



Opisa v Nzoia Water Services Company Limited (Employment and Labour Relations Cause 50 of 2021) [2022] KEELRC 12887 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12887 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 50 OF 2021**

JW KELI, J

OCTOBER 6, 2022

(FORMERLY KSM CAUSE NO. 378 OF 2018)

BETWEEN

PATRICK KWATEMBA OPISA CLAIMANT

AND

NZOIA WATER SERVICES COMPANY LIMITED RESPONDENT

JUDGMENT

Issue

Unfair termination of employment

1. The claimant filed a memorandum claim dated November 19, 2018 against the respondent on grounds of unfair termination seeking payment of salary arrears, gratuity, leave days, notice pay, leave allowance and compensation for unfair termination.
2. Together with the memorandum of claim, the claimant filed verifying affidavit, claimant's witness statement, list of documents of even date together the bundle of documents. The claimant further filed response to the memorandum of reply on the June 18, 2019.
3. The claim is opposed. The respondent entered appearance through the law firm of seneti and Oburu Associates Advocates and filed respondent's witness statement of Patricia Caroline Okello of August 10, 2020 together with respondent's list of documents and the bundle of documents. The respondent further filed proposed list of issues dated February 9, 2021.



Consent Order

4. On the April 4, 2022 the parties filed in court consent order in the matter dated February 8, 2022 in the following terms:-

“ please record the following consent orders:-

 - a. That prayers d,e and f be marked as settled.
 - b. That the honourable court makes determination as to the question of unfair termination of the claimant that is prayers a,b,c,h and i of the claimant’s statement of claim dated November 19, 2018.
 - c. That the matter be dispensed with based on the pleadings filed by the parties.
 - d. That the honourable court gives directions as to filing of submissions by the parties.””
5. The filed consent order was signed by the advocates of the parties namely Liko Anam Advocates for the claimant and Seneti &Oburu Associates Advocates for the respondent.
6. On the April 25, 2022 before court in the presence of Mr Anam advocate for the claimant and in absence of the respondent the said consent order was adopted as order of the court and directions for filing of submissions on the issue of unfair termination issued as per the request of the parties.
7. The claimant’s written submissions drawn by Liko & Anam Advocates are dated June 6, 2022 and filed in court on the June 14, 2022.
8. The respondent’s written submissions drawn by M.O.M & Co advocates are dated July 5, 2022 and filed in court on the July 6, 2022.

Determination.

Issues for determination

9. Pursuant to the consent order dated February 8, 2022 the parties asked the court to determine the question of unfair termination of the claimant that is prayers a,b,c,h and i of the claimant’s statement of claim dated November 19, 2018.
10. The parties rely on their written submissions.
11. The outstanding issues for determination under prayers a,b,c,h and i of the statement of claim are as follows:-
 - a. Twelve months’ salary in accordance with section 49(1) of the [Employment Act](#) being the statutory remedy for unlawful/unfair termination of employment contract (kshs 184,600 x12 x 12) ...kshs 2,215,200/- .
 - b. Salary for the month of June 2018 being kshs 184,600/-
 - c. Three months’ salary *in lieu* of notice of termination as under the employment contract at kshs 553,800/-

Prayer h. costs of this suit.

Prayer i. certificate of service for service rendered to the respondent.



12. The court taking into consideration the terms of the consent order is of the considered opinion the outstanding issues for its determination are as follows:-
 - i. Whether there was unfair termination of employment of the claimant
 - ii. Whether the claimant is entitled to reliefs sought under prayers a,b,c,h and i

Whether There Was Unfair Termination of Employment of The Claimant

The relevant law

13. Section 43 of the [Employment Act](#) addresses proof of reasons for termination of employment as follows:-
 - “(a) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.”
14. Section 44 (4) of the [Employment Act](#) provides for justifiable and lawful grounds for dismissal from employment, *inter alia* to be if:-
 - a. Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
 - b. an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
15. Section 45 (2) of the [Employment Act](#) provides that a termination of employment by an employer is unfair if the employer fails to prove:-

The reason for the termination is a fair reason:-

 - a) Related to the employees conduct, capacity or compatibility or
 - b) Based on the operational requirements of the employer.
16. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.
17. Section 47(5) of the [Employment Act](#) provides for burden of proof in claims for wrongful dismissal as follows:-
 - a. “(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
18. Thus, the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.



19. Section 41 of the *Employment Act* provides for procedural fairness as follows:- ‘41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.’”

The claimant’s case(as per claimant’s statement of claim and witness statement)

20. By a contract of employment dated June 29, 2015 the claimant was engaged as human resources manager of the respondent for a period of 3 years with a probationary period of 6 months(Pok1)
21. The claimant claims that via a company board meeting resolution of June 25, 2015 and subsequent letter of dated November 4, 2015 his contract period was increased to run for 5 years instead of the initial 3 years (Pok3)
22. That by virtue extension the respondent was required to evaluate his performance on agreed targets at the end of the initial three years and if satisfied with his performance , the claimant was allowed to complete the rest of the extended contract term.
23. The claimant claims that on July 3, 2018(Pok4), without notice of 3 months as per paragraph 8 of his contract of 3 months and without evaluation as per his contract he received letter of employment termination.
24. That in the circumstance the termination was illegal and unlawful.

The respondent’s case (as per witness statement of Patricia Caroline Okello)

25. The respondent’s admits the terms of contract of employment and subsequent extension of the term to 5 years save to adding that the extension of the contract was conditional and/or acknowledging the terms of extension in writing as per their contracts and also undergoing an evaluation process to evaluate their performance which was a condition precedent to the extension of the contract.
26. The respondent’s case is that the *vide* letter dated June 6, 2018 the claimant was invited to an appraisal session on the June 15, 2018 of which he responded *vide* letter dated June 13, 2018 that he desired to have the exercise conducted on the June 20, 2018 but claimant never turned up for the appraisal on his preferred date. The respondent *vide* letter dated June 26, 2018 wrote to the claimant and expressed displeasure for non attendance of the appraisal on the June 20, 2018.
27. That the claimant *vide* letter dated July 3, 2018 wrote to the respondent’s managing director indicating he was experiencing challenges in obtaining documents to be used in the appraisal and proposed to be appraised between 3rd and July 5, 2018. That as at that time the claimant’s contract of 3 years had already expired on the June 30, 2018 and was no longer an employee of the respondent.

Determination On The Issue Of Unfair Termination

28. It is not in dispute that the contract of employment for 3 years was to be extended for another 2 years as per terms under letter dated November 4, 2015. The letter on letter head of the respondent reads as follows:-

“Dear Opisa,

Ref: Contract period



I refer to your employment letter ref: Nzowasco/HD/MD of June 29, 2015 , offering you a three(3) year contract appointment for the position of human resource manager. This is to inform that following the recommendation of the organization restricting report and the revised human resource manual, the board of directors resolved that contract period for management staff be reviewed to run for five (5) years.

I'm pleased to therefore inform you that you will be employed with the company for a period of five (5) years with effect from July 1, 2015. The board will evaluate your performance after three years and if you meet the performance targets agreed you will be allowed to complete the rest of the contract term. However if your performance is low you will separate from the company”

29. The court finds and determines that the contract of employment of the claimant was extended to 5 years but subject to the board's evaluating his performance after the three years to determine if he would serve the extended period. That was the only condition. The issue of acceptance of the extension was not raised as the board chose to extend the said contract and did not open the extension to acceptance.
30. The claimant's services were terminated *vide* letter dated July 3, 2018 which is titled contract end and stated that the claimants contract of 3 years had come to an end. The claimant submits that this letter did not meet the threshold of section 43 and 45 of the *Employment Act* as it did not disclose any performance related issues and that further no notice was issued of 3 months as per letter of employment (Pok4). The claimant submits he is entitled to compensation under section 49 of the *Employment Act*.
31. The respondent submits that the claimant was never dismissed from work but his contract of employment lapsed and or expired. That the claimant failed to turn up for his appraisal on the June 20, 2018, a date he suggested to postpone date of June 15, 2018 (respondent's document 3 letter by claimant dated June 13, 2018), that the claimant wrote on July 3, 2018 to the managing director explaining challenges in obtaining documents for appraisal and proposing a future date but as at that time his contract had expired on the June 30, 2018 and was no longer the respondent's employee. To buttress their claim the respondent relies on the decision in *Stephen M.K Kitbeka v Kevita International Limited* (2018)Eklr where the court held that even without communication of non-renewal the petitioner knew of the expiry date of his fixed term contract and there was a reasonable chance he would not have a second term.
32. The respondent submits that the term of contract having lapsed the claimant cannot claim unfair termination and further that the claimant's contract required he signs the varied times in acknowledgement and also failed to attend the evaluation.
33. The court already found the contract was extended by the board on its own and in the communication letter it was clear the contract term was extended for 5 years subject to performance appraisal after the 3 years of the initial contract.
34. The court finds that the claimant was invited for evaluation on the date he suggested of June 20, 2018 as envisaged in the letter of November 4, 2018 to enable the board decide whether or not he would serve the extended period. The court finds that the claimant failed to attend the said evaluation as admitted in his letter of July 3, 2018.
35. The court finds that in view of the letter dated November 4, 2015, the terms of service of the claimant under letter of employment were varied by the board from 3 years to 5 years subject to performance appraisal to serve the extra 2 years. The claimant having failed to attend the appraisal he was then



- entitled to notice and hearing before termination of the contract on basis of the 3 years. Compliance with the provisions of section 41 of the [Employment Act](#) is mandatory before termination of contract.
36. The court having found that the claimant was to blame for failing to attend to the evaluation which was a term of serving in the extended period of 2 years, the respondent had justified reasons to terminate contract as envisaged under section 43 and 45 (2) of the [Employment Act](#).
37. The court finds there were justified reasons of termination of the contract being the failure to attend appraisal scheduled on claimant's request of June 20, 2018 and which appraisal was an express condition for serving the extended period of 2 years. The court finds and determines there was procedural unfairness as the claimant was not invited for hearing or issued with notice before the termination.
- ii. Where whether the claimant is entitled to reliefs sought under prayers a,b,c,h and i
- Prayer a – 12 months salary in accordance with section 49(1) of the [employment act](#) being the statutory remedy for unlawful and unfair termination.
38. The claimant submits he is entitled to compensation for wrongful, unlawful and unprocedural termination and relies on the decision in Nairobi ELRC [Abraham Gumba v Kenya Medical Supplies Authority](#) (2014) eKLR where the court held there was procedural unfairness in the termination. The court considered the decision and found the case not similar to the instant case as in that case the reason for the termination were found to be ‘jumbled’ applying that court language. In the instant case the court established that the claimant was aware of the condition of performance evaluation after the three years and he failed to appear on the scheduled date of evaluation. The court then finds that there existed valid reasons to terminate the contract by failing to extend the contract. The employer complied with the terms of the extension. The court found nevertheless the claimant was entitled to hearing thus there was procedural unfairness.
39. The court finds that the claimant is not entitled to compensation for procedural unfairness as the reason of his failure to attend the appraisal was in breach of the contract of employment leading to the termination. The claimant is entitled to notice pay as stated under his terms of contract of 3 months(Pok1) and consistent with the provisions of section 36 of the [Employment Act](#) being payment *in lieu* of notice and section 49 (1)(a) of the [Employment Act](#).
40. Prayer b is for salary of June 2018. The claimant attached his payslip of June 2018 (Pok2). The court finds the salary for June 2018 was paid and the claim has no merit.
41. Prayer c notice pay. The contract of employment (Pok1) states that the claimant was entitled to payment of 3 months basic salary in lieu of notice. The basic salary under his June 2018 payslip was kshs 129,600/-. notice payment *in lieu* is granted for 3 months basic salary total award of kshs 388,800/-.
42. Prayer h costs follow the event. The claimant is awarded costs of the claim.
43. Prayer i certificate of service. It is a statutory right of every employee to be issued by the employer on exit of service with certificate of service as provided for under section 51 of [Employment Act](#). The respondent is ordered to issue the claimant with his certificate of service as per the terms under section 51 of the [Employment Act](#).



Conclusion And Disposition

44. The court determines that the termination of the employment services of the claimant by the respondent was procedurally unfair but with justified reason and issues judgment for the claimant against the respondent as follows:-
- a. Notice payment *in lieu* is granted equivalent of 3 months basic salary total award of kshs 388,800/- (payment subject to statutory deductions)
 - b. The court orders the respondent to issue the claimant with original certificate of service pursuant to section 51 of the *Employment Act* within 7 days of this judgment through his advocates.
 - c. Interest awarded at court rates from date of judgment until payment in full.
 - d. The respondent to pay the petitioner costs of the suit.
45. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 6TH DAY OF OCTOBER,2022

**J. W. KELI,
JUDGE.**

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant:- Anam Advocate

Respondent: Makori Advocate

