



**Mboku v Gikera & Vadgama Advocates (Cause 900 of 2017)  
[2024] KEELRC 13649 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13649 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 900 OF 2017**

**AK NZEI, J  
MAY 6, 2024**

**BETWEEN**

**CAROLYNE MBOKU ..... CLAIMANT**

**AND**

**GIKERA & VADGAMA ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondents herein vide a memorandum of claim dated 1/12/2017 and filed herein on 4/12/2017 and sought the following reliefs:-
  - a. 1 day pay.....ksh. 3,117
  - b. 1 month pay in lieu of notice.....ksh. 93,500
  - c. 5% of the legal fees raised and paid .....ksh. 240,606
  - d. Maximum compensation for wrongful dismissal and/or unlawful termination.....kshs. 1,122,000
  - e. An order compelling the Respondent to issue the Claimant with a certificate of service.
  - f. Any further entitlement/order that the Court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the Claimant submits on in his final filed submissions.
  - g. Costs of the cause.
  - h. Interest on prayers (a), (b), (c) and (f).
  
2. The Claimant pleaded that she was, on or about 01/07/2015 to 21/9/2016, employed by the Respondents as an Associate Advocate in charge of Litigation Department in the Respondent's



Mombasa Office, earning a net salary of ksh. 85,000 at the time of employment and ksh. 93,500 per month at the time of termination.

3. It was the Claimants' further pleading:-
  - a. that on 21/9/2016, she reported to work and performed her duties as usual and that at 5.00pm when she was preparing to leave the office, she was summoned by the Head of the Mombasa Office, one Emma Ochieng, and was informed that her employment services had been terminated.
  - b. that the termination was unlawful, abrupt and in contravention of *the Constitution* of Kenya 2010, the rules of natural justice and fundamental International Labour Conventions and Declarations.
  - c. that the termination was unfair as it was without a fair or valid reason, was effected without according the Claimant a hearing and without notice, without payment of the Claimants' terminal dues and issuance of a certificate of service, and that there was no adherence to fair procedure as set out in Section 41 of the *Employment Act*.
4. Documents filed by the Claimant alongside the Memorandum of Claim included the Claimant's witness statement dated 1/12/2017 and an evenly dated list of documents, listing five (5) documents. The listed documents included the Claimant's letter of appointment, the termination letter dated 21/9/2017, a tabulation of the Claimant's terminal dues, the Respondent's Office and HR Manual, and a demand letter dated 29/9/2017.
5. The Respondents entered appearance on 4/1/2018 and filed response to the Claimant's claim on 25/1/2018. The Respondents admitted having employed the Claimant as an Associate in the Litigation Department at their Mombasa office at the pleaded salary, but denied ever designating the Claimant as the Head of Litigation Department in the said office. The Respondents further stated that the 3<sup>rd</sup> Respondent, Emma Ochieng, was not registered as a proprietor of the law firm (Gikera & Vadgama Advocates) under the Partnership Act Cap 29 Laws of Kenya.
6. The Respondents denied the Claimant's claim and pleaded:-
  - a. that the claimed 5% commission was not part of the contractual agreement between the Claimant and the Respondents.
  - b. that although the Claimant's work was satisfactory initially, her performance/work deteriorated, contrary to the firm's expectation, as she failed to promptly update clients' inquiries on the progress of the matters handled by the Claimant and failed to pick or to return their calls.
  - c. that the Claimant was on 21/9/2016 duly furnished with the reasons for her termination by the Head of Branch – Mombasa, and was afforded an opportunity to be heard on the said date.
  - d. that if there was failure by the Respondents to give a termination notice, the Claimant received payment in lieu of notice, and her salary and dues were fully paid and receipt of the same acknowledged on 12/10/2016.
  - e. that the Claimant was advised to collect her certificate of service from the Respondents' Branch Office in Mombasa but she did not.
  - f. that the Claimant was on 7/10/2017 paid her terminal dues as follows:-
    - i. salary for 20 days worked in September 2017.....ksh. 62,333.33



- ii. one month salary in lieu of notice.....ksh. 93,500
  - iii. unspent leave, 14 days.....kshs. 43,633.33
  - iv. welfare savings refundable.....ksh.4,000
- g. that the Claimant is not entitled to the reliefs sought.
7. Other documents filed by the Respondents included written witness statements of Valerie Ogutu and Emmah Ogolla, and a list of documents dated 25/1/2018, listing six (6) documents. The listed documents included the Claimant's appointment (confirmation) letter, the Claimant's leave application form dated 26/4/2016, the termination letter dated 21/9/2017, tabulation of the Claimant's terminal dues, copies of cheques drawn by the Respondents in favour of the Claimant and an acknowledgement of receipt thereof. The Respondents also filed a supplementary list of documents dated 24/1/2023, listing the first document listed on the initial list of documents, which the Court had directed be filed afresh pursuant to an objection raised by the Claimant.
  8. Trial commenced on 24/5/2021 before Ndolo, J. The Claimant testified and adopted her filed witness statement, which largely replicated the statement of claim, as her testimony. She also produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified that she was given the termination letter by the 3<sup>rd</sup> Respondent on 21/9/2017 and that the reason for termination was given in the letter as failure to communicate with clients and failure to return the clients' enquiring calls made to the Claimant's personal line. That she was told by the 3<sup>rd</sup> Respondent that one of the clients' husband had called the Claimant on her personal line enquiring about a case and that the Claimant did not return the call. It was the Claimant's evidence that client/advocate confidentiality would have been breached by her communication with the client's husband.
  9. The Claimant further testified that she was not given an opportunity to defend herself, that her salary was paid upto 20/9/2016, which was less one day, and that she was entitled to 5% of the legal fees paid as there was a verbal office policy that all the Advocates were entitled to 5% commission of the legal fees paid. That the legal fees paid was kshs. 4,812,120, and that the Claimant was entitled to 5% thereof, which was kshs. 240,606.
  10. Cross-examined, the Claimant testified that her letter of offer dated 29/5/2015 did not state that she would be HOD (Head of Department), that her effective date of employment was 1/7/2015, that the termination letter did not specify the client whose call she failed to return, that her termination was effective from 21/9/2016 and that she was never paid any commission for the period she served.
  11. The Respondents' case opened before me on 24/1/2023. The Respondents called two witnesses. The first witness, Valerie Ogutu (RW-1), adopted her filed witness statement (filed on 18/6/2021) and produced in evidence the Respondents' documents referred to in paragraph 7 of this judgment. The witness further testified that the Claimant was employed by the Respondents on 1/7/2015 as an Associate in the litigation department, and that her services were terminated vide a letter dated 21/9/2016 and was paid her terminal dues, including payment in lieu of notice.
  12. Cross-examined, RW-1 testified that the Claimant's employment period was not disputed, that there were no written records of complaints against the Claimant, either by clients or by the Respondents. That according to the Respondents' Human Resource Policy Manual, an employee would be given an oral warning, and then 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> (final) warnings. That a formal complaint would then be registered and disciplinary proceedings would follow. The witness told the Court that none of those steps were shown to have been taken regarding the Claimant.



13. RW-1 further testified:-
  - a. that there was no show cause letter on record, there was no letter inviting the Claimant to a disciplinary hearing, and that there were no minutes of any discussion on the Claimant by the Respondents.
  - b. that there was no notice issued; that only a termination letter dated 21/9/2016 was issued.
  - c. that the tabulation of the Claimants' dues dated 7/10/2016 states that the termination date was 20/9/2016.
  - d. that for one to earn commission on fees paid, there had to be a written contract on that.
  - e. that the Respondents' record did not show that a certificate of service had been issued to the Claimant.
  - f. that there was nothing on record to show that due procedure was followed in terminating the Claimant's employment, save for payment in lieu of notice.
14. The Respondent's second witness, Emmah Ogolla (RW-2), is named as the 3<sup>rd</sup> Respondent herein. She told the Court that she was not registered as a proprietor of the firm of Gikera & Vadgama Advocates, and that the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents were the proprietors of the said firm, which was registered as a partnership. RW-2 adopted her witness statement dated 30/1/2018 as her testimony.
15. RW-2 further testified that the Claimant was never promoted to the level of head of litigation department, and that she was the only litigation counsel in the Mombasa office. That complaints against the Claimant regarded communication (failure to return calls and emails), and that this was the reason for termination given in the termination letter. RW-2 further testified that by virtue of her position, she was the Manager of the Respondents' firms' Mombasa office, was privy to the Claimant's termination and that no show cause letter was served on the Claimant requiring her to give an explanation on the accusations made against her. That the Claimant was not invited for a disciplinary hearing and no disciplinary hearing was conducted. That the Claimant was handed a termination letter after the day's work on 21/9/2016 and was not given the option of appealing. That the Claimant was not issued with any warning letters.
16. Having considered the pleadings filed and evidence presented by both parties herein, issues that fall for determination, in my view, are as follows:-
  - a. whether termination of the Claimant's employment was unfair.
  - b. whether the Claimant is entitled to the reliefs sought.
17. On the first issue, Section 45(2) (a) & (c) of the Employment Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and that termination was in accordance with fair procedure. Section 45(4) (b) of the said Act on the other hand provides that termination of employment shall be unfair if it is found out that in the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of an employee.
18. Section 41 of the Employment Act 2007 sets out a mandatory procedure that must be adhered to by every employer considering termination of employment of an employee on account of misconduct, poor performance or physical incapacity. The section provides as follows:-



1. Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  2. Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
19. Evidence on record in the case herein shows that the accusations levelled against the Claimant by the Respondents, and on account of which the Claimant’s employment was terminated, were of the nature of poor performance. The Claimant’s letter of termination dated 21/9/2016 states in part:-
- “It is with sincere regret that we write to inform you that your employment with GVA will terminate with effect from 21<sup>st</sup> September 2016 due to persistent clients’ complaints over your lack of proper communication or at all.
- You have previously been cautioned over the gravity of failing to return clients’ calls and the dissatisfaction expressed by the clients as a result...”
20. The foregoing being the position, the Respondents were obligated to adhere to the mandatory procedure set out in section 41 of the Employment Act 2007. They did not, and this contravened both the statute and principles of fairness. It was held as follows in the case of Walter Ogal Anuro -vs- Teachers Service Commission [2013] eKLR:-
- “...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
21. On procedural fairness, the Court of Appeal stated as follows in the case of New Kenya Co-operative Creameries Limited -vs- Olga Auma [ 2019] eKLR:-
8. The repeated use of the word “shall” in Section 41 makes it clear that the Section is a mandatory provision. The use of the words “present during this explanation” in Section 41 (b) places an obligation on the employer that the explanation for which the employer is considering the termination be given in an oral explanation where the employee and another person chosen by the employee is present. Section 41(2) requires that both the employee and the other person present be given an opportunity to make representations, which representations should be considered by the employer in making his decision.
- In our view, Section 41 provides for a physical interaction in the disciplinary process and therefore, the hearing provided under Section 41 of the Employment Act, which is a mandatory provision, must be an oral hearing.”
22. It is my finding that termination of the Claimant’s employment by the Respondents on 21/9/2016 was procedurally unfair for want of mandatory statutory procedure. Further, the evidence on record shows that the Respondents did not follow their own laid down internal procedure in terminating the Claimant’s employment.



23. On substantive fairness, the Respondents did not demonstrate validity of the reason and/or reasons on account of which the Claimant's employment was terminated. No single complaint against the Claimant, either by the Respondents or by their clients, was produced in evidence. It was not demonstrated that the reasons given in the termination later dated 21/9/2016 had been made known to the Claimant before hand. In all circumstances of the case herein, the Respondents did not act in accordance with justice and equity in terminating the Claimant's employment.
24. It is my finding that termination of the Claimant's employment was procedurally and substantively unfair.
25. On the second issue, and having found that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of seven months' salary as compensation for unfair termination of employment. That is ksh. 93,500 x7 – Ksh. 654,500. I have taken into account the manner and the circumstances in which the Claimant's employment was terminated.
26. The claim for ksh. 3,117 being one day pay is allowed. It was a common ground that whereas the Claimant worked upto 21/9/2016 and was handed the termination letter after the day's work on the said date, she was paid twenty (20) days' salary for the month of September 2016.
27. The claim for kshs. 240,606 being 5% of legal fees raised and paid is declined as no basis for the same, contractual or otherwise, was demonstrated by the Claimant. The claim, having been denied by the Respondents, was not proved by the Claimant.
28. The claim for kshs. 93,500 being one month salary in lieu of notice is declined. It was a common ground that terminal dues paid to the Claimant upon termination of her employment included one month salary (ksh. 93,500) in lieu of notice. The Claimant, however, maintained in the proceedings herein that she was entitled to two months' salary in lieu of notice pursuant to the Respondents' Office and Human Resource Manual (Policy) as she was a Head of Department. This position/claim was denied by the Respondents. I have perused the Claimant's letter of both appointment and confirmation and I have not seen any indication that the Claimant was a Head of Department. No letter of promotion in such regard was produced in evidence.
29. The claim for issuance of a certificate of service is allowed pursuant to Section 51(1) of the [Employment Act](#).
30. In sum, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Claimant against the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents jointly and severally as follows:-
  - a. Compensation for unfair termination of employment.....ksh. 654,500
  - b. One (1) day pay .....ksh. 3,117

Total ksh. 657,117
31. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#) 2007.
32. The 1<sup>st</sup> and the 2<sup>nd</sup> Respondents shall issue the Claimant with a Certificate of Service pursuant to Section 51(1) of the [Employment Act](#).
33. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.



34. The Claimant’s claim against the 3<sup>rd</sup> Respondent is hereby dismissed with no order as to costs, in view of the evidence on record regarding the proprietorship of the Firm of Gikera & Vadgama Advocates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> MAY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

