



**Paul v Navisat Telematics Limited (Cause E092 of 2021)
[2024] KEELRC 13635 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E092 OF 2021**

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

BETWEEN

VICTOR MUOKI PAUL CLAIMANT

AND

NAVISAT TELEMATICS LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 14/10/2021 and filed in this Court on even date, and pleaded that he was employed by the Respondent as a General Manager in the year 2008, earning a salary of kshs. 234,000, a position he held until the year 2018. The claimant further pleaded that for 8 months in 2018, from April to November 2018, he was not paid his salary, and that the Respondent frustrated the Claimant by barring him from accessing his office. That in the month of November 2018, the Claimant stopped going to the Respondent’s premises.
2. It was the Claimant’s further pleading that besides failing to pay the Claimant’s salary and barring him from accessing his office, the Respondent pressed criminal charges of stealing by servant against the Claimant, but which the Court dismissed and acquitted the Claimant on 24th June 2021.
3. The Claimant further pleaded that the Respondent was guilty of unfair labour practices contrary to Article 41 of *the Constitution* of Kenya.
4. The Claimant sought the following reliefs against the Respondent:-
 - a. A declaration that termination of the Claimant’s employment was both procedurally and substantively unfair.
 - b. Compensation for unfair termination of employment (ksh.234,000x12)
.....ksh.2,808,000
 - c. Unpaid salary for 8 months(April to



- November 2018).....ksh. 1,872,000
- d. Salary in lieu of notice.....ksh. 234,000
- e. Gratuity(ksh.234,000x13).....ksh.3,042,000
- f. Unpaid leave days (189 days) at 7,800x189.....ksh.1,474,200
- g. Costs and interest.
5. Documents filed by the Claimant alongside the memorandum of claim included the Claimant’s written witness statement and a list of documents dated 14th October 2021. Documents listed on the said list of documents included the Claimant’s payslips, NSSF and NHIF statements, the Respondent’s Personnel Manual, a demand letter and the Claimant’s identification card.
6. The Respondent entered appearance on 10th November 2021 and filed a statement of defence on 28th January 2022, denying the Claimant’s claim. The Respondent further pleaded:-
- a. that the dispute between the Respondent and the Claimant arose between May and August 2018 after the Respondent realized that it had incurred massive losses amounting of ksh. 13,758,930.13 during the year 2017, which the Claimant was unable to respond to despite the fact that he was incharge of all the company’s departments.
- b. that upon interrogations and investigations, it was established that the Claimant had been part of the group in the Respondent company which oversaw the loss.
- c. that after hearing representations by the Claimant, the Respondent terminated the Claimant’s employment on 15th August 2018.
- d. that on 16th August 2018, the Respondent lodged a formal complaint of stealing by servant at Nyali Police Station and that on 17th August 2018, the Claimant was arrested and was on 18th August 2018 charged with the offence of stealing by servant in Shanzu Chief Magistrate’s Court Criminal Case No. 1190 of 2018. That the said criminal case was on 24th June 2018 withdrawn under Section 87(a) of the *Criminal Procedure Code*.
- e. that it is not true that the Respondent frustrated the Claimant’s duties and barred him from accessing his office.
- f. that the Claimant’s claim offends Section 90 of the *Employment Act* 2007 as the Claimant was terminated in August 2018.
- g. that the Claimant’s termination was lawful and was based on a valid reason, and that his claim is without merit and should be dismissed with costs.
7. Other documents filed by the Respondent were a written witness statement of Walter Kiilu Mbindyo dated 14/9/2022 and a list of documents listing one document.
8. At the trial, the Claimant adopted his witness statement dated 14/10/2021 as his testimony and produced in evidence the documents referred to at paragraph 5 of this judgment. The Claimant further testified that he was never given a termination letter, was never given a termination notice and was never invited for a disciplinary hearing. He further testified that from August to November 2018, he was barred from accessing the Respondent’s premises by the Respondent’s security guards at the gate, and was not paid any salary during that period. That the last salary that he received was for March 2018.



9. It was the Claimant's further evidence that he was taken to Court in August 2018 and was charged with the offence of theft (stealing) by servant in Shanzu Criminal Case No. 110 of 2018, but was acquitted by the Court as the allegations against him were never proved, and that the Respondent did not conduct an internal disciplinary hearing. The Claimant further testified that as the Respondent's General Manager, his duty was to oversee the company's Operations and that he never dealt with money. That all money payable to the company and cheques drawn in favour of the company were paid to the company, and were banked by accounts. That no payments were made to the Claimant; and that the Claimant had not been shown any audit report or the Respondent's audited accounts.
10. Cross-examined, the Claimant testified that he was a permanent employee, and denied having worked on renewable contracts. He denied having signed any such contracts. He further denied knowledge of any losses having been made by the Respondent, and denied having been questioned regarding any audited accounts or having attended any meeting regarding such issue. He denied having been terminated on 15th August 2018 and testified that he went to work on 20th August 2018 after being charged in Court, but was denied access. That the Respondent's reception had a register on who went in and who went out.
11. The Claimant further testified that according to the Respondent's Personnel Manual, which he was conversant with, leave days not taken by an employee on his own volition could not be carried forward, and that he had nothing to show that he had applied for leave and had been denied.
12. The Respondent called one witness, Walter Kiilu Mbidyo (RW-1), the Respondent's CEO. The witness adopted his filed witness statement dated 14/9/2022 as his testimony and produced in evidence the document referred to at paragraph 7 of this judgment; and which he confirmed was not an audit report, but a copy of quick books as at December 2017. RW-1 further testified that the Claimant was terminated on 15th August 2018, and denied having frustrated him by denying him access to his office. He testified that the Claimant's termination was not constructive, but was based on loss of company money amounting to ksh. 13,758,930. That the criminal case against the Claimant was withdrawn.
13. Cross-examined, RW-1 testified that the Claimant was terminated verbally on 15th August 2018 and was not given any termination letter; and that there were no disciplinary proceedings record/minutes. That the Claimant was not paid his dues, and that he had worked for the Respondent since the year 2008. That there was no audit report on the money allegedly lost by the Respondent company.
14. Having considered the pleadings filed and evidence presented by both parties herein, issues that present for determination, in my view, are as follows:-
 - a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimant's claim is statute barred.
 - c. whether the Claimant is entitled to the reliefs sought.
15. On the first issue, it was a common ground that the Claimant was employed by the Respondent as a General Manager, and that he retained his employment until he was terminated by the Respondent in 2018. It was further a common ground that the Claimant was terminated by the Respondent without the Claimant being granted an opportunity to be heard on the allegations of theft/stealing by servant said to have been levelled against him by the Respondent. The Respondent's CEO (RW-1) testified that the Claimant was terminated verbally and that criminal charges (of stealing by servant) were pressed against him by the Respondent and were subsequently withdrawn as appropriate evidence had not been availed by the Respondent to the prosecution.



16. From the evidence on record, and in view of the provisions of Section 44(4) (g) of the Employment Act 2007, the allegations on the basis of which the Claimant's employment was terminated by the Respondent were those of gross misconduct. The Claimant was suspected by the Respondent to have committed a criminal offence to the detriment of the employer/the Respondent. This brings the matter of termination of the Claimant's employment within the purview of Section 41 of the Employment Act 2007, which 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.”

17. The Respondent did not in any way comply with the foregoing mandatory provisions of the statute on termination procedure. Further, the Respondent is not shown to have taken into account the provisions of Section 43(1) of the Employment Act 2007 which provides as follows:

“(1) In every claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

18. The Respondent did not prove, by evidence, either before termination of the Claimant's employment or at the trial herein, that the Respondent either stole the alleged sum of Kshs. 13,758,930.13 or caused the loss of the said sum by being careless or improperly performing any duty which, under his contract, was his duty to have performed carefully or properly. The Claimant testified that all matters money or payment were dealt with by the Respondent's accounts, and that he, the Claimant, never handled such matters.

19. Indeed, it is to be noted that no written contract of employment regarding the Claimant's employment was produced by either party. The scope of the Claimant's duties under the contract of employment with the Respondent was never demonstrated. Section 9(2) of the Employment Act obligates an employer to cause an employment contract to be drawn up stating the particulars of employment. Section 10(2) of the Act states that an employee's job description is one of the particulars to be set out in an employment contract. Section 10(7) of the Act states as follows:

“(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

20. The Respondent failed to discharge the foregoing burden by proving the validity of its allegations against the Claimant; and this failure rendered termination of the Claimant's employment



substantively unfair pursuant to Section 45(2) of the *Employment Act*. The Court of Appeal stated as follows in the case of Naima Khamis –vs- Oxford University Press (e.a) Limited [2017] EKLR:-

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2)(c) requires a termination to be done according to a fair procedure. From the foregoing, termination of the employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”

21. It is my finding that termination of the Claimant’s employment by the Respondent was procedurally and substantively unfair, and I so declare.
22. On the second issue, whereas the Respondent’s witness (RW-1) testified that the Claimant’s employment was verbally terminated by the Respondent on 15th August 2018, a day before the Claimant was arrested and subsequently charged in Court with the offence of Stealing by Servant, the Claimant candidly testified that he was not terminated in August 2018 as alleged by the Respondent. That he went back to work in August 2018 after being charged in Court, but was denied access to the Respondent’s premises by the Respondent’s security guards. That he continued going to work and being denied access until November 2018 when he stopped going. This evidence was not rebutted by the Respondent. The Respondent’s witness (RW-1) testified that the Claimant was not issued with a termination notice or a termination letter, and was not subjected to any disciplinary hearing/proceedings before termination. In other words, the Respondent did not present any evidence pointing to the date of termination of the Claimant’s employment, which date is in dispute.
23. I have noted from the Claimant’s NSSF statement which was produced in evidence and whose contents or validity the Respondent did not dispute, that the Respondent continued remitting the Claimant’s monthly NSSF contributions beyond November 2018. The Respondent could not have been making those remittances for an employee whose employment it had terminated. Guided by the word and spirit of Sections 9, 10 and 41 of the *Employment Act*, I am of the view that where the date of termination of an employee’s contract of employment is in dispute, the burden of proving or disproving such date should be on the employer. In view of this, and in view of the evidence on record, I make a finding that the Claimant proved, on a balance of probability, that his employment was terminated by the Respondent in November 2018.
24. The Claimant’s employment having been terminated in November 2018 and the suit herein having been filed on 14th October 2021, I find and hold that the suit was filed within the three years’ period stipulated in Section 90 of the *Employment Act* 2007, and that the Claimant’s suit herein is not statute barred.
25. On the third issue, and having made a finding that termination of the Claimant’s employment was unfair, and having taken into account the length of the Claimant’s service in the Respondent Company and the circumstances in which the termination took place, I award the Claimant the equivalent of seven months’ salary as compensation for unfair termination of employment. Both parties pleaded that the Claimant was earning a gross salary of Kshs. 234,000/= per month. The Claimant demonstrated as much in evidence. The equivalent of seven months’ salary is Kshs. 1,638,000, which I award the Claimant.



- 26. The claim for Kshs. 1,872,000 being unpaid salary for eight (8) months (April to November 2018) is declined. The Claimant demonstrated in evidence that the Respondent remitted the Claimant’s NSSF contributions to the relevant Government agency (NSSF) during the aforesaid months. The Court was not told how such contributions could have been remitted if the Claimant’s salary was not being paid during that period.
- 27. The claim for one-month salary in lieu of notice is allowed pursuant to Section 35(1)(c) of the Employment Act, and I award the Claimant Kshs. 234,000 in that regard.
- 28. The claim for Kshs. 3,042,000 being gratuity for the years worked is declined. The Claimant demonstrated by evidence that he was a member and a contributor to NSSF. Section 35(6)(d) of the Employment Act disqualifies him from making such a claim. Further, it was not demonstrated that payment of gratuity was a term of the Claimant’s contract of employment or a collective bargaining agreement whose terms applied to the Claimant’s employment contract.
- 29. The claim for Kshs. 1,474,200 regarding alleged 189 unpaid leave days is declined. The Claimant did not specifically plead that claim in his statement of claim, and did not state, with precision or otherwise, the years of service during which those days were not taken. Cases belong to parties, and it behoves them and/or their counsel where represented by counsel, to plead their claims and to present evidence in proof of such claims. The Claimant only mentioned the leave issue in the prayers/reliefs part of his Memorandum of Claim, and did not testify regarding that claim.
- 30. In sum, and having considered the written submissions filed, Judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. Compensation for unfair termination
of employmentKshs. 1,638,000
 - b. Payment in lieu of notice.....Kshs. 234,000
 - TotalKshs. 1,872,000
- 31. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH 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.

Appearance:

.....Claimant
Respondent

