



Ombajo v Institute of Certified Public Accounts of Kenya (ICPAK) (Employment and Labour Relations Cause 224 of 2014) [2024] KEELRC 1865 (KLR) (16 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1865 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 224 OF 2014**

**HS WASILWA, J
JULY 16, 2024**

BETWEEN

NEBERT MANDALA OMBAJO CLAIMANT

AND

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTS OF KENYA
(ICPAK) RESPONDENT**

RULING

1. This suit was instituted by a Memorandum of claim dated 17th June, 2014, on the grounds that the claimant had been unlawfully and unfairly terminated by the Respondent. The claimant sought for the following reliefs; -
 - a. That the Honourable Court be pleased to declare that the termination of the Claimant by the Respondent amounted to unfair and unlawful and wrongful termination.
 - b. The Honourable Court be pleased to order that the Claimant be reinstated or redeployed either in the same position or level as that which he held at 5th March 2014.
 - c. That the Honourable Court be pleased to order that the Respondent do pay to the Claimant all his unpaid salaries and allowances from the month of March 2014 together with such other monthly salary, allowances and benefits that will have accrued at the determination of this suit and/or until such time the Claimant is reinstated or redeployed.
 - d. That the Honourable Court be pleased to award the Claimant general damages.
 - e. That the Honourable Court be pleased to award the Claimant exemplary damages.
 - f. That the Honourable Court be pleased to award the Claimant maximum compensation.



- g. In the alternative and without prejudice to the 1st prayer for reinstatement, the Honourable Court be pleased to award the Claimant; -
 - i. 12 month's salary maximum compensation.
 - ii. General and exemplary damages.
 - iii. Salary for 5 days worked in March 2013.
 - iv. Unpaid Leave days.
 - v. Service pay at the rate of one month's salary for every year worked.
 - vi. Three months' salary in lieu of notice as per the tabulation appearing at Paragraph 30 of the Memorandum of Claim.
 - h. The Honourable Court be pleased to order the Respondent to issue a certificate of service to the Claimant.
 - i. Interest on (c & g) above at court rates from the date of filing this Cause in Court.
 - j. Costs of this cause.
 - k. Such further orders and/or relief as this Court may deem just and fit to award.
2. The respondent filed its statement of response together with a counterclaim for Kshs. 1,165,000 being advanced payments and irregular payments approved by the claimant.
 3. By a judgment dated 8th September 2017, this court dismissed the claim for unlawful termination and entered judgment in favour of the respondent for the counterclaimed in the sum of Kshs. 1,165,000 and order for each party to bear its costs.
 4. The claimant was aggrieved by this decision and appealed against the judgment to the Court of Appeal and by a judgment delivered on 2nd December 2022, the Court of Appeal allowed the appeal and held that the claimant was unfairly terminated as the respondent did not act in accordance with justice and equity in the disciplinary process and directed that the matter referred back to the trial court to address the issue of damages for unfair termination. Therefore, that the only issue pending for determination was on assessment of damages for unfair termination, which was canvassed by written submissions.

Claimant's Submissions

5. The Claimant submitted from the onset that owing to the fact that the Appellate Court held that the termination of the Claimant by the Respondent amounted to unfair and unlawful termination, he is entitled to all the reliefs sought in the Memorandum of Claim dated 17th June 2014.
6. On the claim for maximum compensation for unfair termination, it was submitted that the Claimant was employed by the Respondent on 1st June 2009 as a Chief Manager, Corporate Support Services. A job that he diligently did and exceeded the Respondent's expectation, gaining a salary rise. However, on 5th March 2014, he was unfairly terminated by the Respondent. Therefore, that as per section 49 (1) (c) of the [Employment Act](#), he is entitled to twelve-month salary for unfair termination which is equals to Kshs. 7,132,500.
7. On reinstatement, the Claimant submitted that an Order of reinstatement is provided for under section 49 (4) and based on the following grounds; the practicability of recommending reinstatement; the opportunities available to the employee for securing comparable or suitable employment with



another employer; the employee's length of service with the employer; and the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination.

8. It was however submitted that this prayer is impractical at this time considering the lengthy pendency of the suit before this Honourable Court and at appeal. In support of this, the claimant relied on the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) (Civil Appeal 240 of 2018)* [2021] KECA 173 (KLR), where the Court held that One of the factors is the impracticability of reinstatement due to time lapse since dismissal, the relationship between the employer and the employee having been beyond repair, and the impact on the employee's career and reputation. The court also pointed out that one of the guiding principles for remedies under Section 49 is that they are awarded to compensate the claimant not to punish the employer.
9. On service pay, it was submitted that section 35 (5) of the *Employment Act* of 2007 provides that an employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. Therefore, that the Claimant is entitled to service pay for every year worked. In addition, the claimant submitted that at the time of termination, the Respondent had a culture of paying service pay to its employees in the terms as found under Appendix 12 which shows the terminal benefits payment voucher for the former CEO of the Respondent Caroline Kigen and thus applying the same to the Claimant herein, the same is calculable as: Service Pay One Month for every year worked (594,375x5) which equals to Kshs. 2,917,875. To Support this, the claimant relied on the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited* [2014] eKLR, where the court was of the opinion that basic membership to the National Security Fund or other Schemes is not in itself a bar to an employee accessing service pay under Section 35[5] and courts must look at the social security route that confers overall greater benefit on the employee.
10. On unpaid leave pay, the claimant submitted that as per the Employment contract, the claimant is entitled to leave pay of Kshs. 1,634,531, which was not disputed by the Respondent.
11. The claimant also claimed the unpaid Salary for five days in March, 2014 (Kshs. 594,375/31x 5) which equals to Kshs. 99,062. He argued that this amount is not disputed and infact is admitted by the Respondent who stated that the amount was not paid because the claimant had not cleared, a fact that was successfully challenged during hearing and a handover report produced in Court.
12. On Notice pay, the claimant submitted that he is entitled to three months' notice pay of Kshs. 1,783,125 as per Clause 4 of the Revised Terms and Conditions of Service dated 28th April 2010 at Pg. 18 of the Respondent's Memorandum of Reply and Counterclaim. In fact, that this claim was admitted.
13. The claimant urged this Court to order the Respondent to issue him with certificate of service in line with section 51 of the *Employment Act*. In support of this, the claimant relied on the case of *Alphonce Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR where the court stated that:

“there is a statutory obligation upon an employer to issue an employee with a certificate of service on separation in spite and despite the circumstances of the separation.”

Respondent's Submissions

14. The Respondent submitted that the Court of Appeal at paragraph 24 of its judgment relied on the case of *Patrick Abu a versus Institute of Certified Public Accountants of Ken a ICPAK & Another*



2015 eKLR where the Court held as follows regarding the issuance of reasonable notice in disciplinary processes:

“Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood.”

15. It is argued that in its judgment the Court of Appeal held that the conduct of the respondent in issuing the claimant with an invite to disciplinary hearing on 3rd March 2014 at 3:00 pm to appear for the hearing on 4th March 2014 at 9:30 am, reduced the disciplinary hearing to a mere formality with a pre-determined outcome. The Court of Appeal found that there was no procedural justice which thus vitiated the disciplinary process against the claimant. The Court of Appeal held that the respondent did not issue the claimant with adequate notice of the intended disciplinary hearing. The claimant was issued with a show Cause letter dated 12th February 2014 to which he responded on 18th February 2014. The claimant was thereafter issued with a notice for disciplinary hearing on 3rd March 2014 for a disciplinary hearing scheduled on 4th March 2014.
16. It was argued that in as much as the notice was short, the claimant did not indicate to the respondent that the notice was not sufficient and did not request for more time. Without prejudice to the foregoing, the respondent submits that an award of two (2) months’ salary will be sufficient compensation in the circumstances and relies on the following decisions:
 - a. In Patrick Abu a versus Institute of Certified Public Accountants of Ken a ICPAK & Another [2015] eKLR this court awarded the claimant 2 months’ salary as damages for wrongful termination having found that the claimant was not issued with adequate notice of the disciplinary hearing.
 - b. In Matsesho v Newton Cause 9 of 2019 [2022] KEELRC 1554 KLR this court awarded a claimant 2 months’ salary as damages for unfair termination after only finding fault in the procedure that was used to terminate the claimant.
 - c. In Oyombe v Eco Bank Limited Civil A: -eal 185 of 2017 [2022] KECA 540 KLR 13 Ma 2022) (Judgment), the Court of Appeal found that the appellant was dismissed from employment for fraudulent activities that led to the loss of money from the respondent bank but was neither given a notice to show cause nor subjected to a disciplinary hearing hence denied procedural fairness. It however noted that there was sufficient evidence to justify the appellant's dismissal hence substantive fairness was met. The court awarded the appellant 2 month’s salary as compensation for unfair termination, and 50% of the costs of the suit in the trial court and Court of Appeal.
 - d. In Mariita v Leading Locks & Access S stem Cause 2407 of 2017 [2022] KEELRC 1194 KLR , where the claimant was terminated for absconding duty. He had served for 10 years. The court noted that the claimant was neither given notice to show cause nor subjected to a disciplinary hearing. The court however noted that there were valid reasons for termination and the claimant had disciplinary issues during his period of service. The court awarded the claimant one month’s salary in lieu of notice and 2 month’s salary as compensation for unfair termination. Each party was ordered to bear its costs.
17. Based on the above case laws, the Respondent urged this Court to award the claimant 2 months’ salary as compensation and direct each party to bear its own costs.
18. The only issue pending before this court is on assessment of damages for unfair termination.



19. From the proceedings before this court, the Claimant was invited for a disciplinary hearing following complaints levelled against him.
20. He received a letter on 3.3.2014 to appear before the disciplinary committee the following day at 9.30 am.
21. He sought for more time to respond to the audit report and was given 2 days which was also not adequate. His complaint was that he was subjected to an unfair disciplinary process for which the Court of Appeal found as much.
22. In the claim before this court the Claimant had sought to be paid his outstanding leave but which the Respondent indicated they could not pay because he had not cleared and had other liabilities (paragraph 83 of judgment). The leave dues are admitted by the Respondent and which the Claimant indicated were 52 in number.
23. I therefore allow this prayer for payment of 52 leave days being $52/30 \times 594,375 = 1,030,250/=$
24. The Claimant was also owed salary for March 2014 which is also admitted by the Respondent at paragraph 84 of the judgment. I accordingly award the Claimant his March 2014 salary for 5 days $= 5/30 \times 594,375 = 99,062.5/=$
25. On compensation for unlawful termination, given the unlawful termination meted against the Claimant in the disciplinary process as established by the Court of Appeal, I find he is entitled to compensation which I award at 8 months' salary $= 8 \times 594,375 = 4,755,000/=$
26. I also award Claimant 1 months' salary in lieu of notice $= 1 \times 594,375 = 594,375/=$
Total awarded $= 6,478,687.5/=$
Less counter claim awarded by the Hon. J Radido to the Respondents of 1,080,000/= (paragraph 72 of the judgment) leaving balance of 5,398,687.5/=
Less statutory deductions
27. I also order that the Claimant be issued with a Certificate of Service.
28. The Respondents will pay costs of this suit and of the appeal plus interest with effect from the date of this judgment.

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Makori for Respondent – Present

N/A for Claimant – Absent

Court Assistant - Fred

