



Njung'e v Jinah t/a Make Over Salon and Supercuts (Constitutional Petition E045 of 2023) [2024] KEELRC 2607 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2607 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E045 OF 2023**

**MN NDUMA, J
OCTOBER 24, 2024**

BETWEEN

CALLEN NJUNG'E PETITIONER

AND

HANIFA JINAH T/A MAKE OVER SALON AND SUPERCUTS . RESPONDENT

JUDGMENT

1. The Petitioner filed the Petition on the 7/3/2023 against the Respondent seeking the following reliefs-
 - i. A declaration that the action of the Respondent to terminate the Petitioner's employment without any prior adequate notice, without an opportunity to be heard and without written reasons for the adverse decision violated the Petitioner's Constitutional right to Fair Administrative Action as provided under Article 47 of the *Constitution* and the *Fair Administrative Action Act*.
 - ii. A declaration that the action of the Respondent to terminate the Petitioner's employment without just cause and by withholding her salary arrears, leave allowance and certificate of service violated the Petitioner's Constitutional right to Fair Labour Practices as provided under Article 41 of the *Constitution* and the *Employment Act*
 - iii. Damages for violation of rights
 - iv. 12 months salary as damages for unfair termination assessed at Kshs 420,000
 - v. Service pay
 - vi. Payment in lieu of 21 days accrued leave days assessed at Kshs 24,500.
 - vii. One month salary in lieu of notice assessed at Kshs 35,000
 - viii. Costs of the suit and interest



2. The Petitioner was employed by the Respondent as a hair stylist and a beautician at his business known as Makeover Hair Salon and Supercuts. The Petitioner worked from the year 2017 until April 2022. That the Petitioner earned Kshs 35,000 per month paid in cash and no taxes, NHIF and NSSF were paid by the Respondent on behalf of the Petitioner
3. By a letter dated 9/4/2022, the Respondent served the Petitioner with a letter of termination of employment on one month notice
4. That the Respondent demanded that the Petitioner sign the termination letter to accept the termination which the Petitioner refused.
5. Three days later on the 12/4/2022, the Respondent served the Petitioner with a new letter of termination with immediate effect because she had refused to sign the letter.
6. The Respondent entered a memorandum of appearance in the matter and filed a replying affidavit. The Respondent says that the termination was done in accordance with fair procedure as evidenced by the termination letter dated 9th April 2022 which served as a notice of termination as required by section 41. That there were various gross misconduct which entailed poor punctuality for no reason, poor working habits and deciding in 2021 to go on leave without approval. She was given opportunity to be heard but decided not to air her grievances.
7. The Parties filed written submissions which the Court have gone through.

Determination

The following are the issues for determination in the case

- a. Whether there was valid reason for the termination of the employment contract
- b. Whether a fair procedure was followed in the termination process.
- c. Whether the Petitioner's rights to fair labour practices under Article 41 and right to fair administrative action under Article 47 of the Constitution have been violated.
8. In Walter Ogal Anuro v Teachers Service Commission 2013 eKLR the court held that;

for termination to pass the fairness test, there must be both substantive justification and procedural fairness and that substantive fairness has got to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.
9. In terms of section 43 of the Employment Act, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.
10. In the Court of Appeal decision in the case of Ken freight (EA) Limited v Benson K. Nguti [2016] eKLR, the Court held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”



11. The Court in *[Galgalo Jarso Jillo v Agricultural Finance Corporation](#)* [2021] eKLR. held 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’
12. The Respondent’s letter of termination dated the 09/04/2022 simply gave the one month notice to terminate the Petitioner’s employment. It was not calling upon the Petitioner to show cause nor was the opportunity to be heard afforded in the letter. The Petitioner was therefore not heard before the decision to terminate her was taken. Without hearing, the reasons said to have led to the termination cannot be said to have been proven. The termination was therefore substantively and procedurally unfair.
13. This was in violation of procedural fairness requirements under section 41 of the *[Employment Act](#)* 2007 and violated the Petitioner’s right to fair labour practices under Article 41 as read with Article 47 of the *[Constitution](#)* on the right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair.
14. The Court in *[Abisalom Ajusa Magomere v Kenya Nut Company Limited](#)* Cause No 2525 stated that;

‘ From the evidence on record, the Respondent did not comply with the procedural fairness requirements set out in section 41 and the Court therefore finds that apart from failing to prove a valid reason for termination of the claimant’s employment, the procedure followed fell below the threshold set out in law. Overall, I have arrived at the conclusion that the termination of the Claimant’s employment was unfair for want of substantive and procedural fairness.
15. The Court therefore makes a finding that the termination of the Petitioner was both procedurally and substantively unfair.
16. This court taking into account the factors listed under section 49 (4) of the *[Employment Act](#)* 2007 including that the petitioner had served for a period of 5 years, the petitioner did not contribute to the termination, was not paid any terminal benefits nor compensated for the unlawful termination and that the petitioner suffered loss and damage due to early loss of employment and means of livelihood, considers 6 months’ salary compensation to be adequate compensation. The Petitioner is therefore awarded 6 months’ salary compensation for the unfair termination assessed at Kshs 210,000
17. The Petitioner was not a member of the National Hospital Security Fund or a registered pension or provident fund scheme under RBA. He is therefore entitled to Service Pay under section 35 (5) of the *[Employment Act](#)* 2007 calculated at 30,000/30 days x 15 x5.4 Kshs 81,000
18. The Petitioner is awarded Kshs 24,500 being payment in lieu of 21 days accrued leave and one month salary in lieu of notice assessed at Kshs 30,000
19. In the final analysis judgment is entered for the Petitioner as against the Respondent as follows;
 - a. A declaration is issued that the action of the Respondent to terminate the Petitioner’s employment without any prior adequate notice, without an opportunity to be heard and without written reasons for the adverse decision violated the Petitioner’s Constitutional right



to Fair Administrative Action as provided under Article 47 of the Constitution and the Fair Administrative Action Act

- b. A declaration is issued that the action of the Respondent to terminate the Petitioner's employment without just cause and withholding her salary arrears, leave allowance and certificate of service violated the Petitioner's Constitutional right to Fair Labour Practices as provided under Article 41 of the Constitution and the Employment Act
- c. An award of 6 months' salary in compensation assessed at Kshs 210,000
- d. Service pay at Kshs 81,000
- e. Payment in lieu of 21 days accrued leave days assessed at Kshs 24,500
- f. One month salary in lieu of notice at Kshs 30,000
Total Award Kshs = 345,500
- g. Costs of the suit are awarded to the Petitioner

DATED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr Kamau for the Petitioner

M/s Korir for the Respondent

Court Assistant Kemboi

