



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 840 OF 2016**

**ZAKARIA AUMA SAMUEL OTIENO ODERO.....CLAIMANT**

**VS**

**KALUWORKS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is an employment dispute between Zakaria Auma Samuel Otieno Odero and his former employer, Kaluworks Limited.
2. The Claimant's claim is captured in a Memorandum of Claim dated 10<sup>th</sup> October 2016 and filed in court on 27<sup>th</sup> October 2016. The Respondent's defence is by way of a Memorandum of Reply dated 14<sup>th</sup> January 2019 and filed in court on 17<sup>th</sup> January 2019.
3. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Consultant, Hezrone Rachilo.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent from September 2003 until 30<sup>th</sup> September 2013, initially as a Senior Production Engineer and later in the higher position of Assistant Production Manager.
5. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 69,961.
6. The Claimant accuses the Respondent of unlawfully withholding his terminal dues and now claims the following:
  - a) One month's salary in lieu of notice.....Kshs. 77,733.00
  - b) Unpaid salary for the month of October.....77,733.00
  - c) Leave pay for 58 days.....155,466.00
  - d) Outstanding travel allowance @ Kshs. 4,400 per year.....13,200.00
  - e) Severance pay @ 15 days' pay per year.....538,151.40
  - f) 12 months' salary in compensation.....932,796.00
  - g) Certificate of service
  - h) Costs plus interest

**The Respondent's Case**

7. In its Memorandum of Reply dated 14<sup>th</sup> January 2019 and filed in court on 17<sup>th</sup> January 2019, the Respondent admits having employed the Claimant as a Senior Production Engineer with effect from 2<sup>nd</sup> September 2003.

8. By letter dated 19<sup>th</sup> January 2006, the Claimant was appointed to the position of Assistant Production Manager, effective 1<sup>st</sup> January 2006.

9. The Respondent states that the Claimant was erratic and negligent in the performance of his work.

10. The Respondent claims to have offered the Claimant support to improve on his performance through training, but the Claimant lacked managerial skills of planning and follow up, which were key to his role.

11. The Respondent adds that despite being sponsored to attend training to help improve his performance and the Respondent's management having tried severally to offer guidance, support and correction to the Claimant, there was no improvement in the Claimant's performance.

12. The Respondent states that it held a disciplinary meeting with the Claimant on 26<sup>th</sup> October 2015 whose minutes the Claimant acknowledged but the Respondent's management did not summarily dismiss the Claimant as had been recommended in the meeting. Instead, the Claimant was allowed to continue in service.

13. The Respondent avers that the Claimant again made errors in his work leading to serious losses to the Respondent and the Claimant was invited to a disciplinary hearing on 30<sup>th</sup> October 2015 after which it was resolved that he be dismissed.

14. The Respondent further avers that the Claimant signed each page of the minutes of the disciplinary hearing, confirming his agreement with the contents and did not raise any objection to any point that had been minuted.

15. The Claimant was served with a letter of summary dismissal on 30<sup>th</sup> October 2015.

16. The Respondent denies unlawfully withholding the Claimant's dues and states that the same was to be released upon the Claimant completing clearance from the Respondent as per procedure, which the Claimant had failed to do.

17. Regarding the claim for leave pay, the Respondent states that the Claimant had a leave balance of 55 days, which on the basis of his basic salary, amounts to Kshs. 98,663 and not Kshs. 155,466 as claimed by the Claimant.

18. The Respondent goes on to state that on 30<sup>th</sup> October 2015 and 2<sup>nd</sup> November 2015, it wrote to the Claimant advising him that his terminal dues would be payable as computed hereunder and that the same would be released subject to the Claimant completing clearance from the Respondent as per procedure:

Salary up to 31<sup>st</sup> October 2015;

55.5 days leave due; and

Prorata leave travelling allowance (if any)

Less deductions specified under Section 19 of the Employment Act.

19. The Respondent avers that since the Claimant was summarily dismissed, he is not entitled to one month's salary in lieu of notice.

20. With regard to the Claimant's claim for leave allowance, the Respondent avers that the same is payable for 55 days' pending leave which translates to Kshs. 8,067.00 and not Kshs. 13,200 as claimed.

21. The Respondent avers that the claim for severance pay is not payable on account of the Claimant being a member of the National Social Security Fund (NSSF) in addition to the Respondent's Retirement Benefit Scheme.

22. The Respondent maintains that the Claimant's dismissal was not wrongful or unfair and therefore denies the claim for compensation.

23. The Respondent states that the Claimant's certificate of service is ready for collection.

### **Findings and Determination**

24. There are two (2) issues for determination in this case:

a) Whether the Claimant's dismissal was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

25. The Claimant's dismissal was communicated by letter dated 30<sup>th</sup> October 2015 stating thus:

*"Dear Odera,*

**RE: DISMISSAL LETTER**

*We refer to the meeting held in the Director's office on 26<sup>th</sup> October 2015 and further discussion in the HR office on 30<sup>th</sup> October 2015, minutes of which have been served to (sic) you.*

*As already advised during the said meetings, the company noted that you had fundamentally breached your obligations where you are expected to perform your duties carefully and properly. It was therefore resolved that your services were to be dismissed (sic) effective 31<sup>st</sup> October 2015 on grounds of poor performance and gross negligence as per sections 44 (4c) of the Employment Act, 2007.*

*Your terminal dues will be made payable as computed below:*

*Salary up to 30<sup>th</sup> October 2015*

*Leave days due*

*Leave travelling allowance (if due)*

*Less deduction specified under section 19 of the Employment Act*

*Take note that you will only be officially cleared from our employment upon receipt of a duly signed clearance certificate from the company.*

*We wish you all the best in your future professional endeavours.*

*Yours sincerely,*

*For Kaluworks Limited,*

*(signed)*

*Anne Kamenwa*

*Human Resource Officer*"

26. Although the Claimant did not plead the circumstances of his exit from the Respondent's employment, his dismissal letter discloses poor performance as the reason for dismissal.

27. Poor performance is one of the grounds for termination of employment allowed under the Employment Act, subject to the procedural fairness dictates of Section 41 of the Act.

28. The applicable procedure for handling disciplinary cases on account of poor performance was well articulated by my brother, **Rika J** in **Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures (Cause No 273 of 2010)** in the following terms:

***"The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time."***

29. From the evidence on record, the Respondent took issue with the Claimant's performance as far back as January 2005. In this regard, the Respondent's witness, Hezrone Rachilo cited the following chronology of cautionary and warning letters issued to the Claimant:

- a) Cautionary note dated 18<sup>th</sup> January 2005 on poor performance;
- b) Warning letter dated on 5<sup>th</sup> February 2008 on negligence while on duty;
- c) Warning letter dated 1<sup>st</sup> November 2008 on account of exhibiting irresponsible behaviour while on duty;
- d) Warning letter dated 3<sup>rd</sup> September 2010 on gross negligence leading to a fire accident at work;

- e) Warning letter dated 24<sup>th</sup> September 2012 on poor performance and negligence at work;
- f) Warning letter dated 13<sup>th</sup> October 2015 on negligence at work;
- g) Adverse mention on 27<sup>th</sup> October 2015 on account of being negligent at work.

30. Overall, the Respondent complained that the Claimant lacked managerial skills of planning and follow up required for his position. The Respondent produced two appraisal reports in which this skill gap had been noted.

31. The Claimant did not object to the foregoing chronology. In fact, he was completely silent on the circumstances leading to the termination of his employment.

32. There was further evidence that the Respondent took steps to support the Claimant to improve on his performance through training and one-on-one interaction with his superiors. Again, the Claimant did not counter this piece of evidence.

33. It is evident therefore that prior to the disciplinary hearing on 30<sup>th</sup> October 2015 which culminated in the Claimant's dismissal, the Claimant had been made aware of his shortcomings and supported to improve over a reasonable period of time.

34. Regarding the disciplinary meeting of 30<sup>th</sup> October 2015, whose record the Claimant acknowledged by appending his signature, I have this to say; the Claimant was duly notified of the date, venue and agenda of the meeting, he did not object to any aspect of the meeting and he fully participated in the disciplinary proceedings.

35. It seems to me therefore that the procedural fairness requirements of Section 41 of the Employment Act were fully satisfied. In reaching this verdict, I am guided by the decision in *Jacob Oriando Ochanda v Kenya Hospital Association T/A Nairobi Hospital [2019] eKLR* where the Court of Appeal confirmed that an employee who has prior notice of a disciplinary hearing and actually goes ahead to participate in the hearing cannot complain that they were not given an opportunity to be heard.

36. Overall, I find and hold that the Respondent had a valid reason for dismissing the Claimant. The claims for compensation and notice pay are therefore without basis and are disallowed.

#### **Other Claims**

37. The Claimant makes a claim for 58 days' leave pay and the Respondent admits the claim but reduces the number of days to 55.5 days. As the Claimant's employer, the Respondent was responsible for maintenance of employment records.

38. The Respondent did not however provide any document to support its assertion that the Claimant was owed 55.5 and not 58 days' leave pay. The Claimant's claim for 58 days' leave pay was therefore unchallenged and is allowed. The same applies to the claim for leave travelling allowance.

39. No basis was established for the claim for severance pay which is payable to employees declared redundant.

40. The claim for salary for the month of October 2015 was abandoned at the trial.

41. In the final analysis, I enter judgment in favour of the Claimant as follows:

- a) Leave pay for 58 days (69,961/30x58).....Kshs. 135,258
- b) Leave travelling allowance.....13,200
- Total.....148,458**

42. This amount will attract interest at court rates from the date of judgment until payment in full.

43. The Claimant is also entitled to a certificate of service plus costs of the case.

44. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF MAY 2020**

**LINNET NDOLO**

**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 15<sup>th</sup> March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mbuya for the Claimant

Mr. Nanji for the Respondent