



**Boriga v Mega Pack (K) Limited (Cause 101 of 2017)
[2022] KEELRC 12813 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12813 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 101 OF 2017
DN NDERITU, J
SEPTEMBER 22, 2022**

BETWEEN

DOUGLAS OGENTOTO BORIGA CLAIMANT

AND

MEGA PACK (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. In a statement of claim dated March 2, 2017 filed through Munene Chege & Co Advocates the claimant prays for:-
 - a. A declaration that the claimant’s dismissal was unlawful, unjust and discriminatory and the same amounts to unfair dismissal
 - b. Payment in lieu of notice
 - c. Compensation for unfair termination
 - d. An order compelling the respondent to settle the outstanding benefits
 - e. General damages
 - f. Cost of the suit and interest thereof at court rates
 - g. Any other relief that his court may deem fit to grant
2. Accompanying the memorandum of claim is a verifying affidavit, claimant’s statement, and a list and bundle of documents that were produced by the claimant as exhibits during the hearing.



3. In a reply to the claim dated May 9, 2017 filed through Sheth & Wathigo Advocates, the respondent denied each and every material allegation in the memorandum of claim and prays that this cause be dismissed with costs.
4. Accompanying the response to the claim is a list and bundle of documents which were produced as respondent's exhibits during the hearing and a witness statement by Eric Njenga(RW1).
5. This cause came up for hearing before this court on February 16, 2022 when the claimant (CW1) testified in-chief, was cross-examined, and re-examined and he closed his case.
6. On the same date, February 16, 2022 Eric Njenga (RW1) testified in-chief, was cross-examined, and re-examined, and the respondent closed its case.
7. After the parties closed their respective case the court directed, with the concurrence of Counsel for both parties, that written submissions be filed. claimant's Counsel, Miss Daye, filed her submissions on April 11, 2022 while Mr. Murithi for the respondent filed on April 7, 2022.

II. Claimant Case

8. As gathered from the memorandum of claim, the oral and documentary evidence adduced, and the written submissions by his counsel, the claimant's case is that he was at all material times to this cause an employee of the respondent starting off as a machine attendant and later on became a machine operator. He alleged that he was employed on or around June 15, 2013 and that he was unprocedurally, unfairly, and unlawfully dismissed on November 11, 2016.
9. The claimant testified that he was not given a hearing or a notice before dismissal and that the dismissal was irregular, wrongful, and unlawful.
10. In his oral testimony in court the claimant alleged that he used to work in shifts either from 6am to 6pm or from 6pm to 6am from Monday to Saturday. He testified that on November 10, 2016 he reported to work at 6pm and worked until 6am on November 11, 2016. He alleged that on November 11, 2016 the human resource manager informed him that he should never again come to work. He stated that he was neither issued with a warning, a show cause letter, or a notice of dismissal.
11. The claimant testified that he caused no damage to any machine(s) and that he had a clean disciplinary record. He claimed that the warning letters adduced by the respondent are forgeries and false, including the show cause letter dated May 17, 2016. He stated that he was not served with the said letters and notices.
12. The claimant testified that he was not paid salary for November, 2016 and that no terminal dues were paid to him upon the dismissal, including leave pay. He alleges that he did not take leave during the entire period of employment.
13. In cross-examination, the claimant insisted that he started as a machine attendant from December, 2013 to June, 2014 but that later on he was engaged as a machine operator from June, 2014.
14. He also testified that contrary to what is stated in the memorandum of claim he started working with the respondent in December, 2013 not June, 2013. He further claimed that he was dismissed in January, 2017 not November, 2016. He admitted that he executed the contract of employment on April 23, 2014. He stated that he was dismissed verbally by the human resource manager, Eric Njenga, and that his attempts to report back to work after November 11, 2016 were thwarted at the gate as the guards had firm instructions not to allow him into the premises.



15. The claimant admitted that he was paid salary for November, 2016 but not other dues. He admitted that in the payslip for November, 2016 he was paid leave allowance.
16. In re-examination he admitted that before he executed the contract in April, 2014 he was a casual. He alleged that the telephone line that he indicated on the contract was lost almost immediately thereafter.
17. It is on the basis of the foregoing that the claimant reiterated that he be granted as prayed in the memorandum of claim.

IV. Respondent's Case

18. The respondent's case is found in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by their Counsel.
19. RW1 testified that the claimant was on separate fixed term contracts from February 3, 2015 to November 11, 2016. He testified that the initial contract was executed on April 23, 2014. He denied that the claimant worked as a casual and emphasized that he only worked as a machine attendant and never as a machine operator.
20. RW1 testified that the claimant started at a basic monthly salary of Kshs 9,025/= plus house allowance of Kshs 1,334/= and that his last monthly basic salary was Kshs 11,650/= plus house allowance of Kshs 2,600/= making a last gross salary of Kshs 14,250/=.
21. RW1 testified that the claimant had a poor disciplinary record littered with warning letters for absenteeism, failing to answer to calls from the supervisor, among others. He testified that on the night of 10th/November 11, 2016 the claimant caused damage to the machines(s) while on duty. He testified that he called the claimant on the cellphone line that he had supplied but the claimant failed and or refused to respond.
22. RW1 testified that when the claimant reported to work at 1756 hours on November 11, 2016 he was issued with a show cause letter in the presence of shop steward, one Mr. Baraza, but the claimant refused to acknowledge receipt thereof. After this, RW1 further testified, the claimant went away and failed to ever report back to work. He testified that the claimant was summarily dismissed on November 21, 2016.
23. RW1 testified that the claimant was paid his November, 2016 salary as per the payslip he produced in court as exhibit. He alleged that a letter of dismissal was sent to the claimant through his last known address. However, RW1 did not avail a copy of the alleged dismissal letter in court.
24. RW1 testified that the claimant was an employee of the respondent in 2013 but he was paid all his dues upon expiry of the fixed term contracts in 2014 and 2015, respectively.
25. In cross-examination, RW1 claimed that since the claimant had failed to pick phone calls there was no way of inviting him for a disciplinary hearing. He stated that the claimant absconded duty after he was issued with the show cause letter.
26. On the basis of the foregoing the respondent prayed that the claimant's cause be dismissed with costs.

IV. Issues For Determination

27. Counsel for both parties executed a list of agreed issues for determination dated June 9, 2017. Upon reading the said list and considering the evidence adduced as summed up in the foregoing parts of this judgment, the following issues commend themselves to this court for determination:-



- (i) What was the nature of the employment relationship between the claimant and the respondent?
- (ii) Was the dismissal of the claimant by the respondent unfair, wrongful, and unlawful?
- (iii) If (ii) above is in the affirmative, is the claimant entitled to the reliefs sought?
- (iv) Costs.

V. Employment

28. It is not in dispute that the claimant was at all material times to this cause an employee of the respondent. It is also not in dispute that after the night of 10th /November 11, 2016 the claimant did not work for the respondent again. It is also settled that the last gross monthly salary for the claimant was Kshs 14,250/=.
29. However, there are at least two issues relating to the employment relationship that the parties differed over that need to be determined. What was the position held by the claimant as at the time of his dismissal? Was he a machine attendant or an operator? When did the claimant commence employment with the respondent?
30. In a letter of renewal of contract dated July 1, 2016 which was produced as an exhibit by the respondent, it is clear that as at the time of dismissal on or about November 11, 2016 the claimant was on a fixed term contract of six (6) months that was to run from July 1, 2016 to December 31, 2016. The claimant is described as “SFK operator” in that letter.
31. The initial contract between the claimant and the respondent, that was renewed from time to time, was executed on April 23, 2014. By the time this contract was executed the claimant was already in employment as clause 3 thereof states that the employment commenced on February 3, 2014 to run until June 30, 2014.
32. There is no designation or job description that was assigned to the claimant but the gross monthly salary was agreed at Kshs 10,379/=. The understanding of this court, reading from clause 4 of the said contract, is that the claimant was engaged as a general worker as it is stated that the claimant was “required to diligently and faithfully perform all duties assigned and any other duties within the scope of their (sic!) abilities that the company may call upon the employee from time to time to perform.”
33. Other than the various contract renewal letters which stated that
- “All other terms and conditions of service remained the same as per your original letter.”
- there is no evidence that the job description or designation for the claimant ever changed. The payslips relied on by both parties do not offer help as there is no job description or designation contained therein.
34. However, in clause 1 of the initial contract that contains the details of the employee, the job description assigned is “Afk assistant.” None of the parties explained to this court what that description or designation means or what it entailed.
35. In the other documents availed to the court by the parties the claimant is variously described as “SFK Operator”, “SFK”, “corrugator”, “SFK assistant”, among other names. This ‘mixed grill’ leaves this court in an uncertain position as to what position or job description and or designation the claimant held and at what point, rendering this court amenable to adopt the description given in the original/ initial contract that the claimant was engaged/employed as “Sfk Assistant” whatever that means. None



of the parties assisted this court in discerning what that means, but from the evidence on record the claimant was apparently a machine assistant and that is what both parties settled on as his initial engagement.

36. The claimant was therefore not able to prove that he was promoted to a machine operator at anytime during his employment. He did not adduce any evidence to prove that he was a qualified machine operator, in any event. Other than that he was a form 4 leaver, there is no other evidence on any further or other educational or professional qualifications of the claimant.
37. Other than his verbal claim in court that he was a machine operator, the claimant did not adduce evidence to unsettle the written evidence on record as alluded to above. Written evidence cannot be contradicted or displaced by verbal evidence – See section 97 of the *Evidence Act* (Cap 80).
38. On the issues stated above concerning the nature of the employment of the claimant, therefore, this court returns that the claimant was a machine attendant or assistant who was engaged by the respondent on various separate fixed term contracts running from February 3, 2014 to the time of his dismissal on November 11, 2016. His last gross salary was Kshs 14,250/=.

VI. Dismissal

39. The two parties have given diametrically opposed versions on how the employment relationship between them ended. On the one hand, the claimant alleges that when he reported to work on November 11, 2016 he was verbally informed by the human resource manager, RW1, that his employment had ended. On the other hand, the respondent, through RW1, alleged that after the claimant caused damage to the machine(s) on the night of 10th/November 11, 2016 he was served with a show cause letter but the claimant absconded duty from that point, deserted duty, and never returned to work.
40. The claimant testified that after November 11, 2016 he was denied entry into the premises by the gate guards on instructions from the management of the respondent.
41. The respondent did not produce any records to demonstrate that the claimant was away from work as from November 11, 2016. There is no evidence on record to prove that the respondent applied reasonable means to trace the claimant to resume duty after the alleged desertion by the claimant. Counsel for the claimant has ably cited the South African case of *Feabolo v Belgravia Hotel* (1997) 6 BLLR 829 to distinguish desertion from absenteeism and also *Felistas Achaba Ikatwa v Charles Peter Otieno* (2018) eKLR on the duty of an employer to demonstrate efforts made towards getting an employee to resume duty in case of desertion.
42. It would therefore appear to this court that the respondent failed to keep records of employment of the claimant as required under sections 10 and 74 of the *Employment Act* (the Act). Such records would have demonstrated and proved when the claimant stopped attending to his duties and the reason(s) therefor.
43. There is no reason as to why the claimant would have left the employment with the respondent yet he had not, according to his evidence, secured another job.
44. RW1 was not forthright in his evidence; he even failed to produce in court the show cause letter that was allegedly issued to the claimant after he allegedly deserted duty.
45. In the circumstances, this court is inclined to believing the evidence by the claimant that he was verbally dismissed by the respondent's human resource manager (RW1) on November 11, 2016. The letter of dismissal was not produced in court.



46. It follows that the claimant was not issued with a notice of dismissal, no hearing was accorded to him, and no reason was given for the dismissal. The respondent failed to comply with sections 35, 41, and 45 of the Act. Further section 43 of the act requires that an employer shall prove the reasons(s) for the termination or dismissal, as the case may be. Other than unsubstantiated allegation that the claimant had damaged machines, there is no reason or evidence given by the respondent as to why the claimant was dismissed.
47. The absolute necessity for substantive and procedural fairness in termination or dismissal of an employee cannot be overemphasized. A plethora of decisions from this court (the ELRC) has settled this issue. Such decisions include Kenya Union of Commercial & Allied Workers Limited (2014) eKLR, 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.
48. This court finds and holds that the dismissal of the claimant was irregular, unfair, wrongful, and unlawful.

VII. Reliefs

49. The reliefs sought by the claimant were set out at the commencement of this judgment. Now this court shall consider each prayer as hereunder.
50. Prayer (a) is for a declaration that the claimant's dismissal was unlawful. This court has no difficulties in making that declaration as this court has already found so in the proceeding part of this judgment.
51. Prayer (b) is for one month's gross salary *in lieu of* notice. Clause 9 of the initial contract between the parties, which was extended from time to time, provides that either party could terminate the contract by issuing a one month's notice or one month's salary in lieu of notice.
52. Having found that the dismissal was unlawful and that no notice was issued, this court has no difficulties in awarding the claimant one month's last gross salary in lieu of notice in the sum of Kshs 14, 250/=.
53. Prayer (c) is for compensation for unfair termination. The letter of contract renewal dated July 1, 2016 confirms that the new fixed term contract was to terminate on December 31, 2016 by effluxion of time. Upon that expiration the parties were free to either enter into a new contract or part ways. It is clear, either way, that the employment relationship between the claimant and the respondent, as at the time of dismissal, was only guaranteed to continue upto December 31, 2016 and not beyond, except by mutual consent.
54. By reason of the foregoing, what the claimant actually lost as a result of the unlawful termination was the gross salary due till the end of the contract. The claimant was paid the monthly salary till November, 2016 and hence the salary that is due is for December, 2016 in the sum of Kshs 14,250/=. This amount is hereby awarded.
55. Prayer (e) is for general damages which cannot be awarded as there is absolutely no evidence as to why the same may be awarded. General damages is not awardable in employment claims as the same is replaced with compensation under Section 49 of the Act. This claim for general damages is thus denied.
56. The claim for leave allowance is denied as the same was paid in the payslip for November, 2016 and the claimant has not demonstrated that he was owed more than what was paid.



VIII. Costs

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

IX. Orders

58. . In disposal of this cause this court makes the following orders:-

- (a) A declaration be and is hereby issued that the dismissal of the claimant by the respondent was unfair, wrongful, and unlawful.
- (b) The claimant is awarded the following
 - (i) One (1) month's salary in lieu of notice - - Kshs 14,250/
 - (ii) Compensation for unlawful dismissal in the remainder of the fixed term contract -Kshs 14,250.00Total - Kshs 28,500.00
- (c) Costs to the claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE

