



REPUBLIC OF KENYA



KENYA LAW
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**Arvindbhai v Slapper Shoe Industries Ltd (Cause E001 of 2020)
[2022] KEELRC 13075 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13075 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E001 OF 2020
B ONGAYA, J
NOVEMBER 4, 2022**

BETWEEN

JANI SANJAY KUMAR ARVINDBHAI CLAIMANT

AND

SLAPPER SHOE INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 23.09.2020 through Mune Katu & Associates Company Advocates. The claimant changed his advocates to Jacqueline Kariuki & Associates by the notice of change filed on 26.10.2020. The claimant pleaded as follows. He was employed by the respondent on 01.09.2007 as a production executive deployed in Mombasa. The monthly salary was Kshs. 122,000.00. The job ceased on 30.11.2018 and reason for termination was not properly given. The letter of appointment was dated 15.04.2008 and employment commenced on 01.09.2007. The claimant worked with a clean record until 30.11.2018 when he was terminated verbally without due procedure and it was unfair because there was no termination notice; there was no hearing; there was no termination letter; and terminal dues were not paid. The demand letter dated 14.08.2020 was issued by the claimants' advocates and was replied by the respondent's advocates' letter dated 25.08.2020.
2. The claimant claimed and prayed for judgment against the respondent for:
 - a) A declaration that the claimant's termination by the respondent was procedurally unfair.
 - b) One-month salary in lieu of the notice Kshs. 122,000.00.
 - c) 20-days of accrued annual leave Kshs. 164,230.00.
 - d) Leave traveling allowance Kshs. 309,000.00.
 - e) Severance payment Kshs. 671,000.00.



- f) Maximum compensation $122,000 \times 12 = \text{Kshs. } 1,464,000.00.$
 - g) Total amount claimed Kshs. 2,730,230.00.
 - h) Certificate of service.
 - i) Costs and interest.
3. The respondent filed the response to the memorandum of claim on 26.10.2020 through Jacqueline Waihenya Advocate. The respondent pleaded as follows. The claimant was employed upon a term contract dated 01.04.2009 as an Electrical Engineer in Rubber Division. His basic salary was Kshs. 40,000.00 per month and he was provided a free and furnished housing accommodation. He was provided transport to and from the factory. He was a member of NSSF. The contract was for 2 years effective 01.04.2009. The position was subject to availability of Work Permit Class A as confirmed by the Kenya Department of Immigration. He was entitled to 20 days of annual leave accumulated over the 2-years of service. The contract was terminable by either party giving 3 months' notice. The contract was renewable at the respondent's discretion.
4. The respondent further pleaded as follows. The claimant was initially employed by Umoja Rubber Products Limited from 01.08.2002 up to 31.05.2008. He could not therefore have been employed by the respondent prior to 31.05.2008 as per his certificate of service dated 31.05.2008 issued by his employer and his resignation letter of 02.05.2008 duly exhibited. Thus the respondent issued the claimant a letter of appointment dated 01.09.2008 but which had a typographical error reading 2007 instead of 2008. That letter was to facilitate him apply for the work permit with the Immigration Department. The application for work permit was rejected and the respondent appealed on behalf of the claimant as per notice of appeal dated 01.09.2008. The claimant applied for special pass No. 516257 dated 15.09.2008 to enable him stay in Kenya and apply for the work permit. The respondent succeeded in obtaining a work permit for the claimant dated 14.04.2009 and paid the relevant fees and security bond. The respondent's case is that the claimant did not have the legal status to work for the respondent until he obtained the work permit dated 14.04.2009 and per the immigration laws.
5. The respondent also pleads as follows. It assisted the claimant to obtain permanent residency status on 10.10.2013 and paid Kshs. 500,000.00 on his behalf per receipt No. 0530863. He was given a certificate of permanent residence dated 21.04.2015. As he exited the respondent's employment, he had not repaid that money. The respondent admitted that as the claimant left employment his monthly salary was Kshs. 122,000.00. Further the claimant's employment was connected to the respondent's rubber plant. There were many attempts to sell the plant which yielded in May 2018. All the staff at the rubber plant were declared redundant but the claimant being a favoured employee, the respondent's directors went out of their way to secure employment for him with the new owner of the plant who engaged him to install the machines. After completing installation of the machines in November 2018, the claimant refused to take up the new employment and for reasons best known to himself. The respondent's directors then gave favourable references to Jumbo Mattresses in Mombasa and who employed him.
6. The respondent further case is as follows. The claimant's final dues were computed and shared with him as follows:
- a) Gratuity for 9 completed years of service Kshs. 549,000.00.
 - b) Prorate leave for 2018 (17 days) Kshs.69,133.00.
 - c) Total dues Kshs. 618,133.00.



- d) Less PAYE Kshs. 224, 806.00.
 - e) Less cash paid Kshs. 320, 000.00.
 - f) Less water tanks sold Kshs. 60,000.00.
 - g) Net pay due Kshs. 13, 327.00.
7. Further the claimant had requested and was paid in cash Kshs. 320, 000.00 being his redundancy dues and he signed petty cash vouchers dated 23.08.2018, 13.09.2018, and 27.09.2018 duly exhibited and to acknowledge the receipt. After he left it was discovered that he had sold to Mr. Job two tanks each of 5, 000 litres valued at Kshs. 30,000.00 x2 thus Kshs. 60,000.00. The certificate of service was issued on 03.12.2018 and signed by the claimant. Throughout service the claimant took his annual leave and the respondent paid for his air travel tickets. The claimant refused to collect his net dues because he objected to the lawful deduction of statutory dues like PAYE.
8. The respondent pleaded that the claimant was not entitled to the claims and prayers. He enjoyed the respondent's preferential and favoured treatment. The respondent did not terminate the employment but the claimant left on his own volition. The respondent in the process took lawful steps. The respondent prayed for orders:
- a) The claimant's net dues are Kshs. 13,327.00 as computed by the respondent.
 - b) A declaration there was no unlawful termination.
 - c) A declaration the Kshs. 500,000.00 paid by the respondent for the claimant to obtain a permanent resident permit is due and refundable to the respondent company.
 - d) The claimant's suit be dismissed with costs.
 - e) That the claimant to issue apology to the respondent for malicious and unfair prosecution.
 - f) Any other relief that the Court may deem fit.
9. The claimant testified to support his case. The respondent's witness (RW) was the Chief Accountant Mohamed Shaffi Abdulkumar. Final submissions were filed for the claimant and the respondent belatedly file on 01.11.2022 outside the time as had been directed by the Court. The Court has considered the material on record and returns as follows.
10. To answer the 1st issue for determination the Court returns that there is no dispute that the respondent employed the claimant. The dispute is the capacity of employment and the section the claimant was to work in. The respondent states that the letter exhibited for the claimant dated 15.04.2008 purportedly engaging the claimant as Production Executive was issued only to assist the claimant to process the work permit without which the respondent could not have employed him. The respondent states that the effective letter of appointment was therefore the one dated 01.04.2009 employing the claimant as Electrical Engineer in Rubber Division. The respondent's case is that the claimant got the work permit dated 06.04.2009 and without which he could not have been employed. The claimant testified that he worked in in all sections including the rubber section and later testified that after the sale of the rubber plant many employees did become redundant but with his exception. He had testified that he needed a work permit to work as appointed. The Court finds that by law and as testified by the claimant, a work permit was a precondition for the claimant's employment. Accordingly, the Court returns that per the respondent's case, the claimant was employed as an Electrical Engineer in the respondent's rubber division as per the letter dated 01.04.2009. He worked until the respondent sold the rubber plant in



2018. The last monthly salary was Kshs. 122,000.00. The respondent's account of the circumstances of the employment are upheld.

11. The 2nd issue for determination is whether the claimant's contract of service was terminated. The claimant pleads that on 30.11.2018 the respondent decided and terminated his services verbally without fairness. RW has confirmed that position. RW testified thus, "He was declared redundant. It was communicated by letter. It is page R.23. It confirms he worked 01.04.2009 to 30.11.2018..." The claimant testified that when the rubber plant was being sold he was not given a notice about that sale. Further he was not given a letter of termination and he was not paid any terminal dues. The respondent at page R.23 has exhibited what appears as a certificate of service stating that the claimant worked as its Electrical Engineer from 01.04.2009 to 30.11.2018, being 9 complete years of service. The Court returns that the termination was on account of redundancy after the rubber plant was sold sometimes in 2018.
12. To answer the 3rd issue for determination the Court returns that the termination was unfair in procedure and generally in view of section 40 of the *Employment Act*, 2007. First, the reason for termination appears not to have been suspect. While the respondent pleaded at paragraph 11 that the rubber plant had been sold in May 2018, the claimant appears to have continued to work for the respondent and he did so until 30.11.2018. The allegation that the respondent secured the claimant job with the buyer appears suspect and not credible because, if it was true, why did the respondent plead that the machines were sold in May 2018 and yet, the claimant continued to work for the respondent until 30.11.2018? It appears that while the claimant was employed in the Rubber Division, he indeed worked in all other divisions beyond the Rubber Division and as per his own evidence. Clause 13 of the letter of appointment states that the claimant could be required to serve in any country or area to which the company could assign him from time to time for purposes of furthering the company's or its client's interest. The Court returns that the claimant's testimony that he served beyond the Rubber Division is consistent with the said clause 13. Further, there was no evidence that the respondent arranged for the claimant to be absorbed by the buyer of the rubber plant or by any other employer as was pleaded for the respondent.
13. The Court further finds that the termination was in breach of section 40 of the *Employment Act*, 2007. No 30 days' notice has been shown to have been served upon the claimant and the area labour officer on the extent and nature of the redundancy as per section 40(1) of the Act. The provisions on the payment of severance dues, notice and other dues under the section appear not to have been complied with. It was an unfair termination both in procedure and substance.
14. To answer the 4th issue for determination the Court returns on the remedies as prayed for the claimant as follows:
 - a) The Court returns that the claimant is entitled to the declaration that the claimant's termination by the respondent was procedurally unfair.
 - b) The claimant is entitled to one-month salary in lieu of the notice Kshs. 122, 000.00 per section 40 of the Act.
 - c) The claimant prayed for 20-days of accrued annual leave Kshs. 164,230.00. The respondent has admitted to 17 days per its own computation and the claimant is awarded Kshs. 69,133.00 for leave days due as at separation and per section 40 of the Act.
 - d) The claimant prays for leave traveling allowance Kshs. 309,000.00. The period for which the claim is made is not pleaded and the evidence to justify the award is not provided. The claim will collapse as not particularized in the pleading and not strictly proved.



- e) The claimant has prayed for severance payment Kshs. 671,000.00. Section 40 of the Act entitled him to half monthly pay for each completed year served making Kshs. $122,000/2 \times 9$ thus Kshs. 549,000.00.
 - f) The claimant prays for maximum compensation $122,000 \times 12 =$ Kshs. 1,464,000.00. The Court has considered the expenses the respondent incurred to facilitate the claimant obtain permanent residence and work permit. While those may have been on generosity or gift arrangements, the Court considers that they serve as mitigating factors in favour of the respondent per factors to consider in such awards under section 40 of the Act. Looking at the factors, the claimant had been a good and experienced employee per RW's testimony, he appears to have had a clean record of service, he desired to continue in employment, and he did not contribute to his unfair termination. To balance justice for parties, he is awarded 7-months' salaries in compensation under section 49 of the Act making Kshs. 854,000.00.
 - g) Total amount awarded Kshs. 1,594,133.00.
 - h) The certificate of service appears to have been issued and the original to be delivered to the claimant.
15. The 5th issue is whether the respondent is entitled to the Kshs. 500,000.00 paid on 10.10.2013 to obtain his permanent residence status. First, there appears to be no clause in the letter of appointment or elsewhere about that payment so that the Court considers that it falls outside the contract of service between the parties. In absence of the specific arrangements by way of a binding agreement between the parties on refund, the Court finds that it is not recoverable. Second, the payment was on 10.10.2013 and since then it has been a continuing injury or claim whose cessation was on 30.11.2018 when the parties separated. Under section 90 of the Act, the time of limitation for such continuing injuries is 12 months from the date of cessation but the apparent claim or counterclaim as it appears was filed belatedly on 26.10.2020 –so that the cause of action was time barred. Even if the time was to be computed for whatever reason, which would be wrong, as at the time the memorandum of claim was filed on 23.09.2020, the respondent's claim would as well be time barred. Fourth, that expense as incurred by the respondent has already been taken into account by the Court as a mitigating factor in awarding the claimant only 7-months' salaries in compensation for the unfair termination. The claim by the respondent is therefore declined. The other prayers by the respondent against the claimant are found unjustified. They will collapse.
16. The claimant has substantially succeeded in his claim and is awarded costs of the suit.
17. In conclusion, judgment is hereby entered for the claimant against the respondent for:
- 1. The declaration that the claimant's termination by the respondent was procedurally unfair.
 - 2. The respondent to pay the claimant the sum of Kshs. 1,594,133.00 (less PAYE) by 31.12.2022 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
 - 3. The respondent to deliver the original claimant's certificate of service by 01.12.2022.
 - 4. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4TH NOVEMBER, 2022.

BYRAM ONGAYA



JUDGE

