



**Njoki v Deep Blue Enterprises Kenya Limited (Cause 184 of 2015)
[2022] KEELRC 12940 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12940 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 184 OF 2015
L NDOLO, J
OCTOBER 27, 2022**

BETWEEN

JOHN MWANGI NJOKI CLAIMANT

AND

DEEP BLUE ENTERPRISES KENYA LIMITED RESPONDENT

JUDGMENT

1. Family businesses often provide an effective vehicle for growing and passing on wealth from one generation to another. These businesses however present unique challenges especially after the passing on of a prime mover.
2. The respondent Company was such a business owned by Charles Ngaruiya and his wife Dr Esther Muoria. It would appear that Ngaruiya is the one who ran the business up until June 2013, when he passed on. His wife, Dr Esther Muoria had a full time at Jomo Kenyatta University of Agriculture and Technology.
3. After the passing on of her husband, Dr Muoria took over the running of the business, including employees who had been employed by her late husband. The claimant was one such employee and within a short time differences emerged between him and Dr Muoria, who accused the claimant of being disrespectful. The claimant's employment was eventually terminated on February 13, 2015 and this is the subject of the dispute now before me.
4. The claimant filed a memorandum of claim dated February 12, 2015 and the respondent filed a reply dated April 2, 2015. The matter went to trial with the claimant testifying on his own behalf and Dr Muoria testifying for the respondent. The parties also filed written submissions.



The claimant's Case

5. The claimant states that he was employed by the respondent in the position of Accountant/Manager from February 5, 2008 until February 13, 2015. He claims to have earned a monthly salary of Kshs 30,000.
6. The claimant further states that he was not issued with a written contract of employment.
7. The claimant accuses the respondent of terminating his employment without justifiable cause and in violation of due procedure.
8. The claimant's claim against the respondent is as follows:
 - a. Damages for loss of career and earnings.....Kshs 2,520,000
 - b. Unpaid overtime.....1,814,400
 - c. Service pay for 7 years.....210,000
 - d. Unpaid leave for 7 years105,000
 - e. Notice pay.....30,000
 - f. Certificate of service
 - g. Costs plus interest

The respondent's Case

9. In its reply dated and filed in court on April 2, 2015, the respondent admits that the claimant was its employee. The respondent however states that the claimant earned a monthly salary of Kshs 15,000.
10. The respondent avers that the claimant deserted duty after being asked to give an account of his handling of money entrusted to him.
11. The respondent further avers that upon desertion, all the claimant's terminal dues were computed.
12. The respondent terms this cause unnecessary and maintains that there is no dispute for determination by the court.
13. In its submissions contained in the reply, the respondent states that the claimant was lawfully dismissed for gross misconduct and disobedience of lawful instructions.

Findings and Determination

14. There are two (2) issues for determination in this case:
 - a. Whether the claimant has made out a case of unlawful termination of employment;
 - b. Whether the claimant is entitled to the remedies sought.

Unlawful Termination?

15. The claimant states that his employment was terminated without any justifiable cause and in violation of due procedure. While denying this claim, the respondent accuses the claimant of deserting duty.
16. The law as pronounced in several judgments of this court (variously constituted) is that an employer alleging that an employee has deserted duty is required to demonstrate efforts made towards reaching



out to the employee, with a view to putting them on notice that termination of employment on this ground is being considered (see *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Dickson Matingi v Db Schenker Limited [2016] eKLR*).

17. In the present case, no effort was made to reach out to the claimant and the allegation of desertion of duty was not proved. Flowing from this, the only conclusion to make is that the respondent terminated the claimant's employment without justifiable cause as required by section 43 of the *Employment Act* and in violation of the procedural fairness dictates of section 41 of the *act*.

Remedies

18. I therefore award the claimant eight (8) months' salary in compensation. In making this award, I have taken into account the claimant's length of service and the respondent's unlawful conduct in the termination transaction.
19. I further award the claimant one (1) month's salary in lieu of notice.
20. In the absence of leave records showing utilisation of the claimant's leave entitlement, the claim for leave pay succeeds and is allowed. Similarly, in the absence of evidence showing that the claimant was a contributing member of the National Social Security Fund or any other pension scheme, the claim for service pay also succeeds.
21. The claim for overtime compensation was not proved and is disallowed.
22. Before making the final award, I need to settle the question of the claimant's monthly salary for purposes of this claim. On his part, the claimant gave his monthly salary as Kshs 30,000 while the respondent gave three conflicting figures of Kshs 15,000; 19,000 and 19,500.
23. It was incumbent upon the respondent to document the terms of the claimant's employment which it failed to do. As a result, I invoke section 10(7) of the *Employment Act* and adopt the figure of Kshs 30,000 pleaded by the claimant as his monthly salary for purposes of this claim.
24. Ultimately, I enter judgment in favour of the claimant as follows:
- | | | |
|----|---|--------------|
| a. | 8 months' salary in compensation..... | Kshs 240,000 |
| b. | 1 month's salary in lieu of notice..... | 30,000 |
| c. | Leave pay for 7 years (30,000/30*21*7)..... | 147,000 |
| d. | Service pay for 7 years (30,000/30*15*7)..... | 105,000 |
| | Total..... | 522,000 |
25. This amount will attract interest at court rates from the date of judgment until payment in full.
26. The claimant is also entitled to a certificate of service plus costs of the case.
27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF OCTOBER 2022.

LINNET NDOLO

JUDGE

Appearance:

Mr Kinuthia for the claimant



Mr Kamau for the respondent

