



**Mutua v China National Aero Technology International Engineering Ltd
(Cause 705 of 2015) [2024] KEELRC 1728 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1728 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 705 OF 2015
AN MWAURE, J
JULY 5, 2024**

BETWEEN

GENARO MULUTI MUTUA CLAIMANT

AND

**CHINA NATIONAL AERO TECHNOLOGY INTERNATIONAL
ENGINEERING LTD RESPONDENT**

JUDGMENT

1. The Claimant filed an Amended Memorandum of Claim dated 30th November 2015.

Claimant’s Case

- 2. The Claimant avers that he was employed by the Respondent as a fitter earning a monthly salary of Kshs 43,000.
- 3. The Claimant avers that on 30/09/2014, the Respondent’s department manager, Mr. Zhao Kaihong sent him a text message informing him not to report to work until he is informed what to do; to date he has not received any word therefore the Respondent’s actions indicate his services were terminated.
- 4. It is the Claimant’s case that his services were unfairly terminated by the Respondent despite the fact that he did nothing wrong to warrant disciplinary action; no hearing took place and due process was not adhered to before dismissing his services.

Evidence in Court

- 5. The Claimant adopted his witness statement dated 30/11/2015 as his evidence in chief and produced his amended list of documents dated 30/11/2015 as his exhibits.
- 6. The respondent did not file response to the statement of claim and did not give any evidence in Court or file any submissions.



Claimant's Submissions

7. The Claimant submitted that he was an employee of the Respondent, he further testified before this court that the Respondent offered him employment on 08/08/2010 and to this effect he produced a gate pass from Catic International Ltd.
8. It is the Claimant's submission that a notice of intention to sue was issued and the same was received by the Respondent as evidence by the aforementioned notice produced during the trial and marked as Exhibit 3.
9. The Claimant submitted that he was terminated without any prior warning or opportunity to address any alleged performance concerns. Despite requests for clarification, the reasons provided for his dismissal were vague and unsubstantiated.
10. It is the Claimant's submission that the Respondent did not conduct any formal investigation or consultation prior to the decision to terminate his employment. Further, the termination lacked any proper procedural steps which highlights the arbitrary nature of the dismissal.
11. The Claimant submitted that he made several phone calls to the Respondent's management regarding his termination, however, there was no response whatsoever, demonstrating the lack of clarity and justification provided.

Analysis and Determination

12. The Respondent did not enter appearance or even file a defence in opposition to the claim.
13. Having considered the pleadings, affidavits and submissions, the issues for the Court's determination are:
 - a. Whether the Claimant was an employee of the Respondent.
 - b. Whether the termination of the Claimant's employment was unfair.
 - c. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was an employee of the Respondent

14. It is trite law that he who alleges must prove. In civil matters, the burden of proof is on he who alleges a fact. Sections 107 and 108 of the [Evidence Act](#) provide as follows:

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
15. To prove that he was an employee of the Respondent, the Claimant produced in court a gate pass indicating he was employed as a land surveyor and certificates of outstanding employee from CATIC International Engineering Corporation (K).



16. Therefore, he has shown that he was an employee of the Respondent herein.

Whether the Claimant’s employment was unfairly terminated.

17. In *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, the court summarized fair and lawful termination as follows: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize 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. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”

18. It is the Claimant’s case that on 30/09/2014, the Respondent’s department manager, Mr. Zhao Kaihong sent him a text message informing him not to report to work until he is informed what to do; to date he has not received any word therefore the Respondent’s actions indicate his services were terminated.

19. Section 47 (5) of the *Employment Act* provides: -

“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.”

20. Additionally, in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court held: -

“Section 47(5) of the *Employment Act* sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations.



It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination.

21. The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. In *Josephine M. Ndungu & others v Plan International Inc [2019] eKLR*, the court said this of the foregoing: -
"Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act."
22. The claimant avers he was dismissed from his employment by a text message which initially asked him not to report to work unless otherwise recalled.
23. This is practice against fair labour practice contrary to article 41 of *the Constitution* of Kenya 2010. The employer should not just ask his employee not to report to work without any reason and fail to recall him or send him a notice to show cause. The respondent failed to follow the required substantive justification rule as is mandatory in employment law and in particular sections 43(1) and 45(1) and 47(a) and 41 of the *Employment Act*.
24. The claimant wrote to a demand letter on 8th October 2014 after being asked not to go back to work on 30th September 2014. There seems to be no response from the respondent.
25. Even when the claimant filed a statement of claim dated 28th April 2015 and served on the respondent on 15th May 2015 the respondent did not participate in the proceedings. They did not file a response and did not appear in court.
26. The statement of claim and the prayers thereto are uncontroverted by the respondent and therefore the court holds the same to be truthful and enters judgment in favour of the claimant.
27. In conclusion, and having entered judgment in favour of the claimant he is awarded the following reliefs.
 1. One month salary in lieu of notice kshs 43,000/-.
 2. Prayer 2 of untaken leave is not proved as claimant has no evidence of having applied for leave and denied.
 3. Service pay is granted for 4 years worked kshs 99,230/-.
 4. Damage for illegal dismissal @ 3 months equivalent considering the period he worked for the respondent kshs 129,000/-.
 5. Total award of kshs 271,230.80/- plus interest at court rates from date of judgment till full payment.
28. The claimant is also awarded costs.
He is to be given certificate of service 14 days from today's date.

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

