



**Rayani v Management Committee Nyali Plam Garden Estate & another
(Cause 641 of 2016) [2024] KEELRC 13651 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13651 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 641 OF 2016**

**AK NZEI, J
MAY 9, 2024**

BETWEEN

JAMES RAYANI CLAIMANT

AND

**MANAGEMENT COMMITTEE NYALI PLAM GARDEN ESTATE &
ANOTHER RESPONDENT**

JUDGMENT

1. Vide a memorandum of claim dated 31/8/2016 and filed in this Court on 6/9/2016, the Claimant sued the Respondents herein and pleaded that in or about May 2010, the Claimant was engaged by the 1st Respondent as an Estate Manager, earning a gross monthly salary of kshs. 22,000, which position the Claimant held until May 2016 when his employment was terminated by the Respondent.
2. It was the Claimant's pleading:-
 - a. that following a general meeting of the 1st Respondent held at the 1st Respondent's premises on 17/4/2016, the 2nd Respondent was appointed as a member of an interim committee of the 1st Respondent. That prior to the 2nd Respondent's said appointment, the Claimant and the 2nd Respondent had a strained relationship as a result of the 2nd Respondent's refusal, failure and/or neglect of some financial obligations to the 1st Respondent, and which fell within the Claimant's mandate to collect.
 - b. that the 2nd Respondent started acts of threats, intimidation, revenge and/or blackmail and racial abuses against the Claimant and continue with such acts until sometimes in May 2016 when the Claimant was denied access to the 1st Respondent's premises by the 1st Respondent's security guards, effectively terminating his services.
 - c. that termination of the Claimant's services was unlawful, wrongful, unjustified and unfair as no reasons for the termination were given and the laid down procedure was not followed.



- d. that the Claimant had, since May 2010, worked for the 1st Respondent diligently and without any complaint, warning or disciplinary issue against him, and that termination of his services was actuated by bad faith, malice and revenge on the part of the 2nd Respondent.
3. the Claimant sought the following reliefs against the Respondents:-
- a. a declaration that the summary dismissal of the Claimant from employment by the Respondents was irregular, unlawful, unfair and wrongful.
 - b. One month salary in lieu of notice.....ksh.22,000
 - c. Damages under Section 49 of the Employment Act (ksh. 22,000 per month x12)ksh. 264,000
 - d. Unpaid leave for the period between May 2000 to May 2016.....ksh. 352,000
 - e. Unpaid salary for February to April 2016.....ksh. 66,000
 - f. Prorated salary for the half month worked in May 2016.....ksh. 11,000
 - g. Certificate of service.
 - h. Costs of the claim and interest.
 - i. Such other relief that is just and expedient for the Court to grant.
4. Documents filed by the Claimant alongside the memorandum of claim were the Claimant's written witness statement dated 31/8/2016 and an evenly dated list of documents listing some 24 documents.
5. The Respondents entered appearance on 7/10/2016 and filed their Response to the claim and a counter-claim. Apart from an admission that the 1st Respondent had appointed the Claimant as an Estate Manager in May 2000, the Respondents denied the Claimant's claim and pleaded:-
- a. that the 1st Respondent was the employer of the Claimant and that there was no cause of action against the 2nd Respondent, who was not the Claimant's employer.
 - b. that following claims of misappropriation, the Claimant absconded work and never returned. That the Claimant was not denied access as alleged by him, and that the Claimant was not entitled to compensation as sought by him.
 - c. that the Claimant was earning a gross salary of kshs. 22,000, and was paid all his dues in full and final payment.
 - d. that the Claimant did not come to Court "with clean hands" as he failed to disclose to this Court that he had admitted diverting revenue collected from members contrary to his terms of appointment to pay for his daughter's examination, with the intention of repaying with his salary.
 - e. that after the 1st Respondent noticed that there was misappropriation and from the Claimant's own admissions, the Claimant was on various occasions requested to furnish the 1st Respondent with a detailed statement of accounts on the status of the Estate during the financial years 2014, 2015 and upto March 2016; which the Claimant failed, refused or neglected to do; and abruptly absconded duty never to return to work.
6. The 1st Respondent raised a counter-claim against the Claimant and counter-claimed from him a sum of kshs. 340,420 being the amount misappropriated by the Claimant between the years 2014



- (ksh.130,000), 2015 (kshs. 198,620) and 2016 upto March (ksh.11,800). The 1st Respondent also sought to be paid costs of the suit and of the counter-claim and interest.
7. The Claimant filed Reply to the Respondent's Response and a response to the counter-claim on 30/4/2018, and denied the 1st Respondent's counter-claim. The Claimant further pleaded:-
 - a. that the Management of the Estate was vested in Management Committee, with the Claimant being merely an Estate Manager; and that all payments and expenses of the Estate were being approved, done and accounted for by the Estate Management Committee on the day to day administration and affairs of the Estate.
 - b. that all income and expenditure were ratified in general meetings of members of the Estate, and that the Claimant was never involved in any fraud and/or misappropriation of the Estate's funds, until when the 2nd Respondent raised the same after a personal disagreement and grudge with the 2nd Respondent and Estate Security Personnel on denial of access to visitors to the 2nd Respondent's house while the 2nd Respondent was out of the country.
 8. Documents filed by the Respondents alongside the Response and counter-claim were written witness statements of Hans Peter Warle and Dr. Johnson Mokaya, both dated 3/4/2018, and a list of documents dated 9/10/2016, listing some 16 documents.
 9. Trial opened on 7/7/2021 before Ndolo, J. The Claimant testified and adopted his filed witness statement dated 31/8/2016 as his testimony, and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified that his employment was terminated as from 11/5/2016 when the 2nd Respondent instructed the security guards not to let him in. He denied having absconded duty or having misappropriated the 1st Respondent Estate's Money. That he was never notified of any charge of misuse of money, and was never invited to attend a meeting discussing such issue.
 10. The Claimant further testified:-
 - a. that he used ksh. 10,000 from the Estate's Money without authority. That he used the money on a personal issue and did not pay back. That the admission on the ksh. 10,000 was made on 17/4/2016 during a meeting called to discuss estate affairs not his conduct, and that it was after this admission that he was on 22/4/2016 issued with a letter to account for funds, to which he responded on 6/5/2016.
 - b. that from 11/5/2016, the 2nd Respondent instructed the security guards not to let him in. That the Claimant did not abscond duty/refuse to go to work; and was not given an opportunity to respond to accusations by the 2nd Respondent.
 11. The Respondent's case proceeded before me. The Respondents called one witness, Hans Peter Warle (the 2nd Respondent) who testified as RW-1. The witness (RW-1) testified and adopted his filed witness statement as his testimony. He also produced in evidence the Respondent's documents referred to in paragraph 8 of this judgment. RW-1 (the 2nd Respondent) denied having employed the Claimant at any given time and denied having been the chairman of the 1st Respondent. He stated that he was only a member of an interim committee (of the Estate) from 20/3/2016. That during this time, and even before he became a member of the Interim Committee, the Claimant was the Estate Manager and his duties included collecting funds from residents and banking the money collected. That if the Claimant needed any money to pay expenses, he was supposed to ask for money from the treasurer. That the Claimant never used to bank all the money collected, and never accounted for it. That the unaccounted



money formed the basis of the counter-claim. That the Claimant admitted having taken ksh. 10,000, which he never refunded.

12. RW-1 further testified that the total sum of money unaccounted for by the Claimant for the period 2014, 2015 and upto March 2016 was found to be kshs. 340,420, and that by a letter dated 22/4/2016, the Claimant was asked to explain how the missing money was spend. That the Claimant responded (vide letters received on) dated-29/4/2016 and 6/5/2016) respectively. That the Respondents wrote to the Claimant asking him to avail documents by 11/5/2016 in support of the expenditure that he said he had incurred. That the Claimant absconded duty thereupon and never responded to that letter. That he was last seen in the Estate on 10/5/2016. RW-1 further testified that the Respondents never terminated the Claimant's employment.
13. It was RW-1's further evidence that the Claimant was never given a termination notice, and was not paid his salary for the months of February, March and April 2016. On the claim based on leave days, RW-1 testified that he had been told by the 1st Respondent's former secretary that the Claimant worked part-time and was therefore not entitled to leave. RW-1 prayed that the Claimant's suit be dismissed with costs, and that the Respondent's counter-claim be allowed. RW-1 was categorical that although the Claimant worked from the year 2000 upto May 2016, he had only forwarded books for the period from 2014 upto 10th May 2016, and that the Respondents could not tell exactly how much money was unaccounted for.
14. Cross-examined, RW-1 testified that he had seen the Claimant's letter of appointment, duly signed by one Johnson Mokaya, the Estate Management Committee's Secretary, and duly endorsed with the Estate's stamp, and that the same stated that the Claimant had been appointed as the Estate Manager as from 1/5/2000. He denied having instructed the Estate's security guards to deny the Claimant access to the Estate. The witness further testified that the Claimant did not have an office in the estate as at the time he (RW-1) was a member of the 1st Respondent's Interim Committee; and that after the Claimant failed to turn up to work at the estate after 10/5/2016, the Respondents did not call him by phone, was not reported to the police for misappropriation and that his employment was not terminated. That it was the Claimant and the chairman to account for expenditure.
15. Having considered the pleadings filed and evidence presented by the parties herein, issues that present for determination, in my view, are as follows:-
 - a. whether the Claimant has a cause of action against the 2nd Respondent.
 - b. whether the Respondents terminated the Claimant's employment and if so, whether the termination was unfair.
 - c. whether the Claimant is entitled to the reliefs sought.
 - d. whether the 1st Respondent is entitled to the reliefs sought in the counter-claim.
16. On the first issue, it was a common ground that the Claimant was an employee of the 1st respondent, having been employed by the 1st Respondent as an estate manager in the year 2000. There is no evidence on record pointing to the 2nd Respondent having employed the Claimant at any given point in time. The fact that the 2nd Respondent served in the 1st Respondent's interim management committee as from March 2016, a time during which allegations of misappropriation of funds were being made against the Claimant, did not make the 2nd Respondent the Claimant's employer. I find and hold that the Claimant has no cause of action against the 2nd Respondent, and his suit against the 2nd Respondent is hereby dismissed with no order as to costs.



17. On the second issue, the Claimant pleaded and testified that his employment was terminated by the Respondents in May 2016 when he was locked out on instructions of the 2nd Respondent and denied access to the 1st Respondent's premises (the Estate). On their part, the Respondents pleaded and testified that the Claimant absconded duty, and that he was last seen at the 1st Respondent's premises on 11/5/2016. That he disappeared after being asked to account for missing funds. The Respondent's witness (RW-1) testified that the Respondents did not contact the Claimant after he failed to report on duty.
18. Under Section 44(4) (a), failure by an employee to report on duty at the place appointed for the performance of his work amounts to gross misconduct, and the employer of such an employee becomes justified to dismiss such an employee, of course in accordance with the procedure set out in Section 41 of the *Employment Act* 2007.
19. It follows, therefore, that where an employer alleges absconding of duty by an employee, where such allegation is denied by the employee, the employer is expected to prove his allegations by demonstrating what action he took when the employee absconded. This, in my view, is necessitated by the fact that not every absence of an employee from the place appointed for the performance of his work entitles an employer to dismiss an employee. It is only when the employee absconds himself "without leave or other lawful cause" that the employer becomes entitled to effect summary dismissal. The only way in which an employer can establish that there was or there was no "lawful cause" is by contacting the employee in one way or the other, or by preferring charges of gross misconduct against the employee by issuing a notice to show cause and/or a catalogue of charges to the employee, and calling upon him to respond and/or to show cause why disciplinary action cannot be taken against him (the employee).
20. In the case of Stanley Omwoyo Onchweri -vs- Bom Nakuru Ymca Secondary School [2015] eKLR (cited in Jane Ashimbina Mayi -vs- Menengai Oil Refineries Ltd [2016] eKLR), it was stated that:

“...The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances and a hearing may be necessary.”
21. Having considered all the evidence on record, and having seen the correspondence exchanged by the Respondents and the Claimant between 22/4/2016, and 6/5/2016, and in the absence of any demonstration by the Respondents that they in any way contacted the Claimant at any time after 11/5/2016, I find and hold that the Claimant's employment was terminated by the 1st Respondent.
22. On fairness or otherwise of the termination, termination of employment may be substantively or procedurally unfair. It was stated as follows in 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.”
23. On the validity of the reasons for the termination, it was a common ground that the Claimant was on 17/4/2016 found to have misappropriated ksh. 10,000 belonging to the 1st Respondent. In his testimony in this Court, the Claimant admitted that he had taken the said amount of money belonging



to the 1st Respondent without authority. RW-1 testified that upon scrutiny of the 1st Respondent's books for the years 2014 to March 2016, it was discovered that a total of ksh.340,000 was missing and that the Claimant was, vide a letter 6/5/2016, called upon to furnish documents in support of the information on expenditure which the Claimant had given vide a letter received by the 1st Respondent on 29/4/2016. That the Claimant was supposed to furnish the documents latest by 11/5/2016.

24. The 1st Respondent is not shown to have given the Claimant an opportunity to be heard regarding the unadmitted sum of kshs. 340,000, which the 1st Respondent pleaded and testified had been misappropriated by the Claimant. The loss of a total sum of kshs. 340,000 from the Claimant's hands was also not proved by the 1st Respondent at the trial herein. No financial statements and/or audited accounts of the 1st Respondent were produced in evidence, and RW-1 testified that the aforesaid sum was based on estimates.
25. The foregoing notwithstanding, however, the 1st Respondent was justified to terminate the Claimant's employment on account of the admitted misappropriation of the 1st Respondent's ksh. 10,000. The reason for the termination was valid pursuant to Section 45(2) (a) of the Employment Act, and the termination was, therefore, substantively fair.
26. On procedural fairness, and as already stated in this judgment, the Claimant was not given an opportunity to be heard regarding the unadmitted amount of the alleged misappropriated money. The 1st Respondent ought to have complied with the procedure set out in Section 41 of the Employment Act 2007 regarding the alleged sum of kshs. 34,000, but it did not. This rendered the termination procedurally unfair, and I so find and declare.
27. The Court of appeal stated on the foregoing issue, as follows in the case of Naima Khamis -vs- Oxford University Press [2017] eKLR:-

“...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 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 an employee an opportunity to be heard as by law required.”

28. On the third issue, and having made a finding that termination of the Claimant's employment by the 1st Respondent was procedurally unfair, and having made a finding that the 1st Respondent was justified to terminate the Claimant's employment, it is my view that the Claimant is only entitled to a minimal award of compensation for unfair termination of employment. In that regard, therefore, I award the Claimant the equivalent of four months' salary. That is kshs.22,000x4 = kshs. 88,000.
29. The claim for one month salary in lieu of notice is allowed pursuant to Section 35(1) (c) of the Employment Act, as the Claimant was not shown to have been issued with a termination notice. I award the Claimant ksh. 22,000 in that regard. The claim for unpaid leave is declined as the same was not specifically pleaded, and the period for which it was claimed was not specifically pleaded. A claim for unpaid leave is in the nature of a special damage, and must be specifically pleaded and proved.



30. The claim for kshs. 66,000 being unpaid salary for the months of February, March and April 2016 is allowed. RW-1 confirmed in evidence that the Claimant’s salary for those months was not paid. On the claim for prorata days worked in May 2016, RW-1 testified that the Claimant worked upto 10/5/2016, and did not demonstrate that the Claimant was paid for those days worked. I award the Claimant kshs. 7,333 in that regard. The claim for issuance of a certificate of service is allowed pursuant to Section 51 of the *Employment Act*.
31. On the fourth issue, the 1st Respondent’s counter-claim is allowed to the extend of the kshs. 10,000 (ten thousand Kenya shillings) admitted by the Claimant. As already stated in this judgment, the rest of the counter-claim was not proved. The awarded sum of kshs. 10,000 shall be off-set from the sums awarded to the Claimant in this judgment. Each of the parties to the counter-claim (the Claimant and the 1st Respondent) shall bear its own costs of the counter-claim. Judgment accordingly.
32. On the Claimant’s claim, judgment is hereby entered for the Claimant against the 1st Respondent as follows:-
- a. Compensation for unfair termination
of employment.....ksh. 88,000
 - b. Payment in lieu of notice.....ksh. 22,000
 - c. Salary for February, March and April 2016.....ksh. 66,000
 - d. Days worked in May 2016.....kshs. 7,333
- Total ksh. 183,333
33. The 1st Respondent shall issue a certificate of service to the Claimant pursuant to Section 51(1) of the *Employment Act* 2007 within thirty days from the date of this judgment.
34. The Claimant is awarded costs of the suit, to be taxed on the lower scale, and Interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH 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

