



REPUBLIC OF KENYA



KENYA LAW
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Kunga v George Joshua Ongonga Okungu t/a Rock Resort Kisumu (Cause 18 of 2016) [2022] KEELRC 13156 (KLR) (9 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13156 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 18 OF 2016
S RADIDO, J
NOVEMBER 9, 2022

BETWEEN

JOAB ODHIAMBO KUNGA CLAIMANT

AND

**GEORGE JOSHUA ONGONGA OKUNGU T/A ROCK RESORT
KISUMU RESPONDENT**

JUDGMENT

1. This cause was heard on 22 November 2021 when Joab Odhiambo Kunga (the claimant) testified, and the respondent's case was rescheduled to 31 January 2022.
2. Despite being indulged severally, the respondent did not lead any evidence, and it closed its case on 30 June 2022.
3. The claimant filed his submissions on 5 July 2022, and the respondent's submissions were not on record by the agreed timeline of 30 October 2022.
4. The court has considered the pleadings, evidence, and submissions.

Unfair Termination Of Employment

5. The claimant's case on unfair termination of employment was that in August, September, October and November 2015, the respondent failed to pay his salary and that on 9 December 2015, he was informed verbally that his services were no longer required.
6. The claimant asserted that he was not given any notice hence the decision was unlawful.
7. The respondent's pleaded defence was that the claimant's employment was terminated on account of gross misconduct and that he was paid November 2015 salary as well as pay in lieu of notice on 9 December 2015.



8. On the assumption that the claimant's employment was terminated, it was incumbent upon the respondent to issue a written notice as envisaged by section 35(1)(c) of the [Employment Act, 2007](#) (unless it was a case of summary dismissal). The respondent did not assert that this was a case of summary dismissal.
9. The respondent did not demonstrate that it issued a written notice.
10. Similarly, section 41 of the [Act](#) requires the employer to afford an employee facing termination of employment an opportunity to make representations. This could be through correspondence such as a show cause or oral hearing.
11. The respondent did not discharge the burden of showing that it allowed the claimant an opportunity to make representations in the presence of another employee.
12. The court finds that the respondent unfairly terminated the claimant's employment.

Compensation and pay in lieu of notice

13. The respondent did not produce any records in court to show that it paid the claimant salary in lieu of notice, and the court will allow the equivalent of 1 month salary in lieu of notice.
14. Records filed in court by the respondent and not produced suggest the claimant had honesty concerns in the performance of his duties.
15. However, considering the claimant's length of service of 3 years, the court is of the view that the equivalent of 1 month's salary as compensation would be appropriate (the claimant was earning Kshs 35,000/- per month).

Breach of contract

Salary Arrears

16. The respondent did not produce any pay records to rebut the claimant's testimony that he was not paid salaries for August, September, October, November and 9 days in December 2015. The court will allow this head of the claim in the sum of Kshs 150,500/-.

Leave

17. The claimant did not provide an evidential foundation to this head of the claim, and relief is declined.

Service Pay

18. A copy of the pay slip produced by the claimant show he was contributing to the National Social Security Fund and, therefore, by dint of section 35(5) & (6) of the [Employment Act, 2007](#), he is not entitled to service pay.

Conclusion And Orders

19. The court finds and declares that the respondent unfairly terminated the claimant's employment and that it was in breach of contract.
20. The claimant is awarded:
 - i. Compensation Kshs 35,000/-



- ii. Pay in lieu of notice Kshs 35,000/-
 - iii. Salary arrears Kshs 150,500/-
- Total Kshs 220,500/-

21. The claimant to have costs.

DELIVERED VIRTUALLY FROM MALINDI, DATED, AND SIGNED ON THIS 9TH DAY OF NOVEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For claimant Bruce Odeny & Co Advocates

For respondent Kimanga & Co Advocates

Court Assistant Chrispo Aura/Everylyne Nyaboke

