



**Kosgei v Toshamatt Supermarket (Cause 251 of 2017)
[2022] KEELRC 13416 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13416 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 251 OF 2017
NJ ABUODHA, J
NOVEMBER 21, 2022**

BETWEEN

ENOCK KOSGEI CLAIMANT

AND

TOSHAMATT SUPERMARKET RESPONDENT

JUDGMENT

1. By a memorandum of claim dated June 19, 2014 the claimant pleaded inter alia that:
 - a. At all material times to this cause, the claimant was employed by the respondent.
 - b. The claimant worked for the respondent on February, 2012 until October, 2013 when the respondent unlawfully terminated the services of the claimant and refused to pay his dues.
 - c. The claimant avers that the respondent without compliance with the *Employment Act* cap 226 proceeded to purport to terminate his employment.
 - d. The claimant avers that the termination was unlawful for the following reason.
 - i. The claimant trade union was not informed of the intention to declare the claimant redundant.
 - ii. No leave pay was given.
 - iii. No one month's salary in lieu of notice was paid.
 - iv. The required severance pay was not paid.
 - v. There was no chance given to the claimant to air his view and/or explain himself.
 - e. The claimant thus seeks a declaration that the termination process as carried out by the respondent is unlawful.



f. The claimant further avers that during his employment with the respondent he was grossly underpaid hearing regard to the regulation of wages (general) (amendment) order, in force, worked overtime without payment, he worked of rest days without pay and worked on public holidays without due pay.

g. The claimant hence claims against the respondent as hereunder:-

a. 1 month pay in lieu notice

basic + house allowance

$12,184 + 1,827 = \text{Kshs } 14,011$

b. Leave due-21days x years

worked x basic + house allowance/26

$1.75\text{days} \times 21 \text{ months} \times 12,184 + 1,827/26 = \text{Kshs } 19,804$

c. Service benefits –15 days x yrs worked x basic/30 days

$15\text{days} \times 1 \text{ year} \times 12,184/30 = \text{Kshs } 6,092$

d. Salary of 4 days

$4 \text{ days} \times 14,011/30\text{days} = \text{Kshs } 1,868$

e. Overtime dues form 45hrs per week

$11 \text{ hrs} \times 6 = 66-45 = 21 \text{ hrs}$

$21\text{hrs per week} \times 4 \text{ wks} = 84$

$84 \text{ hrs} \times 1.5 \times 12,184/195 = 7,872 \text{ p m}$

$7.872 \times 21 \text{ months} \text{ Kshs} = 165,312$

f.

(i) underpayment of wages legal notice No 71 of 2012

basic + Hse all – current pay

$10,687 + 1,603 = 12,290 - 10,800$

$1,490 \times 12 \text{ months} = \text{Kshs } 17,880$

(ii) underpayment of wages legal notice No 197 of 2013

$12,184 + 1,827 = 14,011 - 10,800 \times 5 \text{ months} = \text{Kshs } 16,055$

Total Claim = Kshs 241,022

2. The respondent entered appearance and filed a memorandum of response on June 17, 2015 in which it pleaded inter alia that:

a. The claimant is a former employee of the respondent as a general a general labourer with effect from February 21, 2013 as a general labourer and thereafter from August 15, 2013 earning a salary Kshs 9,024/= per month.

b. The claimant was not performing his duties diligently and at times he used to report to work while drunk and disorderly.



- c. The claimant's service were terminated on June 5, 2013 and after apologizing and agreeing to mend his ways was reinstated only for him to be caught trying to steal batteries from the supermarket on October 9, 2013.
 - d. The claimant disappeared from employment thereafter while investigations were being carried out to ascertain whether other items from the supermarket had been missing and whether he was involved in any other theft.
 - e. The respondent therefore in response to paragraph 5,6,7,8 and 9 of the claim denies having unlawfully terminated his employment, underpaying him, working overtime, rest days and public holidays without pay
 - f. The respondent further denies the particulars under paragraphs 6(a)-(e) of the memorandum of claim and puts the claimant to strict proof thereof.
3. At the oral hearing the claimant stated that he was employed as a milkman in charge of shelves and floor. He was terminated on October 10, 2013 without notice. He worked for the respondent for one year.
 4. The claimant denied coming to work drunk and stealing. His monthly salary was Kshs 9,200/= and that he used to report to work at 8.00am and would work until 8.00pm. He further stated that he never went on leave during the period he worked.
 5. In cross examination he stated that he applied for employment as a general worker and was hired and issued with employment contract on August 15, 2013. His wages were paid weekly and he signed for them. His daily wage was Kshs 335/= per day.
 6. The claimant further stated that he used to work for 12 hours per day with 5 minutes lunch break. He denied reporting to work drunk and trying to steal batteries. He never worked in the line for batteries. He denied disappearing on October 9, 2013.
 7. The respondent's witness Ms Irine Seurei stated that she was a sales lady and that she recorded a witness statement on April 5, 2013 which she adopted as her evidence in chief. According to her, the claimant was a general worker and that he was paid weekly and also paid overtime. He signed weekly payment receipts. He denied the claimant was dismissed on October 9, 2013. It was her evidence that after the claimant was given a last chance he was caught with batterers on his pockets.
 8. In cross-examination she stated the claimant used to coordinate movement of goods from the store to the shop and that he was paid Kshs 9,124/= per week. This was basic salary and did not include allowances.
 9. It was her evidence that the theft was reported to the police but the claimant was never taken to the police and that he disappeared from that day. He was called on phone but could not be reached.
 10. In a claim for unfair termination, the burden of proof of the reasons for termination is on the employer. The respondent herein alleged that the claimant used to report to work drunk and further he was found attempting to steal batteries from the respondent's shop. The respondent further alleged that the claimant failed and or ignored to change his ways even after promising to do so. The respondent however produced no evidence of any warning letter or memo to the claimant expressing its disapproval of the claimant's conducts.
 11. The respondent further alleged that the claimant disappeared and never came back after being caught attempting to steal batteries but did not produce any evidence to show any attempt was made to reach the claimant for purposes of disciplinary hearing.



12. From the foregoing the court is not persuaded that the respondent has discharged the legal burden cast upon it by law. The court therefore holds that the termination was unfair.
13. The claimant has made a raft of claims including payment for leave, service benefits, underpayment and overtime.
14. From the documents produced before the court by the respondent the claimant was employed on August 15, 2013 at a monthly salary of Kshs 9,024. The contract was to run for one year renewable by mutual agreement. From his evidence in court the claimant stated that by the time he was terminated he had worked for one year.
15. The respondent in its bundle of documents attached with the response attached documents shown as weekly payment reports signed by the claimant and his colleagues. The weekly payment report indicated that overtime was paid where worked. These documents were not disowned by the claimant. The court therefore accepts them as evidence showing overtime was paid whenever worked.
16. Regarding underpayment, the claimant never produced the relevant wage order to show the legal minimum wage payable to persons of his cadre at the material time in order for the court to compare with what he actually paid to see if there was underpayment. This heads of claim are therefore rejected. The records show the respondent never made any NSSF contributions for its workers. Service is therefore payable.
17. In conclusion the court awards the claimant as follows:
Kshs
 - a. One month's salary in lieu of notice - 9,024
 - b. Three months' salary as compensation for unfair termination of service - 27,072
 - c. On months' salary on account of leave - 9,024
 - d. 15 days' salary as service pay - 4,512Total= 49,632
 - e. Cost of the suit at subordinate court rates.
18. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2022

Abuodha Nelson Jorum

Judge ELRC

