



REPUBLIC OF KENYA



KENYA LAW
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**Shollei v Keroche Breweries Limited (Employment and Labour Relations Claim
35 of 2019) [2022] KEELRC 4869 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4869 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CLAIM 35 OF 2019**

**HS WASILWA, J
SEPTEMBER 27, 2022**

BETWEEN

SAM KRUS SHOLLEI CLAIMANT

AND

KEROCHE BREWERIES LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this suit by a memorandum of claim dated May 3, 2019, alleging to have been unfairly terminated and seeking for compensation for the alleged unfair termination. He prays for the following reliefs;
 - a) Kshs 2,500,000 being salary for the month of October, 2018.
 - b) Kshs. 12,500,000 being salary up to March 31, 2019 being the date of constructive termination.
 - c) Kshs. 15,000,000 being six months salary in lieu of Notice.
 - d) Kshs. 4,555,555 being payment for leave days.
 - e) Kshs. 30,000,000 being damages for unlawful termination equivalent to 12 months salary.
 - f) Kshs 3,036,000 being unpaid salary for October, November and December, 2017 at 50%.
 - g) Kshs 5,500,000 being gratuity payment.
 - h) Kshs. 2,500,000 being customary acting allowances for acting as the company CEO while the CEO and the Chairman attended to the chairman's' medical treatment in the United Kingdom.
 - i) Damages for unfair termination.
 - j) Interest on a-h above at prevailing commercial bank lending rates until the amount is full paid.



- k) Immediate issuance of certificate of employment.

Claimant's case.

2. The claimant was employed by the respondent as its managing director vide the employment contract dated July 10, 2017, on a gross salary of Kshs 2,500,000. The contract was to take effect commencing October 1, 2017 for a period of 4 years.
3. Clause 9 of the said employment contract, provides for termination clause that either party can terminate the contract of employment by giving three (3) months' notice or payment in lieu of the said notice. It is stated that there was an addendum of September 12, 2018 that increased the notice period to six (6) months.
4. Due to political instability, the claimant's reporting date was postponed from October to January, 2018. The claimant states that for the period the Respondent delayed his reporting, it was a common understanding that he would be paid half of the agreed salary.
5. While still new at the respondent's employ, the respondent's CEO left the country in February, 2018 and upon her return, she informed him that she would be leaving with the Chairman of the respondent for treatment for a period of 6 months. The CEO and the chairman left the country on February 20, 2018 and returned in mid-July, 2018 and officially resumed work in August, 2018. During this period the claimant states that he was acting as the CEO and overseeing operations at the Respondent.
6. The claimant wrote an email addressed to the CEO on October 23, 2018, giving an update of the day to day running of the company, policy directions and decision made while the CEO was away. This email was not well received by the respondent's CEO, who in turn wrote back threatening to invoke termination clause on alleged basis that the claimant was not promoting a similar agenda with the Respondent's top management. The claimant requested for a meeting to discuss the areas that the respondent was unhappy with and suggested a dated in November, 2018.
7. The claimants took his leave on October 29, 2018 that lapsed on November 12, 2018 and on reporting back to work he was denied access to his office and informed that his services had been terminated. His personal assistant was handed over cheques of Kshs 7,005,504 being his terminal dues.
8. He states that he was not informed of the reason for the dismissal, neither was he subjected to any disciplinary process, as such that the termination was unlawfully in the eyes of the law.
9. In reply to the defence dated July 15, 2019, the claimant asserts that pursuant to the verbal agreement to pay him half salary for the month of October to December, 2017, the respondent agreed to pay him 250,000 more each month till payment in full. He stated further that he had been persuaded by the respondent's chairperson to join the company in 2016 and that he had been head hunted based on his excellent performance in previous employments.
10. He further prayed for payment of 95 Million being pay for unserved duration of the contract.
11. During hearing the claimant testified as CW-1 and adopted his witness statement dated May 3, 2019 and produced bundle of documents dated July 9, 2019 as his exhibits. He prayed for thy claim to be allowed as prayed.
12. Upon cross examination by Wachira Advocate, the claimant testified that he received 7 million as his terminal dues. He testified that clause 9 of the contracted provided that he would not be entitled to the remainder of the contract. On claim for leave days, the claimant testified that he had taken 10 leave days in July, 2018 also that he was on leave at the time of termination. He testified further that



he had not completed a year working for the Respondent. He admitted that he is seeking for pay for October to December, 2017 but had not started working for the Respondent till January. He added that no evidence is produced to confirm that he was to be paid half salary for the period not worked. On gratuity pay the claimant testified that clause 6 of the contract provides for the same and that its customary for employees to be paid such gratuity when they are on contract.

13. On re-examination, the claimant testified that he was ready to work in October, 2017 as such is entitled to the salary for that period.

Respondent's case.

14. The respondent entered appearance on June 4, 2019 and filed a response to claim on even date. In the said response, the respondents admitted employing the claimant vide a contract of employment dated July 10, 2017 but contends that it took effect in 2018.
15. It is stated that the claimant was always at loggerheads with the policies and ideologies of the top management and tried on various occasions to superimpose his strategies to the detriment of the success of the company.
16. On the email authored by the claimant on October 23, 2018, the respondent states that the same was demeaning and disrespectful.
17. It is stated that upon termination, the claimant was indeed paid Kshs 7,005,504 which included his monthly pay and salary *in lieu of* notice and the said particulars were captured in his final dues pay slip.
18. During hearing, the respondent called Nicholas Kipchirchir Kechir, the Deputy head of brewery, as its RW-1. He adopted his witness statement of May 29, 2019 and produced the bundle of documents of even date as respondent's exhibits. In addition, the witness testified that the actual date of commencement was January, 2018. He testified that the addendum to the claim increased the notice period from 3 months to 6 months. He testified further that the claimant was paid his October, 2018 salary and the claim for salary till end of contract does not arise as he did not work till end of the contract. On the pay for unfair termination, the witness testified that the claimant was dismissed on justifiable grounds. He reiterated that the claimant was fully paid his terminal dues.
19. Upon cross examination by Achach advocate, the witness testified that while he was the deputy head of the breweries he was sitting in most management meetings. The witness testified that indeed the contract provide for commencement date of October 1, 2017 but it was changed to January, 2018. He testified that the claimant was dismissed for non-performance. It was his testimony that as much as he was not with the claimant and the CEO in the meeting in London, he saw the email with regard to the said meeting which he relies on.
20. On further cross examination, the witness testified that the issue arose when the sales went down due to poor sales distribution. He attributed the failure to the claimant and testified that it's the claimant who had hired the sales persons that caused the low distribution and poor sales. On being asked what was paid to the claimant as terminal dues, he testified that the claimant was paid Leave, notice and October 2018 salary. He admitted that the notice paid was for three months.
21. On re-examination, RW-1 testified that he was part of the management team as such was aware of the circumstances leading to the termination of the claimant. He also stated that there was an email notice intimating the termination of the claimant's services.



Claimant's Submissions.

22. The claimant submitted on three issues; whether the termination of the claimant was substantively unfair, whether the termination was procedurally unfair and whether the claimant is entitled to the reliefs sought.
23. On the first issue, the claimant submitted that as per the provisions of section 43 and 45 of the Employment Act, the onus is on the employer to prove the reason for termination. He argued that as much as the email of October 30, 2018 alluded to the termination, the basis upon which that email seeking to terminate his services was without any basis. It was argued further that the said email indicated that the Respondent was considering invoking clause 9 of the employment contract, which provide for a notice period of 6 months before termination or payment in lieu, which clause cannot just be invoked without the employer proving reasons for termination. To support his case, the claimant relied on the case of Kenfreight (EA) Limited v Benson K Nguti [2016] eklr.
24. On whether due procedure was followed, it was submitted that the employee's right to be heard whenever an employer was contemplating termination of their service is sacrosanct and cannot be taken away by any clause in the agreement of employment. He cited the case of David Gichana Omuya v Mombasa maize millers Limited [2014] eklr where the court held that section 41 of the Employment Act has a long pedigree in administrative and public law and are referred as the rules of natural justice. To further reinforce its arguments, the claimant cited the case of CMC aviation Limited v Mohammed Noor [2014] eklr and the case of Walter Ogal Anuro v Teacher Service Commission [2013] eklr.
25. Accordingly, that the claimant was not subjected to any disciplinary process, therefore, the termination was unlawful.
26. On the reliefs sought, it was submitted that the claimant has proved his case on a balance of probability and therefore urged this court to allow the claim as prayed.
27. I have examined all the evidence and submissions of the parties herein. From the documents and evidence herein the claimant was employed vide a contract of employment dated July 10, 2017 which indicated that the claimant was employed on a 4 year contract as managing director with effect from October 1, 2017.
28. The contract could be renewed but was upon issuance of 3 months notice. The salary attached was 2,500,000/= with some bonus and gratuity of 10% on basic pay.
29. An addendum to the contract dated September 12, 2018 indicated that the termination notice was 6 months.
30. Vide an email dated November 2, 2018, the claimant was informed of the decision to terminate his contract.
31. He was then paid kshs.7,005,504/= as his terminal dues. He was not informed of the reason for the dismissal nor subjected to any disciplinary process.
32. Section 41 of the Employment Act 2007 states 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”.
33. The respondents have averred that they terminated the claimant’s contract procedurally due to the poor performance.
34. There is no indication that the claimant was subjected to any performance contracting nor is there any evidence that his poor performance was proven based on set targets or deliberations.
35. No disciplinary hearing was conducted.
36. As provided under section 45(2) of the *Employment Act* 2007, the termination of the contract was unfair and unjustified.
37. Section 45 (2) of the *Employment Act* 2007 states as follows;-
- “45.
- {1}
{2} A termination of employment 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”.
38. The claimant was further terminated without being given notice and so he is entitled to notice pay.
39. Having stated as above and having found the claimant’s termination unfair and unjustified, I find for claimant and award him as follows;
1. 6 months notice pay as per the addendum contract = 6 x 2,500,000/=
- = 15,000,000/= (15 million)
2. 2,500,000 October 2018 salary = 2,500,000/=
3. 10 months salary as compensation for unfair and unlawful termination
- = 2,500,000 x 10 = 25,000,000/=



4. Gratuity pay of 10% basic pay as pleaded = 5,500,000/=
 5. Leave pay as pleaded 4,555,555/=
- Total = 52,555,555/=
- Less 7,005,504/= paid
- Leaving a balance of kshs.45,550,051/=
- Less statutory deductions
6. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Amemba for Claimant – present

Mukopi holding brief for Wachira for Respondent – present

Court Assistant – Fred

