



Magonga v Safe Energy Limited (Employment and Labour Relations Cause E767 of 2022) [2024] KEELRC 1727 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1727 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E767 OF 2022**

AN MWAURE, J

JULY 5, 2024

BETWEEN

IBRAHIM MAGONGA CLAIMANT

AND

SAFE ENERGY LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 19th August 2022.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent as a Chief Security Officer on or about November 2018 earning a basic salary of Kshs 100,000.
3. The Claimant avers that since his employment, his salary was never adjusted to accommodate this appointment despite several false promises and verbal/oral assurances by the Respondent.
4. The Claimant avers that he worked diligently until May 2022 when the Respondent summarily dismissed or unfairly terminated from his employment.
5. The Claimant avers that in December 2021, the Respondent without any explanation ceased to pay his salary and/or benefits.
6. The Claimant avers that in the event of any lapses or non-performance occasioned by him, the Respondent should have had a recourse to a warning system as provided under Section 46 of the [Employment Act](#).
7. The Claimant avers that he worked closely with DCI to stop the illegal business refilling LPG gas cylinders and was involved in the operation that shut down plants operating without a licence.



8. The Claimant avers that they discovered that the cylinders were not standardised and such businesses were ripping innocent Kenyans by charging them for less gas than was in the cylinder. And with his help, the police confiscated gas cylinders from various such companies.
9. The Claimant avers that he brought a lot of business to the Respondent and worked overtime to secure their LPG and protect them from unfair competition. He further used his networks on acquiring information from the public voluntarily which helped apprehend the illegal operations.
10. The Claimant avers that he was unprocedurally, unlawfully and wrongfully dismissed from employment and the Respondent failed to pay his terminal benefits causing him loss, damage and mental anguish.

Evidence in Court

11. The Claimant (CW1), adopted his witness statement dated 16/12/2022 as his evidence in chief and produced his list of documents as his exhibits.

Claimant's Submissions

12. The Claimant submitted that there was no valid reason to warrant his termination under Section 44(4) of the [Employment Act](#) and states that the onus of proof of the alleged misconduct lies with the employer by dint of Section 43 and 45 of the Act.
13. It is the Claimant's submission that the burden of justifying the grounds of summary dismissal lies upon an employer in which in this case it was not in any manner whatsoever proved as expected. Therefore, the termination was unfair and with no justifiable cause.
14. The Claimant relied on [James Ooko Seda v Adsite Limited](#) (2019) eKLR, and submitted that there is no indication that he was taken through any disciplinary process as envisaged under Section 41 of the [Employment Act](#). Therefore, the termination of the Claimant was unfair and unjustified for lack of proper reasons and want of due process.
15. The Claimant submitted that he has proven on a balance of probabilities that he was unfairly terminated and he is entitled to damages for unfair termination as provided under Section 49 (1) of the [Employment Act](#). Further, he was not accorded notice as required hence entitled to one month's salary in lieu of notice.

Analysis and Determination

16. The Respondent in this case did not enter appearance or even file a defence in opposition to the Memorandum of Claim.
17. Having considered the pleadings, affidavits and submissions, the issues for the Court's determination are:
 - a. Whether the Claimant's employment termination was unprocedural, illegal and unfair.
 - b. Whether the Claimant is entitled to the reliefs sought.
18. The claimants evidence is that in December 2021 the respondent failed to pay his salary with no explanation or statement tendered. He says he was not issued with a notice as per the law. He says his termination was therefore unlawful and unprocedural.



19. It is also the claimant's averment that he was not given any warning of poor performance or gross misconduct.
20. He therefore avers he was unfairly terminated without any grounds and he was not paid his terminal benefits. He therefore prays for reliefs on his statement of claim paragraph 7.
21. The claimant stated he served the respondent with summons deponed by Bernard Okoyo Ochieng deponed on 2nd December 2022.
22. Seeing the claimant filed his claim and there was no notice of appointment of the respondent or their response that means the claimants pleadings and evidence in court was not controverted by the respondent.
23. The law provide in mandatory terms that the employee should not be terminated from employment without a valid reason. Section 45(1) of the Employment Act provides as follows:

45. (1) No employer shall terminate the employment of an employee unfairly.
24. Section 41(1) of the said Employment Act will provide as well provide as follows :

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.
25. The respondent has not provided any evidence whatsoever and has not put any pleadings or evidence or submissions and that means the claimants case has not been controverted. Under the circumstances and the court having considered the evidence and pleadings by the claimant and considering the respondent did not file any response finds the claimant has established a case of unlawful and unfair termination. Judgment is entered in her favour.
26. Having entered judgment in favour of the claimant he is awarded the following reliefs:
 - a. One month in lieu of notice Kshs 100,000/-.
 - b. Service/severance pay are not the same and is not clear what claimant is claiming. The same is not proved and is not clear what the same is based on. The prayer is declined.
 - c. The arrears of salary between December 2021 to May 2022 once again is not substantiated and is therefore not proved it is declined.
 - d. Leave accrued for 2019 to 2021 is not proved as there is no evidence claimant applied for leave and it was declined so the same is also declined.
 - e. Commission/gratuity also is not proved and so is also declined.
 - f. House allowance is also not proved and claimant did not raise that claim since 2019 and so is also declined.
 - g. The claimant prays for any other relief the Court deems fit to grant and grants him 2 months pay equivalent of his salary being Kshs 200,000/- for unlawful termination.
 - h. He is awarded a total of Kshs 300,000 plus interest at Court rates from date of judgment till full payment.



- i. Claimant is also to be paid costs of this suit.
- j. Claimant is to be issued his certificate of service 14 days from today's date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

