



**Salik v Maya Duty Free Limited (Employment and Labour Relations Cause
1583 of 2017) [2024] KEELRC 1999 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1999 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1583 OF 2017**

K OCHARO, J

JULY 26, 2024

BETWEEN

KHEZRAN SALIK CLAIMANT

AND

MAYA DUTY FREE LIMITED RESPONDENT

JUDGMENT

Introduction

1. Through her statement of claim dated 24th July 2017, the Claimant sued the Respondent seeking the following reliefs:
 - a. A declaration that the Respondent’s action against the Claimant amounts to unfair termination of her employment contract and therefore entitles her to terminal dues amounting to KShs.565,348.00.
 - b. General damages for unfair termination of the Claimant’s employment resulting to stress and mental anguish.
 - c. Costs of this suit.
 - d. Interest on (a), (b) and (c) above at court rate from the date of filing the claim.
 - e. Any other or further relief this Honourable Court may deem fit or just to grant.
2. The Respondent resisted the Claimant’s claim through its memorandum of response dated 13th October 2017. The Respondent denied the Claimant’s cause of action, and entitlement to the reliefs sought. The response incorporated a counterclaim wherein he Respondent alleged that the Claimant was obligated to pay it notice pay of Kshs.136,250 and sought for an order directing it to pay the same, plus interest thereon, and costs of the claim and counter-claim.



The Claimant's case

3. At the hearing, the Claimant adopted her witness statement dated 27th July 2017 as her evidence in chief and tendered the documents under her list of documents dated 27th July 2017 as her documentary evidence.
4. It was her case that she first came into the employment of the Respondent sometime in October 2000. At all material times she was stationed at Jomo Kenyatta International Airport.
5. The Claimant asserted that on the 27th January, 2017 one Ashman Sapra, a director of the Respondent company assaulted her at her workplace, by slapping her and head butting her.
6. As a result of the unjustified and unprovoked assault, her diabetic and high blood pressure health situation was triggered to get worse. This prompted her to seek medical attention. On the same day of the assault, she was taken to Shree Cutch Lava Patel Samaj clinic for treatment.
7. Thereafter she went to Zam Zam Medical Services Centre for further management of her health. The doctor recommended her to take time off her place of work to allow for emotional and stress healing.
8. On 2nd March 2017, she revisited Zam Zam Medical Services Centre as her condition had not improved. The doctor recommended more off days for her.
9. The Claimant stated further that following the assault, she lodged a complaint with report to the police at JKIA Police Station.
10. On the 9th March 2017, Ashman Sapra wrote a letter to the Claimant summarily dismissing her from her employment for failure to report to work, yet he knew that she was on sick off as a result of the assault.
11. The summary dismissal was, without any reason, driven by malice unjustified, uncalled for, capricious, and in breach of the tenets of natural justice.
12. Without any justification, the Respondent declined to pay her February salary. Further, the dismissal was unfair, entitling her to the reliefs sought.
13. Cross-examined by Counsel for the Respondent, the Claimant testified that her last salary was paid on the 27th January 2017. Further, the assault incident occurred on the 27th January 2017. The incident subjected her to a traumatic experience.
14. She testified further that following the doctor's advice, she did not report to work between 27th January 2017 to 9th March 2017. During this period, she was not enjoying good health.
15. In December 2016, she was on leave and out of the country to attend her brother's wedding. She came back into the country in January 2017. The Respondent's assertion that she was not on duty from August – December 2016 is untrue.
16. As at the time she was taking her leave in December, she had the 21 days of annual leave accrued for that year and other unutilized days. The Respondent has a record in regard thereof.
17. The Respondent was given all the Doctor's recommendations at all material times.
18. Contrary to the Respondent's assertion, she did not attend any meeting with them, on 31st January, 2017 and 2nd February 2017 at Eka Hotel. She was so traumatized to attend any meeting at that time, with the Respondent.



19. She wrote a letter on 31st January, 2017 to the Human Resource Manager, inquiring of her safety if she reported back to work. The letter was not responded to, instead the Respondent served her with a termination letter through her phone.

The Respondent's Case

20. The Respondent presented Azwa Zulfikar, to testify on its behalf. The witness presented himself to court as the Respondent's Accountant/Human Resource Manager. She urged the court to adopt her witness statement dated 29th May 2018 as her evidence in chief. She tendered the Respondent's documents filed herein by the Respondent as its documentary evidence.
21. The witness stated that the Claimant was on duty last on 27th January 2017 when she left immediately after reporting duty, on allegations that she had been assaulted by one of the Directors of the Respondent. Thereafter she did not return to work but in mid-February, 2017 she sent to the Respondent an unsigned medical note purportedly from Zam Zam Medical Services dated 31st January 2017 proposing one month sick off. The document did not have the signature of the medical officer. The medical document is different from the one the Claimant placed before this court in evidence.
22. The witness stated that although the Claimant did not avail to the Respondent a medical certificate signed by a qualified medical practitioner, the Respondent allowed her one month off duty, but still after the lapse of the period, she did not resume duty on 1st of March 2017 nor communicate to the company the reasons for her continued absence from duty.
23. The witness stated that on 8th March 2017, she called the Claimant to find out why she had not reported back to work, but instead of explaining why she had not, she complained about her salary for February 2017 not having been paid. She was not ready to resume duty as she could not wish to work with the director who allegedly assaulted her.
24. On the 9th March 2017, the management of the Respondent company decided to terminate her employment on account of desertion of duty. She had failed to resume duty or show up to explain why she should not be dismissed for absconding duty. The termination letter was emailed to her on 14th March 2017.
25. The witness alleged that it came to her knowledge that the Claimant and her son had approached the Director who had allegedly assaulted the Claimant for a settlement and demanded that her monthly salary be increased to KShs. 300,000/-, as a condition for resuming work and withdrawing the allegations against the Director but he declined.
26. The salary for February, 2017 was not paid to her as it was utilized for the unpaid leave the Claimant had taken in December, 2016 for she was paid in anticipation that she was to continue working.
27. The Claimant's refusal to resume work amounted to constructive resignation without notice. She is therefore obligated to pay the Respondent one month's salary in lieu of notice.

The Claimant's submissions

28. The Claimant's Counsel identified three issues for determination in this matter thus;
- a. Whether the summary dismissal of the Claimant was fair.
 - b. Whether the Respondent had a valid reason to terminate the Claimant's employment.
 - c. Whether the Claimant is entitled to the terminal benefits sought in the statement of claim.



29. The Claimant's Counsel submitted that as can be discerned from the summary dismissal letter, the dismissal of the Claimant was on two grounds; that on 23rd February 2017, she gave in a doctor's letter which did not bear a signature as per labour law requirements and that as per the doctor's note she was supposed to report to work on 1st March, 2017, a thing she did not do.
30. Where an employer alleges that the employee's employment was terminated on account of absence of duty without authority or reasonable cause, he must demonstrate the efforts made to contact the latter. The Respondent did not at all demonstrate that there were any efforts that were made. The Claimant's witness only made bald assertions as regards the efforts.
31. Counsel submitted that the law requires that any employer contemplating dismissal of its employee, must adhere to the procedural structures set out under section 41 of the Employment Act. From the material before this court, it is clear that the Respondent failed to demonstrate that the Claimant was subjected to fair procedure before the summary dismissal. Even where termination of employment is by summary dismissal the mandatory procedure under section 41 must be adhered to. To support this submission, reliance was placed on the decision in Shankar Saklani vs. DHL Forwarding Ltd (2012) eKLR.
32. It was further submitted that the Respondent failed to prove that it had a valid reason to terminate the Claimant's employment. The legal burden under Sections 43 and 45 of the Act required this of the Respondent. To support this release was place on the decision on Louis Armstrong Otieno vs. Mediamax Notwork Limited (2016) eKLR.
33. Counsel stated that it is undeniable that the Claimant was assaulted in the course of her employment. That reasonably she could get back to work upon being assured of her safety. Instead of giving the assurance, the Respondent dismissed her summarily.
34. The Respondent admitted that it did not pay the Claimant her salary for February 2017. That however, the same was not paid to her as the same was used to offset an unpaid leave that she took in December 2016. The assertion was not proved at all. The Respondent did not present any documentary evidence to support the same. As a result, the award of KShs.141,337/- sought under the head, unpaid salary for February 2017 should be availed to her.
35. As the Claimant's employment was terminated without notice the Claimant entitled to notice pay, equivalent to 3 month's gross salary.

The Respondent's Submissions

36. Counsel for the Respondent submitted that the issue in controversy is whether the reasons for the termination of the Claimant's employment were justified as required under section 43 of the Employment Act and whether the procedure adopted in arriving at the termination was in conformity with the requirements under section 41 of the Act.
37. Submitting that the Respondent did discharge its duty under section 43 of the Employment Act, Counsel stated that the Claimant did not in her evidence justify her absence from work. However, on its part, the Respondent was able to demonstrate that the termination of her employment was as a result of gross misconduct on her part, continuous absence from duty without justification. The medical documents tendered by the Claimant in evidence do not in any way support her claim that the absence was as a result of her health conditions. The document from Zam Zam Medical Services dated 31-01-2017 was only for purposes of reporting the alleged assault incident to the police.



38. In the circumstances, the Respondent asserted that the reason for terminating the Claimant's services were valid.
39. Addressing the court on procedural fairness, Counsel for the Respondent submitted that the Respondent's intention and reasons, the basis for the intention to terminate the Claimant's employment were communicated to her both verbally and via email. That in particular by an email of 8th March 2017, through the Claimant's son the Respondent indication that it intended to terminate her employment on account of absconding duty. She responded to the email, stating that she was unwell but failed to avail any documentary evidence in support. The Respondent's witness's evidence that she asked the Claimant to attend the Respondent's offices to explain her absence from work was not rebutted.
40. The Claimant was accorded an opportunity to be heard but failed to seize the opportunity. She cannot therefore claim that she was dismissed without being heard.
41. Counsel further submitted that under section 47(5) of the *Employment Act*, the Claimant bore the duty to prove that an unfair termination occurred. By reason of the foregoing premises, the Claimant cannot be said to have discharged the burden.
42. On the reliefs sought, Counsel for the Respondent submitted that the correct salary that the claimant was earning at separation was KShs.136,250/= not KShs.141,337/= as she stated in her pleadings. Further, she cannot be availed the salary for February 2017, as the Respondent had rightly utilized in for the excess leave days that the Claimant took in December 2016.
43. The claim for three (3) months salary in lieu of notice lacks basis. The Respondent had no contractual or statutory obligation to pay the same. The Respondent having demonstrated that the termination of her employment was fair, disentitles the Claimant of the relief sought under this head.
44. Counsel submits that damages are never awardable in employment contract matters and to fortify this submission, placed reliance on the case of Olutu vs. *County Government of Siaya & Another (Employment and Labour Relations Cause E059 of 2021)* (2022) KEELRC 13206 (KLR).
45. Counsel submitted on the counter claim stating that the Claimant did not file any response to the counterclaim. Consequently, the counterclaim should be deemed admitted. Judgment should be entered for the Respondent in the sum of KShs.136,250/=.

Analysis and Determination

46. I have carefully considered the pleadings, the evidence and submissions by the parties and distil the following issues for determination;
 - a. Whether the Claimant's was unfairly dismissed from her employment.
 - b. Whether the Claimant is entitled to the reliefs sought.
 - c. Whether the respondent's counterclaim is merited.
 - d. Who should bear the costs of the suit and counterclaim.

Whether the dismissal of the Claimant from employment was fair

47. Confronted with a dispute concerning whether or not termination of an employee's employment, or dismissal of an employee from employment summarily was fair, the court has to resort to the



comprehensive statutory beacons provided for under the [Employment Act](#), 2007 which speak to substantive and procedural fairness.

48. The two aspects, procedural and substantive fairness, form the total unit for fairness in a termination of employment or summary dismissal of an employee from employment.
49. Section 41 of the [Employment Act](#) provides a procedure that any employer contemplating termination of an employee's employment must adhere to. The procedure entails; the employer notifying the employee of the grounds informing the intention; the employer according the employee an adequate opportunity to prepare and make a representation on the intention and the grounds, the employer allowing the employer to be accompanied by a colleague of his choice or a Trade Union representative during the hearing; and he or she considering the representation made before taking a decision.
50. The onus of proving that the procedure was adhered to is always on the employer. The question that springs up is, did the Respondent demonstrate presence of procedural fairness in the process leading up to the dismissal of the Claimant? For the reasons as could emerge shortly hereafter, no doubt the answer is in the negative.
51. I have carefully analysed the Respondent's witness's evidence, the same does not in any sufficient manner show that the Claimant was at any time informed that the Respondent was intending to dismiss her from her employment and the grounds forming the basis thereof. The Respondent did not show at all that she was invited to a disciplinary hearing and given a chance to defend herself against the allegations.
52. The witness for the Respondent argued that there was a meeting between the Respondent's Director and the Claimant and her son to discuss the assault incident. Sensibly, the meeting cannot be considered a disciplinary hearing meeting contemplated under section 41 of the Act.
53. Counsel for the Respondent submitted that the Respondent through an email, done to the claimant's son, invited the Claimant to render an explanation regarding her continued absence from duty. Two vital questions arise, why did the Respondent decide to send the email through the Claimant's son's address? Did the email correspondence reach the Claimant? This questions were not answered by the evidence of the Respondent. This submission in my view does not aid the Respondent's assertion that there was conformity with the strictures of section 41 of the [Employment Act](#).
54. There is no doubt that the Claimant was dismissed from employment through a letter dated 9th March 2017, which read in part;

RE: SUMMARY DISMISSAL

“You are hereby summarily dismissed under section 44 (4)(a) of the [Employment Act](#);

1. On 23rd February 2017; you brought a doctor's note dated 31st January 2017 which does not have a doctor's signature as per law required.
 2. As per doctor's note you were supposed to report to work on 1st March 2017.
You are in possession of the Kenya Airport Authority Pass and you are supposed to return it to the office.”
55. In my view the grounds as put forth on this letter are too vague to form a basis for dismissal of an employee from employment. In any event, the Respondent's witness testified that notwithstanding the fact that the Doctor's notes were not signed, the Respondent allowed the Claimant to be off duty



to recover. How then can the non-signed Doctor's notes be made a ground for dismissal? It is difficult to fathom.

56. The genesis of the events that led to the dismissal of the Claimant was the alleged assault on her by one of the Director's of the Respondent. The Director did not testify before this court to deny the allegation. The Respondent's witness did not deny the incident. The Claimant testified that on 31st of February, 2017 she wrote the Respondent's Human Resource Manager to ascertain whether it was safe for her to resume duty in light of the assault incident. In my view, the inquiry was reasonably prudent. Instead of responding to the inquiry, the Respondent sent her, a dismissal letter. The Respondent's witness did not deny the assertion regarding the inquiry. I hold it was made.
57. By reason of the premises, I hold that the dismissal was retaliatory, unfair, without equity and justice.
58. In sum, I find that the summary dismissal against the Claimant was both procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought

59. The Claimant sought inter alia, general damages for unfair termination. Section 49 (1)(c) of the [Employment Act](#) bestows upon this court the authority to grant an employee who has successfully challenged the decision of his or her employer to dismiss him or her, a compensatory award in form of damages to a maximum of his or her twelve (12) month's gross salary. However, the exercise of the authority is discretionary. It is often informed by the circumstances of each case.
60. I have carefully considered the fact that; the summary dismissal was retaliatory, therefore unjust and without equity; the Respondent dismissed the Claimant from employment without care of what the law required of it (ensuring procedural and substantive fairness); the unaddressed assault incident; the length of service; and the fact that she did not contribute to the dismissal, and hold that she is entitled to the compensatory award and to the extent of ten (10) months' gross salary.
61. In the circumstances of this matter, and considering the fact that the Respondent did not place any documentary evidence before this court to speak to the leave days that the Claimant pre-utilized, to form the basis of withholding her salary, I come to the conclusion that the respondent did not establish the justification for withholding her salary.
62. The Claimant sought for three months' gross salary. She did not place any evidence before this court that could justify a grant of notice pay beyond that which the [Employment Act](#) provides, one month's salary in lieu of notice. Undeniably, the Claimant's employment was one terminable by twenty-eight days' notice under section 35 of the [Employment Act](#). The notice was not issued. She is entitled to notice pay under section 36 of the Act, one month's salary.
63. The claim for statutory remittances to NSSF or NHIF remained unclear to this court, and unproved. It is declined.
64. A certificate of service contemplated under Section 51 of the [Employment Act](#) is a right to a dismissed employee. The Respondent had an obligation to issue the same to the Claimant.
65. Having found as I have hereinabove that the Claimant did not abscond duty, that she was unfairly dismissed, the Respondent's counterclaim should fail.
66. In the upshot judgment is hereby entered for the Claimant in the following terms:
 - a. A declaration that the summary dismissal against her was unfair.
 - b. The claimant shall be paid;



- i. Withheld salary for February 2017 – KShs.136,250/-
- ii. One month’s salary in lieu of notice - KShs.136,250/-
- c. Compensation for unfair dismissal pursuant to the provisions of section 49(1) (c) of the Employment Act, 10 months gross salary, KShs.1,362,500/-.
- d. Interest on the amount awarded in (b)(i) above, at court rates from the date it fell due, 27th February 2017, till full payment.
- e. Costs of this suit.
- f. The Respondent to issue the Claimant with a Certificate of Service per section 51 of the Employment Act.
- g. The Respondent’s counterclaim is dismissed with costs.

READ, DELIVERED AND SIGNED THIS 26TH DAY OF JULY, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms Nyaga for the Claimant

Mr. Opiny for the Respondent

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.

OCHARO KEBIRA

JUDGE

