



**Akomo v Light And Life Broadcasting Station (Cause 36 of 2018)
[2022] KEELRC 3995 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3995 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 36 OF 2018
ON MAKAU, J
SEPTEMBER 20, 2022**

BETWEEN

JANE AKOMO CLAIMANT

AND

LIGHT AND LIFE BROADCASTING STATION RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a radio presenter/marketer from December 2012. The contract was never reduced into writing. Her starting salary was Kshs10,000 per month but it was increased to Kshs 16,000 in 2015.
2. The claimant protested the failure by the employer to issue her with a written contract and on April 1, 2014, she was given a written contract. However, the contract failed to address certain issues she had raised and for that reason, she declined to sign the contract. Nevertheless, she continued working until March 30, 2015 when she was dismissed without any prior notice.
3. She, therefore, brings this suit alleging that her dismissal was unfair and the suit seeks the following reliefs: -
 - i. A declaration that the termination of the claimant's employment by the respondent was unfair, unlawful and unprocedural.
 - ii. Damages as set out hereunder: -
 - a. Damages for unlawful termination of employment
 - b. Payment *in lieu* of notice of termination of employment
 - c. Payment *in lieu* of annual leave for period between December 2012 – April 2015
 - d. Unremitted dues for NSSF for period between December 2012 – April



- e. Unremitted dues for NHIF for period between December 2012 – April 2015
 - f. Unpaid housing allowance in accordance with Employment Act for period between December 2012 – April 2015 (3 ½ years)
 - g. Unpaid dues for overtime services.
- iii. Order of *mandamus* directing the respondent to issue the claimant with a certificate of service.
 - iv. Costs of the suit
 - v. Interest on the damages and the costs of the suit
 - vi. Any other relief the court may deem fit to grant
4. The respondent filed defence on June 11, 2018 clarifying that its name is Light and Life Media Limited and denying that it employed the claimant or dismissed her as pleaded in the memorandum of claim. Finally, the respondent averred that the claimant is non-suited against it, and prayed for the suit to be dismissed with costs.
 5. The claimant responded to the statement of defence denying that the correct name of the respondent is Light and Life Media Limited. She then urged the court to reject the defence by the respondent and strike it out with costs.
 6. Undeterred the respondent filed a notice of preliminary objection on June 26, 2018 on the ground that the claimant was non-suited against it. However, Marete J dismissed the objection on October 9, 2018 for the reason that it did not raise a pure point of law.
 7. The suit was heard on July 21, 2022, when the claimant gave evidence but the respondent did not attend court for the hearing. Again, after the hearing, only the claimant filed written submissions.

Evidence

8. The claimant testified as CW1 and adopted her written statement dated March 29, 2018 as part of her evidence. She also produced 9 documents in the list dated March 29, 2018 which are annexed to the reply to the defence. In brief, her evidence reiterates the facts contained in her pleadings as summarized above.
9. Concerning the separation, she contended that her services were terminated without prior notice and without being accorded a fair hearing. She testified how on March 30, 2015, she received a phone call from her supervisor Mr George Omollo telling her that her services had been terminated. No reason was cited despite her enquiries and all what supervisor told her was that the board had decided.
10. As a result, she reported the matter to the labour office and a letter was addressed to the employer. By a letter dated March 30, 2015, the employer requested her to withdraw the case from the labour office.
11. She further contended that she was never given any leave during her employment and that was one of the reasons she declined to sign the contract issued in 2014. The other reason was the failure to indicate NSSF and NHIF contributions as part of her benefits in the contract of service.

Submissions

12. The claimant submitted that she has established by the documentary evidence that she had an employment relationship with the respondent. For emphasis, she relied on the case of Francis Mwaura Gitau v Nyala Tea Estate Limited (2016) eKLR.



13. The claimant further submitted that no reasons were explained to her for the summary dismissal. She was not also given any prior notice or accorded any hearing before the dismissal was decided. Therefore, she maintained that her dismissal was unfair and unlawful because the provisions of section 35 and 41 of the *Employment Act* was not complied with before the dismissal.
14. For emphasis, the claimant relied on the case of *Evans Mogite Nyaudi v China Road and Bridge Corporation (K) Limited, Fred A Odhiambo v Attorney General & another* (2013) eKLR, *Angala Wokabi Muoki v Tribe Hotel Limited* (2016) eKLR, *Alexander Irungu Wanjiru v Trustees of Sister of Mercy (K) t/a Mater Misericordiae Hospital* (2020) eKLR, In the end, the claimant urged the court to grant the reliefs sought in the claim.

Issues for Determination

15. Having considered the pleadings on record, the uncontested evidence by the claimant and her written submissions, the following issues fall for determination: -
 - a. Whether the claimant was employed by the respondent.
 - b. Whether the employment was unfairly terminated by the respondent.
 - c. Whether the reliefs sought are merited.

Employment Relationship

16. The claimant contends that she was employed by the respondent but the respondent is in denial. I have carefully considered the draft contracts which the claimant has acknowledged and the letter dated March 30, 2015, all issued by the respondent. They are proof that the parties herein were engaged in an employer-employee relationship up to March 30, 2015. There is also a letter reassigning duty to the claimant effective February 1, 2015 which reinforces the foregoing finding.
17. The letter stated as follows: -

“Jane Akomo,

The board of directors of the Light and Life Station wishes to thank you for serving in the role of presenter.

The board is in the process of restricting the station to fit in with the correct state of finances. I confirm that you will continue in the same position as the presenter and any duties assigned from time to time.....

Your emoluments will be Kshs 16,000 per month....

This reassignment takes effect from February 1, 2015.

Yours faithfully,

Signed.....”

18. The above letter leaves no doubt that the claimant was employed by the respondent as a radio presenter and marketer for the employer’s radio station. She was employed for a monthly salary of Kshs 16,000 as per the letter of reassignment. Section 2 of the *Employment Act* defines an employee as: -

“a person employed for wages or a salary and include an apprentice and indentured learner.”



Unfair Termination

19. Under section 45 of the [Employment Act](#), termination of employment is unfair if the employer fails to prove that the same was grounded on valid and fair reason related to the employee's conduct capacity or compatibility or based on the employer's operational requirements. It is also unfair if the employer fails to prove that the procedure followed was fair which basically means that the employee was accorded a fair hearing before the termination.
20. In this case, the respondent did not tender any evidence to prove the reason for the termination and that the procedure followed was fair. However, the legal burden under section 47(5) of the Act remains with the employee to prove that the termination was by the employer and there the same was unfair within the meaning of section 45 of the Act.
21. In this case the claimant produced a letter dated March 30, 2015 which stated as follows: -

“Jane Akomo,

Re: Request to withdraw services

Following your phone call on March 30, 2015 at 3 pm requesting to withdraw your services as a presenter with Light and Life Station, I hereby confirm that the board has accepted with regret this abrupt turn of events.

Mr Peter, I understand has been appointed to take over the programme of “Baraka Kazini” as from April 1, 2015.

As your last commission and pay for the month of March 2015 were banked into your account, there is no monies still held by the station.

We wish you the best in your next station.

Faithfully,

Signed

J. Omollo.....”

22. The above evidence was produced by the claimant but is at variance with the pleading. The pleading alleged that the claimant was dismissed while the said exhibit indicates clearly that the claimant resigned. She did not dispute the resignation indicated in the said letter.
23. Having carefully considered the said letter and without any evidence that the resignation was not voluntary, I find and hold that the claimant has not discharged her burden of proving that the respondent dismissed her from employment and that the dismissal was unfair within the meaning of section 45 of the [Employment Act](#).

Reliefs

24. In view of the foregoing finding, I decline to declare that the respondent dismissed the claimant from service unfairly and unlawfully. For the same reason, the claimant is not entitled to damages for unlawful termination as prayed. She is also not entitled to salary in lieu of notice.
25. The claim for unremitted NSSF and NHIF lacks particulars and evidence that the said contributions were deducted from the claimant's salary.



26. However, the claim for leave for December 2012 to April 2015 is merited. The respondent did not deny that the claimant worked continuously during that period and no leave records were adduced to rebut the claim. Therefore, the claimant is awarded 21 leave days for every year served being 2013 and 2014 plus 1.75 days on prorata basis for the four months worked on top of the 2 years.

The total leave days earned is 49 days from December 2012 to January 2015. Her salary was Kshs 10,000 x 45.5/26 = Kshs 17,500

From February to March 2015 her salary was Kshs 16,000 x 3.5/26 = 2,153.85. Therefore, the total pay for the 49 leave days is Kshs 19,653.85.

27. The claimant also seeks payment of withheld housing allowance. The respondent did not adduce any evidence to prove that it provided the claimant with housing or paid her house allowance in lieu. Therefore, I award the claimant house allowance at the rate of 15% of the basic salary. From December 2012 to February 2015 the basic salary was Kshs 10,000, hence the house allowance payable is Kshs 10,000 x 15% x 26 months = Kshs 39,000.

From February to March 2015, the basic pay was Kshs 16,000 per month and the house allowance was, therefore, Kshs 16,000 x 15% x 2 = 4,800. Therefore the total due for house allowance is Kshs 43,800.

28. The claim for overtime lacks particulars and it is declined. However, the claim for certificate of service is granted as per section 51 of the *Employment Act*.

29. In conclusion, I enter judgment for the claimant against the respondent for the following: -

Leave.....Kshs 19,653.85

House allowance.....Kshs 43,800.00

Total.....Kshs 63,453.85

30. The claimant will also have costs and interest from the date of filing the suit. She will also be issued with a certificate of service. The award of damages is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF SEPTEMBER, 2022.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

