



**Kathumbi v Philip Ocharo t/a Ocharo & Co. Advocates (Cause  
2171 of 2017) [2022] KEELRC 12949 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12949 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2171 OF 2017  
JK GAKERI, J  
OCTOBER 27, 2022**

**BETWEEN**

**SIMON KIOKO KATHUMBI ..... CLAIMANT**

**AND**

**PHILIP OCHARO T/A OCHARO & CO. ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim dated 1<sup>st</sup> November, 2017 and filed on November 2, 2017 alleging unlawful termination from employment.
2. The Claimant avers that he was an employee of the Respondent for 20 years at a monthly salary of Kshs.32,000/=. That on August 1, 2015, the Respondent verbally informed him that his services were no longer required owing to reduction of work.
3. The Claimant prays for;
  - a. The sum of Kshs.1,696,000/= as particularized in paragraph 7 above as follows;
    - i. One month's salary in lieu of notice Kshs.32,000/=
    - ii. Service pay for 20 years Kshs.640,000/=
    - iii. Salary in lieu of untaken leave Kshs.640,000/=
    - iv. 12 months compensation Kshs.384,000/=
  - b. Costs of the suit with interest.



### **Respondent's case**

4. By a Statement of Defence and Counter-Claim filed on December 7, 2017, the Respondent denies the Claimant's allegations and avers that the Claimant was not an employee but an independent contractor/freelance clerk who had been accommodated by the Respondent in its office premises and stopped operating from the office on August 1, 2015 and left on his own volition.

### **Counter-Claim**

5. The Respondent avers that while the Claimant was operating from its office as an independent contractor, the Respondent advanced to him soft loans amounting to Kshs.75,000/= which he did not pay.
6. The Respondent prays for dismissal of the Claimant's suit with costs and he be ordered to pay or reimburse Kshs.75,000/=

### **Reply to defence and Defence to Counter-Claim**

7. In his Reply to defence and defence to counter-claim, the Claimant denies having been advanced the sum of Kshs.75,000/= as alleged.

### **Claimant's evidence**

8. The Claimant adopted the written statement which replicates the contents of the statement of claim in its entirety.

### **Respondent's evidence**

9. The Respondent did not tender any evidence notwithstanding service of notice of the mention slated for January 24, 2022 and the hearing notice for the hearing slated for June 21, 2022 as well as the mention notice for the confirmation of filing of submissions slated for July 26, 2022.
10. In sum, the Claimant's allegations against the Respondent were uncontroverted.

### **Claimant's submissions**

11. The Claimant's counsel identifies three issues for determination on whether the Claimant was an employee of the Respondent, whether termination was unfair and entitlement to the reliefs sought.
12. On the first issue, reliance is made on the provisions of section 2 of the *Employment Act* to urge that the Claimant was indeed an employee of the Respondent. Reliance is made on the copy of a letter from the Respondent stating that the Claimant was attached at the firm from September 15, 1995 to December 15, 1995, the Law Society of Kenya badges showing that the Claimant was an employee of the Respondent from January 2, 1996, letter from the Respondent to the LSK SACCO Society stating that the Claimant worked at the law firm as a court clerk and payment vouchers from the Respondent's law firm on salary advances.
13. The Claimant submits that these documents are sufficient to show that he was an employee of the Respondent and worked diligently for a period of 20 years.
14. On the issue of termination of employment, reliance is made on the provisions of section 45 of the *Employment Act*, 2007 to urge that the provisions were not complied with.



15. The decision in *Joseph Mwaniki Nganga V United Millers Ltd* (2022) eKLR is relied upon to underscore the burden of proof of the Respondent.
16. It is further submitted that the Respondent did not give sufficient reasons for termination of the Claimant's employment and did not comply with the provisions of section 40 of the *Employment Act* on redundancy.
17. Reliance was made on the decision in *Bernard Misawo Obora V Coca Cola Juices Kenya Ltd* (2015) eKLR to urge that the notice required by section 40 of the *Employment Act* was not a mechanical exercise.
18. It is the Claimant's submission that termination of his employment by the Respondent was unprocedural, unfair and unlawful.
19. Finally, on reliefs, it is submitted that the Claimant was entitled to one month's salary in lieu of notice and service pay for every year worked and compensation for unlawful termination of employment.
20. Finally, it is the Claimant's submission that he served the Respondent diligently and faithfully for 20 years and had no warning letter until his employment was terminated by word of mouth on August 1, 2015.

### **Respondent's submissions**

21. On June 21, 2022, the Claimant testified and the Claimant's case was closed. The court directed the Claimant to file and serve its submissions within 14 days and the Respondent was accorded 14 days after service and a mention was slated for July 26, 2022 to confirm compliance.
22. On July 26, 2022, the Respondent was unrepresented and had not filed submissions.
23. A judgement date was set.

### **Determination**

24. The issues for determination are;
  - i. Whether the Claimant was an employee of the Respondent.
  - ii. Whether termination of the Claimant's employment was unfair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
25. As to whether the Claimant was an employee of the Respondent as alleged, the starting point is the evidence on record.
26. The Claimant's statement state that he was an employee of the Respondent for 20 years. The statement makes no reference to the date of employment.
27. The Claimant, as submitted by counsel relies on four documents as evidence of his employment by the Respondent.

#### **i. Payment vouchers**

28. The Claimant has attached six (6) payment vouchers for salary advances as follows;
  - i. May 15, 2015 Kshs.15,000/=
  - ii. June 1, 2015 Kshs.17,000/=



- iii. June 15, 2015 Kshs.15,000/=
  - iv. July 1, 2015 Kshs.17,000/=
  - v. July 15, 2015 Kshs.15,000/=
  - vi. July 31, 2015 Kshs.17,000/=
29. Several things are noticeable from these payment vouchers which raises serious doubts of their authenticity.
- 1. The forms are all completed by the Claimant in his handwriting and have no other person's input by way of signature or stamp. It is a mere form completed and signed by the maker exclusively. They have no file number.
  - 2. All the forms were completed from May 2015 to August 2015. The duration appears to have been calculated to fulfil a particular purpose.
  - 3. The amount of cash advance in standard and adds to Kshs.32,000/=.
  - 4. Interestingly, the salary advance for June 2015 was received on a national public holiday.
30. The courts highly doubts the authenticity of the payment vouchers and declines to rely on them as evidence of the salary payable to the Claimant.
31. Intriguingly, not a single document on record other than the doubtful payment vouchers attests to the Claimants salary for the 20 years as alleged. Be that as it may, the Respondent led no evidence to contradict the Claimant assertion.
- ii. The "To who it may concern" letter dated December 15, 1995 evidences 3 months practical attachment from September 15, 1995 to December 15, 1995 at the Respondent's offices and is a reference letter directed to 3<sup>rd</sup> parties. The Claimant was an employee for the specified duration.
  - iii. The Law Society of Kenya Badge issued on September 15, 1998 states that the Claimant was employed by the Respondent on 2<sup>nd</sup> January 1996. A second badge is effective December 1, 2008 to December 1, 2013.
  - iv. Finally, the Respondent's letter to the Manager LSK Sacco Society Ltd dated July 11, 2012 introducing the Claimant as its employee is persuasive evidence of an employment relationship between the Claimant and the Respondent.
32. Section 2 of the *Employment Act*, 2007 defines an employee to as "a person employed for wages or a salary and includes an apprentice and indentured learner."
33. In addition, section 2 defines a contract of service to mean "an agreement, whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contact of service to which Part XI of this Act applies."
34. Evidently, a contract of service need not be in writing. Oral agreements qualify as contracts of service and are enforceable.
35. In light of the foregoing, the court is satisfied that the documents on record in particular the Law Society of Kenya badges dated 1998 and 2008, letter dated December 15, 1995 and the introductory letter dated 11<sup>th</sup> July, 2012 which *inter alia* contains the Claimant's ID number 14430632 constitute



- circumstantial evidence which points to the existence of an employment relationship between the Claimant and the Respondent.
36. This court so finds and holds.
37. As regards termination, the uncontroverted evidence of the Claimant is that on August 1, 2015, the Respondent informed the Claimant by word of mouth that his services were no longer required due to reduction of work which implies that the Claimant was being declared redundant.
38. An assertion or intimation by an employer that the services of an employee were no longer required on account of reduction of work constitutes a redundancy statement.
39. Redundancy is one of the ways of separation between an employee and employer recognized by the provisions of the *Employment Act*. The Act prescribes the steps to be complied with by the employer for a redundancy to pass muster.
40. Section 40 of the *Employment Act* sets out the seven (7) conditions an employer must satisfy for redundancy to pass as lawful.
41. Section 40(1) is unequivocal that
- “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions – . . .”
42. This provision is couched in mandatory terms and non-compliance with any of the conditions renders the purported redundancy an unlawful termination of employment.
43. For instance under section 40(1) (a) and (b) of the *Employment Act*, the employer is required to
- i. Notify the union where the employee is a member of the union, and the local labour officer the reasons for and the extent of the intended redundancy at least one month prior to the date of the intended date of termination on account of redundancy.
  - ii. Notify the employee, if not a member of a union, in writing and the labour officer.
44. The Court of Appeal has held that a similar number of days apply in both instances i.e at least one month prior to the effective date.
45. The court is in agreement with the sentiments of Mbaru J. in *Bernard Misawo Obora V Coca Cola Juices Kenya Ltd (Supra)* on the essence of notice and compliance with the provisions of section 40(1) of the Act.
46. In the instant case, the Respondent tendered no evidence of compliance with the provisions of section 40(1) of the *Employment Act*, 2007.
47. Consequently, the purported redundancy transitioned to an unfair and unlawful termination of employment for non-compliance with the provisions of section 45 of the *Employment Act*, 2007.
48. For the foregoing reasons, the court is satisfied that the Claimant has on a balance of probabilities established that his termination from employment by the Respondent on August 1, 2015 was unfair.
49. Having found that termination of the Claimant’s employment was unfair, the Claimant is entitled to the following reliefs.



**a. One month's salary in lieu of notice**

50. The Respondent led no evidence of having given the Claimant the requisite notice or pay in lieu of notice as by law required.

The Claimant is awarded Kshs.32,000/=.

**b. Service pay for 20 years**

51. The Respondent tendered no evidence that the Claimant was a member of the NSSF or made contributions to the Fund. In the absence of compliance with the provisions of the National Social Security Fund Act which provides for mandatory social security for all employees, the Claimant is entitled to service pay for every year worked and is awarded the same at the prescribed rate.

**c. Salary in lieu of untaken leave for 20 years**

52. The Claimant tendered no evidence of his leave entitlement since 1996 and provided no particulars on the numbers of days and when they accrued and became outstanding.

53. The fact that the suit was undefended did not lessen the Claimant's burden to establish his case on a balance of probability.

54. The written statement makes no reference to any untaken leave.

55. This is a claim for special damages which must be specifically pleaded and proved.

56. In the absence of the requisite particulars and evidence, the prayer is declined.

**d. 12 months compensation for unlawful termination**

57. Having found that termination of the Claimant's employment was unfair, the Claimant becomes eligible for the discretionary relief prescribed by section 49(1)(c) of the Employment Act subject to the provisions of Section 49(4) of the Act.

58. In this case, the court has considered the following;

- i. The Claimant was an employee of the Respondent for a duration of 19 years 7 months, which is reasonably long.
- ii. The Claimant did not contribute to the termination of employment and had no warning letters or notice to show cause.
- iii. There is no indication that the Claimant wished to continue in the employment of the Respondent.
- iv. The Claimant did not appeal the Respondent's decision.

59. In light of the foregoing, the court is satisfied that the equivalent of eight (8) months salary is fair.

**Counter-claim**

60. The Respondent rendered no evidence to substantiate the counter-claim. It is denied.

61. In the upshot, judgment is entered for the Claimant against the Respondent on the following terms;

- a. One month's salary in lieu of notice Kshs.32,000/=



- b. Service pay for 19 years 7 months. Amount to be computed by the Claimant's counsel, filed in court and served upon Respondent within 30 days of the date hereof.
- c. Equivalent of 8 months compensation Kshs.256,000/=
- d. Costs of this suit.
- e. Interest at court rates from the date hereof till payment in full.

62. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF OCTOBER, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

