



REPUBLIC OF KENYA



KENYA LAW
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**Nzalukya & 9 others v I.S.L (K) Limited (Cause 1936 of 2017)
[2022] KEELRC 12929 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12929 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1936 OF 2017
JK GAKERI, J
OCTOBER 25, 2022**

BETWEEN

**FREDRICK MUTUNGA NZALUKYA 1ST CLAIMANT
MUNYAO MUSEMBI 2ND CLAIMANT
SIMON WAMBUA KIILU 3RD CLAIMANT
BENARD MALONZA MUSYOKI 4TH CLAIMANT
JOHN MUTUKU MUTUNGI 5TH CLAIMANT
RICHARD AINGI OGENDI 6TH CLAIMANT
COSMAS KILONZO DAUDI 7TH CLAIMANT
CHARLES MUTUNGA KIMEU 8TH CLAIMANT
BRIAN MWENDWA MUSILI 9TH CLAIMANT
DANIEL KYEVA NZAKI 10TH CLAIMANT**

AND

I.S.L (K) LIMITED RESPONDENT

JUDGMENT

1. The claimants commenced this suit by a memorandum of claim dated September 28, 2017 and filed on September 29, 2017 alleging unlawful/unfair summary dismissal and non-payment of terminal dues and compensatory damages.
2. The claimants allege that they were employed by the respondent sometime on February 25, 2015 and worked diligently and continuously to the respondent's satisfaction until their dismissal on March 7, 2017.



3. They aver that they were employed in various capacities as follows;
The 1st, 2nd and 3rd claimants were Machine Operators earning Kshs 655/= per day while the rest were general labourers earning Kshs 484/= per day.
4. The claimants further avers that on March 6, 2017 at the close of the day, Mr Okello, the Human Resource Manager informed them that there would be no work for them henceforth and were to report to the office the following day to collect terminal dues.
5. That when they reported to the office on March 7, 2017, they were paid for the days worked and untaken leave.
6. It is the claimants case that the respondent's action amounted to summarily dismissal as no notice or reason was given.
7. Relatedly, redundancy procedure was not followed.
8. The claimants pray for:
 - i. A declaration that the respondent's action to dismiss them from employment summarily was illegal, unlawful and unfair.
 - ii. An order for the respondent to pay the claimants terminal and compensatory damages pleaded in paragraph 9 of the memorandum of claim as follows;
Fredrick Mutunga Nzalukya Kshs 255,450
Munyao Musembi Kshs 255,450
Simon Wambua Kiilu Kshs 455,450
Bernard Malonza Musyoki Kshs 188,760
John Mutuku Mutungi Kshs 188,760
Richard Aingi Ogendi Kshs 188,760
Cosmas Kilonzo Daudi Kshs 188,760
Charles Mutunga Kimeu Kshs 188,760
Brian Mwendwa Musili Kshs 188,760
Daniel Kyeva Nzaki Kshs 188,760
Total Kshs 2,087,670
 - iii. Costs of this claim plus interest thereon.

Respondent's case

9. The respondent filed its statement of defence on February 7, 2018 denying having employed the claimants.
10. It is the respondent's case that it was forced to terminate the claimants employment after the Kenya Bureau of Standards banned the manufacture of twisted steel bars in favour of ribbed steel bars for reinforcement of concrete which in effect rendered the claimants redundant.
11. It avers that termination of the claimants employment was lawful and in compliance with the provisions of the *Employment Act* and article 41 of the *Constitution* of Kenya, 2010.



12. The respondent avers that it engaged the claimants as casual workers and could terminate their employment without notice.
13. That it evaluated the positions affected by the intended redundancy and the claimants were notified and were involved in the process.
14. The respondent further avers that it paid the claimants their terminal dues as follows;
Fredrick Mutunga Nzalukya Kshs 13, 550
Munyao Musembi Kshs 13, 550
Simon Wambua Kiilu Kshs 13, 550
Bernard Malonza Musyoki Kshs 9, 888
John Mutuku Mutungi Kshs 9, 888
Richard Aingi Ogendi Kshs 9, 888
Cosmas Kilonzo Daudi Kshs 9, 888
Charles Mutunga Kimeu Kshs 9, 888
Brian Mwendwa Musili Kshs 9, 888
Daniel Kyeva Nzaki Kshs 9, 888
15. That the claimants have no claim against the respondent and the same should be dismissed with costs.
16. In its amended statement of defence dated April 17, 2019, the respondent avers that by accepting their terminal dues, the claimants entered into a mutual contract and waived their rights to the 30 days' notice as well as the right to claim redundancy payment or other sum. That the claimants are estopped from claiming further compensation.

Claimants' Evidence

17. The claimants gave written authority to the 2nd claimant Mr Munyao Musembi to execute documents and testify on their behalf.
18. In the written statement, the witness states that he was employed on April 25, 2017 as a Machine Operator at a daily wage of Kshs 655/=. It is his testimony that he was employed and dismissed along with 8 other persons whose daily wage he did not know.
19. On cross-examination, the witness testified that he was indeed employed on April 25, 2015 not February 25, 2015 as avered in the memorandum of claim.
20. The witness confirmed that he acknowledged receipt of terminal dues and signed the form on page 5 of the respondent's list of documents.
21. The witness further confirmed that he had no evidence to show that he was coerced to accept the sum of Kshs 13,550/= as terminal dues.
22. Finally, the witness confirmed that he was unaware of when one Munyao Musembi was employed by the respondent or when he acknowledged receipt of terminal dues.
23. On re-examination, the witness testified that he knew his colleagues and had worked with them since 2015 and their employment was terminated at the same time.



24. It was his testimony that the other claimants had given him authority to testify on their behalf.
25. The witness testified that the respondent did not invite them for a meeting on the challenges it was facing.

Respondent's Evidence

26. In his written statement RW1 states that while the 1st, 2nd and 3rd claimants were employed as Machine Operators, the other claimants were general labourers as alleged and were all casual employees and the daily wage was as follows;
 - i. 1st, 2nd and 3rd claimants Kshs 655/=
 - ii. 4th, 5th, 6th, 7th, 8th 9th, and 10th claimant Kshs 484/=
27. That on November 16, 2016, the respondent received a notice from the Kenya Bureau of Standards (KEBS) to the effect that a ban had been imposed on the manufacture of twisted steel bars for the reinforcement of concrete and in compliance thereof the claimants employment was adversely affected and they were declared redundant and the area labour officer was notified.
28. That the claimants were dismissed from employment on March 7, 2017.
29. It was the respondent's witness testimony that all the claimants acknowledge receipt of terminal dues and signed that they had no further claims against the respondent and none of them signed under protest.
30. On cross-examination, RW1 confirmed that the letter to the sub-county Labour Officer dated March 31, 2017 was not copied to any other person. The witness further confirmed that the respondent did not notify the claimants that they would be declared redundant.
31. On re-examination, the witness testified that the claimants accepted and signed for the amount paid without any protest.

Claimants' Submissions

32. Counsel for the claimants submitted that termination of the claimants employment was ipso facto illegal and an unfair labour practice as they were not accorded notice.
33. That the notice by KEBS was advertised on November 22, 2016. That the letter from the Kenya Bureau of Standards to the respondent and the respondent's letter to the Area Labour Officer were written three (3) weeks after the claimants had been dismissed.
34. It is the claimants submission that the provisions of section 40 of the *Employment Act*, 2007 were not complied with.
35. As regards the payment vouchers, it is submitted that the claimants signed for 7 days salary and prorated leave and nothing more. That the respondent cannot argue that it was discharged from other liability.
36. That the employees were ambushed having worked for the respondent for 3 years and had no employment the following day and were not made to understand the import of the payment voucher and assumed they were signing for what they were being paid. That the document was unequivocal.
37. The respondent had not filed submissions by July 27, 2022 as directed by the court on July 19, 2022 when it ought to have filed submissions.



Determination

38. The issues for determination are;
- i. Whether termination of the claimants employments was unfair.
 - ii. Whether the claimants are entitled to the reliefs sought.
39. As regards termination of employment, the provisions of the *Employment Act*, 2007 are explicit that for a termination to pass muster, it must be established that the employer had a valid and fair reason to terminate the employee's employment and did so in accordance with a fair procedure. The Act prescribes the respective obligations of the employer and employee in a claim of unfair termination of employment. (See *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR).
40. Sections 40, 41, 43, 44, 45 and 47(5) of the *Employment Act* prescribe the framework on termination of employment. These provisions lay it bare that for a termination of employment to pass muster, the employer must demonstrate that it had a substantive justification and conducted the termination in accordance with a fair procedure. These requirements were explained by this court in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and the court of Appeal in *Naima Khamis v Oxford University East Africa Ltd* (2017) eKLR among others.
41. In this case, CW1 testified that on March 6, 2017, they were notified that their employment would cease forthwith and were directed to collect their dues the following day which he confirmed they did.
42. The respondent on the other hand testified that the claimants were declared redundant occasioned by the requirement by KEBS that they transition from twisted steel bars to ribbed steel bars for the enforcement of concrete.
43. A notice that effect was published in a local daily on September 22, 2016 and was followed by a letter to the respondent dated March 29, 2017 on cessation of production of twisted steel bars. In compliance with the notice, the respondent notified the Athi – River sub county Labour Officer that it was closing its business to facilitate the installation of the TMT Machine as recommended by KEBS.
44. Noteworthy, the letter to the sub – county Labour Officer was sent about three weeks after the claimants had been declared redundant.
45. RW1 testified that the claimants had not been notified of the impending redundancy nor were they consulted on the issue.
46. The respondent's evidence is unequivocal that the provisions of section 40 of the Employment were not complied with in the conduct of the alleged redundancy.
47. As the Court of Appeal has affirmed, section 40 (1) of the *Employment Act* is couched in mandatory terms which implies that non-compliance with the provisions of section 40 renders the purported redundancy unlawful and the same transitions to an unfair termination of employment as happened in the instant case.
48. Neither the substantive nor the procedural requirements of termination of employment were complied with in the instant case.
49. For the foregoing reasons, it is the finding of the court termination of the claimants employment was unfair.
50. As regards the reliefs sought, all the claimants pray for one month's notice salary and 12 months compensation for the unlawful termination of employment.



51. The respondent urges that they are not entitled to compensation or other payment as they all accepted payment and absolved the respondent from further claims.
52. The respondent availed documentary evidence of terminal dues form signed by all the claimants on March 7, 2017. Although CW1's statement made no reference to the terminal dues form, on cross-examination, the witness confirmed that he received Kshs 13,550/= as terminal dues and had no evidence to show that he was coerced to accept the amount paid.
53. The witness further confirmed that he was not present when the other claimants signed the terminal dues form.
54. In submissions, the claimants counsel submitted that the claimants were not made to understand the import of the terminal dues form in a language they understood and assumed they were signing for what they were being paid.
55. Contrary to the counsel's submission, the claimants did not plead that they were not educated on the import of the document they were about to sign or assumed they were signing for other payments.
56. The claimants statement on record make no reference to the terminal dues form or the circumstances in which it was signed, but acknowledges receipt of the amount paid.
57. It is not in dispute that on March 6, 2017, Mr Okello informed the claimants to collect their dues on March 7, 2017 which they did. The documents on record show that each of the claimants signed the terminal dues form and inserted his ID card number. The form is also signed by the General Manager and the Human Resource Officer.
58. The claimants neither pleaded nor testified that they were coerced to sign the document or that its contents were misrepresented to them or that they did not understand its import and no explanation was given.
59. Finally, none of them signed the form under protest.
60. The terminal dues form contains the handwritten name of the employees, month of employment, date of termination, number of months worked and daily rate. It also sets of the calculations
 - Number of days worked Kshs
 - Leave days Kshs
 - Deductions
 - NSSF Kshs 360
 - NHIF Kshs 500
 - Total deductions Kshs
 - Net pay Kshs
61. The forms also states in part
 - “I terminated on March 7, 2017 agreed to the above calculations of my terminal dues and have nothing to claim from ISL (K) Limited. And have no claim against anybody in the company.”
62. The law on the effect of discharge or payment voucher or settlement agreement is well settled in a catena of Court of Appeal decisions.



63. As a foundation, the court has emphasized that employment contracts are generally governed by the general law of contract as encapsulated on the provisions of the *Employment Act* and other statutes. That it is negotiated and agreed upon by the employer and employee (see *Krystalline Salt Limited v Kwekwe Mwakele and 67 others* (2017) eKLR).
64. These authorities are clear that the court must satisfy itself that the settlement agreement was entered to voluntarily as explained in *Coastal Bottlers Ltd v Kimathi Mithika* (2018) eKLR and *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR.
65. The court is in agreement with the holding in *Trinity Prime Investment Ltd v Lion of Kenya Insurance Co Ltd* (2015) eKLR as follows;
- “The execution of the discharge voucher we agree with the learned judge constituted a complete contract. Even if payment by it was less than the total loss . . .”
66. Contrary to the claimants submission that the terminal dues form tabulated two items only, none of the claimants raised the issue or pleaded misrepresentation or that the amount was less than expected. In the absence of evidence of misrepresentation, fraud, mistake or coercion, the mutual signatures render the agreement binding on the parties.
67. In the instant case, the claimants were in agreement with the calculations as reflected on the document and the amount payable to them and are therefore bound by their signatures.
68. For the above stated reasons, the court is satisfied that the respondent has on a balance of probability established that the claimants entered into a binding agreement on terminal dues and absolved the respondent and its officers from other claims.
69. Having found that the claimants waived their right to pursue other claims against the respondent and its officers, the claim for reliefs is not sustainable.
70. In conclusion, claimants suit against the respondent is dismissed.
71. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH 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 15th March 2020 and subsequent directions of 21st 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

