



**Masila v Timsales Limited (Cause 2634 of 2016)
[2022] KEELRC 13523 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13523 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2634 OF 2016
SC RUTTO, J
DECEMBER 9, 2022**

BETWEEN

JOSPATE NDUVA MASILA CLAIMANT

AND

TIMSALES LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent as a general labourer with effect from February 28, 2011. That his services were unfairly terminated on October 3, 2015. That following his termination, he was not paid 60 days salary *in lieu* of notice as contained in the Regulation of Wages (Building and Construction Industry). Consequently, the claimant seeks against the respondent the sum of Kshs 515,756.00 being payment in lieu of notice, accrued leave for five years, gratuity for five years served, weekly resting days, public holidays and compensation for unfair termination.
2. The respondent neither entered appearance nor filed a response in answer to the statement of claim. The claim was therefore undefended. The claimant through his advocate produced an affidavit of service sworn on September 20, 2019 by Mr Anthony Nzioka Mule, through which he deponed that he effected service of the summons to enter appearance upon the respondent on September 20, 2019.
3. It is against this background that the matter proceeded for formal proof hearing on July 20, 2022.
4. At the hearing, the claimant testified in support of his case and to start with, sought to rely on his witness statement which he asked the court to adopt as his evidence in chief. He also produced the documents filed together with his claim as exhibits before court.
5. The claimant testified that his starting salary which was Kshs 325/= per day, progressively rose to Kshs 528/=.



6. That it was agreed by both parties that all the conditions contained in the *Employment Act* shall be followed by both parties. That he was unfairly terminated on October 3, 2016. That upon his termination, he was not paid 60 days salary in lieu of notice, accrued leave, gratuity for the years served, weekly resting days and compensation for 12 months.

Submissions

7. The claimant submitted that the respondent failed to give any reason behind the decision to terminate his employment. That further, the respondent failed to follow due process when terminating his employment.

Analysis And Determination

8. The court singles out the following issues for determination:
 - a. Was the claimant's termination unfair and unlawful?
 - b. Is the claimant entitled to the reliefs sought?

Unfair And Unlawful Termination

9. The starting point in determining whether an employee's termination was fair or not, is section 43(1) of the *Employment Act* (Act), which places the burden on the employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further, section 45 (2) (a) and (b) of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements. This is also known as substantive fairness.
10. That is not all. An employer is required to prove that in terminating an employee, it applied a fair procedure. Section 45 (2) (c) of the Act, places the burden on the employer to prove that it complied with the requirements of fair process in terminating the employment of an employee. Section 41(1) of the Act elaborates what entails fair procedure. In this regard, it requires an employer to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative. Basically, this is also termed as procedural fairness.
11. In a nutshell, what is stipulated above is the legal threshold that constitutes fair termination.
12. Turning to the case herein, the claimant has alleged that his termination was unfair. Notably, he did not provide the circumstances surrounding his termination. This was compounded by the fact that the respondent did not file a defence. As such, the court is not in a position to review such circumstances against the applicable law, so as to ascertain whether the same meet the legal threshold.
13. Be that as it may, the evidential burden lay with the respondent to prove the reasons for disengaging with the claimant and that such reasons were fair, valid and related to his conduct, capacity, compatibility or its operational requirements.
14. Having failed to file a defence, it is obvious that the respondent failed to discharge its evidential burden as by law required.
15. It further follows that the respondent did not prove that it applied a fair process in disengaging with the claimant for whatever reason.



16. All in all, the respondent did not discharge its evidential burden in terms of sections 41, 43 and 45 of the Act, hence I am led to conclude that his termination was unfair and unlawful.
17. Having found as such, I now turn to the reliefs due to the claimant.

Appropriate Reliefs

18. As the court has found that the claimant's termination was unfair and unlawful, he is awarded compensatory damages equivalent to six (6) months of his gross salary. This award takes into account the length of the employment relationship.
19. The claimant is further award one (1) month's salary in lieu of notice.
20. The claim for accrued leave days, rest days and public holidays is declined for want of proof. On this score, I am guided by the determination in the case of *Rogoli Ole Manadiegi v General Cargo Services Limited* (2016) eKLR where the court expressed itself as follows:

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

21. In regards to payment of gratuity, the claimant did not establish entitlement to the same, either through a contract of employment providing as much or a Collective Bargaining Agreement binding on the respondent. Therefore, the court has no basis to award the same.

Orders

22. In the end, judgment is entered in favour of the claimant against the respondent as follows:
 - a. The claimant is awarded compensatory damages equivalent to six (6) months of his gross salary being Kshs 95,040.00.
 - b. The claimant is awarded one month's salary *in lieu* of notice being the sum of Kshs 15,840.00.
 - c. The total award is Kshs 110,880.00.
 - d. Interest on the amount in (c) at court rates from the date of judgment until payment in full.
 - e. The respondent shall also bear the costs of this claim.**

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of December, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Njenga

For the Respondent No appearance



Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

