



**Bernd v Bahari Dhow Limited & another (Cause E123 of 2023)
[2024] KEELRC 1556 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1556 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E123 OF 2023**

**M MBARÚ, J
JUNE 13, 2024**

BETWEEN

WILFRED SCHULTE BERND CLAIMANT

AND

THE BAHARI DHOW LIMITED 1ST RESPONDENT

**LEO INVESTMENTS LIMITED T/A THE CLOUD HOTEL &
SUITES 2ND RESPONDENT**

JUDGMENT

1. The claimant is a male adult. The 1st respondent is a limited liability company carrying out business in Kwale County. The 2nd respondent is a limited liability company carrying out business in Nairobi County.
2. The claim is that the respondents are a family-owned group of companies, jointly owned by the Chartur and Savani families. The claimant was initially employed by the 2nd respondent on 29 October 2018 as general manager. He was posted to the 1st respondent in August 2019 on the same contractual terms where he worked until his employment was terminated.
3. The claim is that the claimant was earning Ksh. 132,340.50 as basic pay and Ksh. 60,000 house allowance. He was residing in one of the respondent's villas until 3 months before the termination of his employment. Due to renovations at the Bahari Villas, the claimant had to seek alternative accommodation upon instructions by the 1 respondent Mr. Ashraf Savani. The 1st respondent paid Ksh. 60,000 in house allowance.
4. Based on the contract of employment, the claimant was entitled to a consolidated salary of 2% of the net profit and 1% of the net revenue amounting to Ksh.100, 000 guaranteed by the respondents. In the year 2022, the claimant was paid Ksh. 204,000 on account of this consolidated salary. This was the commission for the month of December 2021 only.

5. The claim is that on 30 June 2023, he was summoned by the finance officer of the 2nd respondent, Geoffrey to Nairobi head office for a physical meeting to conform documents and financial reports. The claimant travelled on 4 July 2023 and met with Rahim Chatur who informed him that the respondents had decided to terminate his employment with immediate effect. No reasons were given or the opportunity for a hearing.
6. The claimant was served with a letter dated 6 July 2023 after the fact where the respondent cited poor performance as the reason leading to termination of employment. The claimant did the handing over to his successor on 11 July 2023.
7. The claim is that there was unlawful and unfair termination of employment. The respondents violated the provisions of Section 41 of the *Employment Act*, 2007 (the Act) by failing to accord the claimant a hearing. The respondents withheld the claimant's terminal dues and also failed to issue him with a Certificate of Service. The claimant is seeking the following dues;
 - a) One month's notice pay Ksh. 192,341;
 - b) Salary for days worked in July 2023 Ksh.70,525.12;
 - c) 369.25 leave days for 4 years Kshs. 2,367,397.14;
 - d) Service pay for 4 years Ksh. 384,682;
 - e) 12 months' compensation Ksh. 2,308,092;
 - f) .Certificate of service;
 - g) Costs of the suit.
8. The claimant testified in support of his case that he was first employed by the 2nd respondent and then placed with the 1st respondent. Both are part of a group of companies within the family.
9. The claimant testified that in the course of his employment, the respondent directors would visit the hotel and make comments. In the year 2020, he was issued with a warning letter after Chatur visited the hotel and noted some problems that required to be addressed. Through email dated 31st October 2020, the claimant replied to the warning and explained himself and noted the issues that the respondent ought to address■
10. The claimant was issued with a second warning letter after Tabani a director had visited the hotel. He complained that profits were below. The claimant responded to these matters and the same settled.
11. The claimant testified that upon employment by the 1st respondent, he was allocated Bahari villa where he settled with his wife who had a tailoring business operating from the villa. Tabeni asked the claimant and his wife to move out of the villa for renovations.
12. On 4 July 2023, the claimant was called to the Nairobi head office to confirm financial reports. He travelled ready to present his reports but he was issued with a notice terminating his employment over alleged poor performance. There was no explanation or a hearing over the allegations made.
13. The claimant testified that the respondent refused to tabulate his terminal dues properly. His house allowance was Ksh. 60,000 per month. For 3 months he had to look for alternative accommodation. He left with the respondent's laptop since he had a lot of information installed and wanted to use it. There was a verbal agreement to deduct Ksh. 150,000 from his terminal dues for the laptop.

14. The offered terminal dues were too low and he declined to collect. What was tabulated did not include compensation for unfair termination of employment which is due.
15. Upon cross-examination, the claimant testified that his contract of employment provided that before termination of employment, notice should be issued or payment in lieu thereof. This was not done and hence notice pay is due. Clause 9 of the contract provided that where annual leave was not taken, this could be forfeited but due to the nature of his employment, he was not able to take his annual leave for 4 years. The alleged poor performance was without proof since he filed monthly reports with the respondents and no issues arose. The respondents allowed him to reside in one of the villas where the wife was running a business. The respondents alleged that the wife was using hotel staff in her private business but this was only done by cleaners when there were no customers.
16. The claimant also admitted that he had the respondent's computer that he was using. He is now ready to return it and has offered to offset it from his terminal dues.
17. The claimant admitted that he employed Kemboi as the accountant, a brother to his wife (brother-in-law). He was qualified for the job and the claimant had the authority to hire him to assist him in his duties and financial reports. His employment was not an issue until after the termination of his employment.
18. The contestations concerning payment of terminal dues related to;
SUBPARA a.
Payment for 11 days worked in July 2023;
 - b. Leave pay was offered for 10 days whereas for 4 years he had not taken his annual leave and hence a balance of 369 days due;
 - c. Payment of service pay since the respondent failed to pay statutory dues.
19. The claimant also called Constantine Kemboi Ogolla as his witness. He testified that he was hired by the claimant to work with him as the accountant in the year 2019 but on 6 February 2024, he left the employment of the respondents. The respondents were at all material times aware that he was related to the claimant. He was undertaking finance and human resources duties. The allegations that the claimant was on poor performance were not true since he worked diligently and the respondents made profits.

Response

20. In response, the respondents deny that the claimant was employed on an indefinite contract of employment effective 29 October 2018. The employment contract was for a period of 2 years renewable and based on the claimant's performance. Either party was eligible to terminate the contract subject to payment of one month's notice.
21. The claimant was posted to the 1st respondent's hotel in August 2019 on the same contractual terms.
22. The claimant was guaranteed a minimum consolidated salary of Ksh. 100,000 per month in the event the commissioned salary was less than Ksh. 100,000. The claimant as the general manager in 2022 was receiving Ksh. 100,000 as salary since it was the minimum guaranteed payment. There was no sum of Ksh. 60,000 advanced to the claimant as a house allowance since he had a consolidated salary and was housed at the hotel villa owned by the respondent.

23. The claimant did not seek alternative accommodation on the instructions of the 1st respondent as alleged. He was not diligent in his duties and a visit by management and shareholders to the hotel on 18 to 20 June 2023 revealed the neglect in the performance of duties, which matters were brought to the claimant's attention. These matters were deliberated and it was agreed that the claimant should leave on the terms of his contract due to poor performance.
24. The claimant was invited to Nairobi to be informed of his poor performance and that there was a decision to terminate his employment. He was allowed to state his case. He was issued with a termination notice stating the reasons. He was paid his terminal dues including one month's notice pay which was to be paid upon handing over company property and he declined to collect his dues.
25. The claimant was served with warnings concerning the performance of his duties and employment terminated under the terms of his contract and the law. The Certificate of Service was to be issued upon return of company property. The claims made are not justified since the respondent is willing to issue the due certificate upon clearance, especially a laptop valued at Ksh. 227,000.
26. The respondent called Jackline Kendi Kimathi, the legal officer as the witness. She testified that the claimant was employed as general manager at a guaranteed salary of Ksh. 100,000 per month. It was consolidated and he was accommodated by the respondent. The employment contract was based on performance but this declined as evidenced by profits drop and growing food costs. A visit by management to the hotel on 18 June 2023 revealed that the claimant had neglected the facility. There was poor landscaping, poor room maintenance, TV cables were not functioning and several maintenance and service problems were noted. All these matters were under the claimant's responsibility.
27. Kimathi testified that the claimant was invited to a meeting to deliberate on these matters of his poor performance. After the handing over, he declined to return the office computer worth Ksh. 250,000 and his claims should be dismissed with costs.
28. Upon cross-examination, the witness testified that she was not sure if the respondents paid for NSSF with regard to the claimant. The salary paid was Ksh.271, 000 gross less PAYE but no NSSF or NHIF remittance. These were paid but not reflected on the pay slip. During the hotel renovations, the claimant briefly left his allocated accommodation in the hotel.
29. At the close of the hearing, both parties filed written submissions.
30. The claimant submitted that termination of employment was not procedural or lawful. This was contrary to Sections 41, 43 and 45 of the *Employment Act*, 2007 (the Act). In the case of Peter Otabong Ekisa v County Government of Busia [2017] eKLR the court held that upon a claim of unfair termination of employment, the employer has the burden of proof regarding the reasons leading to termination of employment. The witness called by the respondent Ms. Kimathi testified that the claimant was called to the head office to be informed that he was performing poorly. He had no notice or hearing within the provisions of section 41 of the Act.
31. The claimant was on a contract dated 29 October 2018 which required notice before termination. Under Section 41 of the Act, termination of employment can only arise upon notice, hearing and being given reasons. Where poor performance is cited as the reason leading to termination of employment, the employer must address it before taking such action. The alleged warning emails issued to the claimant were not addressed nor was he given a fair chance to state his case as held in Jane Samba Mkala v Ol Tukai Lodge Limited [2013] eKLR.

32. The claimant submitted that due to a lapse in due process, he is entitled to notice pay based on his monthly salary of Ksh. 192,431. He is also entitled to the July salary for 11 days worked at Ksh. 70,525.12.
33. The claimant is also entitled to untaken leave day at 369.25 under Section 28 of the Act as held in the case of *Shatora v Orange Garage for World Navi Co. Ltd* [2024] eKLR. The total leave days of 369.25 amount to Ksh. 2,367.14.
34. The claimant is entitled to compensation following unfair termination of employment. Total compensation at 12 months at Ksh. 1,308,092 is due.
35. Service pay is claimed on the grounds that the respondents failed to pay NSSF and NHIF as held in *Mary Rhobi v Annah Bhamania* [2014] eKLR. The claims made should be awarded with costs as held in [*Cecilia Karuru v Barclays Bank of Kenya & another HCCC No. 17 of 2014*](#).
36. The respondents submitted that the claimant was on a two-year contract, renewable subject to good performance which he failed to address leading to the issuance of a warning but still, he failed to take heed. The respondents visited the claimant at the hotel and found various problems and poor performance which were addressed directly with him. For these lapses, he was issued two warning letters. There was no change and this was demonstrated by declining profits.
37. The directors held a meeting on 29 June 2023 and resolved to terminate the claimant's employment for poor performance. He was offered notice pay and salary for days worked but he declined to collect.
38. On 5 July 2023, the claimant was personally served with his termination notice which gave him reasons and the tabulation of his terminal dues. He was required to clear and hand over the company computer which he declined to do. There were therefore fair and justified reasons leading to termination of employment as held in the case of [*Joseph Mwaniki Nganga v United Millers Limited Cause No. 59 of 2019*](#). The correct test for an employer before termination of employment is the reasonableness test. Where the employer is of the view that the employee has performed poorly, it is not for the court to assign other reasons.
39. In the case of *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR the court held that the proper procedure once the poor performance of an employee is noted is to point out the same and to give the employee the opportunity to improve. In this case, the claimant was notified of his poor performance and issued with warnings but he failed to address leading to termination of employment.
40. The claimant had a contract of employment stipulating his salary at Ksh. 100,000 per month. This was consolidated. To cushion him, the respondents paid him Ksh. 132,340.50 the sum of Ksh. 32,340.50 being for statutory deductions to cater for PAYE, NHIF and NSSF. It is therefore not correct that the claimant was not registered with NSSF or NHIF as these payments were factored into his monthly salary.
41. The issue of house allowance does not arise since the claimant was housed by the respondents within the hotel facility. Under Section 35(5) and (6) (d) of the Act, an employer who has paid statutory dues should not pay service pay or pensions.
42. The claimant was offered one month's notice pay plus pay for days worked but he declined to collect.
43. The claim for 369.25 leave days is not justified since the claimant had 21 leave days for every year worked. Clause 9 of the contract allocated 21 days only and he failed to submit any leave applications to allow the respondents to approve. The claimant is only entitled to 10.50 leave days at Ksh. 46,319.35 as held in *Jacob Osoro Manyisa v Lavington Security Limited*.

444. Under Section 89 of the Act, claims made beyond 3 years are time-barred. Leave days accrued outside the limitation period cannot be part of the current claim and should be dismissed.
45. Following lawful termination of employment, compensation claimed is not justified.

Determination

46. The issues which arise for determination can be summarized as follows;
 - Whether there was unfair termination of employment;
 - Whether the reliefs sought should be issued; and
 - Who should pay costs.
47. The employment of the claimant by the respondents is not contested.
48. Through a letter of appointment dated 29 October 2018, the respondents employed the claimant as the general manager for LEO Investments Ltd t/a The Cloud Hotel & Suites.
49. The term of employment was agreed at two (2) years under clause 2 of the letter of appointment.
50. This contract was therefore to lapse on 28 October 2020.
51. The period after the lapse of this contract is not addressed by either party.
52. The respondents as the employer did not file any work records. This is a legal duty under the provisions of Section 10(6) and (7) of the Act.
53. The claimant testified that he joined the 2nd respondent as an employee on 1st October 2018 and worked until 1st August 2019 when he was transferred to Bahari Dhow in Diani, the 1st respondent as the general manager. He worked in this capacity until 11 July 2023 when his employment was terminated.
54. On the records and evidence, parties continued to operate within the provisions of the expired contract. Without the respondents submitting any work records as to the extension of a new contract, the claimant having been engaged continuously, became protected under the provisions of Section 37 of the Act. The monthly salary was agreed upon as;

Salary

55. The consolidated salary for the engagement will be 2% Net Profit and 1 % Net Revenue, payable monthly. In case the salary based on commission will not reach Ksh. 100,000.00 this amount will be guaranteed as a minimum monthly salary.
56. There is a commission pay and a guaranteed monthly salary of Ksh. 100,000.
57. Other benefits under the contract dated 29 October 2018 were that the claimant would be covered under the medical scheme, pension scheme and accommodation within the workplace.
58. The payment statement issued to the claimant indicated that his basic salary was Ksh. 138,892.05.
59. This is the last salary paid to the claimant. It has a general application of PAYE at Ksh. 32,340.50. The respondents submitted that the parties agreed that NSSF and NI-IIF would be compensated under this head.
60. However, a payment statement is a legal requirement under the provisions of Section 20 of the Act. It must state the total salary paid and the statutory deductions. Any agreements outside the law are

null and void. The payment statement is a guide to the tabulation of statutory dues owed to the statutory bodies, the Kenya Revenue Authority, the National Social Security Fund and the National Health Insurance Fund. These cannot be circumvented through agreements between an employer and employees. An employer who fails to effect these deductions at source is liable to pay the same together with penalties.

61. On the other hand, the employee cannot claim what is lawfully not due to him but to the statutory body. Where there is no remittance to the statutory body, a claim for service pay is due.
62. Service pay to an employee is regulated under the provisions of Section 35(5) and (6) of the Act. The law requires that;
 5. An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
 6. This section shall not apply where an employee is a member of—
 - a. a registered pension or provident fund scheme under the *Retirement Benefits Act*;
 - b. a gratuity or service pay scheme established under a collective agreement;
 - c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - d. the National Social Security Fund
63. Where the employee is a beneficiary of a pension scheme such as the claimant was secured under his contract under clause (8), he is removed from the benefit of service pay.
64. Equally, the claim for house allowance at Ksh. 60,000 is on the basis that the claimant was directed to vacate the allocated Bahari Villa and forced to secure accommodation in Diani. For the duration of the employment period, the claimant was accommodated by the respondents. He cannot claim for house allowance over and above such benefit. Even where the claimant was not housed by the respondents, which is not the case here, his salary is over and above the minimum wage protected under the Wage Orders under which a house allowance is due.
65. Through a letter and notice dated 5 July 2023, the respondents terminated the claimant's employment on the grounds of poor performance. Various matters were outlined and related to;
 1. Neglected landscaping;
 2. Poor room maintenance;
 3. TV cable Issues;
 4. Maintenance and service shortcomings;
 5. Inadequate kitchen supplies; and
 6. Sanitation and hygiene issues.
66. Ms. Kimathi for the respondents testified that the claimant was called to the head office in Nairobi from Mombasa and these shortcomings were addressed. The claimant had previously been issued warning letters over the same matters and he failed to comply.

67. However, matters relating to the poor performance of an employee are specifically addressed under the provisions of Section 41 of the Act;
- (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.
68. The court has had to address the issue of poor performance and the procedures that the employer should follow in securing the rights of the employee. The respondents relied on the case of *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR where the court held that;
- “The proper procedure once the poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view, 2-3 months would be reasonable.”
- Neither the documentary nor the viva voce evidence showed compliance with the law in this respect. On this score, therefore, I find that the termination of the Claimant's employment by the Respondent on grounds of poor performance and misconduct was unfair within the meaning of Section 45 of the *Employment Act*, 2007.
69. The court in the case of *Francis Ndeke Kyalo v Cosmos Limited* [2021] eKLR reiterated that the proper procedure once the poor performance of an employee is noted is to point out the shortcomings to the employee and allow the employee to improve over a reasonable length of time, and, 2-3 months would be reasonable. In this case, the respondent failed to follow any due process. The meeting the claimant was invited to attend on 4 July 2023 culminating in the notice terminating his employment dated 5 July 2023 was without prior notice that this was a disciplinary hearing. Notice should have been issued securing the claimant's right to attend to address the stated allegations and to allow him the opportunity to decide on another employee to accompany him at the meeting or hearing.
70. The procedures adopted by the respondent, even though the employment contract provided for notice pay are devoid of the legal threshold envisaged under Section 41 of the Act. Furthermore, without the respondents giving the claimant time to improve on the alleged poor performance, the reasons given for termination of employment fail to meet the requirements of Section 43 of the Act. Employment terminated unfairly and contrary to Section 45 of the Act.
71. Hence, the claimant is entitled to claim notice pay and compensation.
72. As outlined above, the consolidated salary over the months is Ksh. 132,340. This amount is due in notice pay.
73. In allocating the compensation due, the court is required to take into account the claimant's work records in accordance with Section 45(5) of the Act. A warning issued to the employee is taken into account. The claimant admitted that in the course of his employment, he was issued with two warnings. He worked cumulatively for 2 years under a written contract. From October 2020 to July 2023, there is no written contract submitted by either party.
74. This last period of 32 months is protected under the provisions of Section 37 of the Act. The claimant had rights and benefits secured under the law. A compensation of 3 months' gross salary of Ksh. 132,340 is hereby found appropriate compensation.

75. Leave due is regulated under the provisions of Section 28 of the Act. The respondent did not file any work records with regard to how the claimant was allowed to enjoy this right.
76. Where an employee has not taken leave days when due, Section 28(4) of the Act allows accumulation for 18 months only. For the period of employment, the claimant can only go back this far under the law. Unless the employer has allowed the employee to accumulate his leave days, such time off should be taken as and when due.
77. Under clause Section 28 of the Act, an employee who is without a written contract is entitled to 21 days of annual leave. For 18 months, the claimant is entitled to 33 leave days. This amounts to Ksh. 145,574.
78. A certificate of service is due under the provisions of Section 51 of the Act. The good practice is to allow the employee to clear and the same is issued. The claimant admitted that he is in possession of the respondent's computer valued at Ksh. 150,000 and he is willing to return it. In the pleadings, the respondent claimed the computer was valued at Ksh. 227,000 while the witness Ms. Kimathi indicated the computer is valued at Ksh. 250,000. There is no receipt or record of this laptop. The claimant has withheld the use of this asset from the respondent since his employment was terminated. He ought and should have willingly surrendered this asset immediately and the offer to return it after its use for over a year is not justified. The earlier attached value of Ksh. 227,000 is hereby applied and shall be deducted from the terminal dues paid to the claimant in accordance with Section 19 of the Act.
79. With regard to costs, as outlined above, there was unfair termination of employment and the employer is entitled to claim the value of its property withheld by the claimant. In this case, each party bears its costs.
80. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. Compensation Ksh. 397,020;
 - b. Notice pay Ksh. 132,340;
 - c. Leave pay Ksh. 145,574;
 - d. Certificate of service to be issued under the provisions of Section 51 of the *Employment Act, 2007*;
 - e. The dues above (a), (b) and (c) to be paid less Ksh. 227,000 value for the computer withheld by the claimant;
 - f. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and