



REPUBLIC OF KENYA



**Njore v Decasa Hotel (Cause 1478 of 2016)
[2024] KEELRC 19 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 19 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1478 OF 2016
JK GAKERI, J
JANUARY 25, 2024**

BETWEEN

WILLIAMSON MOSES NJORE CLAIMANT

AND

DECASA HOTEL RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 28th July, 2016 alleging unfair termination of employment.
2. It is the Claimant's case that he was employed by the Respondent on 1st June, 2015 for a period of six months to offer sales and marketing services at a retainer of kshs.20,000/= and served diligently.
3. That due to his commitment, the Director and General Manager promised to pay him an additional salary of kshs.15,000/= per month, and the Claimant agreed and rendered services for 8 months with any pay.
4. The Claimant avers that the Respondent cancelled the contract of employment by letter dated 8th September, 2015 before its expiry date.
5. The Claimant prays for;
 - a. Terminal benefits comprising;
 - i. August sales commission kshs.37,705.00.
 - ii. Retainer allowance for 5 months kshs.100,000/=.
 - iii. September sales kshs.5,700/=.
 - iv. 8 months supervision @ kshs.15,000/= kshs.120,000/=



Total due kshs.253,013/=

- b. Costs of this suit.
- c. Interest on (a) and (b) above at court rates.
- d. Any other or further relief as the court may deem fit to grant.

Respondent's Case

6. The Respondent admits that the Claimant was its employee as the marketing person and was an average performer.
7. It is the Respondent's case that the Claimant engaged in questionable activities of poaching employees to rival organizations.
8. The Respondent alleges that the Claimant was taken through a hearing.
9. The Respondent admits that it terminated the Claimant's employment and paid his dues including commission.
10. It is the Respondent's case that it did not renew the contract.
11. In his evidence, the Claimant rehashed the contents of the written statement dated 27th July, 2016.
12. The Claimant testified that he was not paid for marketing for the month of September.
13. RWI confirmed that he knew the Claimant as the Respondent's employee and availed a letter by a former employee alleging that the Claimant wanted him to join a rival organization.
14. The witness admitted that he had no evidence of minutes of the hearing.
15. The witness further admitted that the Respondent did not give the Claimant a termination notice and the Claimant had no recorded warning letter.

Claimant's Submissions

16. As to whether the Claimant and the Respondent had a contractual relationship, counsel for the Claimant urged that they had a written agreement signed on 24th June, 2015 as confirmed by RWI.
17. On compensation for unlawful termination of employment, counsel submitted that since the termination of employment was effected without notice, the Claimant was entitled to compensation.
18. Counsel submitted that the Claimant's employment was terminated prematurely.
19. Finally, counsel submitted that the Claimant had a constitutional right to file the claim by virtue of Article 159(2) of the *Constitution* of Kenya, 2010.

Respondent's Submission

20. Counsel submitted that whereas the Claimant's contract of employment provided for a deductible retainer of kshs.20,000/= per month, he had no other contract enhancing his salary.
21. That the notice of termination of employment was duly served and a hearing took place and the Claimant defended himself.
22. That he had not met targets to earn a commission and misconducted himself.



23. Counsel submitted that the Respondent had demonstrated that it had a reason to terminate the Claimant's employment.
24. Reliance was made on the decisions in *Re Waswa's* case (2022) eKLR as well as *Abisalom Ajusa Magomere v Kenya Nut Co Ltd* (2014) and *Noah Sirengo Chelot v Post bank Savings Bank* (2015) eKLR on the burden of proof and urge that the Claimant had failed to prove that his employment was unfairly terminated.
25. Counsel urged the court to dismiss the suit with costs.

Findings and Determination

26. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the relief's sought.
27. It is common ground that the Claimant was an employee of the Respondent from 1st June, 2015 to 8th September, 2015, under a 6 months contract.
28. In determining whether termination of the Claimant's employment was unfair or unlawful, the court is guided by the relevant provisions of the *Employment Act*, 2007 and case law both of which are consistent that for a termination of employment to pass the fairness test, it must be proved that the employer had a valid and fair reason to do so and conducted the termination in accordance with a fair procedure.
29. In other words, it must be shown that the employer had a substantive justification for the termination and conducted it in accordance with a fair procedure as exquisitely captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows.

“ . . . 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. . . ”
30. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR.

Reason for Termination

31. In this case the Respondent admits that it cancelled the Claimant's contract before expiry because the Claimant attempted to recruit staff, one Francis Shimoli for a competitor, an allegation the Claimant did not respond to or deny in his witness statement.
32. An undated handwritten letter allegedly by one Francis Shimoli addressed to the General Manager of the Respondent makes reference to the alleged poaching by the Claimant.
33. In the absence of a response to the Respondent's allegation that the Claimant attempted to poach Francis Shimoli for another employer, the evidence remains uncontroverted and demonstrates that the Respondent had a reason to terminate the Claimant's employment on 8th September, 2015 within the meaning of Sections 43 and 45(2) of the *Employment Act*, 2007.
34. For the foregoing reasons, the court is satisfied that Respondent has proved a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.



Procedure

35. As held in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, Section 41 of the *Employment Act*, 2007 prescribes the mandatory process to be complied with for a termination of employment to pass the procedural fairness test.
36. The section requires the employee to be notified the reason(s) for which termination of employment was being considered in a language the employee understands, entitlement to a representative of his choice or a shop floor representation, hearing and consideration of the representations made by the employee or the representative chosen by the employee.
37. In this case, it is common ground that the Respondent neither issued a notice to show cause nor invite the Claimant for a disciplinary hearing.
38. The Respondent did not avail evidence of having invited the Claimant for a hearing and did not avail minutes of the disciplinary hearing.
39. From the foregoing, it is evident that Respondent has failed to prove that it took the Claimant through a fair termination of process rendering the termination of employment procedurally flawed and thus unfair.
40. On entitlement to the relief's sought, the court proceeds as follows;

i. August Sales Commission

41. The Claimant adduced no evidence of the amount due to him as sales commission for August and how it was arrived at.
The prayer is declined.

ii. Retainer Allowance for 5 months

42. Although RWI testified on cross-examination that the Claimant was paid final dues and he signed for it, he adduced no evidence to prove the alleged payment.
43. Strangely, the Claimant prays for retainer allowance for 5 months yet he served for only 3 months and 8 days and is thus awarded a retainer for 3 months and 8 days unless it was duly paid.

iii. September Sales

44. It is unclear to the court as to what this prayer constitutes. Neither the written statement nor the oral testimony adduced in court make reference to the prayer.
The prayer is declined.

iv. 8 months Supervision kshs.120,000.00

45. Although the Claimant alleged that he had a verbal agreement to offer further services in the department of Food and Beverages at an additional kshs.15,000/= per month, he tendered no credible evidence of the alleged agreement, or rendering of services or payment.
46. Having failed to establish the existence of the alleged agreement or its terms, the claim for "supervision" is unproven and is declined.



v. Compensation

47. Having found that termination of the Claimant's employment by the Respondent was unfair for want of procedural propriety, the Claimant is entitled to compensation under Section 49(1)(c) of the [Employment Act](#), 2007.
48. In determining the quantum of compensation, the court has taken into consideration the following;
- i. The Claimant was an employee of the Respondent for a very short time, 3 months and 8 days.
 - ii. The Claimant did not express his wish to continue in the employment of the Respondent.
 - iii. The Claimant did not appeal the Respondent's decision to terminate his employment.
 - iv. The Claimant had no previous warning.
49. In the circumstances, the court is satisfied that the equivalent of two (2) month's salary is fair, kshs.40,000/=.
50. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;
- a. Retainer for 3 months and 8 days, if not paid.
 - b. Equivalence of 2 months' salary kshs.40,000/=.
 - c. Costs of this suit.
 - d. Interest at court rates from date of judgment till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JANUARY 2024

DR. JACOB GAKERI

JUDGE

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 [Civil 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.

DR. JACOB GAKERI

JUDGE

