



**Ekisa v Hunkar Trading Co Limited (Cause 2182 of 2016)
[2022] KEELRC 13540 (KLR) (14 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13540 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2182 OF 2016
JK GAKERI, J
DECEMBER 14, 2022**

BETWEEN

ANSELM OKIRU EKISA CLAIMANT

AND

HUNKAR TRADING CO LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on 25th October, 2016 alleging that the Respondent had failed to pay him salary in lieu of notice, off-days not taken, salary for 15 days worked in August 2015 and compensation for unfair dismissal.
2. The Claimant avers that he was employed by the Respondent as a rider from 21st July, 2015 to 15th August, 2015 at Kshs.18,235/= per month and had no letter of appointment.
3. That he was paid Kshs.6,045/= for the 10 days worked in the month of July 2015.
4. It is the Claimant's case that on 15th August, 2015, he was sent to collect a cheque from a certain company but the company had closed its office at 12.00 noon.
5. That the Claimant was dismissed from employment without letting him show cause why he did not collect the cheque.
6. That he texted the General Manager, Mr. Dan Aggrey Omondi on 17th August and in November 2015.
7. It is the Claimant's case that he delivered letters to several companies such as ABC Centre, KIPi and many others on the material day.
8. The Claimant prays for;
 - a. A declaration that the Respondent pays the Claimant all his dues as follows;



- i. Salary in lieu of notice Kshs.18,135/=
 - ii. Off-days not taken Kshs.1,813/=
 - iii. Salary for 15 days in August 2015 Kshs.9,064/=
 - iv. Compensation for unfair dismissal Kshs.217,620/=
- Total Kshs.246,633/=
- b. Costs of this suit.
 - c. Interest on (a) and (b) at court rates.

Respondent's case

- 9. The Respondent entered appearance on 10th May, 2017 through the law firm of Njiiri Kariu & Njau Advocates but did not file any response or respond to the courts notice to show cause dated 12th April, 2021 served via email on 19th April, 2021.
- 10. However, as early as 23rd October, 2017, the court had directed that the suit proceeds as undefended due to the Respondent's failure to respond to the claim.
- 11. The suit was heard on 19th July, 2022 and the Claimant was accorded 14 days to file and serve submissions and the Respondent would have 14 days after service.
- 12. The Claimant's advocate was directed to serve mention notice for confirmation of filing of submissions due on 28th September, 2022 and the notice was served on 2nd August, 2022 and an affidavit of service filed.
- 13. The Respondent did not participate in the proceedings though well aware that they were on-going in court.

Claimant's evidence

- 14. The Claimant adopted the written statement dated 21st October, 2016. The statement rehashes the contents of the Memorandum of Claim with minor additions such as purported sms messages to and from the Respondent.
- 15. CWII, Mr. Vincent Omondung testified that he used to work for the Respondent as a rider but secured another job. That he used to speak to the Respondent's Manager, Mr. Dan Omondi and requested the Claimant herein to apply for a position with the Respondent and he was employed but did not work for long.

Claimant's submissions

- 16. The submissions on record address no specific issue other than the facts of the case and no judicial authority is cited.
- 17. The Respondent did not file submissions or participate in the suit.

Determination

- 18. The issues for determination are;
 - i. Whether the Claimant was an employee of the Respondent.



- ii. Depending on the answer to (i) whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
19. As to whether the Claimant was and employee of the Respondent, the Claimant tendered no documentary evidence of a relationship between him and the Respondent.
 20. However, due to the Respondent's refusal or failure to participate in the proceedings, the Claimant's evidence was uncontroverted. The Claimant maintained that he was introduced to the Respondent by a neighbour who worked there previously CWII, and was offered employment by its General Manager, Mr. Dan Omondi whom the Claimant allegedly met and gave his Curriculum Vitae. That the agreed salary was Kshs.18,235/= per month.
 21. The Claimant further told the court that he was dismissed from employment for failure to collect a cheque from a company on 15th August, 2015 and his explanation was that he found the office closed since it was on a Saturday and it was in the afternoon. It was his testimony that he was summarily dismissed from employment.
 22. CWII buttressed the Claimant's testimony as he had worked for the Respondent prior to the Claimant joining it and it was his testimony that he notified the Claimant of the position available at the Respondent's place of work.
 23. In the absence of countervailing evidence, the court is persuaded that the Claimant was an employee of the Respondent in consonance with the provisions of section 2 of the *Employment Act*, 2007 which provides that employee means a person employed for wages or a salary and includes an apprentice and indentured learner.
 24. An employer on the other hand is defined as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and incudes . . .
 25. Finally, the *Employment Act*, 2007 defines a contract of service as an agreement whether oral or in writing and whether expressed or implied, to employ or serve as an employee for a period of time . . .
 26. The evidence on record would appear to suggest that there was a contract of service between the Claimant and the Respondent. The Claimant identifies by name various companies he had delivered mail to.
 27. The Court is guided by the decisions in *Interchemie EA Ltd v Nakuru Veterinary Centre Ltd* HCCC No. 165 B of 2000 and *Kenya Power and Lighting Co. Ltd v Nathan Karanja Gachoka & another* (2016) eKLR.
 28. As regards termination of employment, the Claimant alleges that he was summarily dismissed for failure to collect a cheque from a company and no termination letter was given which appears consistent with the Claimant's oral evidence on how employment was concluded.
 29. Needless to belabour, there is no shred of evidence to show that the Respondent complied with the provisions of the *Employment Act* on termination of employment.
 30. The alleged phone messages between the Claimant and the Respondent's General Manager on 17th August, 2015, 19th August, 2015 and subsequently would appear to suggest that the two had parted ways but were communicating and the Claimant was remorseful for any offending text message.



31. Regrettably, the Claimant did not disclose the cell phone number he was sending or receiving messages from.
32. For the foregoing reasons, it is the finding of the court that termination of the Claimant's employment was unfair.
33. As regards the reliefs sought, the court proceeds as follows;

i. One month's salary in lieu of notice Kshs.18,135/=.

34. Having found that termination of the Claimant's employment was unfair and the Respondent did not accord the Claimant the requisite notice, the Claimant is awarded one month's salary in lieu of notice, Kshs.18,135/=.

ii. Off-days not taken

35. The Claimant adduced no evidence of his entitlement to off-days and when the unidentified off-days accrued.

The prayer is declined.

iii. Salary for 15 days worked in August 2015

36. Having found that termination of the Claimant's employment by the Respondent was unfair and in the absence of evidence to show that he was paid for the 15 days worked in August, 2015 the Claimant is awarded Kshs.9,064.00.

iv. Compensation for unfair dismissal

37. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to the relief provided by section 49(1)(c) of the *Employment Act*.

38. The court has taken the following circumstances into consideration;

- i. The Claimant was an employee of the Respondent for about 25 days which is too short.
- ii. The Claimant contributed to the termination of employment.
- iii. The Claimant did not appeal the Respondent's decision.
- iv. The Claimant had no warning letter or disciplinary issues.

39. In the circumstances, the court is satisfied that the equivalent of one (1) month's salary is fair.

40. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms:

- a. One month's salary in lieu of notice.
- b. Salary for 15 days worked in August, 2015.
- c. Equivalent of one (1) month's salary.
- d. Costs of this suit.
- e. Interest at court rates from the date hereof till payment in full.

41. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF DECEMBER 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.

