total - Kshs 375,230.70

This amount shall earn interest at court rate from the date of this judgment until payment in full.

(c) The claimant is awarded costs of this cause.

(d) Except what is specifically awarded, the other prayers are denied.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 29TH DAY OF SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE

