



**Nthiga v Mundigi, MP (Cause E009 of 2023)
[2024] KEELRC 1900 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1900 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E009 OF 2023
ON MAKAU, J
JULY 19, 2024**

BETWEEN

EVANS NDARU NTHIGA CLAIMANT

AND

SEN ALEXANDER MUNYI MUNDIGI, MP RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as his Personal Assistant vide contract dated 1st October 2022. The employed was for a fixed term of 60 months from the said date. By a Statement of Claim dated 28th April 2023 he alleges that he was summarily dismissed by the Respondent vide a letter dated 24th March 2023. The Claimant contends that the termination was unfair, unlawful and unconstitutional because no reason was cited and chance for a hearing was given to him. Therefore, he prayed for judgement against the Respondent in the following terms:
 - a. A declaration that there was breach of employment contract and the termination of the employment was wrongful, unlawful, unfair and unconstitutional.
 - b. Pay in lieu of one-month notice amounting to Kshs. 200,000/=
 - c. 12 months salary as general damages for wrongful dismissal and unlawful and unfair termination amounting to Kshs. 2,400,000/=
 - d. Gratuity at the rate of 31% of the total salary payable during the term of employment amounting to Kshs. 3,720,000/=.
 - e. Accrued leave pay.
 - f. Costs of this suit.



- g. Interest on b, c, d, e, and f above at court rates from the date of filing the suit until payment in full.
 - h. Certificate of service
 - i. Any further relief that this Honourable Court may deem fit to grant in the interest of justice.
2. The Respondent opposed the claim vide his Response to Claim dated 9th June 2023 wherein he acknowledged having employed the Claimant for a period of 60 months. The Respondent further averred that the contract gave him a clear and irrevocable right to terminate the employee's employment by giving a one month's notice and where an employee was aggrieved, the only avenue for redress was the Parliamentary Service Commission (PSC). In that regard, the Respondent contended that the Court lacked the jurisdiction to hear the matter and thereby issued a notice of preliminary objection on the same. He contended that clause 9 of the contract provided that disputes be referred to an arbitrator. However, he admitted that the Claimant is entitled to gratuity for the period served and contended the same was being processed by the relevant entity.

Evidence

3. During the hearing, the Claimant testified as CW1. He basically adopted his witness statement dated 28th April 2023 as his evidence in chief and produced the bundle of six (6) documents as exhibits in support of his claim. In brief his evidence was that he was employed for a 60 months' fixed term contract and his gross salary was Kshs.200,000 per month; that he had legitimate expectation that he that he would be treated fairly but that was not to be, because he was summarily dismissed without being informed of the reason and without being accorded a hearing; and that since the termination he has not secured another employment. He, however he confirmed that he was paid one-month salary in lieu of notice. He stated that the contract provided for gratuity 31% of gross salary for the 60 months and prayed for judgment as prayed in his Claim.
4. On cross examination, he stated that the terms and conditions of the Contract were binding upon the two parties herein. He confirmed that he worked for 6 out of 60 months before the termination. He further confirmed that the contract period of 60 months was subject to performance and the employer could terminate for misconduct.
5. He stated that on the morning of 6th February 2023 he was at home and denied that the Respondent looked for him the whole morning. He stated that his phone was on but on silent mode and he did not know that the Respondent was to travel to Italy. When he learnt about the travel he processed the travel documents but the respondent never travelled.
6. He admitted that clause 4 (2) of the contract provided for appeals to the PSC while clause 5 (1) provided for termination by one month notice or payment of one-month salary in lieu of notice. He admitted that he was paid salary in lieu of notice but clarified that at the time of filing of the suit he had not received his payslip. He admitted that Clause 9 of his contract provided for referral of disputes to the Parliamentary Service Commission (PSC) but he never did so.
7. He admitted that payment of his salary and gratuity came from the PSC but he never pursued the same from the PSC.
8. In re-exam, he stated that the right of appeal did not ouster the Court's jurisdiction and that the respondent did not object to the court proceedings. He further stated that the [Employment Act](#) was superior to employment contract. Finally, he stated that the respondent was his employer.



9. The Respondent testified as RW1. He also adopted his written statement dated 19th January 2024 as his evidence in chief and produced three (3) documents as exhibits. In brief his evidence was that the Claimant was his employee but he was paid by the PSC. The employment was governed by a written contract that took effect on 1st October 2022. The contract spelled the terms of engagement including the right to terminate the contract by one month notice in writing or payment of one-month salary in lieu of notice.
10. He stated that on 6th February 2023 at about 6.00AM, the Chairman of the Senate committee of Agriculture called him asking for his passport before 10.00 AM for processing of an urgent trip to Italy on 10th February 2023. He called the claimant via his phone but he failed to pick his calls the whole morning and until 2.00PM when the claimant reported to the office which was too late. He lost the chance to travel to Italy and felt that he could not rely on the claimant any more. He then sought advice from the Senate Clerk and he was advised to terminate the claimant's services. Hence the letter dated 24th March 2023 by which he exercised his right to terminate the contract by paying the claimant one-month salary in lieu of notice.
11. On cross examination, he admitted that the claimant was his employee and that he signed the claimant's contract of employment and the dismissal letter. He further admitted that the termination letter did not state the reason for termination as it was not a dismissal but termination as per contract and the law. He further admitted that he never gave the claimant any written warning or hearing before the termination.
12. In re-exam, he stated that the Claimant was employed by him and the senate because the salary came from the PSC. He stated that on 6th February 2023, the Claimant never attended office up to 2pm and as such, he reported to the clerk Senate who advised him to serve him with one month's termination notice or pay salary in lieu of notice.

Claimant's submissions

13. The Claimant submitted on the following issues:
 - a. Whether the Claimant's dismissal was wrongful, unlawful, unfair and unconstitutional.
 - b. Whether the Court has jurisdiction in view of the right of appeal to the PSC and the requirement to refer the matter to the arbitrator under the contract of employment.
 - c. Whether the Claimant was an employee of the Respondent or of the PSC.
 - d. Whether the Claimant is entitled to gratuity and other reliefs sought in the statement of claim.
14. On the first issue, it was submitted that it submitted that the Respondent breached the Claimant's legitimate expectation and amounted to unlawful and unfair termination. For emphasis, reliance was placed on section 45 (2) (a) of the *Employment Act* and the case of Simiyu Kibengo Godfrey vs Private Safaris (E.A.) Limited (Industrial Court cause No. 1683 of 2011).
15. It was further submitted that the Respondent's assertion was misplaced because the law required that an employee be informed the reason for termination and that a fair procedure be followed before the termination. Consequently, it was submitted that the Respondent has failed to justify the grounds of termination and prove the same was done in accordance with a fair procedure. For emphasis reliance was also placed on the Court of Appeal decision in the case of Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR.



16. It was also argued that the Respondent violated the Claimant's right to fair labour practices and fair administrative action as enshrined under Articles 41 and 47 of *the Constitution*. This submission was fortified by citing the case of *Bernard Mutungi Daniel v Lenana Mount Hotel Limited (Industrial Court Cause No. 1423 of 2012)*.
17. On the second issue, it was submitted that this Court's jurisdiction is conferred by Article 162(2) (a) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act* and as such the same cannot be ousted by a private treaty. Further that, arbitration clause is unconstitutional for contravening Article 48 of *the constitution*. For emphasis reliance was placed on the case of Euphrasio Gitonga Mberia vs County Public Service Board, Tharaka Nithi & Another [2019] eKLR.
18. It was further submitted that the respondent did not file a formal application for stay of proceedings as required by section 6 of the *Arbitration Act*. Consequently, it was submitted that the court has jurisdiction to hear and determine the dispute. For emphasis reliance was placed on the case of ICEA Lion Life Assurance Company Limited vs Jomo Kenyatta University of Agriculture and Technology [2018] eKLR.
19. It was further submitted that special circumstances exist to warrant departure from the arbitration clause, namely, conflict of interest since the Chairperson of the PSC is the one to appoint the Arbitrator yet the PSC is named as a facilitator of the employer in the contract of service. For emphasis the case of *United India Insurance Co. Ltd & 2 others v East Africa Underwriters Ltd, Civil Appeal No. 36 of 1983* (UR) was cited.
20. On the third issue, it was submitted that the Claimant was an employee of the Respondent and not the PSC because Clause A defined employer as the member of parliament; Clause B placed on the employer the responsibility of paying salary of the employee and compliance with the *Employment Act* and other relevant laws; Clause C only provided that the PSC would facilitate the employer through the County office to pay salary to the employee; and then Clause 14 exempted the PSC from liability to pay damages and/or costs awarded against the employer by an arbitration panel or court. Accordingly, it was argued that the Respondent and not the commission had the full control of the Claimant since the PSC was just a facilitator.
21. On the fourth issue, it was submitted that the Claimant is entitled to full gratuity since his contract was prematurely cut short by the respondent through unfair and unlawful termination. It was argued that the claimant is also entitled to the other reliefs as sought in the Claim.

Respondent's submissions

22. The Respondent submitted on the following issues:
 - a. Whether the Respondent rightfully dismissed the Claimant subject to the terms and conditions of the employment contract; and
 - b. Whether this court has the jurisdiction to determine this matter.
23. On the first issue, reliance was placed on clauses 4(4) and 5 (1) of the Employment contract which provided for summary dismissal of the employee for absenting himself from duty without leave, and termination by one month notice or payment of salary in lieu of notice, respectively. It was argued that the Claimant signed the contract and has not contested its validity or the intention of the parties to be bound by the terms of the contract.
24. Reliance was also placed on the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020)* [2021] and Pius Kimaiyo Langat versus Co-



operative Bank of Kenya Ltd [2017] eKLR where the court held that when a party signs a contract, that denotes that an intention to be bound by the terms and conditions therein and Court are not in the business of rewriting the contract between parties.

25. It was submitted that the termination was justified since the claimant misconducted himself by absenting himself from work and therefore it was unconscionable for the respondent not to exercise his right to terminate the contract. Besides section 44(3) and (4) of the *Employment Act* entitles the employer to dismiss his employee summarily for a conduct that fundamentally breaches his obligation under the contract of service, absenting himself from the place appointed for the performance of his work and willfully neglecting to perform or carelessly performs his work under the contract.
26. On the second issue, it was submitted that Clause 9 of the contract was an arbitration clause to the effect that any dispute or claim arising out of the contract, or breach thereof shall be referred to arbitration in accordance with the *Arbitration Act* of 1995. It was further submitted that under section 10 of the *Arbitration Act* no court can intervene in matters governed by the Act save to the extent permitted by the Act. Consequently, it was argued that the court lacks jurisdiction to determine the claimant's suit.
27. For emphasis reliance was also placed on the case of Euromec International Limited case, supra, where the Court held that section 10 of the *Arbitration Act* curbs court's role in arbitration, and that the Act was enacted for purposes of increasing party autonomy and minimizing court intervention. Accordingly, in the instant case it was submitted for the respondent that the Court should consider the parties autonomy and their intention, and refer the matter to arbitration.
28. Finally, the Court was urged to find that the respondent rightfully dismissed the claimant under the terms of his contract and proceed to dismiss the suit with costs.

Analysis

29. I have carefully considered the rival pleadings, evidence and submissions. It is a fact that the claimant was employed by the respondent as a personal Assistant under a fixed term contract of 60 months and for a gross monthly salary of Kshs. 200,000. It is also a fact that the respondent terminated the contract by the letter dated 24th March 2023 and paid him one-month salary in lieu of notice. Finally, it is factual that the contract of employed contained an arbitration clause which required that all dispute arising from the contract or breach thereof shall be referred to arbitration panel appointed by the Chairperson of the Parliamentary Service Commission (PSC).
30. The contested issues that fall for determination are as follows:
 - a. Whether this Court has the jurisdiction to hear and determine this matter.
 - b. Whether the Claimant's contract was unlawfully and unfairly terminated.
 - c. Whether the Claimant is entitled to the reliefs sought.

Jurisdiction

31. This Court's jurisdiction is conferred by Article 162(2) (a) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*. However, the right to access the court is not one of the absolute rights recognized under Article 25 of *the Constitution*. It means that the right to access the court can be lawfully limited by a written law as contemplated by Article 24 of *the Constitution*. One of the written laws that limit right of access to court is the *Arbitration Act* where parties may agree in writing that commercial disputes between them shall be referred to arbitration. In my view, a reference



to arbitration is not the same ousting jurisdiction by a private treaty but rather limiting access to court subject to the law.

32. Section 6(1) of the [Arbitration Act](#) is crucial in this case as it provides that: -
- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds-
 - a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
33. The above provisions are direct and mandatory that for a Court to down its tools and stay proceedings, a party must make a formal application within the timelines fixed thereby. In this case, the respondent raised objection in his defence on ground that the parties were bound by an arbitration agreement to refer the dispute for arbitration but never filed an application to stay the proceeding and give effect to the arbitration agreement. Consequently, I find and hold the Respondent submitted himself to the jurisdiction of this Court and I will proceed to determine the matter on the merits.

Whether the Claimant was unlawful and unfairly terminated

34. Unfair termination is provided for, under section 45 (1) & (2) of the [Employment Act](#) on classification of termination as fair as follows:
- (1) No employer shall terminate the employment of an employee unfairly.
 - (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.”
35. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR the Court upheld the above provision when it stated that:
- “... for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness ...”
36. In *George Musamali versus G4S Security Services Kenya Ltd* [2016] eKLR stated that:
- “ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the [Employment Act](#) or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or



she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

37. Sections 43(1) and 47(5) of the *Employment Act* lays on the employer, the burden of proving and justifying the reason for the termination of the contract of employment. The sections provide as follows:

43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required 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.

47. Complaint of summary dismissal and unfair termination

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 the employment or wrongful dismissal shall rest on the employer.”

38. In this case the respondent terminated the claimant's contract for absenting himself from his place of work and negligence of duty. The claimant admitted that he did not report to work in the morning hours of 6th February 2023 and never picked calls because his phone was on silent mode. The consequence of the said conduct was that the respondent missed an official trip to Italy. The said conduct constituted a valid reason warranting summary dismissal of the claimant.

39. However, the respondent chose to terminate the contract under clause 5 of the contract by paying the claimant one-month salary in lieu of notice. He cleverly failed to cite the reason for termination and as such failed to accord him a hearing before the termination. This case is on all fours with the case of *Kenfreight (E.A) Limited v Benson K. Nguti* [2016] eKLR where the Court of Appeal held that:

“apart from issuing proper notice according to the contract or payment in lieu of notice as provided; an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representatives if any, considered by an employer before the decision to terminate his contract of service is taken.”

40. The above decision upheld the mandatory provisions of Section 41 (1) of the *Employment Act* which provides that: -

- (1) 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.
- (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.”

41. The above provision was also upheld by the court in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR when it stated as follows:

“Four elements must thus be discernible for the procedure to pass muster: -

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

42. In the instant case, the Respondent admitted during cross examination that he terminated the claimant’s contract without giving him any hearing. It is therefore obvious that termination was not done in accordance with a fair procedure as required by section 41 and 45(2)(c) of the *Employment Act* and as such it was unfair and unlawful.

Whether the claimant is entitled to the reliefs sought

43. Having established that the grievant was unfairly terminated, I find that he is entitled to a declaration that the termination of his contract was unfair and unlawful.

44. I further find that he is entitled to compensation for unfair termination and salary in lieu of notice. Considering that the claimant had served for only six months and that he contributed to the termination through misconduct, I award him only one-month salary as compensation for the unfair termination. However, the claim for salary in lieu of notice is declined because the Claimant admitted that he was paid the same.

45. As regards the claim for gratuity, the respondent admitted that the claimant was entitled to the same for the period served. However, the claimant maintained that he is entitled to gratuity for the whole contract term of 60 months because he was prevented from completing the term by the respondent through unlawful termination. It is apparent that the Claimant only worked for 6 months.

46. I have considered clause 7 of the contract and confirmed that it entitles the claimant to payment of gratuity if his contract is terminated under clause 5(1), that is to say, by a notice or being paid salary in lieu of notice. The amount of gratuity is equal to thirty-one per cent (31%) of the total salary for the period served. The claimant served for six months and earned a total of Kshs. 1,200,000 and therefore he is entitled to gratuity equalling Kshs.372,000.

47. The claim for leave is also allowed on pro rata basis. His contract provided for 21 leave days per year and since he served for only six months, he earned 11.5 leave days. Hence Kshs.200,000 x11,5/30 equals to Kshs. 76,666.66.

48. Finally, the claimant is entitled to a certificate of service by dint of section 51 of the *Employment Act*.



Conclusion

49. I have made a finding of fact that the parties have voluntarily abandoned the arbitration agreement and subjected themselves to the jurisdiction of this court. I have further found that the respondent terminated the claimant’s contract of service unfairly and unlawfully by failing to accord him a hearing before the termination. I have also found that the claimant is entitled to compensatory damages, gratuity and leave on pro rata basis. Consequently, I hereby enter judgment for the claimant against the respondent in the following terms:

- a. Declaration that the termination of the claimant’s contract of employment was unfair and unlawful.
- b. The respondent to pay the claimant the following:
Compensation.....Kshs. 200,000.00
Gratuity.....Kshs. 372,000.00
Leave..... Kshs. 76,666.66
Total Kshs.648,666.66
- c. The respondent shall pay costs of the suit plus interest at court rates from the date of this judgment.
- d. The award of damages is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

