



**Wachira v Proshade Kenya Limited (Cause E885 of 2021)
[2024] KEELRC 2055 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2055 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E885 OF 2021
NZIOKI WA MAKAU, J
JULY 23, 2024**

BETWEEN

FAHAD KENNEDY WACHIRA CLAIMANT

AND

PROSHADE KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent seeking damages for wrongful and unfair termination of his employment and payment of his salary and terminal dues. He averred that the Respondent employed him as a Project Designer and Renderer in May 2017 and on or about 30th January 2018, formalised his employment on a fixed term renewable contract for three years, termed as 'Offer for Employment'. He stated that on 1st February 2019 and subsequently on 1st February 2020, his employment contract was renewed on fixed term renewable contracts for three years with effect from the said dates. That he performed his duties exemplarily throughout the years and was subsequently promoted to Lead Designer with a team he was supervising. That additionally, he received a raise in salary from Kshs. 50,000/- from his initial 2018 contract to Kshs. 100,000/-. It was the Claimant's averment that in April 2020, the Respondent issued a directive to all its employees to work from home due to the Covid-19 Pandemic to ensure safety of all its employees. That his employment was then marred by late payment of salary such as his salary for May and June 2020 were paid on 1st July 2020 and 20th August 2020 respectively, while his accrued salary for July and August 2020 was paid on 7th and 26th October 2020 respectively. He asserted that he received a Notice of Suspension on 16th December 2020 for alleged misconduct but which notice did not disclose what he was being accused for. That on 22nd February 2021, he was issued with a Notice of Invitation for a Disciplinary Hearing to be held on 24th February 2021 and despite the short notice, prepared himself for the said hearing. According to the Claimant, the disciplinary hearing held as scheduled was not properly constituted and was marred by unfairness, irregularity and procedural impropriety. He averred that his contract was thereafter terminated on 13th May 2021 effective immediately and his last day of work was 12th June 2021.



2. The Claimant's case was that termination of his employment was unfair, unprocedural and unlawful because the Respondent neither gave him any valid and fair reason for the termination nor explained to him the alleged misconduct. Furthermore, the length of time accorded to him to prepare for the disciplinary hearing was very short and inadequate and that due process leading to the eventual termination was not followed. He also cited the Respondent's failure to pay his terminal dues in lieu of notice. The Claimant further contended that he had never been made familiar with the Respondent's HR Policy before or after signing his employment contracts. He asserted that he was thus entitled to damages of 12 months' salary for wrongful and unfair termination of employment, salaries from September 2020 until April 2021, 13 days worked but unpaid in May 2021, and a declaration that termination of his employment by the Respondent was illegal, unprocedural and unfair. He also prayed for interest on the payments sought at 14% p.a from the date of filing suit and for cost of the suit.
3. In his Witness Statement, the Claimant asserted that at his disciplinary hearing, he was called upon to answer to charges of 'soliciting for work' but when his accuser was contacted, he denied that the Claimant solicited. He further asserted that he was terminated from employment for asking for his pay and that he had suffered mental pain and anguish following the unlawful termination.
4. The Respondent was declined leave to file its Defence out of time and was able to cross-examine the Claimant before the Honourable Court.

Claimant's Submissions

5. The Claimant submitted that section 41 of the [Employment Act](#) has made it mandatory for employees to be subjected to procedural fairness before being terminated. That from the onset, he was just served with notices of Suspension and invitation to the disciplinary that did not particularise the aspect of misconduct he was being asked to answer to. He cited the case of [Sani v JSC](#) (Cause 7 of 2019) [2022] KEELRC 4000 (KLR) (26 September 2022) wherein Radido J. relied on the case of [OH Abantu \(Pty\) Ltd v Commission for Conciliation, Mediation and Arbitration and Ors](#) (2019) 40 ILJ 2477 in which the Labour Appeal Court of South Africa opined as follows:

“One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge or add new charges after the commencement of the hearing, where it would be prejudicial to do so..... It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed.”

6. The Claimant further submitted that the short notice to prepare for a defence or even seek to have a work colleague accompany him for the hearing was against the rules of natural justice and prejudiced and occasioned a miscarriage of justice in violation of his right under Article 50(1) and (2)(a) and (c) of the [Constitution](#) of Kenya. That the disciplinary proceedings were also flawed because only the Director Lemi Mwendar and the Operations Manager Elizabeth Chaghu were present contrary to the persons that had been outlined in the invitation to the disciplinary hearing and which violation undermined the integrity and impartiality of the process. It was the Claimant's submission that the Respondent had failed to discharge the onus of proving that it acted fairly and procedurally in terminating his employment.



7. On substantive fairness, the Claimant cited sections 43(1) and 45(1) of the [Employment Act](#) requiring proof of the reason or reasons for the termination, failure which the termination is deemed unfair. He submitted that therefore in the absence of a reason advanced for termination of his employment, it could only be deduced that termination of his employment was unfair. Regarding the first allegation that he did not meet the work deadlines as given by his superiors, the Claimant fronted that the said allegation was not raised in the Suspension Letter or in the Invitation to a disciplinary hearing or as a reason for the termination of his employment. He noted that his testimony before Court was that when he was not able to meet the work deadlines, which was not often as he received work from various superiors hence had an overload, he communicated the same to his superiors who extended his deadlines. That he had further testified that he never received any warning letter pertaining to such allegations, thus buttressing his averment of exemplary performance. The Claimant further submitted that the second allegation (that he was engaged in other businesses thus a breach of the employment contract) was similarly not previously raised and that his suspension letter and invitation to disciplinary hearing both alluded to misconduct, which allegations were not only vague but also failed to specify the charge to which he was answerable to. That the Respondent did not also produce any evidence before this Court to show that he engaged in any business during business hours as inferred. The Claimant asserted that it is unfathomable that he first heard about the allegations at trial and relied on the case of [Munir Sheikh Ahmed v National Bank of Kenya](#) [2020] eKLR in support of his foregoing submissions that the reason for termination of his employment was not at all established. He maintained that in that regard, his termination of employment was thus unlawful and unfair.
8. It was the Claimant's submission that having demonstrated that the termination of his employment was marred by both procedural and substantive unfairness, he was entitled to damages as pleaded being one month's salary in lieu of notice and 12 months' gross salary as compensation for the financial losses and emotional distress caused by the unlawful termination. He relied on the case of [Kenfreight \(EA\) Limited v Benson K Nguti](#) [2019] eKLR and affirmed the remedies under section 49 of the [Employment Act](#). On the claim for unpaid salaries, the Claimant submitted that the Respondent had claimed in the notice of termination that it had put him on half salary beginning the month of December until his termination, but never at any point issued him with any policy depicting the same. He argued that it could thus be concluded that the same was an arbitrary decision of the Respondent aimed at punishing him by denying him his rightful dues. The Claimant finally prayed that the costs of the suit be borne by the Respondent as costs follow the event.
9. In his Further Submissions, the Claimant posited that as per Exhibit 3, he was offered a one-year term renewable contract starting from 1st February 2020 until 31st January 2021. That despite the effluxion of time of the contract, the Respondent in its Notice of Termination to the Claimant, stipulated that his termination was effective 13th May 2021 and that his last day of work was 12th June 2021. The Claimant argued that this coupled with payment of his salary for the months of February until May 2021, albeit being half of the salary, impliedly renewed his contract. He referred this Court to the definition of an implied contract brought out in the case of [Sherry v Children Transformation Project \(K\)](#) (Cause 439 of 2017) [2022] KEELRC 1429 (KLR). In short, the Claimant's position was that he had established that there was an implied contract at the time of his suspension and ultimate termination of his employment.
10. The Claimant further submitted that it is worth noting that he received the money as listed out in the Notice of Termination after the suit herein was initiated. He however disputes the calculations therein on the ground that there was no policy adduced by the Respondent to show that the employees were entitled to a half month salary during suspensions. He thus submitted that for the months of December 2020; January to April 2021; and June 2021, he was entitled to a full month's salary.



Respondent's Submissions

11. The Respondent submitted that at the time of the termination of the Claimant's employment, he had no contract as it had not been renewed. That he only had 90 days remaining in his contract when he was suspended on 16th December 2020 and that the periods in his contract during which he was suspended were fully paid for at the time of termination of his employment. It further noted that the Claimant's salary arrears were paid in full, which evidence is corroborated by the cross examination of the Claimant. The Respondent relied on the Court of Appeal decision in *Transparency International Kenya v Teresa Carlo Omondi* that a fixed term contract terminates automatically on the termination date, and that parties are bound by the terms of a fixed term contract. Further, that once a fixed-term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period. That in essence, fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry and any claim based after the expiry of the contract cannot be maintained.
12. It was the Respondent's submission that the Claimant was not unprocedurally terminated from employment as claimed. It noted that the Claimant was the subject of disciplinary proceedings and that he admitted cross-examination that he engaged in other businesses to supplement his income or to supplement the lack of payment of his salary, while in the employment of the Respondent. The Respondent argued that the Claimant resultantly fell back on his work, leading to the disciplinary proceedings and that his engagement on other forms of business contravened the Contract and led to termination of the same. It further submitted that the Claimant also admitted in cross-examination to not meeting his work deadlines and to moonlighting while still employed by the Respondent. It referred the Court to two transactions from two different senders in the Claimant's bank statements showing he was involved in other engagements and argued that the said payments coincide with the period when he was not meeting his work deadlines, prior to his suspension. The Respondent thus prayed that the Claim herein be dismissed with costs.
13. The Claimant herein was employed as a designer. Despite the contract not being formally renewed, he continued to offer services to the Respondent after the effluxion of the contract with the Respondent. He was suspended and during his suspension received half pay. The Claimant challenges the payment of half pay during his suspension as the Respondent did not have a policy in regard to payment during suspension. The Claimant was of the view that the deductions were malicious and unlawful. The Claimant was subjected to a disciplinary hearing which he claims was lopsided as the Respondent's CEO was present. The disciplinary meeting held was constituted of two persons who heard the Claimant. The dismissal followed this hearing and other than the assertion by the Claimant that there was bias, none was demonstrated in the suit. The animus with the CEO, if any, needed to be proved. The position of the Court is that there was no basis for finding in his favour and as such the claim as presented has no positive result for the Claimant. Suit is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

