



**Oleshetiti v Astral Industries Limited (Cause 1979 of 2017)
[2022] KEELRC 4855 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4855 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1979 OF 2017
JK GAKERI, J
SEPTEMBER 22, 2022**

BETWEEN

ENOCK MOLENJE OLESHETITI CLAIMANT

AND

ASTRAL INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated this claim by a memorandum of claim dated August 26, 2017 filed on October 4, 2017 alleging that his employment was unfairly and unlawfully terminated by the Respondent.
2. The Claimant avers that he started working for the respondent on June 25, 2013 as a driver at Kshs 17,000/= per month and the pay included housing allowance as 15% paid in arrears with all statutory deductions were made.
3. It is further avered that the claimant worked for 12 hours, 6 days a week as opposed to the prescribed 8 hours and was not paid overtime.
4. The claimant further alleges that he was underpaid contrary to the law.
5. That he was never granted leave or paid for leave days or paid house allowance.
6. The claimant alleges that by letter dated June 13, 2016, the respondent terminated his employment unfairly, wrongfully and unlawfully without salary or terminal dues having been a hard worker with an impeccable record.
7. The claimant prays;
 - i. That the court find his termination to have been unfair, unlawful and discriminatory.
 - ii. That the respondent pays him for the period he has been out of employment.



- iii. The respondent pays the claimant all his benefits, notice pay, pro rata leave for three years and severance pay.
- iv. Full compensation of 12 months for loss of employment.
- v. Costs of this suit.
8. The respondent filed a memorandum of reply on December 8, 2017.
9. The respondent denies having employed the claimant on June 25, 2013 as alleged and avers that it employed him on a fixed term contract on January 4, 2016 due to expire on November 25, 2016.
10. The respondent denies that the claimant worked for 12 hours per day, that he only worked for 8 hours a day and did not work overtime.
11. It is the respondent's case that the claimant's salary was above the minimum wage which at the time was Kshs 14,785/70.
12. That the claimant went on leave and rested on all gazetted public holidays.
13. The respondent further avers that the claimant did not work overtime and the salary paid by the respondent was consolidated and thus included house allowance.
14. It is the respondent's averment that termination of the claimant's employment was lawful as he was notified of the reasons for termination and no replacement was hired.
15. That the claimant was paid all terminal dues due to him.
16. The respondent prays for dismissal of the suit with costs.

Claimant's evidence

17. The claimant's written statement which he adopted as evidence in chief rehashes the contents of the memorandum of claim. The evidence is unchallenged.

Respondent's evidence

18. Intriguingly, the respondent did not appear in court on July 16, 2019, when the court certified the matter ready for hearing.
19. It did not appear before the Deputy Registrar on September 7, 2020, October 5, 2020, October 26, 2020, November 16, 2020, December 10, 2020, January 19, 2021 and February 23, 2021.
20. Counsel for the respondent was in court on November 9, 2021 when a hearing date was fixed by consent but did not appear for the hearing on May 19, 2022, and the suit proceeded to hearing at 10.53 am.
21. The court directed the claimant to serve submissions on the respondent and accorded the respondent 14 days after service.
22. On June 20, 2022, counsel for the respondent was in court and sought the court's indulgence to file submissions and was accorded 10 days to file and serve its submissions and a judgement date was given.
23. By July 18, 2022 when the court retired to write this judgement, the respondent had not filed its submissions.



Claimant's Submissions

24. The claimant identifies two issues for determination namely;
- i. Whether the claimant was unfairly and unlawfully terminated from employment.
 - ii. Whether the claimant is entitled to compensation for unlawful termination.
25. As to whether the claimant's termination from employment was unfair or unlawful, the claimant relies on section 45(2) of the [Employment Act, 2007](#) to urge that the reason for termination was unjustified rendering the termination of employment unfair as the relevant provisions of the [Employment Act](#) relating to redundancy were not complied with.
26. Reliance is made on the decision in [Aviation and Allied Workers Union Kenya v Kenya Airways Ltd](#) (2012) KLR to reinforce the submission that the respondent ignored the guiding principles which rendered the termination of employment procedurally unfair.
27. As regards compensation, the claimant submits that he is entitled to the 12 months compensation of Kshs 223,142.40 for unlawful termination, overtime pay of Kshs 571,968, underpayment of Kshs 57,427.20, unpaid leave days Kshs 56,378.70, certificate of service, notice pay and service pay.

Determination

28. The issues for determination are;
- i. Whether termination of the claimant's employment was fair.
 - ii. When the claimant was employed by the respondent.
 - iii. Whether the claimant is entitled to the reliefs sought.
29. As to whether termination of employment was fair, the starting point are the relevant provisions of the [Employment Act, 2007](#).
30. Section 45(2) of the Act provides that;
- 2 A termination of employment by an employer 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.
31. This provision is the bedrock of termination of employment. Employers are bound to ensure that these requirements and those of other provisions such as section 35, 41, 43, 44 and 47(5) are complied with.
32. The net effect of these provisions is that for a termination of employment to pass the fairness test or muster, it must be substantively justifiable and procedurally fair.
33. This proposition has been elaborated in legions of decisions of this court and the Court of Appeal such as in [Naima Khamis v Oxford University Press \(EA\) Ltd](#) (2017) eKLR, [Walter Ogal Anuro v Teachers Service Commission](#) (2013) eKLR and among others.



34. While substantive justification of the termination of employment relates to the reason or reasons for the termination, procedural fairness as the phrase suggests relate to the process employed in effecting the termination. (See Ndolo J in [Walter Ogal Anuro v Teachers Service Commission](#) (Supra).

Reasons for termination

35. The claimant alleges that his employment was terminated by letter dated June 13, 2016. The letter is in fact dated June 14, 2016. The letter under reference “Termination of Employment one month’s notice” states as follows;

“The management has decided to terminate your contract effective today June 13, 2016 because of low work flow.

We are hereby giving you one month’s notice and your last working day will be July 13, 2016.

Any other monies due to you shall be paid accordingly.

Regards.

Signed

Nitesh Rabadiya

Manager.

36. The letter is implicit that the claimant’s employment was terminated on account of redundancy.
37. Section 2 of the [Employment Act, 2007](#) defines redundancy as;

”The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

38. Section 40 of the [Employment Act](#) on the other hand prescribes the tenets to be complied with to effectuate a redundancy process. This provision sets out seven (7) conditions which an employer must meet in a redundancy process.

39. Section 40(1) is emphatic that;

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

This provision is couched in mandatory terms. The employer must give notice to the trade union or the employee and the Labour Officer setting out the reasons for and extent of the intended redundancy, have a selection criteria, ensure that any CBA in force does not place the employee at a disadvantage on account of being or not being a member of a trade union, payment of leave days in cash, notice and severance pay.

40. In the instant case, it is evident that the respondent did not comply with the provisions of section 40(1) of the [Employment Act](#) which undoubtedly renders the termination of the claimant’s employment unfair.

41. As regards the date of employment, the parties cite different dates while the claimant alleges that he was employed on June 25, 2013, the respondent avers that he was engaged under a fixed term contract from January 4, 2016 to November 25, 2016.



42. The unauthenticated document relied upon by the claimant appears to support the respondent's case on the dates, though unreliable as evidence for lack of authentication and legibility.
43. More significantly, the claimant has attached pay slip for November, 2014, the only credible evidence of employment in 2014. The claimant led no evidence that he was employed on June 25, 2013 as alleged.
44. In the absence of any documentary evidence or signification of the date of employment, the court has no alternative but to rely on the documents on record and in particular the payslips as an indicator of the tentative date of employment of the claimant and as a consequence the effective date is November 1, 2014.
45. Having found that termination of the claimant's employment was unfair, I will now proceed to assess whether the claimant is entitled to the prayers sought.
 - a. Having found that termination of the claimant's employment was unfair, a declaration to that effect is merited.
 - b. Salary for the period the claimant has been out of employment
46. The claimant led no evidence to establish this prayer. Neither the statement of claim nor the oral or written statement specify the duration he has been out of employment or loss suffered.

The prayer lacks anchorage in law as prayed for and is declined.

(c) Benefits

47. It is trite that pleadings must not only be clear but specific as well. (See *Thomas Nziwa Mwanzia v Sammy Kisangi Mutie & another* (2016) eKLR, *Joash Otiemo Kongere v South Nyanza Sugar Co Ltd* (2020) eKLR.
48. More significantly, special damages must be pleaded and proved.
49. In *Hahn v Singh* (1985) eKLR, the Court of Appeal stated as follows;

“ . . . Special damages which must not only be claimed specifically but proved strictly for they are not the direct natural and probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by Bowers L J in *Ratcliffe v Evans* (1892) AC 515 at 532-33 . . . ”
50. Whereas the claimant pleads for overtime pay, house allowance and underpayment, the same are not included as prayers. Be that as it may, since the specific claims have been pleaded and guided by the provisions of Article 159(2) (d) of the *Constitution of Kenya, 2010* , the court will consider the claimant's memorandum of claim in its entirety and make awards as generally pleaded.

(i) Overtime Pay

51. Although the claimant's statement states that he worked for 12 hours per day for 6 days a week as a driver, he did not indicate his day-to-day work as a driver.
52. In addition, from the computations on record, it is doubtful that the claimant worked for 12 hours for 6 days a week without fails since 2013 when he allegedly joined the respondent.
53. There is no shred of evidence to establish this prayer and it is declined.



(ii) House allowance

54. In his oral testimony, the claimant testified that his salary did not include house allowance. However, the payslips on record have an entry for house rent allowance. Similarly, paragraph 4 of the memorandum of claim is explicit that the salary included house allowance of 15%.

The claim for the house allowance is dismissed.

(iii) Accrued leave days since 2013

55. This claim is founded on the premises that the claimant did not proceed on leave for a single day during his employment which is high improbable.

56. Moreover, while the payslip for November, 2014 for instance shows that the claimant was paid for 30 days at Kshs 15,000/=, the payslip for December 2015 shows that he worked for 23 days and was paid Kshs 17,000/=.

57. In addition, the relevant particulars have not been pleaded.

58. Finally, the claimant was paid a sum of Kshs11,900/= as leave in December 2015. In the circumstances, the prayer for leave pay is declined.

(iv) Salary underpayment

59. From the payslips on record, the claimant's salary in November, 2014 was Kshs 15,000/= per month while by December, 2015 it had risen to Kshs17,000/= per month.

60. From the payslips on record, it is clear that the claimant's salary was pegged to a daily rate, for instance in 2014, it was Kshs.500 while in December, 2015 and June, 2016, it was Kshs.566.67.

61. Under the Regulation of Wages (General) Amendment Order 2013/2014 effective May 1, 2013 to April 30, 2014, the daily rate for a driver in Nairobi was Kshs 799.05 inclusive of house allowance and under the Regulation of Wages (General) Amendment Order 2015 effective May 1, 2015 to April 30, 2016, it had risen to Kshs 894.90 inclusive of house allowance.

62. It would appear that the claimant was underpaid by the respondent and is entitled to the difference as follows; November 2014 to April 30, 2015 (6 months) at Kshs 799.05 less Kshs 566.67. May 1, 2015 to June 13, 2016 (13 months, 13 days) at Kshs 894.90 less Kshs 566.67.

(v) Notice Pay

63. The letter of termination of employment dated June 14, 2016 states that the claimant was given one (1) month notice from June 13, 2016 to July 13, 2017.

64. Relatedly, the sum of Kshs 981,432.16 pleaded in paragraph 10 of the memorandum of claim does not include notice pay. The prayer is declined.

(vi) Severance Pay

65. The claimant adduced no evidence to prove entitlement to this prayer. Similarly, having found that the respondent did not comply with the relevant provisions of the *Employment Act* on redundancy, the termination of employment is deemed unfair within the meaning of section 45 of the Employment and severance pay is not available as a relief.

The prayer is declined.



(vii) Compensation for unfair termination

66. Having found that the 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 Act, 2007*.
67. In determining the level of compensation, the court has taken into account the following;
- i. The claimant was an employee of the respondent for about 3 years and wished to continue.
 - ii. The claimant did not contribute to the termination of employment.
 - iii. The claimant did not appeal the termination of employment.
68. In the circumstances of this case, the court is satisfied that the equivalent of 3 months' salary is fair.
69. In conclusion, judgement is entered for the claimant against the respondent in the following terms;
- a. Declaration that termination of the claimant's employment was unfair and unlawful.
 - b. Salary underpayment from November 14, 2014 to June 13, 2016.
 - c. Equivalent of 3 month's salary as compensation.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.
70. For the avoidance of doubt, all other prayers are declined.
71. The claimant's advocate shall compute the amount due to the Claimant as underpayment, serve the same upon the respondent's advocate for concurrence and/or modification and file in court within 30 days for adoption.
72. 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

