



**Gichuki v Christian Aid (Cause 528 of 2019)
[2024] KEELRC 2107 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 528 OF 2019
NZIOKI WA MAKAU, J
JULY 23, 2024**

BETWEEN

CAROLINE GICHUKI CLAIMANT

AND

CHRISTIAN AID RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 13th August 2019, the Claimant filed this suit against the Respondent Company claiming wrongful/ unlawful termination of her services and breach of law. She prays that the Court grants the following reliefs:
 - a. A declaration that the Claimant's summary dismissal was unfair, wrongful and unjust;
 - b. Order the Respondent to pay the Claimant 12 months' salary on the monthly salary at the time of the dismissal as required under section 49 of the Employment Act as compensation for unfair termination – Kshs 2,786,011.20
 - c. Order that the Respondent to pay two months' salary in lieu of notice - Kshs 232,168/- x 2 = Kshs 464,335/-.
 - d. Housing allowance for 15 months @15% of basic salary – Kshs 34,825.14 x 15 = Kshs 522,377.10
 - e. General damages.
 - f. Damages for loss of future earnings.
 - g. Orders the Respondent to pay interest at courts rate on the above prayers from the date of termination to the date of full payment.
 - h. Orders that the Respondent be condemned to pay Costs of the suit.



2. The Claimant's case was that the Respondent employed her as a Grants Officer – Case OVC Project Meru on 1st August 2017 and was to be under probation for 26 weeks. She averred that on 13th July 2018, the Respondent sent her on compulsory leave pending investigations, on allegations that she had: unduly influenced partner procurement processes; instructed partners to change their budgets to accommodate higher prices of computers from preferred suppliers; and approved partner's realigned budgets in breach of the Grants Manual. She stated that she gave her detailed explanations on the said allegations and denied that she flouted any regulations or policies of the Respondent. That she attended a disciplinary hearing on 18th October 2018 that was chaired by her accuser, the Respondent's Chief of Party and contended that her defence was not considered since she was informed at the end of the said hearing that they had already made a decision. She maintained that it was the Respondent's Chief of Party who purported to summarily dismiss her from service and that despite filing an appeal, the Respondent upheld the earlier decision to summarily dismiss her.
3. In response, the Respondent filed a Statement of Response dated 26th September 2019 averring that the Claimant acted outside her scope of work and committed various breaches of her contract of employment and the Grants Manual CASE – OVC Cooperative Agreement. That it sent the Claimant on compulsory leave so as to investigate her conduct of misusing her position to influence the Respondent's Partner's Procurement process, and changing partner's budgets to procure goods and services more expensively. It asserted that it paid the Claimant her full salary during the time she was on compulsory leave and argued that she compromised her supervisory role as a Grant Officer and overstepped her mandate as per her job description. The Respondent denied it had any predetermined outcome to the disciplinary hearing, which it argued was based on facts established by an independent investigator. It further averred that upon the Claimant filing appeal, the Respondent's Head of Africa Division reviewed her case, documents, reports and explanations prior to issuing a decision. The Respondent averred that the Claimant's summary dismissal was warranted and not unfair and denied that it was actuated by malice.
4. The Respondent further averred that the Claimant's terminal dues were duly settled and she executed a Discharge of Liability and that the instant Claim is therefore bad in law. Moreover, that the Claimant's pay was a consolidated gross salary that included her statutory benefits and that the amount thus included a sufficient proportion to enable her procure accommodation for herself. The Respondent prays that the Claimant's Claim be dismissed with costs to it and that the Court makes a declaration that the summary dismissal was procedurally fair and that all the dues payable to the Claimant were duly paid in accordance with the provisions of the [Employment Act](#), 2007.

Claimant's Submissions

5. The Claimant submitted that section 43 of the [Employment Act](#) obligates the Respondent to prove the reason or reasons for termination and if it fails to, the termination shall be deemed to have been unfair within the meaning of section 45. That section 45 of the same Act provides that for the termination to be fair, the reason for termination has to be valid and fair, and related to the employee's conduct, capacity or compatibility and based on the operational requirements of the employer. Further, that section 47(5) of the Act states that the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. The Claimant argued that the interpretation given to the latter section by courts is that all the employee needs to do in order to discharge the burden of proof vested on them is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive



justification and or is procedurally flawed. That once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination.

6. The Claimant asserted that while she had discharged her burden of proving that her employment was indeed terminated through the Summary Dismissal Letter of 19th October 2018 and further proven that the dismissal lacked justification, the Respondent has failed miserably in justifying that her dismissal was warranted as the reasons they gave are neither valid nor fair. The Claimant posited that she was acting well within her mandate and did not contravene any company policies. That the Respondent admitting that it had not received the final investigation report by the time of the Claimant's summary dismissal, which meant that there was no basis for her dismissal because the reasons for the same had not been established at the time of the dismissal.
7. It was submitted by the Claimant that in the case of *National Bank of Kenya v Samuel Nauru Mutonya* [2019] eKLR, the Court of Appeal referring to its previous decisions, stated that in determining whether a decision by the employer to terminate an employment is just and equitable, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee. She further cited the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the Court affirmed that a termination of employment passes the fairness test when there is both substantive justification and procedural fairness. The Claimant noted that the Respondent failed to adhere to the requirement of issuing her notification of the disciplinary hearing and availing to her copies of relevant documents including witness statements. She relied on the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR where the Court stated that in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The Claimant further submitted that the Disciplinary Panel was not properly constituted as the meeting was only chaired by one person and the investigating officer was also not present. She stated that she was also not informed of her right of second appeal as required by the Respondent's HR Policy and that in the end, the Respondent failed to adhere to its own disciplinary procedures thus rendering the summary dismissal wrongful, unjust and unlawful.
8. On the reliefs sought, the Claimant submitted that the Respondent has failed to discharge the burden of proving that the termination was fair and lawful and hence she is entitled to the relief of damages sought. She noted that section 36 of the *Employment Act* provides for notice while clause 10 of the terms and conditions of employment also states that either party should give the other two months' notice in writing or two months' salary in lieu of notice before terminating the contract of employment. She further fronted that section 31 of the Act requires the employer to provide reasonable housing accommodation or pay the employee a sum additional to the wages, sufficient to cater for the same. In this regard, the Claimant noted that as shown in the copy of her payslip before Court, the word "consolidated" was not used therein. She argued that both her Contract of Employment and pay slip are vague as to whether or not the salary paid to her was consolidated and urged this Court to be persuaded by the holding of the Court in the case of *Jubilee Jumbo Hardware Ltd v Rogaciana Rading Ogwang* [2021] eKLR as follows:

- “ 18. Both the contract and copy of payslip were vague as to whether the salary paid to the Respondent was consolidated or not because of the use of the term basic.
19. Housing and/or house allowance forms one of the fundamental or basic terms of employment under the *Employment Act*, 2007 (see preamble and section 26 of the *Employment Act*, 2007). It belongs to the normative value of fair labour practices.



20. It is the contract which should have outlined the entitlement to housing and/or house allowance It did not and the Court has only a vague contract.
21. Article 20(2)(b) of the Constitution calls upon the Court to adopt an interpretation that most favours the enforcement or enjoyment of a fundamental right.
22. Due to the vagueness, the Court is of the view that the salary of Kshs 30,000/- did not include a housing allowance.
23. The trial Court therefore did not fall into an error in awarding house allowance.”

Respondent’s Submissions

9. The Respondent cited section 44(3) and (4) of the Employment Act and submitted that it summarily dismissed the Claimant for gross misconduct relating to her discharge of duty and that it adduced evidence giving the reasons for such dismissal. It cited the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR in which the Court held that an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. The Respondent noted that this position was affirmed by the Court of Appeal in the case Kenya Revenue Authority v Rewel Waitbaka Gitabi & 2 others [2019] eKLR that the standard of proof is on a balance of probability and that all the employer is required to prove are the reasons that it genuinely believed to exist. It was the Respondent’s submission that it had demonstrated that the Claimant wilfully neglected to perform the duties entrusted to her, carelessly and improperly performed her work, and went beyond the remit of her authority to the detriment of the Respondent, all which warranted her summary dismissal by the Respondent.
10. On whether due process was followed in terminating the Claimant from employment, the Respondent cited the provisions of section 41 of the Employment Act and the analysis of the Court of Appeal on the same in the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR. It maintained that it had established in its case before Court that due process was followed in the Claimant’s disciplinary hearing and argued that it was the Claimant herself who did not take up her right to a second appeal. It submitted that it also issued the Claimant with a work certificate dated 20th November 2018 in accordance with sections 45(5) and 51 of the Employment Act. The Respondent further submitted that the Claimant never pleaded in her Statement of Claim the issue of the composition of the Disciplinary Panel that conducted her disciplinary hearing, and that she must not be allowed to raise such a claim at this late stage. It relied on the case of Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR where the Court held that submissions are not pleadings and that new issues raised by way of submissions are best ignored.
11. It was the Respondent’s submission that the Claimant neither disputed nor disowned the Discharge of Liability and its import in the satisfaction of all her claims against the Respondent. That under Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016, a party who wishes to controvert a matter raised in the reply to the statement of claim is enjoined to file a reply within seven days of service of the defence. The Respondent cited the case of Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR in which the Court agreed that the execution of the discharge voucher constituted a complete contract, even if payment by it was less than the total loss sum. The Respondent reiterated that the Claimant’s execution of the discharge even before hearing



the verdict of her appeal means that she was wholly satisfied with, first, the substantive reasons for her dismissal, second, the procedural fairness of the dismissal, and third, the settlement of all liabilities and claims she had against the Respondent. It argued that the Claimant thus waived her right to sue and that this Court must give effect to the said Discharge.

12. The Respondent submitted that having demonstrated that it had valid grounds of dismissing the Claimant and that the process followed was a fair one, the Claimant is not entitled to payment of 12 months' salary, to notice pay and to general damages as claimed. For housing allowance, the Respondent posited that this Court should note that the amount it paid to the Claimant per month was more than what was indicated in her contract of employment. That had the said amount been less, then an inquiry into what actually constituted the "gross pay" in the payslip would have been necessary. It argued that in any case, section 31 of the Employment is clear that the document to look at when determining whether house allowance was given to an employee or not, is the Contract of Employment. That in the instant case, the Claimant's contract of employment contained a provision that consolidated the pay due to her and that the Court of Appeal did find in the case of *Postal Corporation of Kenya (supra)* that gross pay would then be the basic salary and allowances. Furthermore, the Claimant's contract is not vague but very clear that the salary payable to the Claimant was consolidated gross pay, which this Court should look at in finding that the Claimant's salary included house allowance. The Respondent further submitted that it is trite law that general damages are awarded if the claimant establishes in principle her legal entitlement to them per the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR. It also noted that the Claimant did not adduce evidence before this Court to prove any real assessable loss that would justify compensation for loss of future earnings, which claim is thus unsupported.
13. This case turns on the aspect of discharge. It is trite law that a discharge that is executed freely without any of the elements that would vitiate a contract is binding on the parties. The Claimant herein executed a discharge which exonerated the Respondent from any further or future claims. As such, the Claimant intended to discharge the Respondent and she cannot resile from this. The Respondent is inured against any claim even if the payment made was less than the Claimant ideally would have got. In the eyes of the Court, the Claimant opted to sue despite knowing she had exculpated the Respondent. The only outcome would be dismissal of the suit.
14. The Court has mulled over the issue of costs. Ordinarily, costs follow the event. This would have been an appropriate case for grant of costs but the Respondent acted in less than a Christian manner in the remuneration of the Claimant by not properly articulating items such as housing which are necessary to discharge an employer from the burden of payment of accrued housing where it is unclear if the salary included the element of housing in terms of the *Employment Act*. As such, the Court will order that the suit is dismissed, but each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

