



**Musungu v Professional Clean Care Limited (Cause 884 of 2018)
[2024] KEELRC 1831 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1831 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 884 OF 2018**

JK GAKERI, J

JULY 11, 2024

BETWEEN

SHEILA KADIARA MUSUNGU CLAIMANT

AND

PROFESSIONAL CLEAN CARE LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 6th June, 2018 alleging unlawful and wrongful dismissal from employment.
2. It is the Claimant’s case that the Respondent employed her on the 6th April 2016 as a professional cleaner earning a salary of Kshs.12,600/= until 20th March, 2018 when her employment was terminated.
3. The Claimant avers that on 20th March, 2018 she was performing her cleaning duties at MP Shah Hospital when her supervisor asked to hand over her uniform and leave the premises.
4. It is the Claimant’s case that she enquired from the respondent’s offices at Next-gen Mall why her employment was terminated and had not been notified of any misconduct, shortcoming or any wrongdoing under the terms of contract of employment.
5. The Claimant states that the Respondent’s Human Resource Manager told her to go home and await a call.
6. The Claimant avers that the Respondent did not conduct any hearing and did not issue a letter of termination of employment.
7. Finally, the Claimant avers that she performed her duties diligently.
8. The Claimant prays for;



1. A declaration that the termination of the claimant by the Respondent was wrongfully, unfair and unlawful ab initio and violation of the Claimants fundamental right under Article 41(1) of *the Constitution* of Kenya.
2. A declaration that the termination of the Claimants employment by the Respondent was un-procedural, irregular and discriminatory.
3. An order that the Respondent do pay the Claimant compensation in the total sum of Kshs.210,000/= itemized as follows
 - a. 12 months salary compensation for unfair and unlawful summary dismissal 12,600 x 12= 151,200/=.
 - b. House allowance of $\frac{1}{3}$ 12 600= 50,400/=.
 - c. NSSF at 12 months 200x12= 2,400/=.
 - d. NHIF at 12 months -500 x12 = 6,000/=.
4. The Respondent do pay the Claimants such general damages as shall be assessed by the honourable court for the violation of the Claimants fundamental right to fair labour practice under Article 41(1) of *the constitution* of Kenya , breach of contract and discrimination.
5. An order that the Respondent do pay the cost of this cause.
6. The Respondent do pay the Claimant interest on (3) above.

Response

9. In response, the Respondent filed a Reply to the statement of claim dated 27th June, 2018.
10. The Respondent admits that it employed the Claimant as a professional cleaner at Kshs.12,600/= per month.
11. It is the Respondent's case that on the 23rd March, 2018, the client reported that the Claimant was no longer required at the MP-Shah Hospital because of her attitude and misconduct. That from 22nd March, 2018 the Claimant did not report to work without a lawful cause, reasonable excuse or permission from the Respondent.
12. The Respondent states that it wrote to the Claimant on the 2nd April, 2018 on desertion but the Claimant failed to provide a reasonable explanation.
13. The Respondent avers that the Claimants acts or omissions amounted to gross misconduct and insubordination that led to the summary dismissal as provided under Section 44(4) of the *Employment Act*.

Claimant's evidence

14. On cross-examination, the Claimant confirmed that she was an employee of the Respondent having been employed on the 6th April, 2016 as a cleaner at the MP-Shah Hospital.
15. She testified that she would receive instructions from the client directly and her supervisor, one Doreen Kianira.



16. It is her testimony that on the 23/03/2018, she received instructions from her supervisor while she was mopping and since it was muddy she continued mopping as the client was whispering and she did not hear what she was saying as the supervisor was not talking to her.
17. The Claimant states that the supervisor told her to leave the hospital and she proceeded to Next-gen Mall where the Respondent's offices are located and sought clarification from the Human Resource Manager, one Grace Njoroge who advised her to go home and await a call but none was made and she did not write to the employer on the issue.
18. On Re-examination, the Claimant testified that she was not issued with a warning letter nor given an opportunity to be heard.

Respondent's evidence

19. RW1, Mr. Fred Oballa confirmed on cross-examination the Claimant was an employee of the Respondent earning a salary of Kshs.12,600/=.
20. He testified that the Respondent reached out to the Claimant vide a letter dated 2nd April, 2018 to find out her whereabouts and the letter was forwarded to the Claimant through her last known address P.O Box 459- 00100.
21. He further stated that they wanted the Claimant to explain why she had ignored the supervisor's instructions at MP-Shah Hospital or respond when her supervisor tried to reach out to her.
22. On re-examination, the witness testified that the Claimant left at the instance of the client not the employer and from that date she did not report to work or present herself to the office.

Claimant's submissions

23. Counsel highlighted the following issues for determination;
 - i. Was the claimant unfairly and unlawfully terminated from employment?
 - ii. Does the dismissal from employment amount to a wrongful unfair and unlawful summary dismissal?
 - iii. Was there a breach of fundamental right to fair labour practice?
 - iv. Is the Claimant subject to damages and costs thereof?
24. On the first issue, counsel submits that the procedure adopted by the Respondent was not valid as the Claimant was neither served with a notice to show cause nor accorded an opportunity to be heard on the allegations levelled by the Respondent.
25. Counsel further submits that the directive to the Claimant to hand over tools of trade and vacate the place of work amounted to an unfair and unlawful dismissal.
26. Counsel submits that the Respondent did not prove that the dismissal was grounded on a valid reason as required by the provisions of Section 43 and 45 of the *Employment Act*.
27. Reliance was made on the holding in Kenfreight (EA) limited v Benson K. Nguti (2016) eKLR and Mary Chemweno Kiptui v Kenya Pipeline Company limited (2014) where it was held that the employer ought not terminate an employment contract without a valid and fair reason and without according the employee a fair hearing.
28. On the second issue, counsel largely reiterates the arguments made in the first issue.



29. On the third issue, counsel submits that the respondent violated *the constitution*, procedural rules of termination and natural justice as it failed to accord the Claimant an opportunity to be heard.
30. Counsel submits that the Respondent failed to comply with the provisions of Section 41(1), 43, 45 and 46 of the *Employment Act* and section 4(1) of the *Fair Administrative Action Act* when dismissing the Claimant from employment.
31. Counsel further submits that the claimant is entitled to the reliefs sought and urges the court to find in favour of the Claimant and award prayers as sought.

Respondent's submissions

32. Counsel for the Respondent highlighted the following issues for determination;
 - i. Whether the Claimant was unfairly and wrongfully terminated from employment?
 - ii. Whether the Claimant was discriminated?
 - iii. Who should bear the cost of the suit?
33. On the first issue, counsel submits that the Claimant's dismissal from employment was fair and lawful and in accordance with the provisions of the *Employment Act*.
34. Reliance is made on the provisions of Section 45(2) of the *Employment Act* and the sentiments of Ndolo J. in *Walter Ogal Anuro v Teachers service Commission* (2013) eKLR that;

“ . . . For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect termination”.
35. The Respondent's counsel submits that the Respondent had a valid reason to summarily dismiss the Claimant from employment for absconding duty which is evidenced in the letter dated 2nd April, 2018.
36. Counsel submits that the claimant's desertion amounted to gross misconduct and insubordination, which violated the company's rules and regulations.
37. Counsel urges that the Claimant's misconduct and insubordination are anchored under Section 44(4) (e) of the *Employment Act* and warranted summary dismissal.
38. Counsel argues that the client reported to the Respondents office stating that the Claimant had misconducted herself by not reporting to work without a reasonable excuse or permission and had demonstrated that it had a substantive justification for the summary dismissal.
39. Counsel further submits that the Respondent tried to reach out to the Claimant severally without success which prompted it to write the letter dated 2nd April, 2018 on absconding of duty.
40. On the third issue, counsel submits that the Claimant wilfully absconded duty and was not discriminated against.



41. Counsel relies on the sentiments of the Court of Appeal in *Barclays Bank of Kenya Limited & Another Vs Gladys Muthoni & 20 others* (2018) eKLR on the definition of discrimination as follows;

“ . . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions.....Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . ”

42. According to the Respondent’s counsel, the Claimant was not discriminated but absconded duty.

43. On costs, counsel submits that the claimant should bear the cost of the suit as her assertions are without basis.

Analysis and determination

44. It is common ground that the claimant was an employee of the Respondent from 6th April, 2016 working for the Respondent’s Client MP-Shah Hospital, as a cleaner.

45. It is also not in contest that the Respondent’s client reported that it no longer wanted the Claimant to work at the Hospital.

46. While the Claimant alleges that her dismissal from employment was unfair and unlawful, the Respondent maintains that the Claimant absconded duty.

47. The issues that commend themselves for determination are;

- i. Whether the Claimant’s employment was terminated or she absconded duty.
- ii. Whether the Claimant is entitled to the reliefs sought.

48. As to whether the Claimant’s employment was terminated or she absconded duty, parties have taken opposing positions. Whereas the Claimant’s submits that she was unfairly terminated from employment, the Respondent on the other hand submits that the Claimant absconded duty from 22nd March, 2018.

49. Section 45(2) of the *Employment Act*, 2007 provides that –

- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.

50. These provisions underscore the need to ensure that termination of employment is substantively justifiable and procedurally fair as held in *Walter Ogal Anuro v Teachers Service Commission* (Supra).

51. Section 43 of the *Employment Act* prescribes the obligation of the employer to demonstrate the reason or reasons for termination of employment failing which the termination is deemed unfair.

52. In addition, Section 47(5) of the Act underscores the burden of proof of the employee and the employer as follows –



- (5) For any complaint of unfair termination of employment or wrongful dismissal 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.
53. Finally, Section 41 of the *Employment Act* outlines the principles of procedural fairness.
54. In the statement of claim, the claimant states that on 20th March 2018 while performing her duties, her supervisor told her to hand over her uniforms and leave the premises. The Claimant states that her employment was terminated without being notified of the misconduct allegedly committed or being subjected to a hearing and was not issued with a termination letter.
55. On the other hand, RWI testified that on 23rd March, 2018, the MP Shah Hospital reported an incident where the Claimant had refused or neglected to take instructions to clean and that it was no longer interested in the Claimant working at its place.
56. From the evidence on record, it is discernible that an incident occurred at the MP Shah Hospital involving the Claimant, the net effect of which was that the Hospital did not wish the Claimant to continue working there and she was instructed to remove her uniform and leave.
57. In her written statement dated 6th June, 2018, the Claimant states that after the incident at the MP Shah Hospital, she proceeded to the Respondent's offices at Next-gen Mall and saw one Grace Njoroge who told her to proceed home and await a call.
58. This evidence was not controverted by the Respondent.
59. Although the Claimant could not recall the timing of the visit, she was clear that she went to the office of the Human Resource Manager, one Grace Njoroge.
60. From the evidence on record, it is clear that the Respondent was aware of the incident between the Claimant and the Client and did not issue a notice to show cause or subject the Claimant to a disciplinary hearing to explain her position.
61. In *Pius Machafu Isindu v Lavington Security Guards Limited* (supra) the Court of Appeal expressed itself as follows –
- “The appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under Section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
62. On the alleged absconding of duty, the Respondent testified that the Claimant did not report to work from 22nd March, 2018 and attempts to reach her fell through hence the letter dated 2nd April, 2018.
63. Regrettably, RWI adduced no evidence on who made the attempts to reach out to the Claimant, how and when. If calls or messages were made, who did so and to what telephone number?
64. As for the letter dated 2nd April, 2018, the Respondent tendered no evidence to show that it was indeed posted to the address or delivered to the Claimant.
65. In *Stanley Omwayo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR, Radido J. held that an employer asserting that an employee has absconded duty must demonstrate that it has taken reasonable steps to establish the where about of the employee. See also



Felistas Acheha Ikatwa V Charles Peter Onyango (2018) eKLR, Boniface Mwangi V B.O.M. Iyego Secondary School (2019) eKLR, Simon Mbithi Mbane V Inter Security Services Ltd (2018) eKLR, Joseph Nzioka V Smart Coatings Ltd (2017) eKLR and Joseph Malonza V Ruth Osolo t/a Eraeva Catering Services (2021) eKLR among others.

66. From the evidence on record, it is clear that the Respondent has failed to discharge the burden of proof to show that the Claimant absconded duty or deserted the workplace.
67. Having confirmed on cross-examination that she was employed by the Respondent as a cleaner at MP Shah Hospital and the Hospital was unhappy with her conduct and attitude as was the Respondent, it is the finding of the court the Respondent had a valid and fair reason to terminate the Claimant's employment but adduced no evidence to show that the process was procedurally fair as by law required.
68. It is the further finding of the court that the termination of the Claimants employment was procedurally unfair.

Whether the Claimant is entitled to the reliefs sought

69. Having found as above, the court proceeds as follows;
 - i. Declaration
70. Having found that the termination of the Claimant's employment was procedurally unfair for non-compliance with the requirements of Section 41 of the Employment Act, 2007, a declaration to that effect is merited.
 - ii. House allowance
71. On cross-examination, the Claimant testified that her house allowance was $\frac{1}{3}$ of the salary but shortly thereafter changed her story and testified that the Respondent did not pay house allowance.
72. More significantly, the payslips on record show that the Respondent paid the Claimant basic salary only and is thus entitled to house allowance at $\frac{1}{3}$ of the basic salary, Kshs.50,400/=.
 - iii. 12 months' salary compensation
73. Having found that termination of the Claimant's employment was unfair the Claimant is entitled to the relief under Section 49(1) (c) of the Employment Act, 2007.
74. In determining the quantum of compensation, the court has taken into consideration the fact that the Claimant was an employee of the Respondent for a duration of 2 years, which was fairly short and had no recorded case of misconduct or indiscipline. The Claimant substantially contributed to the termination of employment and did not appeal the termination.
75. In the circumstances, the court is satisfied that the equivalent of 2 months' gross salary is fair, Kshs.25,200/=.
 - iv. NSSF and NHIF
76. The Claimant prays for NSSF and NHIF dues for 12 months yet copies of the payslips on record clearly indicate that statutory deductions were being made.
77. Similarly, the Claimant has not alleged that the deductions were made and not remitted, a fact NSSF and NHIF statements would have effortlessly shown.
78. The claim lacks particulars and is declined.



- v. General damages for violation of fundamental right to fair labour practices, breach of contract and discrimination

79. The Claimant tendered no evidence to demonstrate entitlement to general damages as neither the breach of contract or violation of Article 41 of *the Constitution* of Kenya or discrimination was proved.

The claim lacks particulars and is dismissed.

80. In the upshot, judgment is entered in favour of Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- b. Equivalent of 2 months' gross salary, Kshs.25,200.00.
- c. House allowance, Kshs.50,400.00.

Total Kshs.75,600.00

81. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH 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

