



**Kiruki v Africa Film & Talent Training Institute (Cause E930 of 2023)
[2024] KEELRC 1867 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1867 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E930 OF 2023**

JK GAKERI, J

JULY 18, 2024

BETWEEN

GIDEON NJOROGE KIRUKI CLAIMANT

AND

AFRICA FILM & TALENT TRAINING INSTITUTE RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 14th November, 2023.
2. It is the Claimant's case that he was employed by the Respondent on 29th November, 2019 as the Respondent's Principal at Kshs.138,000.00 per month having joined the Respondent in May 2016 and served diligently until 22nd September, 2023 when his employment was terminated.
3. The Claimant avers that from as early as 2017, the Respondent started delaying his salary which persisted till termination in 2023.
4. That the total amount owed by the Respondent is Kshs.2,292,139/= which the Claimant demands.
5. The Claimant prays for;
 - i. Judgment against the Respondent for Kshs.2,292,139/=.
 - ii. 12 months compensation Kshs.1,656,000.00
 - iii. Salary in lieu of notice Kshs.138,000/=.
 - iv. Costs of the suit.
 - v. Such further relief that the court may deem fit to grant.



Respondent's case

6. The Respondent does not deny that the Claimant was its employee nor does not deny terminating his employment on 23rd September, 2023.
7. Similarly, the Respondent does not deny owing the Claimant salary arrears.
8. It is the Respondent's case that the loss of cameras and other equipment and items was reported to the Directorate of Criminal Investigations (DCI).

Claimant's evidence

9. On cross-examination, the Claimant confirmed that he did not explore arbitration as provided by the contract of employment, received a notice to show cause and responded but did not file a response in court.
10. The witness admitted that he was given reasons for termination and recorded a statement with the police.
11. That he was invited by the Respondent to discuss salary arrears but did not attend the meeting.
12. On re-examination, the Claimant testified that he was not invited for a disciplinary hearing and was invited for a meeting after dismissal and after the instant suit was filed and the Respondent admitted owing him salary arrears.

Respondent's evidence

13. RWI, Mr. Lucas Kasili confirmed that the Claimant was an employee of the Respondent at Kshs.138,000/= per month.
14. The witness admitted that the Claimant was unpaid in 2020 and his claim was valid.
15. The witness testified that no disciplinary process was undertaken and the Claimant was not charged for any offence and no other employee was dismissed from employment.
16. Puzzlingly, the witness testified that the Board of directors of the Respondent made the decision to terminate the Claimant's employment but invited him for a meeting thereafter, which he declined.
17. RWI confirmed that the Claimant was not paid salary in lieu of notice nor issued with a certificate of service.
18. That the Respondent owes the Claimant Kshs.1,541,311.00 and was willing to pay.

Claimant's submissions

19. On termination of the Claimant's employment, counsel for the Claimant submits that based on the provisions of the *Employment Act*, 2007 and the sentiments of the court in Janet Nyandiko V Kenya Commercial Bank Ltd (2017) eKLR, the termination was unfair as the Claimant's explanation that the items were lost when the premises was raided by auctioneers, was unchallenged and the Claimant was not charged.
20. Similarly, RWI confirmed that no disciplinary hearing took place.
21. As concerns salary arrears, counsel urges that the sum of Kshs.2,292,139/= is owed though the Respondent admits Kshs.1,514,311.00 and the balance of Kshs.812,024/= is contested.



22. That the Claimant was not paid during the COVID-19 Pandemic and should be awarded the same.
23. On the reliefs sought, counsel submits that the 12 months compensation was merited as are other claims.

Respondent's submissions

24. As regards termination, counsel submits that it was lawful and procedural as RWI testified as the Respondent issued a notice to show cause and the Claimant admitted that the alleged items were lost and the Claimant refused to respond to the notice to show cause.
25. That the contract of employment empowered the Respondent to summarily dismiss the Claimant and a letter of termination was issued and received.
26. On arbitration provided by the contract of employment, counsel submits that dispute ought to have been referred to arbitration as was the case in *Wringley Company (East Africa) V Attorney General & 3 others (2013) eKLR* as it was the intention of the parties.
27. As regards the reliefs sought, counsel urges that Respondent disputes the sum of Kshs.2,292,139/= and the Claimant was accorded one month's notice vide the notice to show cause and was not entitled to compensation.

Findings and determination

28. From the record, it is clear that the Claimant was an employee of the Respondent as its Principal at Kshs.138,000/= per month inclusive of all allowances. It is also not in contest that the Respondent owes the Claimant the sum of Kshs.1,514,311/= as salary arrears.
29. It is also not in dispute that the Respondent terminated the Claimant's employment vide letter dated 22nd September, 2023 and did not pay him in lieu of notice as it was a summary dismissal.
30. It is common ground that for a termination of employment to pass the fairness test pursuant to the provisions of Section 45 of the *Employment Act, 2007*, it must be shown that the employer had a valid and fair reason relating to the employee's conduct, capacity or compatibility or operational requirements of the Respondent.
31. In addition, it behooves the employer to prove that the termination was conducted in accordance with a fair procedure.
32. Put in the alternative, there must have been a substantive justification and procedural fairness for the termination, as aptly captured by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR* and *Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*.

Reason for termination

33. The notice to show cause dated 21st August, 2023 accused the Claimant of insubordination and failure to secure the Respondent's assets from loss namely, cameras and other equipment worth Kshs.1,586,000/= on 11th July, 2023, 2 executive chairs and headrests worth Kshs.70,000/= and a computer and monitor worth Kshs.50,000/=. The loss was reported to the police.
34. The letter makes reference to other instances where the Respondent risked losing its property through staff and three are identified by name.



35. Although the Claimant alleges that he responded to the notice to show cause, he did not provide a copy of his response, nor did the Respondent file a copy, if there was one.
36. The letter of termination dated 22nd September, 2023 accused the Claimant of poor performance, disrespect and misconduct.
37. The letter is however reticent on the particulars of the alleged insubordination, misconduct or poor performance.
38. In the absence of particulars and supportive evidence of the alleged disrespect or misconduct, the two allegations are unproven and thus not valid grounds of termination of the Claimant's employment.
39. As regards poor performance, the Respondent has not particularised how the Claimant performed and in what areas under his contract of employment.
40. The Respondent tendered no evidence of any performance appraisal or evaluation let alone whether the Respondent had an operational performance management policy or system and evaluated its employees regularly as held in *Jane Samba Mukala V Ol Tukai Lodge Ltd (2013) eKLR*.
41. Similarly, no meetings were held to explain to the Claimant his shortcomings and how to rectify them including the necessary support.
42. Flowing from the foregoing, it is discernible that the Respondent has not placed sufficient material before the court for the court to find that it had a valid and fair reason or substantive justification to terminate the Claimant's employment.

Procedure

43. Although RWI testified that the Claimant was taken through a disciplinary process before he contradicted himself by stating that there was no disciplinary process, he adduced no evidence of what transpired when the Respondent's board met to discuss the Claimant's fate.
44. The Claimant's testimony that he was not taken through a disciplinary hearing was uncontroverted.
45. Finally and contrary to the Respondent's submission that the termination was procedural, it adduced no evidence of compliance with the provisions of Section 41 of the *Employment Act, 2007*, which is mandatory as held in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*.
46. In sum, it is evident that termination of the Claimant's employment by the Respondent was procedurally wanting and thus unfair.
47. Flowing from the foregoing, it is the finding of the court that termination of the Claimant's employment by the Respondent was neither substantively justifiable nor procedurally fair.
48. As to whether the dispute between the parties is subject to arbitration by virtue of the Appointment Letter dated 29th November, 2019, the Claimant's counsel expressed no view while the Respondent urges that the clause ousted the court's jurisdiction.
49. In the court's view, whereas an arbitration clause expresses the parties' intention to resolve their disputes by arbitration, parties may consensually or unilaterally opt out of the clause.
50. In the latter case, the other party may object to the court action by way of a Preliminary Objection or by normal application under Section 6 of the *Arbitration Act*.



51. In the instant case, the Respondent neither filed a notice of Preliminary Objection nor enter appearance in protest.
52. Evidently, the Respondent seeks to close the stable door after the horse has bolted.
53. Concerning the reliefs sought, the court proceeds as follows;

a. Salary arrears Kshs.2,292,139.00

54. The Claimant prays for the foregoing sum as salary arrears from January 2017 to September 2023 and catalogues the different amounts owing for 22 months and Kshs.812,024/= for 8 months in 2020.
55. Regrettably, the Claimant's statement makes no reference to the amount paid for the 22 months and in 2020.
56. Although the Claimant filed copies of his bank statement from 1st January, 2020 to 30th September, 2023, he only identifies nine (9) payments which are not reflected in the witness statement to demonstrate that. Indeed, the figures on record are the difference between what was paid and the salary.
57. Fortunately, the Respondent admits that it owes the Claimant Kshs.1,541,318.00.
58. As regards the Kshs.812,024/=, the Claimant tendered no evidence as to what was paid and what was outstanding and in respect of what months. The sum is unproven.
59. In sum, the Claimant is awarded Kshs.1,541,311.00 as salary arrears.

b. 12 months' salary

60. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to compensation under Section 49 of the [Employment Act, 2007](#).
61. The court has taken into consideration the fact that;
 - i. The Claimant was an employee of the Respondent for about 5 years and 3 months which is not long.
 - ii. The Claimant did not express his wish to continue working for the Respondent.
 - iii. The Claimant did not appeal the termination of employment.
 - iv. The Claimant contributed to the termination of employment as it was evident that the Respondent lost items and the Claimant was its overall administrator and was thus responsible for the security of the Respondent's property.
62. In the circumstances, the equivalent of 3 months' salary is fair, Kshs.414,000.00.

c. One month's notice

63. On its termination letter dated 22nd September, 2023, the Respondent was emphatic that as it had not given the requisite notice, the Claimant was entitled to salary in lieu of notice which the court hereby awards, Kshs.138,000.00.
64. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;
 - a. Salary arrears Kshs.1,541,311.00.



- b. One month's salary in lieu of notice Kshs.138,000.00.
 - c. Equivalent of 3 months salary Kshs.414,000.00.
- Total Kshs.2,093,311.00

65. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

DRAFT

