



**Kulundu v Chic Fashions Limited (Cause 2128 of 2016)
[2022] KEELRC 4043 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4043 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2128 OF 2016
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

JUSTUS NGOLA KULUNDU CLAIMANT

AND

CHIC FASHIONS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on October 17, 2016.
2. He pleads that he was employed by the respondent on April 1, 2002, as a packing assistant.
3. He was initially paid a monthly salary of Kshs 6,000, which had been improved to Kshs 17,400 by the time he left employment.
4. His contract was terminated by the respondent on August 21, 2015 verbally, without notice. He was not issued a letter to show cause, or suspended on any disciplinary or performance- related ground.
5. He reported the existence of the dispute to the labour office at industrial area Nairobi. The respondent was summoned for conciliation meetings, but declined to attend until February 15, 2016. When the director of the respondent appeared before the labour office, he proposed to pay to the claimant kshs 15,000.
6. The claimant worked from 730 am to 330 [not specified whether am or pm] from Monday to Friday. He never went on annual leave, and was not paid in lieu of leave. He was denied house allowance and certificate of service. His NSSF contributions were never remitted to the Fund. The respondent harassed the claimant, and had earlier on, terminated his contract, and only reinstated the claimant upon the intervention of COTU[K].
7. He prays for Judgment as follows: -



- a. Declaration that termination was unfair.
 - b. 1-month salary in lieu of notice at Kshs 17,400.
 - c. House allowance for 14 years at Kshs 438,480.
 - d. Annual leave for 14 years at kshs 243,600.
 - e. Service at kshs 121,800.
 - f. Compensation for unfair termination at kshs 208,800.
Total...kshs 1,085,680.
 - g. Costs.
 - h. Interest.
 - i. Any other suitable relief.
8. The respondent filed its statement of response on November 16, 2016. It is the position of the respondent that the Parties were not in an employer-employee relationship. The claimant was contracted daily, and paid at the end of each month. He left employment of his own volition, on or about August 25, 2015.
 9. The respondent paid to the claimant an ex gratia payment on February 19, 2016, amounting to kshs 15,000, and discharged the respondent from further claims. The claimant is estopped from making further claims. The respondent prays the court to dismiss the claim with costs.
 10. The claimant gave evidence on November 18, 2021. Respondent's witness, human resource manager Francis Njau Mwaura, gave evidence for the respondent on February 18, 2022 when the hearing closed.
 11. The claimant adopted the contents of his statements of claim and witness, and 4 documents on record, in his evidence. He was a Packer, earning a daily rate of kshs 540 as of the date of termination. He was told by the Personnel Manager that there was no more work. He was not paid the items detailed in his statement of claim. The respondent paid him kshs 15,000 and proposed to pay him another kshs 15,000. When he went to collect the second payment, he was chased away by the respondent. He did not sign any documents as alleged by the respondent. He had proposed that the respondent pays him kshs 100,000. He instructed his advocate, after the respondent chased him away, to issue demand. The claimant did not abscond. NSSF subscription was made only after employees went on a strike. The claimant reiterated that he did not leave employment voluntarily; he was denied annual leave; and was not issued his certificate of service.
 12. Cross-examined, the claimant told the court that he was employed in 2002. He did not have a document to support this. Some contract documents exhibited by the respondent, bore his signature, while others did not. He was not told about the contents of employment records which he signed. He did not know what was the minimum wage, in 2011. He did not agree that the rate paid to him was above the minimum wage in 2015. The labour office advised Parties to compromise. It did not advise that the claimant is not entitled to the claims made. The letter dated February 23, 2016 states that the claimant agreed to be paid kshs 30,000. It was indicated that he would be paid a balance of kshs 15,000.
 13. Francis Njau Mwaura adopted his witness statement, and documents filed by the respondent in his evidence. The claimant was employed in January 2011, and paid a daily wage. The daily contracts are on record. He was paid on completion of a given task. There was a component of basic salary, pro-rata leave, and house allowance. The respondent did not terminate his contract. He left on his own volition.



NSSF contributions were remitted. He reported the dispute to the labour office. The labour officer duly advised the claimant, and proposed a give-and-take settlement between the Parties. She proposed the respondent pays to the claimant kshs 15,000. He received this and discharged the respondent. The claimant wrote a letter through his advocates claiming kshs 15,000, being the balance of the sum agreed to be paid. He was paid kshs 15,000. He did not work in continuity. He would be gone for about 2 weeks in a month.

14. There was no letter of appointment issued in January 2011, the Witness stated on cross-examination. The daily rate included house allowance. The claimant was not employed in 2002. His contract ended the day he left. The respondent's Advocates wrote a letter stating that the claimant's contract was terminated for irregular acts. He was not on duty continuously. The respondent did not issue warning for absenteeism. The claimant did not write the letter at page 88 of respondent's bundle. The letter was authored by Mwaura. The claimant signed when he received the money. He did not sign under duress. He said he could read Kiswahili. Page 87 contains a discharge voucher. It does not state that the money was an ex gratia payment. The claimant was registered with the NSSF in September 2011. Leave was paid on a daily basis. He did not request for certificate of service. Redirected, the Witness told the court that that the contracts on record are sufficient employment records. House allowance was included in the daily wage. He signed discharge and did not make any other claims.
15. The issues in dispute are whether the claimant's contract was terminated unfairly, or at all, by the respondent; whether he merits the reliefs sought; and whether he is entitled to costs and interest.

The Court Finds: -

16. This dispute went for conciliation before the labour office, industrial area Nairobi.
17. There was an agreement between the Parties that the claimant is paid a sum of kshs 30,000, in settlement of the dispute.
18. A letter dated February 23, 2016, addressed to the respondent by claimant's then advocates, Waweru Gatonye & Company, demanded for a balance of kshs 15,000.
19. The letter is specific that an agreement was entered into between the Parties, for the respondent to pay to the claimant terminal dues at kshs 30,000. "Pursuant to this agreement, you paid our client kshs 15,000, on February 19, 2016, and undertook to pay the rest of it, the following day. You have subsequently refused, failed and/or refused to pay our client the balance, despite several reminders."
20. The letter went unanswered, compelling the claimant's advocates, to write a follow-up, dated March 2, 2016. The respondent wrote back on March 9, 2016, asking the claimant to provide "evidence that may advance your position."
21. On February 19, 2016, when the respondent paid the initial sum of kshs 15,000, the respondent drafted a petty cash voucher, indicating that the claimant had been paid kshs 15,000, and had no other claims against the respondent.
22. There was a further acknowledgement and discharge, authored by Francis Mwaura on the same date, indicating that the claimant had, following the conciliation meeting at the labour office, accepted that he left employment of his own volition, and that he had received kshs 15,000 in full and final settlement.
23. In his evidence, Mwaura told the court that the claimant had indicated to him that he was able to read Kiswahili. The voucher, acknowledgement and discharge are in English. Mwaura did not tell the court



- why he did not draft them, in a language understood by the claimant. There is no evidence that these documents were read to the claimant, and explained, in a language understood by the claimant.
24. If the Parties agreed on kshs 30,000 as the totality of the terminal benefits, why did the respondent draw a voucher, acknowledgement and discharge indicating that kshs 15,000 was in full and final settlement?
 25. Those documents indicating that the claimant had received kshs 15,000 in full and final settlement were not drawn in good faith, and breached the agreement arrived at the Labour Office. The court cannot rely on them as binding discharge of liability on the part of the respondent. The respondent was clearly in breach of the agreement made at the labour office. Demand letters made on behalf of the claimant by his advocates, elicited no payment of the outstanding sum of kshs 15,000. Instead, the respondent rather imprudently, sought to prolong the dispute, by asking the claimant to provide evidence to support his position, that he was owed kshs 15,000, and threatening that any action initiated by the claimant, would be strenuously defended. Employers ought to handle employees who are literacy-challenged carefully, and not procure discharge from employment liability through deceit.
 26. The court does not find persuasion in the respondent's position that the claimant left employment of his own volition. The letter from the claimant's advocates dated February 24, 2016, states that, the claimant's contract was terminated by the respondent, on account of his irregular acts. Details of the irregular acts were not disclosed, but it suffices, that the respondent disclosed termination was at its instigation. The respondent terminated the claimant's contract on account of unspecified irregular acts.
 27. Having acknowledged that it initiated termination, an obligation was imposed on the respondent under sections 41, 43 and 45 of the *Employment Act*, to show that fair procedure was followed, and that there was valid reason or reasons, justifying termination.
 28. The claimant was not taken through a disciplinary process for any acts deemed to comprise an employment offence or contrary to his contract. He was not notified of any offences, asked to explain such offences, and brought before a disciplinary forum. The irregular acts alleged against the claimant by the respondent, were never made known to the claimant. They were never placed before him, and were not established through a disciplinary process. Termination was unfair on procedure and substance. The claimant is entitled to compensation for unfair termination.
 29. The court does not believe the respondent's position on the employment date. It is no true that the claimant first worked with the respondent in January 2011. The contracts drawn in January 2011, appear to have been made when there was already an employment relationship between the Parties.
 30. There were attempts made by various institutions to resolve the dispute before it was presented in court. There is a letter dated November 10, 2015, from the Kenya human rights commission to the respondent, which invited Parties to mediation. The letter states that the claimant was employed by the respondent in 2002. The court has not seen any response from the respondent, to the Kenya human rights commission, denying the given date of employment.
 31. The claimant pleads that the relationship with the respondent had broken down, and he was only reinstated by the respondent upon the intervention of COTU[K]. A note from COTU[K] to provincial labour officer to this end, exhibited by the claimant, is dated June 2010. It predates the contract of January 2011.
 32. It is fair to uphold the position of the claimant, that his employment with the respondent, went back to the year 2002.



33. He last earned a daily rate of kshs 540. Daily rates under the general wage [amendment] orders, include the housing element. The prayer for house allowance in arrears is misplaced.
34. The contracts exhibited by the respondent capture payment of pro-rata leave. The claimant did not account for this item. He did not explain why he claims leave, while it has been established that this was included in his daily rate.
35. There are records from the NSSF showing that contributions were remitted. If any was not remitted, it is open to the claimant to pursue remittance from his former employer with the NSSF, rather than ask the court to order that statutory payments revert to his private pocket.
36. He was subscribed to the NSSF in 2013. Service became payable with the Act of 2007, and in the view of the court, the claimant merits service pay for the period between 2007 and 2013- a period of 6 years. He is allowed service pay at 15 days' salary over a period of 6 years, at a rate of kshs 540 per day, equivalent of kshs 48,600.
37. The claimant worked from 2002 to August 2015. Service may have been interrupted as the records show he was not invariably at work daily. There was a time he was away, requiring the intervention of COTU[K] to return him to work. He expected to go on working. He was not shown to have contributed to the circumstances leading to termination. His NSSF and NHIF records show that he was born in 1981. He was 34 years old, on termination. His best productive years were ahead of him. Those years were taken away from him by the respondent. The respondent declined to settle the dispute as had been agreed at the labour office, and prolonged the dispute unnecessarily. The court is persuaded that an award of compensation equivalent to 12 months' wages, is proportionate and adequate. The record indicates that the claimant worked on average 5 days a week. At a rate of kshs 540 per day, he would be entitled to kshs 10,800 in a month. It is not clear how he computes his monthly rate at kshs 17,400. He is granted compensation at kshs 129,600.
38. Notice pay is allowed at kshs 10,800.
39. Certificate of service to issue.
40. Costs to the claimant.
41. Interest allowed at court rates, from the date of judgment till payment is made in full.

It is ordered: -

- a. It is declared that termination was unfair.
- b. The respondent shall pay to the claimant: service at kshs 48,600; compensation at kshs 129,600; and notice at kshs 10,800 – total kshs 189,000.
- c. Certificate of service to issue.
- d. Costs to the claimant.
- e. Interest allowed at court rates, from the date of judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH DAY OF SEPTEMBER, 2022.

JAMES RIKA
JUDGE

