



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

ELCR CAUSE NO. 162 OF 2015

MONICA WANZA MBAVU.....CLAIMANT

VERSUS

ROOFSPEC & ALLIED WORKS CO LTD.....RESPONDENT

JUDGMENT

Vide her Memorandum of Claim dated **9th February, 2015** which was amended on **25th July, 2019** the Claimant herein avers that the termination of the employment by the Respondent was unfair and unlawful. The Claimant seeks the following reliefs:

- a) Respondent to pay the Claimant Gratuity (Service), notice, leave, salary arrears and overtime worked as quantified in paragraph 14 of the Claimant's Memorandum of claim.
- b) Compensation for unfair termination of employment for 12 months
- c) Certificate of service to the Claimant
- d) Costs and interest

The Respondent filed its Answer to Claim on 20th February 2015 wherein it denied the Claimant's allegations.

Claimant's Case

The Claimant avers that she was at all material times an employee of the Respondent having been employed on 2nd September 1991. That she was engaged in different capacities and rose through the ranks to the position of accounts clerk.

The Claimant avers that at the time of termination of her employment, she was earning a consolidated wage of Kshs. 25,000. That she reported to work at 7:00 am and worked until 6:00 PM daily. That she worked even on Sundays and Public Holidays.

It is further the Claimant's case that despite working overtime she was not compensated for the same. Further that for the 23 years she worked for the Respondent she only took leave for the years 1995, 1996, 1997 and 2001 leaving a balance of 19 years leave which she now claims.

The Claimant further states that she was verbally dismissed from employment without any explanation. That she was not given an opportunity to defend herself. That this was in violation of Sections 41 and 43 of the Employment Act which requires that before an employee is dismissed, they must be given reasons and a chance to defend themselves.

The Claimant avers that upon termination, she only received Kshs. 10,000 which was part payment in lieu of notice. That she has greatly suffered. That her rights as an employee were violated by the Respondent who has also refused to pay her terminal benefits. She quantifies her prayers as follows:

- a) Gratuity at the rate of 30 days per year worked (Kshs. 25000x 23yrs) **Kshs 575,000**
- b) Payment in lieu of notice (Kshs. 25,000x 3) less Kshs. 10,000 (already paid) **Ksh 65,000**
- c) Payment in lieu of leave (Kshs 25,000x 19 yrs) **Kshs 475,000**

d) Salary arrears (January 2009 to January 2015) **Kshs. 615,390.20**

e) Overtime worked but not paid (104 Sundays per year for 23 years 9 holidays per year) ie 1666.6 x 2599= **Kshs. 4,331,493.40.**

f) Compensation for unfair termination (Kshs 25,000 x 12) Kshs. **300,000**

Total Amount Kshs. 6,361,883.60

In support of her claim, the Claimant filed her statement dated 25th July 2019 and an amended list of documents dated 25th July 2019. She later on filed a further witness statement dated 23rd June 2020.

Respondent's Case

The Respondent in its Answer to Claim dated 14th February 2015 admits that the Claimant was its employee but denies that she was employed as its accounts clerk. That she was employed as a subordinate worker.

The Respondent denies verbally suspending the claimant from duty but states that if such suspension ever occurred, it was as a result of the Claimant's gross misconduct. That without prejudice to the foregoing, the Claimant deserted duty on her own and failed to resume employment.

The Respondent avers that the allegation that the Claimant reported to work at 7:00 am and left at 6:00 pm every day is untrue and outrageous. It further denies the allegation that the Claimant worked on Sundays and Public holidays. The allegation that she was never granted leave is also denied. The Respondent also denies terminating the services of the claimant as claimed but admits advancing Kshs. 10,000 to the claimant.

The Respondent kept its answer to the Petition short and precise but filed detailed witness statements by Stafford Woodyard, Minah Woodyard and Chief John Muiruri. The same shall be highlighted when highlighting the evidence adduced by the witnesses.

Evidence

The suit was heard on 2nd February, 2021 when the Claimant testified and closed her case. She testified that she worked for the Respondent from 1991 until 2015. She adopted her witness statement as her evidence in chief. She also produced documents as per her list of documents.

It was the Claimant's testimony that she worked as a clerk. By 2015, her salary was Kshs. 25,000. That the issues that led to her termination commenced on 20th January 2015. On that day the Claimant met the Respondent's director, Mrs. Woodyard who was accompanied by an electrician. Mrs. Woodyard asked the Claimant about some invoiced items and the Claimant explained that the items had already been fixed. Mrs. Woodyard insisted that this was not the case and that the Claimant should pay for the items. The Claimant refused and Mrs. Woodyard informed her that she had been suspended until further notice. The Claimant insisted that she should be paid since the Respondent owed her salary arrears amounting to Kshs. 600,000.

The Claimant testified that this is when Mrs. Woodyard called the Chief and requested him to intervene. The Chief requested them to go back the following day. When they returned the next day, the Chief after listening to them advised Mrs. Woodyard to pay the Claimant. She however indicated that she did not have her cheque book and later gave the Claimant Kshs. 10,000.

On cross examination, the Claimant testified that there was no confrontation between her and Mrs. Woodyard. That it was only after the Chief's intervention that she received the Kshs 10,000. She also insisted that Mrs. Woodyard told her she was suspended and that she should never go back. She also maintained that she only proceeded for leave in the years 1992,1993,1994,1998,1999, 2000 and 2002. On the allegation of overtime, she stated that she had no documentary evidence that she worked overtime.

On 25th May, 2021, the Respondent called upon its witnesses to testify. **RW1, Mrs. Minah Woodyard** testified that she has worked for the Respondent since the year 2008. That she was approached by a client who requested her to do some work for her. After the work was done, the Claimant presented to her an invoice for additional work and requested her to approve. She requested the Claimant to send the same to the client to approve the additional work but she declined. An exchange ensued and later on she called the Chief to intervene and mediate as she felt uncomfortable with the way the Claimant came at her. She testified that when they went to the Chief's office the Claimant was still mad at her so the Chief asked them to go back the following day when their tempers had cooled down.

On cross examination, RW1 clarified that the Respondent has two directors. She is a director and also the wife to the other director. Before she joined the company, only her husband and the claimant worked for the company. She confirmed that the Claimant started working for the Respondent in the year 1991.

On the allegation that the Claimant was never allowed to go on leave, RW1 maintained that such was not true. That she used to go on leave. She stated that she had no documentary evidence to prove the same as the Claimant was the one who had custody of the documents. She denied that by the time the Claimant left she was owed arrears of salary to the tune of Kshs. 600,000. She confirmed that by the time the Claimant left, she was earning a gross salary of Kshs 25,000 per month. She also testified that she did not terminate the Claimant's services and that she expected her to report back to work.

The Respondent also called upon **RW2, John Gitau Muiruri** to testify. He testified that he is a Chief in Kibra . He confirmed that he was approached by the parties and requested to mediate. That the Claimant and Mrs. Woodyard were in a heated exchange and noting that the

environment was not conducive, he suggested that the Claimant should proceed for leave for 14 days after which they would come back for mediation. That he also requested the Respondent to pay the Claimant half her salary to enable her pay rent.

CLAIMANT'S SUBMISSIONS

The Claimant through her counsel on record set out the following issues for determination:

- a) Whether Claimant was unfairly terminated?
- b) Whether the claimant is entitled to the reliefs sought?

Counsel submits that the Claimant's employment was verbally terminated by one of the Directors of the Respondent, without following due process. That the Claimant was not issued with notice or afforded an opportunity to be heard as envisaged under section 41 of the Employment Act, 2007 and thereby blatantly disregarding the Claimant's rights. Further that in the absence of a resolution to send the Claimant on compulsory leave or a letter informing the Claimant the decision to send her on compulsory leave as alleged by the Respondent, the only inference is that the Respondent dismissed the Claimant.

Counsel further submits that the allegation by the Director in her testimony that the Claimant deserted duty is ill conceived, untrue and malicious and is intended to deceive this Court into allowing the Respondent to escape liability.

On the allegation that the Claimant instructed firm of advocates too early counsel submits that it was only after the Respondent's refusal to respond to the Claimant's emails that the Claimant instructed her Advocates to write to the Respondent to demand the salary arrears which by the time of her dismissal amounted to Kshs. 615,390.20/=

Counsel cites and relies on section 93 of the Employment Act, 2007 and submits that even though the contract of employment between the Claimant and the Respondent was entered into on the 2nd September, 1991, the applicable law is the Employment Act, 2007. Further that the Respondent's actions were contrary to Section 41(1) and (2) of the Employment Act, 2007. Counsel relies on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the court held;

"Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair."

On whether the Claimant is entitled to gratuity pay, counsel cites section 35(6) of the Employment Act, 2007 which provides that an employee whose contract of service has been terminated under subsection 35(1)(c) shall be entitled to service pay for every year worked. That the Claimant worked for the Respondent for a total of 23 years from 2nd September, 1991 until her unlawful, unfair and wrongful dismissal on 20th June, 2015. That she is therefore entitled to Kshs. 575,000.

Counsel further submits that the Claimant has proved that her termination was unlawful, unfair and wrongful and as such she is entitled to the remedies sought in her amended claim. Counsel also submits that the claimant is entitled to costs of the suit.

RESPONDENT'S SUBMISSIONS

The Respondent through its counsel on record proposes the following issues for determination by this court:

- i. Who bears the burden of proof for unfair termination and whether the Claimant's employment was unfairly terminated?
- ii. Whether the Claimant is entitled to reliefs sought?

On the issue of burden of proof, counsel submits that the burden of proving the assertion of a fact lies with the party seeking to rely on the same, as outlined under section 107 of the Evidence Act, Cap 80 of the laws of Kenya, which states that;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Counsel further submits that from the evidence adduced before this court, it is clear that the Claimant was not dismissed in the presence of RW2, and for all intents and purposes, was expected to report back to him and back to work. That as such section 45 of the Employment Act, 2007 is not operative as the need to prove the validity of termination only arises if the employer exercises its right to terminate the Claimant's employment.

Counsel submits that the court should note the difference between unfair termination and wrongful dismissal. Further that neither of the two apply in the instant case. Counsel relies on the case of **CMC Aviation Limited v, Mohammed Noor [2015] eKLR** where the Court of appeal adduced that: -

"Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service, but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On

the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract.”

On whether the Claimant is entitled to any of the reliefs sought, counsel submits in the negative as there was no termination of the Claimant’s employment. That she is not entitled to gratuity as gratuity is a discretionary payment by an employer to the employee and is only binding on the employer if its basis or foundation is premised on the Contract of Service.

Counsel relies on the case of ***Bamburi Cement Limited v William Kilonzi [2016] Eklr*** where Makau J. stated;

*“The first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the **“discretion of the employer”**”*

To buttress this point further, counsel also relies on the case of ***Bamburi Cement Limited v Farid Aboud Mohamed [2016] eklr*** where the court held that;

“There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement.”

On service pay, counsel cites Section 35 and 36 of the Employment Act, 2007, which limit the payment of service to employees who are not covered under a registered pension scheme or provident fund, gratuity or service pay scheme, or any other scheme established by the employer whose terms are more favourable than the scheme established under the Employment Act or national social security fund. Counsel submits that the claimant was a registered member of the National Social Security Fund in which monthly contributions of Kenya Shillings four hundred (Kshs. 400) was made towards the social security fund on behalf of the Claimant. Thus, the Claimant does not qualify for any service pay. Counsel relies on the case of ***Elijah Kipkoros Tonui vs. Ngara Opticians T/A Bright Eyes Limited [2014] eKLR***, where the court held that;

“this law (Service Pay) is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid double social security benefits. Service pay is therefore payable under Section 35 only to employees who are not covered under the different social security mechanisms elaborated under Section 35”.

Counsel submits that the Claimant is not entitled to Payment in lieu of notice as the Claimants employment was not terminated. On the request for payment for leave days, counsel submits that the evidence adduced in court proves that the claimant’s requests for leave were always allowed. Further that it is an insult to this court for the Claimant to attempt to deceive this court that she never ever took any leave during the duration of her employment. Counsel also submits that the Claimant was not owed any salary arrears, and all the Claimant’s dues were paid and up to date by the time the Claimant left employment.

On the prayer for overtime, counsel submits that the Claimant has prayed for compensation of overtime with an exaggerated claim of having worked overtime for the entire duration of her employment, amounting to a staggering total of **Kshs. 4,331,493.40**. Counsel, while submitting that the prayer must fail relies on the case of Victor ***Sendeu Omwenqa v General Timothy Misiyani Orwenyo T/A GMT Services*** where Justice Makau held;

*“Likewise, the claim for overtime is dismissed for being **exaggerated** and for **lack of documentary evidence in support.**”*

Counsel submits that having failed to prove unfair termination, the claim herein should be dismissed with costs.

Determination

From the pleadings and the evidence available to the court, the issues which emerge for determination are: -

- a) whether the Claimant’s employment was unfairly terminated
- b) Whether the Claimant is entitled to reliefs sought

Whether the Claimant’s employment was unfairly terminated

On this issue, the parties have advanced two distinct stands. While the Claimant maintains that she was verbally dismissed by the Respondent’s director after being told she had been suspended and that she should never go back to the office, the Respondent maintains that the Claimant’s employment was not terminated and that she failed to report to work and prematurely filed this claim.

Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

In **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR**, the Court summarized those procedures as follows: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

From the above, it is clear that for termination to be deemed to be fair, it must pass both the substantive test and the procedural test. In the instant case, it is not in dispute that there was an altercation between the Claimant and the Respondent’s director. r

That the Area Chief who was called upon to mediate advised that the Claimant takes a few days off. Specifically, the Chief stated in his testimony that: -

‘I know the Claimant and the Respondent because they came to me for mediation. What brought the matter is because they had a heated disagreement in the office which was brought to my office. I tried to cool them off but they had a lot of tension. Even in my office they could not have peace. I decided they need some days off. I suggested madam Woodyard gives Monica two weeks off and pay her half salary before they come back. The Claimant was not terminated in my office.’

Both the Claimant’s and Mrs. Woodyard’s evidence agree with the Chief’s. It is thus the Chief who suggested the temporary separation in view of the tension between the Claimant and RW1. The Claimant wrote a demand letter on 23rd January 2015, just a day after she was paid Kshs.10,000/= following the intervention by the Chief. There was no communication between the Claimant and RW1 regarding the status of her employment after the intervention by the Chief.

In the circumstances, I find no proof of dismissal by Respondent.

Whether the Claimant is entitled to reliefs sought

Having established that there is no proof of unfair termination the Court must now establish whether the Claimant is entitled to any of the reliefs sought.

The Claimant has prayed for gratuity(service pay) at the rate of 30 days per year. In ***Bamburi Cement Limited v William Kilonzi [2016] Eklr*** Makau J. stated;

*“The first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the **“discretion of the employer”***

In the instant case, the Claimant has not adduced a contract of service that would shed light on whether gratuity was incorporated therein. The prayer for gratuity thus fails.

The Prayer for service pay also fails. Sections 35 as read with section 36 of the Employment Act, 2007, expressly provide for the instances where employees are not entitled to service pay. The claimant was a registered member of the National Social Security Fund to which

monthly contributions of Kenya Shillings four hundred (Kshs. 400) was made towards the social security fund for the Claimant. She falls under the category that is expressly excluded by the aforesaid sections.

The Prayer for payment in lieu of notice also fails as the Claimant has not proved that her employment was terminated by the Respondent.

The prayer for payment in lieu of leave although the Claimant has not proved that she did not proceed on leave for all the 19 years, no records were available to prove the exact number of years that the Claimant did not take leave. However, owing to the doctrine of limitation under section 90 of the Employment Act, the Claimant is awarded annual leave pay for 3 years at 21 days per year, therefore amounting to **Kshs 65,000**.

On the claim of salary arrears, the Claimant produced her own workings of what she is owed dating back to 2009. Obviously such claims are not payable due to the law of limitation.

For the period that is within the limitation period, the Claimant's records show she was paid salary for 2012 up to November in full. There are arrears for December 2012 of Kshs.19,946.40, January and February 2013 at Kshs.22,137.20 per month making a total of Kshs.44,374.40. There was full payment thereafter up to July 2013. There are arrears for August, 2013 (kshs.9,623.20), September to December 2013 at Kshs.22,137.20 per month (Kshs.88,748.80) and again September 2014 (kshs.4,034.80) and October to December 2014 at 22,187.20 per month (Kshs. 66,561.60), then January 2014 for days worked up to 20th January 2014 less Kshs.10,000 paid.

The prayer for compensation for unfair termination fails because the Claimant did not prove that her employment was unfairly terminated.

The Prayer for overtime worked and not paid also fails as the Claimant did not prove that she worked overtime for the entire period that she was in the employment of the Respondent.

Respondent shall issue a Certificate of Service to the Claimant in terms of section 51 of the Employment Act. The Claimant is also awarded costs of this suit only to the extent that the claim has succeeded.

Conclusion

Judgment is therefore entered for the Claimant against the Respondent for arrears of salary and pay in lieu of annual leave as follows: -

December 2012 **KSHS.19,946.00**

January and February 2013 **Kshs.44,374.40**

August 2013 **Kshs. 9,623.20**

September to December 2013 **Kshs.88,748.80**

September 2014 **Kshs. 4,034.80**

October to December **Kshs.66,561.60**

January 2015 **Kshs.21,666.70**

Annual Leave for 3 years **Kshs. 65,000.00**

Total Kshs.254,955.50

Less Kshs.10,000/- paid on 22.1.2015 **Kshs.244,955.50**

The Claimant is therefore awarded a total of **Kshs.309,955.50** on account of arrears of salary and pay in lieu of leave.

The Respondent shall pay Claimant's costs. The decretal sum shall attract interest from date of Judgement.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF DECEMBER 2021

MAUREEN ONYANGO

JUDGE