



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1082 OF 2015**

**PETER KARIUKI GACHIRI.....CLAIMANT**

**v**

**KENYA BAPTIST THEOLOGICAL COLLEGE.....RESPONDENT**

**JUDGMENT**

1. The Claimant (acting in person) moved Court alleging that the Respondent wrongfully and unlawfully terminated his contract in December 2012. The Claimant sought a total of Kshs 353,622/- being accrued leave, salary arrears and severance pay.
2. The Respondent filed a Response and Counterclaim contending that the Claimants contract was terminated on account of redundancy and that the Claimant owed it Kshs 385,000/- on account of rent arrears and legal charges.
3. On 19 January 2018, the Court directed the parties to attempt out of Court settlement but there was no agreement.
4. The Cause, therefore, proceeded to hearing on 18 January 2017 and 27 June 2019. The Claimant and the Respondent's Principal testified.
5. The Claimant filed submissions on 30 September 2019 (should have been filed by 19 July 2019) while the Respondent's submissions were filed on 3 September 2019.
6. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as discussed hereunder.

**Nature of employment**

7. The Respondent admitted that the Claimant served it for about 22 years but contended that for most of that duration, the Claimant was serving on a casual basis.
8. The Claimant, on the other hand, testified that he was employed on 1 February 1990 as a farm hand before transitioning into a Maintenance Supervisor (copy of job card produced).
9. The Claimant also produced a copy of a *Recommendation* from the Respondent certifying that he served from 1990 to 2012.
10. The *Recommendation* letter does not indicate whether the Claimant served as a casual employee at any point in time, and the Court will find that he was not a casual employee paid at the end of the day as contemplated by law.

**Unfair termination of employment**

11. The Claimant produced a copy of a letter dated 6 January 2012 in which the Respondent indicated that because it was undergoing financial difficulties, it was declaring the Claimant's position redundant.
12. The Court will, therefore, accept that the separation was on account of redundancy.
13. Section 40 of the Employment Act, 2007 sets out the conditions an employer should comply with before declaring a redundancy.
14. The Respondent did not demonstrate that it gave a 30 day written notice of termination of employment on account of redundancy to the Local Labour Officer as envisaged under section 40(1)(b) of the Employment Act, 2007.
15. The Court has no option but to conclude that the termination on account of redundancy was procedurally unfair.

## **Breach of contract**

### **Accrued leave**

16. Annual leave of at least 21 days is a statutory entitlement.
17. The Claimant sought Kshs 43,528/- purportedly for 6 years, he alleged he did not go on leave.
18. The Respondent's letter of 6 January 2012 offered the Claimant outstanding leave, but the particulars were not outlined.
19. The Court will consequently allow this head of claim for outstanding leave, but only for the last 18 months to separation, on account of section 28(4) of the Employment Act, 2007.

### **Salary arrears**

20. Salaries are payable when they fall due. The Claimant sought salary arrears for November 2011, December 2011, December 2012, totalling Kshs 190,091/-.
21. The Claimant's effective date of separation with the Respondent was 6 February 2012.
22. The Respondent's witness testified that it lost the Claimant's records and, therefore, it could not confirm any salary arrears owed.
23. The Court is of the view that the Claimant has proved and is entitled to salary arrears from November 2011 to 6 February 2012 at a monthly rate of Kshs 11,918/-.
24. If the Claimant had a contract after 6 February 2012, he failed to demonstrate the particulars of the contract or even the agreed remuneration, and the Court declines to award any salary arrears after that date.

### **Counterclaim**

25. It is not in dispute that the Claimant occupied the Respondent's house after separation (from March 2012 to 2015, a period of about 46 months). The Respondent had through the redundancy notice advised him to seek alternative accommodation but he did not.
26. The Claimant did not rebut the Respondent's contention that the monthly rent was Kshs 7,000/- per month. A rent reconciliation report filed in Court show that by January 2018, the rent arrears had reached Kshs 497,000/- but the Respondent did not seek to amend the *Counterclaim*.
27. The Court, therefore, finds the Counterclaim proved in the sum of Kshs 315,000/-.
28. However, the Respondent did not prove that it paid Kshs 30,000/- as auctioneers charges or Kshs 40,000/- as legal fees.

### **Appropriate remedies**

#### **Severance pay**

29. The Respondent offered the Claimant *severance pay* without computing the same.
30. The Respondent did not interrogate the figures put across by the Claimant and the Court will allow the sum of Kshs 114,002/- as pleaded.

#### **Accrued leave**

31. Similarly, the Respondent offered to pay the Claimant outstanding leave but did not disclose the figure.
32. The Court will allow the head of the claim in the sum of Kshs 17,877/- being the equivalent of one and a half month salary (there is entitlement to full pay during annual leave)

#### **Salary arrears**

33. For the reasons already mentioned, the Court will allow salary arrears only up to 6 February 2012 in the sum of Kshs 31,091/- (the other rent arrears may be pursued in the appropriate forum).

### **Conclusion and Orders**

34. The Court finds and holds that the termination of the Claimant's employment on account of redundancy was unfair, and awards him

(a) Severance pay	Kshs 114,002/-
(b) Accrued leave	Kshs 17,877/-
(c) Salary arrears	Kshs 31,091/-
<b>TOTAL</b>	<b>Kshs 162,970/-</b>

35. The Respondent succeeds in the Counterclaim and awarded Kshs 315,000/-.

36. After reconciliation, the Court finds that the Claimant owes to the Respondent the sum of Kshs 152,030/-.

37. Judgment is entered for the Respondent in the sum of **Kshs 152,030/-** together with interest from the date of judgment.

38. No order as to costs.

**Delivered, dated and signed in Nairobi on this 8<sup>th</sup> day of October 2019.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

For Respondent Mr Kirwa instructed by Kirwa Koskei & Co. Advocates

Court Assistant Lindsey