



**Jin v Kwale International Sugar Company Limited (Cause
E010 of 2023) [2024] KEELRC 2088 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2088 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E010 OF 2023**

M MBARÚ, J

JULY 4, 2024

BETWEEN

AHMED ABDULKADER JIN CLAIMANT

AND

KWALE INTERNATIONAL SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. On 2 January 2021, the respondent offered the claimant employment as an accountant through a letter dated 9 October 2020. The claim is that the claimant was verbally advised that upon reporting on duty, he would be issued with a formal contract. He accepted the employment offer on 19 October 2020 but was not issued with the terms and conditions of his employment.
2. The claim is that the employment letter should have provided for the payment of salary at Ksh.177, 852 paid to a Kenya Shillings account at DTB bank and USD 850 payable in the dollar account held at Gulf African Bank, Mombasa.
3. Part of the employment terms should have been the provision of a company house under the provisions of Section 31 of the *Employment Act* (the Act). The claimant was forced to rent a house in Mombasa because he could not find suitable accommodation within Ramisi or Ukunda and hence forced to commute daily at his cost of Ksh.1, 256 and Ksh.1, 000 for fuel and ferry charges of Ksh.128 between October to December 2022. He later resorted to the use of public transport at Ksh.600 per day.
4. The respondent did not issue an itemized payment statement required under Section 20 of the *Act*. While the net salary was paid, there was nothing to show the particulars of deductions for PAYE, NSSF, NHIF and statutory deductions. Requests to be issued with the P9 for annual returns went without response and the claimant fears penalties and is unable to get medical treatment.
5. The letter of offer indicated that the claimant would serve 6 months of probation. Such time lapsed and no confirmation letter was issued contrary to Section 42(2) of the *Act*. No job description was



issued despite reminders to the human resources office on 15 and 22 January 2021 and another letter sent to a director on 2nd February 2021.

6. The lack of a contract with terms and conditions of employment created a gap. The claimant was allocated miscellaneous duties in the role of an accounts clerk to replace the officeholder who had taken maternity leave. Later he was relocated to the out-growers Department, Finance Department under the financial controller. He was left without being assigned any duties for over two months and his role was being performed by another officer, Adergachew Teferi based at the head office in Nairobi.
7. The claim is that due to the clash and duplication of roles, there was a conflict between the claimant and his colleagues. In a meeting held with the financial controller, Ahmed Hashmi, Ashok and the claimant, there was no clarity for roles undertaken by him and Adergachew. To the claimant, this was on purpose and meant to lead to the termination of his employment and for two (2) years, he had no performance targets or indicators. He was not subjected to any appraisal.
8. On 3 October 2022, the claimant was served notice terminating his employment dated 30 September 2022. He was alleged to be of unsatisfactory and poor performance of his duties and unauthorized absences. This was cited as gross misconduct contrary to Section 44(4) of the *Act*. The notice listed 8 grounds that the claimant was alleged to have failed to address but these were never brought to his attention before the termination of employment as required under Section 41 of the Act. The alleged absence from work was without any evidence or particulars.
9. On 6 October 2022, the claimant wrote an appeal and narrated that his employment had been frustrating for lack of a job description. On the dates he was alleged to be absent from work, he was on sick leave and paternity leave which he applied for and authorized by the immediate supervisor.
10. Upon his appeal, the respondent altered the termination notice and invited him to a disciplinary hearing on 24 November 2022. He was alleged to lack interest, concern, empathy and enthusiasm towards the performance of his duties. The claimant was also alleged to have failed to adhere to the out-growers finance plan 2022 issued by the finance manager and general manager. This plan has been part of the ad hoc duties assigned to the claimant in February 2022 when Alex Muholo directed him to prepare it and sent it through email on 27 February 2022. The finance manager placed the plan with the general manager, Pamela Ogada on 1st March 2022. The allegations made were therefore false and without proof.
11. The claim is that after the disciplinary hearing, a notice of dismissal was issued effective 5 December 2022. This was pre-meditated and with malice. This violated his rights and without payment of his terminal dues.
12. The claimant is seeking orders that;
 - a. A declaration that his employment was terminated unlawfully and unfairly;
 - b. Payment of withheld salaries for November and December 2022 Ksh.177,852 and \$850 total Ksh.330,507;
 - c. Notice pay of Ksh.177,852 and \$850 total of Ksh.282,252;
 - d. 12 months compensation Ksh.3,399,024;
 - e. House allowances at 15% of gross pay Ksh.977,224;
 - f. Service pay for 2 years Ksh.283,252;
 - g. Refund of NSSF deductions for 18 months at Ksh.200 total Ksh.3,600;



- h. Refund of NHIF for 14 months at Ksh.1,700 total Ksh.25,000;
 - i. Leave pay for 4 accrued days Ksh.37,804;
 - j. Compensation for daily commuting from Mombasa to Ramisi Ksh.596,512;
 - k. Certificate of service;
 - l. Costs and interests on the awards.
13. The claimant testified in support of his case that he was employed through a letter of officer but was not issued with the terms and conditions of service of a job description. He was required to manage the out-grower's account but there was consistent duplication of role between him and head office staff in Nairobi. He sought to address the same but this was not addressed by the respondent. The financial controller delegated him with duties of a staff member who had taken leave, to develop the financial plan, for 2022 which he did and submitted as required. He was later accused of failing to do as directed but he had evidence that the plan had been used by the general manager as he had prepared it.
14. The claimant testified that his letter of offer allowed him to earn a gross salary of Ksh.177, 852 and \$850 which were deposited in different bank accounts. He was not issued with a payment statement to outline how his salary was broken down particularly payment of his statutory dues. He was entitled to housing which was not allocated and no allowance was paid. He was forced to get his accommodation at a suitable place in Mombasa and had to incur the costs of travelling every day but there was no refund.
15. The claimant testified that in the letter dated 9 October 2020, the employer is Unifresh. The respondent is a group of companies and he was working for the group. The respondent has submitted payment for NHIF under Unifresh. In January to April 2021, his salary was paid by Unifresh. The letter of offer did not mention payment of \$850 and this would be remitted to his bank account monthly. The bank statement in this regard is not filed.
16. Upon cross-examination, the claimant testified that his workstation was in Kwale at the Outgrower office and the immediate supervisor was the manager Mr. Karan. He asked for a job description but none was issued. Karan resigned from his employment and his supervisors were Alex and Ravi from the head office.
17. The claimant testified that he was issued with a notice terminating his employment and he lodged an appeal on 6 October 2022. He had outlined and challenged the allegations made against him. The respondent noted the same and altered the termination notice and invited him to a disciplinary hearing. This was an afterthought since the decision to terminate him had been issued. The respondent alleged that he was of poor performance yet he had not been appraised. He was accused of being absent from duty but the details were not stated. He was out of the office due to illness and on paternity and his supervisor was aware of and permitted his absence.
18. In response, the respondent's case is that through a letter dated 9 October 2020, they offered the claimant employment with effect from 2 January 2021 at a consolidated salary of Ksh.177, 852 per month. There was no agreement to pay \$850 as alleged. The terms of employment were in the letter of offer. The salary paid was consolidated inclusive of house allowance.
19. The respondent employed over 2000 employees residing at Ukunda, Ramisi, Msambweni, Milalani and other areas within Kwale County. The claimant chose to reside in Mombasa and the respondent had no responsibility to pay for his accommodation or transport. All statutory deductions were remitted to the relevant statutory bodies.



20. The claimant was taken through the human resources policy of the respondent and cannot claim he lacked a job description. All assigned duties were part of the job. He was to update farmers' data and files including contract status and abandoned fields.
21. On 1st March 2022, the out-grower's finance annual plan 2022 was handed over to the claimant for implementation by the general manager. The plan had been prepared by the claimant himself and indicated key performance indicators and activity costs together with reporting lines. Various reports and key activities had strict timelines based on weekly, after-harvest, continuous, monthly and quarterly or as per request. The claimant failed to implement the plan and hence neglected his duties. He disassociated himself from the Plan to advance his narrative that he had been assigned duties of other employees. The Plan had been forwarded to him by the general manager to implement through email dated 1st March 2022. The only issue he raised was on costs and revenue statements that the head office had through Mr. Andagachew.
22. The claimant was put to task as to why he had not performed his duties as assigned by Sarah and Andagachew. It was noted that he was always absent from work either on annual leave, sick leave or absent from duty without authority. This led to the issuance of a termination letter dated 30 September 2022.
23. The claimant appealed against the notice to terminate his employment through a letter dated 6 October 2022.
24. Upon a review of the appeal, the respondent found sufficient cause to allow him a hearing before a disciplinary committee which was communicated through a letter dated 27 October 2022 and the claimant was advised to bring another employee of his choice at the hearing.
25. On 21st November 2022, the claimant was issued with a letter to attend a disciplinary hearing and to present any schedule reports he had submitted to his supervisors upon performance of his duties including the outgrowers finance plan, 2022. The disciplinary hearing was conducted on 24 November 2022 and the claimant failed to present any reports and a unanimous decision was taken for his summary dismissal through a letter dated 3 December 2022.
26. The respondent adhered to the provisions of Section 41 of the Act and the claims made are without merit and should be dismissed with costs. The claims for salaries unpaid were all tabulated and paid in full upon the claimant filing the clearance form. Notice pay and compensation are not due as employment terminated lawfully through summary dismissal. The claimant had a consolidated salary inclusive of house allowance and was not entitled to transport costs. Serve pay is not due as statutory dues were paid. The 4 accrued leave days were part of the terminal dues already paid.
27. In evidence, the respondent called James Otieno the human resources manager of the group of coming including the respondent. He testified that the claimant was employed under the group of companies and placed with Unifresh from 9 October 2020 starting his employment with effect from 2nd January 2021. His workstation was Ramisi and his salary was Ksh.177, 852 per month all-inclusive as per the human resources policy. The same applied to all employees of the respondent.
28. The claimant was inducted as a new employee and his roles were defined. He was required to do a work plan which he did and shared with Alex. The claimant raised concerns about the plan he had developed on finances and revenue and he was required to implement it. He was working on his work plan approved by the general manager.
29. The claim that there was payment of salary in Kenya Shillings and United States Dollars is not correct as the letter of offer did not state such a matter, upon the offer in October 2020 the claimant did not



question the terms for 2 months when he reported on duty in January 2021. There was no agreement to accommodate the claimant or pay his transport costs as alleged. The option to reside in Mombasa was personal.

30. Mr. Otieno testified that the claimant had issues concerning his work performance. On 30 September 2022 notice to terminate his employment was issued. He was allowed to appeal which was allowed and the claimant was invited to a hearing which he attended on 24 November 2022 but he had no satisfactory responses leading to summary dismissal through a letter dated 3 December 2022. All final dues have been paid in full. The claimant was taken through due process and found to have neglected his duties which justified summary dismissal.
31. At the close of the hearing, both parties agreed and filed written submissions. These are analyzed and the issues which emerge for determination are whether there was unfair termination of employment and whether the remedies sought should be issued.
32. It is common cause that through notice dated 30 September 2022 the respondent terminated the claimant's employment on the grounds that his work was unsatisfactory and was habitually absent from work which had undermined his terms of employment and amounted to gross misconduct and justified summary termination of his employment under Section 44(4) of the Act.
33. The claimant appealed to a letter dated 6 October 2022. He noted that he had not been given a fair hearing. He had repeatedly asked his supervisors for a job description, and terms and conditions of his employment without success. On the alleged absence from work, he noted that he had gone on authorized sick off, leave and paternity leave. The particulars of days absent without authority were not particularized for him to address.
34. Through a letter dated 27 October 2022, the respondent noted we have found sufficient cause to grant your appeal request regarding the issue of your duties and responsibilities. That the matter would be addressed by the appeal disciplinary committee.
35. The motions of the law about alleged unsatisfactory performance of work are under 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.
36. The employee must be issued with notice to allow him to address in the presence of another employee of his choice. This must be done before the decision on whether or not to terminate employment is issued. The Court of Appeal in addressing the motions of Section 41(1) of the Act in the case of Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017) [2022] KECA held that;

Section 41 of the Employment Act provides the minimum threshold of a fair procedure that an employer ought to comply with in summarily dismissing an employee. The said section provides for notification and hearing before termination on grounds of misconduct in the following way:-

...

Under this Section, four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being: -



- a) An explanation of the grounds of termination in a language understood by the employee;
 - b) The reason for which the employer is considering termination;
 - c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
 - d) Hearing and considering any representation made by the employee and the representative chosen by the employee.
37. These motions are mandatory. A lapse in addressing them results in unlawful termination of employment. This is emphasized in the case of *Loice Otieno v Kenya Commercial Bank Limited* Cause No. 1050 of 2011 that it is a mandatory requirement to comply with the principles of natural justice in summary dismissal from employment.
38. Therefore, even in a serious case of alleged gross misconduct that calls for summary dismissal, the provisions of Section 44(4) of the Act must be read together with Section 41(2) of the Act:
2. Notwithstanding any other provision of this Part, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
39. In this case, to allow an appeal after the fact of terminating employment to now proceed and hear the employee on his case is an abuse of process and contrary to the provisions of Section 41. The motions that proceeded after the 30 September 2022 against the claimant were unlawful. They cannot be applied to justify summary dismissal. There was unlawful and unfair termination of employment.
40. In the notice dated 30 September 2022, the respondent offered to pay the claimant one month's notice. However, to sanitize the process, he was allowed in his appeal and worked until a letter dated 3 December 2022 on summary dismissal.
41. The respondent indicated that the summary dismissal was due to gross misconduct hence no notice was due. As noted above, the motions after the 30 September 2022 were unlawful. This is not what is envisaged under Section 45(5) (a) of the Act:
- a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
42. The appeal should only arise upon the employer applying the mandatory provisions of Section 41 of the Act and not after the fact.
43. The claimant is entitled to notice pay and compensation.
44. The claimant claimed his monthly gross salary was ksh.177, 852 and \$850. The letter of offer is clear to the extent that the salary due is Ksh.177, 852. This is the amount due in notice pay.
45. For compensation, part of the reasons leading to termination of employment related to alleged absence from duty. The respondent had filed a schedule of unauthorized days when the claimant was absent. As noted above, even in such a case, the due process of Section 41(2) of the Act should have applied.



This was not the case, and such matters cannot be applied to negate the claim for compensation for unlawful and unfair termination of employment.

46. The claimant worked for the respondent for under two years. For the lapse in fair procedure and substantive fairness, compensation at 4 months' gross salary is hereby found appropriate. At the salary of Ksh. 177,852 total due is Ksh.711, 408.
47. On the claim for payment of withheld salaries for November and December 2022 Ksh.177, 852 and \$850 total of Ksh.330, 507, upon clearance, the claimant was on 29 May 2023 paid Ksh.23, 713.73 for accrued leave days. The assertion that there were pending dues is not justified.
48. The claim for house allowance and transport refund is on the basis that the claimant was not allocated a house under the provisions of Section 31 of the Act and was forced to reside in Mombasa. He would commute daily and there was no refund for his travelling costs. The claimant's letter of offer had no provisions for housing and transport allowances. His salary was above the minimum hence the application of 15% for a house allowance does not apply to him. The option to reside and travel from Mombasa to Ramisi was a personal choice.
49. Service pay is due when the employer fails to comply with Section 35(5) and (6) of the Act. There is evidence that the respondent paid to the NSSF.
50. The claim for unremitted dues to NSSF and NHIF, if any, are not due to the employee but to the statutory body.
51. Leave due is paid and evidence of payment is filed by the respondent. This was however paid in November 2023 when the claimant had already moved court in February 2023. Delay in paying for a benefit due in employment at the end of employment is not justified and for these reasons, the claimant is entitled to his costs.
52. A certificate of service should be issued at the end of employment especially where the employee has attended and cleared. The claimant fully cleared with all departments of the respondent in December 2022. No Certificate of Service is filed to confirm compliance with
53. Section 51 of the Act. This compounds unfair Labour practices for which costs are awarded and compensation is addressed above.
54. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. a declaration that employment was terminated unlawfully and unfairly;
 - b. compensation Ksh.711,408;
 - c. notice Ksh.177,852;
 - d. certificate of Service to be issued under Section 51 of the Employment Act, 2007 provisions;
 - e. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine



..... and

