



Kioko v Astral Industries Limited (Employment and Labour Relations Claim 1980 of 2017) [2022] KEELRC 3952 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 3952 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CLAIM 1980 OF 2017
JK GAKERI, J
SEPTEMBER 22, 2022**

BETWEEN

STEPHEN MUTISYA KIOKO CLAIMANT

AND

ASTRAL INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this claim by a memorandum of claim filed on October 4, 2017.
2. The claimant avers that he started working in January, 2012 as a mechanic operator designated as a helper at Kshs 15,500/= per month.
3. It is avered that the claimant worked for 12 hours 6 days a week.
4. The claimant further avers that the gross salary of Kshs 15,500/= included basic and housing allowance as 15% paid at the end of each month. That the respondent did not pay house allowance since inception of employment.
5. It is the claimant's case on June 13, 2016, the respondent unlawfully and unfairly terminated his employment allegedly for low work flow and a replacement was hired after his termination.
6. The claimant avers that the termination of employment was malicious and unlawful and claims for an award of Kshs 763,147.20
7. The claimant prays for;
 - i. A finding that the termination of employment was unfair, unlawful and discriminatory.
 - ii. Payment of salary for the period he was out of employment.
 - iii. Payment of benefits, notice pay, leave and severance pay.



- iv. Compensation (12 months).

Respondent's case

8. The respondent filed a memorandum of reply on December 8, 2017 denying that it employed the claimant in January, 2012. It avers that the claimant was engaged under a fixed term contract effective January 4, 2016 to November 25, 2016 at a monthly salary of Kshs 15,000/= inclusive of house allowance.
9. It further avers that the claimant worked for 8 hours per day, 6 days a week as per the contract.
10. It is the respondent's case that the claimant's salary was consolidated.
11. The respondent further avers that the claimant did not work overtime at all and all wages due were paid and further denies that it terminated the claimant's employment unlawfully or unfairly.
12. The respondent prays for the dismissal of the suit with costs.

Claimant's evidence

13. The claimant adopted the written statement dated August 26, 2017. The statement rehashes the contents of the memorandum of claim save for the addition that the respondent was making all statutory deductions.

Respondent's evidence

14. The respondent did not participate in the hearing as it was absent on the hearing date taken by consent on November 9, 2021.
15. At the close of the hearing, the respondent was accorded 14 days after service of submissions to file its own and notice of mention was served on June 16, 2022.
16. The respondent's counsel was accorded a further 10 days to file submissions but did not do so.

Claimant's Submissions

17. The claimant identifies two issues for determination, namely; whether termination of the claimant's employment was unfair and unlawful and whether the claimant is entitled to the reliefs sought.
18. As regards the termination of employment, the claimant relies on the provisions of section 45(2) of the *Employment Act*, 2007 to urge that the reason cited by the respondent was invalid as a replacement was hired after termination of the claimant's employment.
19. Section 2 (1) and 40 of the *Employment Act* are relied upon to demonstrate the definition of redundancy and the conditions an employer must fulfil for a redundancy to pass muster. It is urged that the respondent did not fulfil these conditions.
20. Reliance is also made on the decision in *Aviation & Allied Workers Union V Kenya Airways Ltd & 3 others* (2012) eKLR to underscore the essence of a redundancy notice required by the provisions of section 40(1)(a) of the *Employment Act*, 2007.
21. It is urged that the claimant's dismissal from employment was unlawful and unfair for want of procedural fairness.



22. As to whether the claimant is entitled to the reliefs sought, the claimant submits that he is entitled to the maximum compensation of 12 months at Kshs 186,000/= as the respondent did not comply with the prescribed procedure.
23. That the claimant is entitled to overtime pay since he worked from 7.00 am to 7 pm, a total of Kshs 702,768/= and accrued leave days at Kshs 66,787/=.
24. Finally, it is submitted that the claimant is entitled to notice pay, salary for July, 2016, service pay and certificate of service.
25. The respondent did not file submissions.

Determination

26. After careful consideration of the pleadings, evidence on record and submissions by counsel for the claimant, the issues for determination are;
 - i. Whether termination of the claimant's employment was unfair and unlawful.
 - ii. When the claimant was employed by the respondent.
 - iii. Whether the claimant is entitled to the remedies sought.
27. As to when the claimant was employed by the respondent, while the claimant avers that he joined the respondent in January, 2012, the respondent states that he was employed in 2016 under a fixed term contract from January to November 2016 as the employment contract produced by the claimant show. The document is entitled renewal of contract and is dated January 4, 2016. Other than the letter of termination dated June 13, 2016 and a payslip dated June, 2016, the claimant has not furnished any other evidence on his relationship with the respondent from January, 2012 as alleged.
28. The court finds it puzzlingly that the claimant was an employee of the respondent for over 4 years and has a single pay slip for June, 2016.
29. In the absence of credible evidence or indication of any employer/employee relationship between the claimant and the respondent from January, 2012, the court will be guided by the documentation on record which show that the claimant was engaged on January 4, 2016 and his employment was terminated on July 13, 2016.
30. This finding is grounded on the proposition that the standard of proof is not lessened where a claim is undefended. The court is guided by the sentiments of Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR. The claimant is obligated to prove the allegations made on a balance of probability. This is consistent with the provisions of section 107 and 108 of the *Evidence Act* that, he who alleges must prove.
31. In *Humphrey Munyithya Mulemi V Soluxe International Group of Hotels & Lodges Ltd* (2020) eKLR, the court stated as follows;

“In the case of *Monica Kanini Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of employment.”



32. In the instant case whereas the letter of termination of employment and payslip all dated June 2016 show that there was an employment relationship between the claimant and the respondent, the documents shed no light on when the relationship started.
33. As to whether the respondent terminated the claimant's employment unfairly, the springboard are the provisions of *Employment Act*, 2007 on termination and redundancy.
34. Section 45(2) of the Act provides that for a termination of employment to pass the fairness test, the employer must establish that it had a valid and fair reason to terminate the employment contract and did so in accordance with fair procedure.
35. Section 43 of the Act thrusts the burden of proof upon the employer to demonstrate the fairness of the termination of employment.
36. In a nutshell, for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair.
37. Both the Court of Appeal and this court have been unambiguous on these requirements. (See *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR, *CMC Aviation Ltd V Mohammed Noor* (2015) eKLR and *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.
38. In *CMC Aviation Ltd V Mohammed Noor* (Supra), the Court of Appeal stated as follows;

“We respectfully agree. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's services but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination . . .”
39. The court is guided by these sentiments.

Reasons for Termination

40. The letter of termination of the claimant's employment dated June 13, 2016 under the reference “termination of employment-one month's notice” states as follows;

The management has decided to terminate your contract effective today 1 June 3, 2016 due to low work flow.

We are hereby giving you a one month notice and your last working day will be July 13, 2013.

All monies due to you shall be paid accordingly.
41. The claimant acknowledged receipt of the letter on June 14, 2016.
42. The contents of the letter are implicit that the respondent was right-sizing or down-sizing its workforce. This is a redundancy statement which triggered the provisions of section 40 of the *Employment Act*.
43. Section 40(1) of the employment is emphatic that;

An employer shall not terminate the contract of service on account of redundancy unless the employer complies with the following conditions . . .”

The provision is couched in mandatory terms and sets out the requirements on notice to trade union or the employee and the Labour Officer explaining the reasons for and extent of the intended redundancy, selection criteria, ensuring fairness if there is a CBA between the employer and a trade union, payment



of leave in cash, one month's notice or salary in *lieu* of notice and severance pay of not less than 15 days pay for each completed year of service.

44. There is no dispute that from the evidence on record, the respondent did not comply with the provisions of section 40(1) of the [Employment Act](#).
45. The respondent did not give the claimant notice of intended redundancy, there were no consultations, or notice to the Labour Officer among other omissions.
46. The essence of the notice was explained in [Aviation & Allied Workers Union V Kenya Airways Ltd & 3 others](#) (Supra) and the court is in agreement with the sentiments of the court.
47. While employers are at liberty to right or down-size, restructure, re-organize or adopt new technology in the workplace, they must do so within the prescribed legal framework.

Procedure

48. Non-compliance with the provisions of section 40(1) of the [Employment Act](#) renders the redundancy non-compliant with the law and becomes an unfair termination of employment.
49. In the instant case, the respondent led no evidence of its workforce and the alleged low volume of work which are demonstrable by evidence.
50. Needless to belabour, the respondent had no selection criteria and made no severance pay.
51. Non-compliance with the provisions of section 40(1) of the [Employment Act](#) rendered the purported redundancy an unfair termination of the claimant's employment and the court so finds.

Reliefs

52. Having found that termination of the claimant's employment on account of redundancy was unfair, I will now proceed to examine the reliefs prayed for.
 - a. It is the finding of the Court that termination of the claimant's employment was unfair and unlawful.
 - b. Payment of salary for the duration he was out of employment.
53. The claimant furnished the court with no particulars of this claim. Neither the memorandum of claim nor the oral or written testimony specify the duration involved or the loss suffered.

The prayer lacks anchorage in law in its current format and is declined.

 - c. Benefits
54. It is trite that pleadings must not only be clear but specific as well. (See [Joash Otieno Kongere V South Nyanza Sugar Co. Ltd](#) (2020) eKLR).
55. Relatedly, special damages must not only be pleaded but must also be proved. (See [Hahn V Singh](#) (1985) eKLR).
 - i. Overtime pay
56. The claimant led no evidence of the hours and days when he worked overtime as a Helper. The contract of employment on record show that working hours were 8 for 6 days per week. The claimant did not testify on when he would report to work or exit.



57. Finally, the payslip for June, 2016 has an entry for overtime pay of Kshs 3,164.58 which would appear to suggest that the respondent was paying for overtime as provided by the employment contract.

The prayer is declined.

ii. House Allowance

58. Intriguingly, whereas paragraph 4 of the memorandum of claim state that the claimant's gross salary of Kshs 15,500/= "included basic and house allowance as 15%, paragraph 6 states that the claimant "has never been paid house allowance since inception of employment . . ." More significantly, clause 3 of the employment contract on 'emoluments' states as follows:

Your gross salary will be Kshs 15,500/= which includes your basic pay and housing allowance as 15% . . ."

59. The claimant signed the contract on a date that is undecipherable from the documents on record, but appears to be on a 3rd, the month and year are illegible.

For these reasons, the prayer for house allowance is declined.

iii. Accrued Leave

60. The claimant has not indicated how many leave days are involved and how the amount due was arrived at. In the absence of particulars, the prayer for leave pay is declined.

iv. July salary

61. The claimant adduced no evidence that the July salary was not paid. Neither the oral evidence nor the written statement allege that the salary for July, 2016 was outstanding.

62. It is also worth noting that the claimant's last day of service was 13th July, 2016 when the one month notice ended.

The prayer is declined.

v. Service pay

63. The payslip on record shows that the respondent was making NSSF deductions from the claimant's salary. In addition, the claimant adduced no evidence that the deductions were not made or remitted to the National social security fund. Moreover, section 35(6)(d) of the Employment Act disentitles members of the NSSF From service pay.

The prayer is declined.

vi. 12 months compensation

64. Granted that termination of the claimant's employment was unfair, the claimant is entitled to the discretionary relief provided by section 49(1)(c) of the employment subject to taking into account the parameters set forth in section 49 (4) of the Act.

65. The court has taken into consideration the fact that;

i. The claimant served the respondent for a very short time of about 6 months.

ii. The claimant wished to continue in the respondent's employment.

iii. The claimant did not appeal the respondent's decision.



- iv. The claimant had no previous warnings or notice to show cause.
66. In the circumstances of this case, the court is satisfied that two (2) the equivalent of months salary is fair Kshs 31,000/=.
67. In the final analysis, judgement is entered for the claimant against the respondent as follows;
- a. Equivalent of 2 months salary.
 - b. Costs of this suit.
 - c. Interest at court rates from date of judgement till payment in full.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

