



Kuliba v Sandu & another (Cause 15 of 2018)
[2022] KEELRC 4127 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4127 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 15 OF 2018
DN NDERITU, J
SEPTEMBER 29, 2022

BETWEEN

WILLIAM KOKI KULIBA CLAIMANT

AND

ANJU SANDU 1ST RESPONDENT

KAMALDEEP KAUR SANDU 2ND RESPONDENT

JUDGMENT

I. Introduction

1. *Vide* a memorandum of claim dated January 22, 2018, filed through Ndeda & Associates, Advocates the, claimant is seeking the following:
 - (i) The honourable court do find the respondents in this matter violated the claimants employment rights and unlawfully evicted him out of the premises before paying him even the December salary hence unfair termination and cruelty and abuse of authority.
 - (ii) The honourable court be pleased to order the respondent to pay the claimant as herein under:
 - (iii) The respondents pay the claimant one month salary *in lieu* of notice based on the actual minimum gazette wages order, Legal Notice No 112 of May 1, 2017.
 - (iv) The respondents pay the claimant the appropriate salary for December, 2017 based on the government minimum wages order in use, Legal Notice No 112 of May 1, 2017.
 - (v) The respondents pay the claimant the underpayment of wages emanating from the wrong payment based on no legal basis at all.
 - (vi) The respondents pay the claimant the accrued annual leave segmented as per each year's basic minimum gazette wage.



- (vii) The respondents pay the claimant for the public holidays the claimant worked at the respondent's employee but was not paid for.
 - (viii) The respondents pay the claimant gratuity as given under the provisions of section 35(i) of the Employment Act. 15 days' pay per each year of service completed because the respondents were not paying NSSF for the claimant.
 - (ix) The respondents pay the claimant compensation based on section 49(i)c of the Employment act due to unfair termination(12) months gross salary.
 - (x) The respondents do issue the claimant with a certificate of service as provided for under section 51 of the Employment Act.
 - (xi) The respondents to pay costs for the suit.
2. Along with the memorandum of claim the claimant filed a verifying affidavit and several documents in support of the claim.
 3. Upon service, the respondents entered appearance through Mirugi Kariuki & Co Advocates and filed a joint defence dated March 5, 2018 wherein they prayed that the claimant's cause be dismissed with costs. Annexed to the defiance are several documents in support of the respondents' case.
 4. The claimant filed a reply to the defence dated May 16, 2018 retaliating the contents in the memorandum of claim.
 5. On November 29, 2021 the claimant(CW1) testified alone in support of the cause, was cross-examined, and re-examined. The claimant's case was supposed to proceed for further hearing on January 31, 2022 but the intended witness for the claimant was not available to testify and the claimant hence opted to close his case at that point.
 6. The defence hearing was conducted on March 31, 2022 wherein the 2nd respondent Kamaldeep Kaur Sandu (RW1) testified on her own behalf and on behalf of the 1st respondent. RW1 was cross-examined and re-examined and the defence closed their case.
 7. Counsel for both parties addressed the court by way of written submissions. Counsel for the claimant filed on April 11, 2022 and for the respondents on May 11, 2022.

II.Claimant's Case

8. From the pleadings filed, the oral and documentary evidence tendered by CW1, and the written submissions by his counsel, the claimant's case is that he was engaged by the respondents as a caretaker of their property at Milimani estate in Nakuru town on March 14, 2018 at an agreed monthly salary of Kshs 10,000/=.
9. From the evidence on record, it is the claimant's position that he was provided with accommodation within the compound, hence no house allowance was payable.
10. On or about December 20, 2018 the 2nd respondent met the claimant and informed him that he was to move out of the compound forthwith as the premises had been leased or rented out. The claimant alleged that RW1 demanded that the claimant should go to his rural home awaiting for the processing of his terminal dues.
11. The claimant avers that the space that he occupied was locked with his belongings inside and that he slept in the cold for a few days before looking for alternative accommodation. He testified that he was



thus constructively terminated without notice by the respondents and that the said termination was unlawful both in substance and procedure.

12. The claimant subsequently reported the matter to the labour office, Nakuru County, and the respondents were served with a letter dated January 3, 2018 from the said office, outlining the claims that the claimant had against the respondents in terminal dues. Subsequently, on January 9, 2018 the claimant received a sum of Kshs 25,000/= from the respondents through the said labour office allegedly in full and final settlement of the terminal dues.
13. However, the claimant testified that the said sum of Kshs 25,000/= was paid in settlement of leave pay only. This court shall revisit this issue in a later part of this judgment.
14. The claimant insisted that he was employed as a caretaker and not a gardener as alleged by the respondent. He testified that he was underpaid during the entire period of employment.
15. About his duties as the caretaker the claimant stated that he worked as the representative of the respondents on the property by taking care of the property, keeping the house clean, and ensuring the property was secure. He alleged that there were no guards on the property as alleged by the respondents.
16. In cross-examination, the claimant insisted that he signed off the agreement/settlement at the labour office in the sum of Kshs 25,000/= after he was informed that it was for leave pay and not for his entire dues.
17. It is on the basis of the foregoing evidence that the claimant pleaded with the court to be awarded as prayed in the memorandum of claim.

III. Respondents' Case

18. The respondents' case as contained in the oral and documentary evidence adduced through RW1 is that they engaged the claimant as a gardener in 2014 at an initial monthly salary of Kshs 9,000/=.
19. Although the 2nd respondent (RW1) alleged that the claimant had been engaged by the 1st respondent, her sister, she admitted that she used to pay the claimant's salary.
20. RW1 alleged that in December, 2017 they got a tenant for the property and requested the claimant to move from the main house to the servant quarter but the claimant was adamant. She did not explain how the claimant finally moved out of the compound but she alleged that the claimant absconded duty. She denied that the claimant was dismissed or terminated.
21. RW1 testified that after the claimant had left on his own volition, she received a letter from the labour office demanding for settlement of the claimant's dues. She testified that the dues were subsequently agreed at Kshs 25,000/= and that the said amount was paid and accepted by the claimant in full settlement of all the dues.
22. RW1 insisted that the claimant was engaged as a gardener, not as a caretaker of the property. She alleged that security services were provided by an independent contractor, Modern Sky Kenya Security Services Limited. She produced a copy of the contract between the said company and the respondents and receipts for payment for security services to dispute the allegations by the claimant that he was the caretaker of the property.
23. RW1 denied that the claimant worked overtime or on public holidays or that he was underpaid or at all.
24. In cross-examination RW1 admitted that she did not know when the claimant was first engaged as it is the 1st respondent who employed him. However, she insisted that the claimant was a gardener



throughout the entire contract and never a caretaker of the property. She denied that the claimant ever cleaned the family house

25. RW1 insisted that the claimant refused to move out of the main house after they found a tenant to occupy the same and that the claimant then abandoned duty and left the premises in protest. She therefore insisted that it is the claimant who is to blame for the termination of the contract and in the circumstances the claimant is not entitled to any of the reliefs sought in the claim.
26. On the basis of the foregoing, the respondents pray that this cause be dismissed with costs.

IV. Issues for Determination

27. From the foregoing analysis of the pleadings and the evidence presented by both sides, together with submissions by counsel for both sides the following issues commend themselves to his court for determination:-
 - (a) What was the nature of the employment relationship between the claimant and the respondents?
 - (b) Was the claimant terminated/dismissed by the respondent, and if yes was the termination unlawful?
 - (c) Is the claimant entitled to the reliefs sought?
 - (d) Costs

V. Employment

28. Section 2 of the *Employment Act* (the act) defines an employer as “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.” (Emphasis added).
29. While the 2nd respondent (RW1) alleges that the claimant was employed by the 1st respondent, RW1 admits that she paid the salary to the claimant. Although no legal documents were availed, RW1 testified that the property where the claimant used to live in and work belonged to both the respondents. This court concludes and holds that both the respondents were legally the employers of the claimant and are therefore jointly and severally liable in case of any award made to the claimant.
30. The claimant testified that he was employed as a caretaker of the property while the respondents, through RW1, holds that he was employed as a gardener. A gardener is a person who tends and cultivates a garden as a pastime or for a living while a caretaker is a person employed to look after a building (See concise *Oxford English Dictionary*).
31. While the respondents alleged that the claimant’s work was limited to attending to flowers and other plants in the compound, the claimant insisted that he also cleaned the building, kept watch on the property, and answered to enquiries by any interested or prospective tenants.
32. RW1 testified that as far as security of the property is concerned the respondents had engaged the services of Modern Sky (K) Security Services Limited and she produced a copy of the contract thereof together with receipts of payment for the services as exhibits. The said contract indicates that the same commenced on December 9, 2013 and there are receipts for payment of the said services for 2014, 2015, 2016, 2017, and even 2018. However, there is no indication in the contract as to whether the security services were provided for day and night or during the night only.



33. However, this court takes the view that providing security for the building would only be one aspect of the duties of a caretaker. As a resident in the compound there is no way that one can logically argue that the claimant did not keep watch in the compound. The claimant testified that he also cleaned the building and also did gardening. This court holds that for all intents and purposes the claimant was a caretaker and not a mere gardener as alleged by the respondents.
34. The respondents were under obligation to reduce the contract of service between them and the claimant into writing under section 9 of the *act*. They failed to do so and hence this court holds that the evidence by the claimant that he was a caretaker of the property and not a gardener has not been dislodged by the respondents.
35. In terms of the period of employment the claimant testified that he was engaged from March 14, 2014 to December 20, 2017 when he was constructively terminated. On the other hand, the respondents allege that the claimant was engaged in June 2014 and absconded duty in December, 2017.
36. Under sections 10 and 74 of the *act* it is the duty of an employer to keep the records of employment. It is clear that the respondents failed in that legal duty and obligation and as such this court shall go by the unchallenged evidence of the claimant in this regard, that he was engaged in March, 2014 and remained in employment until December, 2017.
37. There is no dispute that the monthly salary of the claimant was Kshs 10,000/= as at the time of termination.

VI. Termination

38. The claimant's testimony is that after the respondents got a tenant to occupy the premises in December, 2017 RW1 directed him to vacate the premises as the tenant intended to occupy the entire compound and the buildings thereon and that the claimant's services were no longer required. On the other hand RW1 testified that after they got a tenant for the building she requested the claimant to move to another accommodation but the claimant protested and absconded duty at that point.
39. According to the claimant RW1 directed him to go to his rural home and that his dues were to be paid after he vacated the premises. He testified that he had nowhere else to go and had no money. The claimant testified that he spent several nights in the cold. He alleged that his personal items were locked in the compound into which he no longer had access. He stated that it is only after he reported the matter to the labour office that he was allowed to pick his items.
40. This court notes that the respondent did not pay any dues to the claimant as at the time of termination and it took the intervention of the labour office for the respondent to pay the Kshs 25,000/=. There is no way, and it would not make any logical sense, that the claimant absconded duty on or about December 20, 2017 and then reported the unfair termination to the labour office on January 3, 2018.
41. In the entire circumstances of this cause this court is inclined to believe the testimony by the claimant that once the respondents procured a tenant for the premises they had no more use for the claimant's continued presence on the property. What the respondent forgot is that they had an employment relationship with the claimant which they ought to have settled or terminated in accordance with the law.
42. There is no way, and it does not make sense, that the claimant would have absconded duty to go to his rural home without another job or a source of income. The claimant testified that he spent several nights in the cold, which evidence was not disputed by the respondents. There is no way that



the claimant would have refused to take up the alleged alternative accommodation offered by the respondents to spend nights in the cold.

43. This court comes to the inevitable conclusion that the respondents unlawfully, unprocedurally, and unfairly terminated the claimant on or about December 20, 2012.
44. The termination was unfair, unprocedural, unreasonable, and unlawful for the following obvious reasons. No notice was issued, no reason was given, no hearing was held, and further, no terminal dues were paid in accordance with the law. The respondents failed to comply with sections 35, 36, 40, and or 41 of the *act*.
45. The claimant has proved that there was no reason to terminate him (sections 43 and 45 of the *act*), he was not given a hearing, no notice was issued to him or dues paid, and in totality the termination was unlawful both in substance and procedure (sections 43 and 45 of the *act*).

VII. Reliefs

46. The claimant has testified that the sum of Kshs 25,000/= was, in his understanding, in regard to leave pay. Either way, that payment in whatever account, is not a bar to the claimant from pressing for other dues that may be legally payable to him. This court holds that if the said sum of Kshs 25,000/= was intended to cover for the entire dues to the claimant, the payment was fraudulent and illegal and this court cannot stand by and watch or rubber stamp such an illegality. However, the said amount shall be taken into account in computing any dues that may be payable to the claimant as hereunder.
47. The reliefs that the claimant is seeking against the respondents were set out at the beginning of this judgment. This court shall now examine each of the prayers as hereunder.
48. Prayer (i), in the understanding of this court, is to the effect that the termination of the claimant by the respondents was unfair and unlawful, and this court has been called upon to declare so. It has already been found that the termination was unreasonable, illogical, and unlawful, for want of both substantive and procedural fairness. This court has no difficulties at all in declaring as such and it is so held.
49. Prayer (ii) is an introduction to the other claims and not a prayer in itself. Prayer (iii) is for one month's salary *in lieu* of notice. claimant's counsel has submitted that according to Legal Notice (LN) No 112 of 2017 the claimants basic minimum monthly salary ought to have been Kshs 25,031.70. The claimant or his counsel has not availed this LN to court.
50. However, the LN 112 of 2017 provided by the respondents indicate that the minimum basic monthly wage for a general labourer including cleaner, sweeper, gardener, children's ayah, house servant, day watchman, messenger etc, within the former Nakuru Municipality was set at Kshs 11,926.40. It is the opinion of this court that although a caretaker of a building is not directly mentioned, such work is general labour and fits into this category. In any event, the claimant has not provided the court with an alternative or other legal notice to the contrary.
51. In view of the foregoing, the claimant is awarded one (1) month's salary *in lieu* of notice in the sum of Kshs 11,926.40.
52. Prayer (iv) is for the salary for the month of December, 2017. For the same reasons advanced above the claimant is awarded Kshs 11,926.40 for the salary of the month of December, 2017.
53. Prayer (v) is for underpayment of salary. The claimant alleges that as at the time of his engagement in March, 2014 his basic minimum monthly wage ought to have been Kshs 18,940.40 based on LN 197 of 2013. The claimant has not attached the said LN.



54. However, according to LN 197 of 2013 availed by the respondents, the minimum basic monthly salary for a general labourer, including cleaner, sweeper, gardener children's ayah, house servant, day watchman, messenger, and others in that category, ought to have been Kshs 9,024.15 within the former Nakuru municipality.
55. Further, *vide* LN 117 of 2015 the minimum monthly basic salary for workers in the category of the claimant within Nakuru municipality was fixed at Kshs 10,107.10. *Vide* LN 112 of 2017 the minimum basic monthly salary in the claimant's category was raised to Kshs 11,926.40.
56. By reason of the foregoing, and in absence of any evidence to the contrary, the claimant was actually overpaid for the period from 2013 to May, 2015. From May, 2015 to May 2016 he was underpaid in the sum of Kshs 107.10 per month. For the period from June, 2016 to December, 2017 he was underpaid in the sum of Kshs 1,926.40 per month.
57. In the circumstances the total underpayment is calculated as follows:
 June 2015 to May 2016 @ Kshs.107.10 per month that is Kshs 107.10 x 12 months = 1,284/=.
 From June 2016 to May, 2017 @Kshs 1,926.40 per month that is Kshs 1,926.40 x 12 months =Kshs 23,116.80.
 For the Period from June, 2017 to December, 2017 the underpayment as per LN 112 of 2017 which fixed the minimum basic monthly salary for claimant's category at Kshs 12,926.55, is Kshs 1,926.55 x 6 months = Kshs 17,559.30.
58. The total underpayment total to:
 June 2015 to May 2016- Kshs 1,284.00
 June 2016 to May 2017- Kshs 23,116.80
 June 2017 to December, 2017 - Kshs 17,559.30
 TOTAL - Kshs 47,517.60
59. Prayer (v) is for leave pay. The claimant admitted in evidence that he accepted the Kshs 25,000/= as leave pay. This court is not intent on disturbing that settlement and the same is upheld as fully settled on that account.
60. Prayer (vii) is a claim for payment of work done on public holidays. The claimant resided on the property and there is no evidence adduced on what work he allegedly did on the said public holidays. The claimant was on monthly pay and resided on the property which inevitably means that he, unless he went out, was to be on the property even during public holidays. It therefore becomes impossible, unless there is specific evidence adduced, to conclude that the claimant actually worked during public holidays. Due to the lack of evidence to authenticate this clam, the same is denied in toto.
61. Prayer (viii) is for gratuity. It is by now settled and this court (ELRC) has stated severally that gratuity is a gratuitous payment from an employer to an employee in appreciation or a "thank you for a job well done." As the word implies, gratuity is only paid at the instance of an employer or if and where the same is specifically provided for in the contract. Counsel for the respondents has correctly cited *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR to illustrate the right position in law. See also *Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi*(2019) eKLR, *Bamburi Cement Ltd v Farid Aboud Mohamed* (2016) eKLR, and *H Young & Company EA Limited v Javan Were Mbago* (2016) e KLR.



62. The claimant has not demonstrated that payment of gratuity was a term of the contract and the respondents are not willing to voluntarily pay for the same. This prayer for gratuity is hence denied.
63. Prayer (ix) is for compensation for unlawful termination based on section 49(1)(c) of the act. The respondents treated the claimant with indignity, disrespect and disgrace notwithstanding that the claimant had served them for over four (4) years. They did not care how the claimant was to survive without an income. They did not pay him his dues as per the law and that is why this matter is in court. It would appear that once the respondents procured a tenant to occupy the building they had no more use for the claimant and they treated him with utmost contempt.
64. This court has considered the factors and parameters that it ought to under section 49(4) of the act and finds this cause an appropriate one for the award of the maximum 12 months gross pay in compensation calculated as Kshs 12,926.55x12 months = Kshs 155,118.60. This amount is subject to statutory deductions.
65. The respondents are ordered to issue and deliver a certificate of service to the claimant within 30 days of this judgment in accordance with section 51 of the act, and as prayed in prayer (x).

VIII. Costs

66. The claimant is awarded costs of this cause to be agreed on or to be taxed in the usual manner.

IX. Disposal

67. This court therefore makes the following final orders:
- (a) A declaration be and is hereby issued that the termination of the claimant by the respondents was unfair and unlawful.
 - (b) The claimant is awarded the following:
 - (i) One (1) months salary *in lieu* of notice Kshs 12,926.55
 - (ii) Salary for December 2017 - Kshs 12,926.55
 - (iii) Salary underpayments - Kshs 47,517.60
 - (iv) Compensation for unfair and unlawful termination - Kshs 155,118.60Total - Kshs 228,489.50
 - (c) The respondents to issue and deliver a certificate of service to the claimant within 30 days of this judgment
 - (d) Costs of this cause to the claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 29TH DAY OF SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE

