



**Maganga v Jenebys Enterprises Limited (Cause E021 of 2024)
[2024] KEELRC 2089 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2089 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E021 OF 2024**

**M MBARŪ, J
JULY 25, 2024**

BETWEEN

COSMAS MAGANGA CLAIMANT

AND

JENEBY'S ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. The hearing proceeded ex parte. The claimant filed the Memorandum of Claim on 30 March 2024 and served the respondent on 5 April 2024. There is no appearance of a response filed. There is an Affidavit of Service to confirm service of summons. A mention notice was served on 9 May 2024 for attendance on 27 May 2024 but there was no appearance.
2. The claim is that the respondent employed the claimant as an oil specialist in the year 2000 earning ksh.18, 500 per month which was below the wages required of a specialist. The claimant worked until March 2023 on the same wage stationed at Makupa, Mombasa County.
3. The claim is that the respondent dismissed the claimant without notice or giving him any reasons or payment of terminal dues. A colleague recommended that the claimant should go on unpaid leave to enable him to seek out the issue which was outside his contract of employment and contrary to the law. This was wrongful and contrary to fair labour practices. Efforts to try and be given reasons and letters of recommendation failed.
4. The claimant is seeking the following terminal dues;
 - a. Notice pay at Ksh.18,500;
 - b. Service pay Ksh.212,865;
 - c. 12 months compensation Ksh.220,000;



- d. Unpaid leave Ksh.386,400;
 - e. Unpaid public holidays Ksh.331,200;
 - f. Unremitted NHIF Ksh.220,800;
 - g. Costs of the suit.
5. The claimant testified in support of his case that after working for many years for the respondent, he was dismissed for allegedly recommending a family member for employment, Keneth Mwai Charo who was alleged to have stolen funds from the respondent. The matter was reported to the police who conducted investigations and the claimant was not linked to such matter but the respondent proceeded to use such extraneous matters to terminate his employment without notice, hearing or payment of terminal dues. He had worked diligently from the year 2000 as an oil specialist without any incident or poor record only to end up with an unfair termination of employment. For the 23 years, he worked at a wage of Ksh.18, 500 per months which was an underpayment. Following an audit, the respondent found missing funds and caused another employee to be arrested and unrelated to the claimant. He was forced to take leave to assist in addressing the matter and without any justified cause, terminated employment.
 6. The claimant testified that he should be paid his dues as pleaded with costs.
 7. At the close of the hearing, the claimant filed his written submissions.

Determination

8. As outlined above, there is no appearance or response filed by the respondent despite being served. The court is therefore denied crucial work records with regard to the claimant's employment as required under Section 10(6) and (7) of the *Employment Act*.
9. There is no written contract of employment. The pleadings and evidence of the claimant are the only materials made available to the court and these are not challenged.
10. Termination of employment, even for gross misconduct should abide by the due process of the law under Sections 35, 41 and 45 of the *Employment Act*. The same should have justification under the law. Without any work records to justify the reasons leading to termination of employment, even in a case where the claimant is alleged to have introduced another employee to the respondent and who committed gross misconduct, before termination of employment, the motions of Section 41 of the *Employment Act* required that he should be taken through the due process.
12. Under Section 41(2) of the *Employment Act*, an employer is required to;
 - (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.
13. In the case of *Juliet Mwangeli Muema v Smollan Kenya Limited* [2019] eKLR; *Justus Kavisi Makosi v Wema Technical Services Limited* [2013] eKLR and *Florence Wairimu Muturi v Nelson Andayi Havi & 11 others*; *Council of the Law Society of Kenya & 9 others (Interested Parties)* [2021] eKLR the courts have held that termination of employment is unfair where the employer fails to follow the due procedures under Section 41 of the *Employment Act*.



14. In this case, without any response or work records to demonstrate how employment was terminated save for what the claimant testified to, under Section 45 of the *Employment Act*, there was unfair termination of employment. The claimant is entitled to his terminal dues.
15. Under the provisions of Section 35 of the *Employment Act*, notice pay is due at the last paid wage which is Ksh.18, 500.
16. Compensation is due on the finding that there was unfair termination of employment. The claimant worked for the respondent for 23 years and there are no work records that he had poor work records. He is seeking payment of 12 months compensation. Without any defence of any nature, such a claim is justified and he is awarded Ksh.220, 000.
17. On the claim for service pay, this is due when the employer fails to remit statutory dues. Part of the records filed by the claimant is his NSSF statement. This demonstrates that the respondent as the employer was remitting the dues from 1st April 1996. Under the provisions of Section 35(5) and (6) of the *Employment Act*, service pay is not due.
18. On the claim for untaken leave days for 23 years, Section 28(4) of the *Employment Act* allows the employee up to 18 months accrued leave unless the employer has approved the carrying over of the same. The employee must take the due annual leave unless he can demonstrate there was an application which was rejected by the employer without good cause. See *Rumba Mnyika Nguta v Southern Hills Development Agency Limited t/a Radio Kaya* [2020] eKLR. In this case, for 18 months, the claimant is entitled to 33 leave days under Section 28 of the *Employment Act* all assessed based on the last wage at ksh.20, 350.
19. On the claim for payment for work during public holidays, these days are gazette by the Minister. They are not general and must be outlined by the employee to justify working on such a day. Without any particulars of which public holidays are under reference, such is not justified despite the claim being unopposed.
20. On the claim for unremitted NHIF dues, such dues are owed to the statutory body and not to the employee. The alternative claim is service pay which is addressed above.
21. The other issue addressed by the claimant is that he was dismissed from his employment without the issuance of a letter of recommendation. Under Section 51 of the *Employment Act*, the employer is only required to issue a Certificate of Service and issuing a letter of recommendation is discretionary. In this case, issuance of a Certificate of Service shall suffice.
22. The findings herein that there was a lack of due process or substantive justification for termination of employment, the claimant is entitled to his costs.
23. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. Compensation Ksh.220,000;
 - b. Notice pay Ksh.18,500;
 - c. Leave pay Ksh.20,350;
 - d. Certificate of Service be issued in accordance with Section 51 of the *Employment Act*;
 - e. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25 DAY OF JULY 2024.



M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

