



**Workers Union v Rastopark (Employment and Labour Relations Cause
15 of 2019) [2022] KEELRC 4085 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4085 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 15 OF 2019**

**JW KELI, J
SEPTEMBER 22, 2022**

**BETWEEN
KENYA HOTEL AND ALIED WORKERS UNION CLAIMANT
AND
HOTEL RASTOPARK RESPONDENT**

JUDGMENT

1. The Claimant, a trade union registered in the Republic of Kenya to represent workers in Kenya hotels and allied workers filed a claim dated August 14, 2019 and received in court on the same date, on behalf of the grievant, against the Respondent seeking for declaration of unfair and unlawful termination, compensation and terminal dues under clause 4 of the Claim.
2. In addition, the Claimant filed together with the statement of claim witness statement of Chrispinus Ouma Ojiambo (grievant), verifying affidavit to the statement of claim, the witness statement all dated the August 14, 2019 and list of documents with the bundle of the documents.
3. The Claim is opposed by the Respondent who entered appearance via the lawfirm of Ouma-Okutta & Associates Advocates and filed response to the claim dated August 27, 2019.

Hearing and Evidence

4. The case for both parties was heard on the May 11, 2022.
5. The Claimant's witness Chrispinus Ouma Ojiambo testified on oath as CW1 by adopting his written statement dated August 14, 2019 as his evidence in chief and relied on the statement of claim. He also relied on the documents filed with the claim marked as exhibits HRP1 to HRP9 CW1 was cross-examined by Mr Okutta Advocate, for the Respondent and on re-examination the Claimant closed its case.
6. The Respondent did not call any witness. It closed its case.



7. The court directed the parties to file written submissions after the hearing. The Claimant's written submissions are dated June 2, 2022 and filed in court on the June 6, 2022. The Respondent's written submissions drawn by Wycliffe Okutta Advocate are dated May 27, 2022 and filed in court on the June 3, 2022.

The Claimant's case

8. The Claimant's case was that the grievant was employed by the Respondent verbally on the June 8, 2015 as a cook and earned a basic salary of Kshs 8,000/ per month without provision of house allowance. That the grievant was suspended from service for 15 days on basis of failing to prepare a meal for the manager and on other allegation of shortage of 49 plates of chips and 10 glasses passion juice. That the letter of suspension had a double penalty of warning and recovery of Kshs 8,000/- from his salary (Appendix HRP4). That on expiry of the 15 days the grievant reported back to work but was denied entry to the premises.
9. That the Claimant took up the matter with the Ministry of Labour wherein a conciliator was appointed (HRP6). The conciliator invited the parties to a hearing (HRP7).
10. The parties appeared before the conciliator and made submissions and the conciliator made his report which is filed in court (HRP 8).
11. The Claimant told the Court that the grievant was underpaid and produced the minimum wages for cooks based at Nairobi being Kshs 13,960.80 (HRP9)
12. The Claimant states that the grievant was not granted annual leave for entire period he worked, was not paid salary for July 2018 and 6 days worked in August 2018 as well as termination notice.

The Respondent's case

13. The Respondent's case as per response to the claim dated August 27, 2019 is that the grievant was never their employee hence no cause of action. That no demand notice was served.

Determination

Issues for determination

14. The Claimant in its submissions identified the following issues for determination namely:-
 - a. Whether the grievant, Chrispinus Ouma Ojiambo was in employment of the Respondent as stated in the Claimant's pleadings and grievant's testimony.
 - b. Whether the claimant was unfairly dismissed by the Respondent.
 - b. Whether the claim as computed by the Claimant is payable.
15. The Respondent in its written submissions addressed the following as the issues:-
 - a. Whether the suit brought by the Claimant is defective for want of capacity.
 - b. Whether the grievant was an employee of the Respondent
16. The court having read the pleadings and heard the case by the Claimant in court and considering the issues addressed by the parties in their respective written submissions is of the considered opinion that the issues placed before court by the parties for determination of the dispute as follows:-



- a. Whether the Claimant has capacity to file the instant suit
- b. Whether the grievant was employed as a cook by the Respondent
- c. Whether the termination of the employment of the grievant was lawful and fair.
- d. Whether the grievant was underpaid
- e. Whether the Claimant is entitled to reliefs sought.

The relevant law

17. Section 43 of the *Employment Act* addresses proof of reasons for termination of employment as follows:-

' (a) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.'

18. Section 44 (4) of the *Employment Act* provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-

- (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
- (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
- (c) An employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.'

19. Section 45 (2) of the *Employment Act* provides that a termination of Employment by an employer is unfair if the employer fails to prove:-

- a. The reason for the termination is a fair reason:-
 - i. Related to the employees conduct, capacity or compatibility or
 - ii. Based on the operational requirements of the employer.

20. Section 46 of the *Employment Act* provides for reasons that do not constitute fair reasons for dismissal.

21. Section 47(5) of the *Employment Act* provides for burden of proof in claims for wrongful dismissal as follows:

' (5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.'



Thus, the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.

22. Section 41 of the *Employment Act* provides for procedural fairness as follows:- '41. (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.'

a. Whether the Claimant has capacity to file the instant suit

23. The Claimant pleaded under paragraph 1 of the Memorandum of Claim that it was a duly registered union within the meaning of the *Labour Relations Act*, 2007 to cater for unionisable employees in the hospitality industry as envisaged in her constitution and annexed its certificate of registration and its Constitution (Appendix HRP1). The Respondent being an hotel falls under the industry in which the Claimant is authorised to represent workers.
24. The Respondent filed its response dated August 27, 2019 and did not object to the capacity of the Claimant to bring the instant suit. It however raised the issue during the cross-examination of the grievant who told the court the Union brought the suit on his behalf.

Court determination on the issue

25. The Claimant is a registered union and evidence was produced in court of its registration and its constitution (HRP1). The Claimant also produced membership form indicating the grievant was its member (HRP3). The Claimant further produced the report of the Conciliator who recognised its status during the conciliation process. The Respondent participated in the proceedings and did not raise the issue of capacity of the Claimant to represent the grievant.
26. The Claimant being a registered union to represent hotel workers and the grievant being its member, under the provisions of the *Labour Relations Act* Section 4 and Section 73 and taking into account the provision of Article 41 of the *Constitution* all which protect employee rights to fair labour practice and right to join unions and for the unions to represent the members, the Court finds and determines that the Claimant has capacity to sue and be sued and to represent the interest of its members in employment claims and trade disputes.

The court finds and determines the Claimant had capacity to institute the instant suit.

b. Whether the grievant was employed as a cook by the Respondent.

27. The Claimant pleaded under paragraph 2.1 of its Memorandum of Claim that the grievant was verbally employed by the Respondent on the June 8, 2015 as a cook and earned a basic salary of Kshs 8,000/- per month without provision for house allowance. That the grievant was issued with a suspension letter on July 23, 2018 from the Manager (Appendix HRP4). The parties appeared before the conciliator who issued a report on her findings and opinion on the April 16, 2019 (Appendix HRP8).
28. The Respondent in its response states that the Claimant has never been in Respondent's employment as such at all. That it has never entered into a contract with the claimant and the claim is mischievous, vexatious, scandalous and an abuse of the court process. That the claimant was never issued with a termination letter as there was no contract in the first place for such to be issued.



29. During cross-examination of CW1 by Counsel for the Respondent, the grievant told the court his employer was Hotel RastoPark, that he did not have employment letter, that he was earning Kshs 8000/- and was paid in cash and documents retained by the office, that the owner of the hotel who he worked for was one Josphat Matete who issued him with a dismissal letter. During re-examination the grievant relied on the letter of suspension by Ayub Muyekwe(App HRP4) CW1 told the court he worked for Hotel RastoPark and did not bother with its ownership.

Court determination on the issue

30. The Claimant produced evidence of suspension of grievant from employment (HRP4) by Ayub Muyekwe of Rasto Park. It also produced the report of the conciliator dated April 16, 2019 where the submissions of the Respondent are recorded as follows:-‘ that the grievant was employed by the hotel as cook in 2015. That he was suspended on the July 23, 2018 due to missing items in the hotel. That the hotel owes him nothing because he was paid all his dues.’

31. In the said report the finding of the conciliator are as follows, inter alia,

‘That indeed the aggrieved was employed by Rasto park hotel on the June 8, 2015.’

32. The Respondent did not deny the contents of the conciliation report in its defence. The conciliation process is a statutory process as stated under Section 73 of the *Labour Relations Act*. The Respondent did not call any witness to rebut the claim of employment of the grievant.

33. The court finds and determines that the Claimant has discharged its burden of prove that the grievant was an employee of the of the Respondent as a cook.

c. Whether the termination of the employment of the grievant was lawful and fair.

34. The Claimant produced evidence that the grievant was suspended from employment (HRP4) for 15 days and was not allowed into the hotel premises on resuming duty after the expiry of the suspension period (HRP5 and HRP8).

35. The Respondent in written response stated that the grievant could not be issued with a termination letter since there was no contract in the first place to be issued. The Respondent did not call evidence to rebut the allegation of unfair termination of employment. The defence was that the grievant was not an employee of the Respondent.

Court determination on the issue

36. The court already found that the grievant was an employee of the Respondent. The Claimant has the burden to demonstrate unfair termination of employment.

37. Section 47(5) of the *Employment Act* provides for burden of proof in claims for wrongful dismissal as follows:

‘ (5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.’ Thus, the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.



38. The court finds and determines that the Claimant discharged its burden of proving the unfair termination occurred as per Section 47 (5)(supra) and the burden then shifted to the employer to justify the reasons of the termination.
39. In the instant suit the Respondent did not provide any evidence to justify the wrongful termination of employment of the grievant. The Respondent instead closed its defence without calling any witness or producing any evidence to rebut the claim.
40. Section 41 of the *Employment Act* (supra) requires the employer to inform an employee of the reasons as to why they contemplate the termination and before the termination action, afford the employee opportunity to be heard in the presence of shop floor representative or fellow employee. Hearing of an employee before termination of employment for any reasons is mandatory as provided for under section 41 of the *Employment Act*.
41. The court finds there was no compliance with the law before termination of the employment of the grievant by the Respondent. The court upholds the decision of the Court of Appeal in *Geoffrey Gikonyo Mathu v Intex Construction Company (2017)eKLR* in which the court of Appeal held that, 'But even if the reasons advanced by the Respondent had been valid, the dismissal herein would stand impugned for want of a hearing in line with section 41(2) of the *Employment Act* set out hereinabove.'
42. In the instant case there was allegations of unaccounted for 49 plates of chips and 10 glasses of passion juice. There was no evidence placed before the court of prove of those allegations contained in the suspension letter. The allegations do not meet the test contemplated under section 43 of the *Employment Act*. The court upholds the decision of Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards limited (2017)eKLR* where the Court of Appeal held, inter alia, ' the employer must prove the reasons for termination or dismissal(section 43), prove the reasons were valid and fair(section 45), prove the grounds are justified (section 47(5) among other provisions. A mandatory and elaborate process is then set up requiring notification and hearing before termination.'
43. The court finds and determines that the termination of the employment of the grievant from employment of the Respondent was unlawful and unfair for lack of valid reasons and for lack of hearing.

d. Whether the grievant was underpaid.

44. The Claimant pleaded that the Respondent grossly underpaid the grievant and produced the minimum wages legal notice of 2016 (App HRP9)
45. The Respondent did not produce any payment records. The Respondent simply denied the grievant was their employee but the court found he was indeed their employee.
46. The court examined the said Legal Notice and found that the hotel having been based at Busia (which fell under all other areas) the grievant was entitled to minimum wage of Kshs 7,967.95 exclusive of housing allowance. The grievant was paid Kshs 8000/- without housing allowance. The court finds and determines that the grievant was underpaid but only with respect to housing allowance for period from June 8, 2015 to April 2018.
47. The court grants underpayment wages of housing allowance at 15% of monthly wage of Kshs 8,000/- for the period worked. Thus $15/100 \times 8,000 \times 35(\text{months})$ total sum awarded of Kshs 42,000/-
48. The Legal Notice No 2 of 2018 effective May 1, 2018 increased the minimum wages of cooks in other areas to Kshs 8366.35. Thus, from May to June 2018 the grievant was underpaid basic salary by Kshs 366.35/- which is awarded plus housing allowance at rate of 15%. $366.35 \times 2(\text{months})$ total



Kshs 732,70/- plus housing allowance for 3 months $15/100 \times 8,366.35 \times 2(\text{months}) = \text{Kshs } 2,510/-$. Total underpayment in the year 2018(May and June) being Kshs 732.70/- plus Kshs 2,510/- /- total sum awarded as being Kshs 3,242.70

49. The total underpayment wages awarded is Kshs 42,000/- plus Kshs 3,242.70 to sum of Kshs 45,242.70/-
- e. Whether the Claimant is entitled to reliefs sought.
- i. Compensation for loss of employment
50. The Claimant submits that under Section 49 of the Employment Act the court has jurisdiction to award the grievant compensation where it establishes unfair labour practice. The court having found the termination was unlawful and unfair the grievant is entitled to compensation. To buttress its submissions on the Claim for maximum compensation of twelve months the Claimant relies on the decision of the Supreme Court in *Kenfreight(EA) Limited and Benson K Nguti (2019)* where the court held that a court on finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is one provided under section 49 of the Employment Act. The court clarified that, 'a payment under Section 49(1)(a) is different from an award under section 49(1)(b)(c). That Section 49 allows an award to include any or all of the listed remedies provided that a court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m).'
51. The court is duly guided by the Supreme Court (supra) whose decisions are binding on this court.
52. The Claimant in the instant case was unlawfully and unfairly dismissed. Applying the criteria under section 49(4), the court finds there is no evidence of payment of any dues after termination. The employee had worked for 3 years. He is a cook hence likely to get employed elsewhere. The court finds and determines 6 months compensation equivalent of the minimum monthly wage of Ksh 8366.35 (legal notice no 2 of 2018) plus 15% housing allowance (Kshs)1255/- total monthly salary of Kshs 9621.35/- is adequate compensation for the unfair termination. Thus Kshs 9621.35/- x 6 = Ksh 57,728.10.
53. The grievant is awarded compensation for unfair termination the equivalent of 6 months gross wages at rate of Kshs 9621.35/- for total sum of kshs 57,728.10.

1 month's Payment in lieu of Notice.

54. The Claimant is entitled to notice pay under Section 49(1)(a) to wit: 'the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service' and section 35 of the Employment Act and 36 which requires notice in the event of contemplated termination of employment or payment in lieu'.
55. The court grants 1 month's notice pay based on the minimum wages of Kshs 9621.35/-

Claim for July 2018 salary

56. The Claimant pleaded that the grievant was not paid salary for the month of July 2018.
57. The Respondent did not rebut the claim.
58. The court finds and determines that the grievant was not paid salary for month of July 2018 and awards the same at the statutory minimum wages plus 15% housing allowance as at July 2018 at total sum of Kshs 9621.35/-



Claim for payment of salary for 6 days worked in August 2018

59. The claimant pleaded that the grievant was not paid salary for 6 days worked in the month of August 2018.
60. The Respondent did not rebut the claim.
61. The court finds and determines that the claim is proved and awards salary for the 6 days at the daily rate of Kshs 413.60/- (inclusive of house allowance) total Kshs 2481.60 (Kshs 413.60x6)

Claim for untaken annual leave.

62. The claimant pleaded that the grievant never took annual leave during the three years of employment.
63. The employer (Respondent) is the custodian of records (section 74 of the [Employment Act](#)) and failed to produce evidence to the contrary.
64. The court finds and determines that the claim for 3 years untaken leave succeeds and awards the same as follows:-

$$9621.35/-/30 \times 24 \text{ days} \times 3 = \text{Kshs } 23,091.24/-$$

65. The sum of Kshs 23,091.24/- is award as untaken annual leave.

Public Holidays for 3 years (30 days)

66. The Claimant pleaded that the grievant worked during public holidays for 3 years amounting to 30 days.
67. The employer (Respondent) is the custodian of records (Section 74 of the [Employment Act](#)) and failed to produce evidence to the contrary.
68. The court finds and determines that the claim succeeds and awards as follows: -Kshs 9621.35 x 30 days total sum awarded for public holidays pay is kshs 9621.35/-

Service Pay

69. The Claimant in its submissions submitted that the grievant having not been under NSSF ought to be awarded service pay.
70. Section 35 provides for service pay where no NSSF is being. The grievant is entitled to this statutory right. The Respondent did not produce evidence to the contrary. Service pay of 15 days for every complete year worked being 2016 and 2017 is due thus $15/30 \times 2 \times 9621.35/-$ to total sum of Kshs 9621.35/- .
71. The Claimant is awarded service pay for total sums of Kshs 9621.35/-.

Certificate of service

72. Issuance of certificate of service is a statutory right of an employee notwithstanding the circumstances of exit from employment. Section 51(1) of the [Employment Act](#) states:- An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.'
73. The grievant having served with the Respondent for approximately 3 years is entitled to his certificate of service from the Respondent in the terms stated under Section 51(2) of the [Employment Act](#).



74. The Court orders the Respondent to issue the Claimant with the grievant's certificate of service within 14 days of this judgment.

Conclusion and disposition

75. The Claimant has succeeded in their claim of unfair termination of employment of the grievant. The court enters judgment for the Claimant against the Respondent as follows: -

- a. Award of underpayment of wages for the total sum of Kshs 45,242.70/-.
- b. Compensation pay for unfair termination awarded at the equivalent of 6 months gross wages at rate of Kshs 9621.35/- for total sums of Kshs 57,728.10.
- c. Award for unpaid July 2018 salary sum of Kshs 9,621.35/-
- d. Award for 6 days worked in August at the daily rate of Kshs 413.60/-(inclusive of house allowance) total Kshs 2481.60
- e. Award of Notice pay equivalent of 1 month gross wages of Kshs 9621.35/-.
- f. Award of untaken annual leave for 3 years for the total sums of Kshs 23,091.24.
- g. Award for public holidays pay for the sum of Kshs 9621.35/-.
- h. The Claimant is awarded service pay for total sums of Kshs 9621.35/-.
(a-h total award of Kshs 167,029.04) payable subject to statutory deduction of PAYE only)
- i. Interest is awarded at court rates from date of judgment until payment in full.
- j. Certificate of service of the grievant to issue to the Claimant within 14 days of the judgment.

76. No order as to costs.

77. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 22ND SEPTEMBER 2022.

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda

For Claimant:- Absent

For Respondents: Absent

