



**Khagali v Mutungati Farmers Co-operation (Cause 138 of 2016)  
[2022] KEELRC 12972 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12972 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 138 OF 2016  
DN NDERITU, J  
OCTOBER 27, 2022**

**BETWEEN**

**SUSAN KHAGALI ..... CLAIMANT**

**AND**

**MUTUNGATI FARMERS CO-OPERATION ..... RESPONDENT**

**JUDGMENT**

**i. Introduction**

1. Vide a memorandum of claim dated April 11, 2016 drawn and filed by Mongeri & Co Advocates the claimant prays for -
  - (a) 3 months' salary *in lieu* of notice - Kshs 12,900/=
  - (b) Unpaid leave for 13 years - Kshs 154,800/=
  - (c) Unpaid 4 months' salary - Kshs 17,000/=Total- Kshs 184,700/=
2. Accompanying the said memorandum, as expected, is an affidavit of verification, a list of documents and a bundle thereof, and witness statement by the claimant.
3. The respondent, entered appearance on October 27, 2016 through Ikuu, Mwangi & Company, Advocates, and filed a reply to the claim on even date in which the respondent denied all the material aspects of the claim and prayed that the cause be dismissed with costs.
4. On September 3, 2018 the claimant filed an application to amend the memorandum of claim but there is nothing on record to confirm if that application was prosecuted. There is no amended memorandum of claim on record and as such this court justifiably presumes that the original memorandum of claim obtains.



5. This matter came up in court for hearing on March 16, 2022 when the claimant (CW1) testified in support of her claim. On the same date Everline Njeri Kariuki (RW1) testified for the respondent. Both parties closed their respective case on this date and it was agreed that counsel for both parties address the court by way of written submissions. Counsel for the claimant, Miss Moenga, filed her written submissions on May 11, 2022 while counsel for the respondent, Miss Kimure, filed on June 9, 2022.

## **ii. Claimant's Case**

6. The claimant's case as contained in the pleadings filed, the oral and documentary evidence adduced, and the summing up of the case in the written submissions by her counsel is that she was first engaged as a casual employee by the respondent in December, 2001.
7. *Vide* a letter dated February 23, 2012 the claimant was engaged on permanent basis, as a general worker, with effect from February 1, 2012 at a monthly salary of Kshs 4,500/=.
8. The claimant alleges that in 2009 she worked for four months without a salary and that in the same year the respondent ordered her to vacate the house she occupied that had been allocated to her by the respondent.
9. The claimant testified that *vide* a letter dated September 2, 2013 her employment was terminated with effect from September 1, 2013. The claimant argues that the said termination was unfair and unlawful. She alleges that she was not given a hearing and that no reason was given for her termination which was actually dismissal without notice.
10. It is on the basis of the foregoing that the claimant sought to be granted the prayers as per the memorandum of claim.

## **iii. Respondent's Case**

11. The respondent's case is expressed in the filed response to the claim, the oral and documentary evidence as tendered through RW1, and the written submissions by counsel.
12. RW1 testified that sometimes in May, 2012 the claimant became a habitual absentee from work without offering explanation and defiant against orders and directions from those placed in authority by the respondent. RW1 alleged that the claimant was warned severally both verbally and through letters but she neither responded to the said letters nor did she improve. RW1 claimed that the claimant deserted duty from May, 2012 until her termination and that she has continued to unlawfully occupy respondent's premises even after her termination and being ordered to vacate.
13. RW1 admitted that the respondent did not have the employment records for the claimant. She admitted that the letter of termination did not indicate the reasons for termination. She admitted that except for the letters allegedly sent to the claimant there is no disciplinary hearing that was held before the claimant was terminated.
14. It is on the basis of the foregoing that the respondent pleaded that the claimant's cause be dismissed with costs.

## **iv. Issues For Determination**

15. A party to a cause is bound by the pleadings filed. The reliefs sought by the claimant have been set out at the inception of this judgment. The respondent has denied the entire claim in the response to the claim filed.



16. Based on the pleadings filed, oral and documentary evidence adduced, and the written submissions filed by counsel for both parties the following issues commend themselves to this court for determination –
  - a. What was the nature of the employment relationship between the claimant and the respondent?
  - b. Was the termination of the claimant by the respondent unfair and unlawful?
  - c. Is the claimant entitled to the reliefs sought?
  - d. Costs.

#### **v. Employment**

17. Both parties are in agreement that the claimant was engaged as a permanent employee of the respondent with effect from February 1, 2012 as a general worker as evidenced in a letter dated February 23, 2012. The said letter was produced by the claimant as an exhibit and the respondent through RW1 admitted to the contents thereof.
18. It has been agreed by and between the parties that prior to February, 2012 the claimant was a casual employee of the respondent. According to the claimant she was such casual employee since 2001.
19. From the foregoing, as at the time of termination with effect from September 1, 2013 the claimant was an employee of the respondent on permanent basis at a monthly salary of Kshs 4,500/=.

#### **vi. Termination**

20. It is by now settled jurisprudence that a fair and lawful dismissal or termination must comply with both substantive and procedural fairness - See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
21. The *Constitution* (article 41), *Fair Administrative Action Act*, and the *Employment Act* (the Act) make the provisions on fair labour practices and among them is that an employer can only terminate or dismiss an employee in accordance with the law.
22. In the material part the letter of termination dated September 2, 2013 states as follows-

“Following the resolution by the management committee during their meetings that is, minute MCM 3:19/2013, minute MCM 7:20/2013, and minute MCM 3:21/2017. In defiance of the above your services have been terminated with effect from September 1, 2013.”
23. There is no evidence whatsoever that the minutes of the Management Committee mentioned above were availed or disclosed to the claimant. There is no evidence that any disciplinary hearing was conducted before the decision to terminate the claimant was arrived at. RW1 testifying for the respondent admitted as much.
24. This court has no difficulties in finding that the termination of the claimant by the respondent was defective both in substance and procedure and hence unfair and unlawful. It is so held. It was actually not a termination but a dismissal without notice.



## **vii. Relief**

25. The reliefs sought by the claimant are set out at the inception of this judgment as extracted from the filed memorandum of claim.
26. Prayer (a) is for three (3) months' salary in lieu of notice. There is no evidence adduced or any submission in support of this particular claim. The letter of appointment dated February 23, 2012 does not provide for three (3) months' notice before termination. In the circumstances this court has to rely on section 35 of the Act and grant only one month's salary *in lieu* of notice in the sum of Kshs 4,500/=.
27. Prayer (b) is for unpaid leave for 13 years. To be clear on this, prior to February 1, 2012 the claimant was a casual employee of the respondent for unknown period. The claimant stated that she had worked as such casual employee since 2001. However, the claimant did not disclose how much she earned on daily basis and how often she was engaged. This makes it difficult and or impossible for this court to assess how much leave pay she should have earned. In any event, any claim that is over three (3) years is time barred under section 90 of the Act. For these reasons, this prayer is denied in toto.
28. Prayer (c) is for unpaid salary arrears of four (4) months. RW1 admitted in cross-examination that there were no records of employment for the claimant. No record of payment of salary was availed and as such this court can only go by the unchallenged evidence from the claimant, that she was owed four(4) months' salary in arrears at the time of dismissal and the same is granted as prayed in the sum of Kshs 17,000/=.
29. It is unfortunate that the claimant did not amend her memorandum of claim to include a prayer for compensation for wrongful and unlawful dismissal. The hands of this court are tied as granting such compensation shall deny the respondent an opportunity to respond thereto as the same was neither pleaded nor was evidence tendered by the claimant in support thereof.
30. The above observation and finding calls for counsel and litigants to be more vigilant and accurate in their pleadings and presentation of causes in court. For not pleading compensation for the wrongful and unlawful dismissal this court is unable to consider that aspect as that would highly prejudice the respondent who has not had the opportunity to respond thereto.

## **viii. Costs**

31. The claimant is awarded costs of this cause.

## **ix. Order**

32. This court grants the following orders –
  - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was unfair and unlawful.
  - b. The claimant is awarded –
    - i. One month's salary *in lieu* of notice - Kshs 4,500/=
    - ii. Unpaid salary for four (4) months - Kshs 17,000/=Total Kshs 21,500/=
  - c. Costs to the claimant.



DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF OCTOBER 2022.

.....

DAVID NDERITU

JUDGE

