



Tiparo v Stephen Macharia t/a Vinky Security Ltd (Employment and Labour Relations Cause 161 of 2018) [2024] KEELRC 428 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 428 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 161 OF 2018
MA ONYANGO, J
FEBRUARY 29, 2024**

BETWEEN

ARCENT TIPARO CLAIMANT

AND

STEPHEN MACHARIA T/A VINKY SECURITY LTD RESPONDENT

JUDGMENT

1. Vide her Memorandum of Claim dated 12th April 2018 and filed in Court on 13th April 2018, the Claimant avers that the Respondent unfairly terminated her employment.
2. The Claimant states that she was employed by the Respondent as a security guard with effect from 15th March 2017 until 31st July 2017 when the Respondent unlawfully terminated her services and refused to pay her dues.
3. The Claimant particularized the unlawfulness of her termination as follows: -
 - a. The Claimant's trade union was not informed of the intention to declare the Claimant redundant
 - b. No leave pay was given
 - c. No one month's salary in lieu of notice was paid
 - d. The required severance pay was not paid.
4. The Claimant therefore sought for judgment against the Respondent for: -
 - a. A declaration that the termination process as carried out by the Respondent is unlawful and that during her employment with the Respondent, she was not remunerated as required by law.



- b. Payment of the sums of money claimed under paragraph 9 of the Memorandum of Claim
 - c. Costs and Interests
 - d. Any other relief the court may deem fit to grant.
5. The Respondent in its Reply to the Memorandum of Claim dated 18th June 2018 and filed in court on even date denied the Claimant's assertions that she was employed by the Respondent. At paragraph 7 of the Statement of Defence, the Respondent averred that the Claimant was put on probation for 6 months starting from 1st May 2017 to November 2017 but on 31st July 2017, the Claimant did not report to work hence the termination was on her own volition.
 6. The Court was urged to dismiss the Claim with costs.
 7. Before the Claim was heard, the Respondent's Counsel on record filed the application dated 12th December 2022 seeking to cease acting for the Respondent on grounds that Counsel did not have instructions.
 8. On 15th March 2023, that application was allowed after the Court was satisfied that both the Respondent and the Claimant's Counsel had been served.
 9. The suit was then set down for hearing on 10th July 2023, when the hearing proceeded ex-parte, the court having confirmed that the Respondent had been properly served. The Claimant testified as CW1 and adopted her witness statement dated 12th April 2018 as her evidence in chief and relied on her bundle of documents filed in court. It was the Claimant's testimony that on 31st July 2017 while at work, she was called to the office by the supervisor who told her that her services had been terminated. The Claimant reiterated the contents of her Memorandum of Claim in her testimony.
 10. The court thereafter directed the parties to file written submissions. The Claimant's submissions were filed on 18th July 2023. The Respondent was served with the Claimant's submissions but did not file any submissions.

The Submissions

11. In her submissions, the Claimant framed the issues for determination as:
 - i. Whether the Claimant was an employee of the Respondent
 - ii. Whether the termination of the Claimant from employment was wrongful, unfair and unlawful in the circumstances
 - iii. Whether the Claimant is entitled to the Reliefs sought and compensation for unlawful, unprocedural and unfair termination from employment
 - iv. Who should bear the costs of this claim?
12. On the first issue, the Claimant submitted that the copy of her work ID filed in court issued by the Respondent confirmed that she was employed by the Respondent. It is further her submission that the Respondent admitted at paragraph 7 of its Statement of Defence that the Claimant was its employee.
13. On the second issue, the Claimant submitted that section 35 of the [Employment Act](#) requires an employer to give notice of termination. That section 45 provides that an employer should give reasons for termination. It is submitted that the Respondent failed to comply with section 35 and 45 of the [Employment Act](#) as it did not issue notice to the Claimant informing her of the reason for her dismissal.



14. In response to the allegation by the Respondent in its defence that the Claimant absconded duty, the Claimant submitted that the Respondent failed to prove to court that the Claimant absconded duty and neither did it adduce any evidence to show that it attempted to contact her. In support of this position, the Claimant relied on the decision in *Joseph Nzioka v Smart Coatings Limited* (2017) eKLR, *Boniface Francis Mwangi v B.O.M Iyego Secondary School* (2019) eKLR.
15. On the issue whether the Claimant is entitled to the reliefs she is seeking, it is submitted that the Claimant has established a case of unlawful termination of employment and is therefore entitled to the reliefs.
16. Lastly on the issue of costs, the Claimant submitted that she had proved her case against the Respondent and urged the Court to condemn the Respondent to pay costs.

Determination

17. From the testimony and submissions of the Claimant the issues that fall for the court's determination are:
 - i. Whether the Claimant was employed by the Respondent;
 - ii. Whether the Claimant was unlawfully and unfairly terminated from employment;
 - iii. What reliefs should issue?

Whether the Claimant was employed by the Respondent

18. The Respondent admitted at paragraph 7 of the Statement of Defence that the Claimant was engaged on probation of 6 months starting from 1st May 2017 to November 2017 but absconded duty on 31st July 2017. The admission is proof of the employment relationship between the Claimant and Respondent.

Whether the Claimant was unlawfully and unfairly terminated from employment

19. The law relating to fair termination is contained in Sections 41, 43 and 45(2) of the *Employment Act*. Before an employer terminates an employee's employment, the employer must not only prove that it has valid reasons for the said termination but must also ensure that the procedure set out in section 41 of the Act is complied with.
20. Section 43 of *Employment Act* 2007 provides inter alia:

“ 43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee



21. The burden of proof in termination of employment is on the employer who is required to prove that the reasons for the termination as valid and the procedure was fair.
22. Section 45(1) of the *Employment Act* provides that:
- “No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -
- a) That the reason or reasons for the termination is valid.
 - b) That the reason for the termination is a fair reason.
 - (i) Related to the employee’s conduct, capacity or compatibility or
 - (ii) Based on the operational requirements of the employer was that the Employment was terminated in accordance with fair procedure”.
23. The Claimant in her testimony stated that her employment was terminated without any reason. The Respondent apart from filing its Statement of Defence did not adduce any evidence in support of assertions made therein. The evidence of the Claimant therefore remains uncontroverted and the Statement in the Defence that the Claimant absconded duty remains as mere allegations.
24. I find that the Claimant has proved that the termination of her employment was without valid or any reason and that there was no compliance with fair procedure. The termination was therefore unlawful and unfair and I declare accordingly.

Whether the Claimant is entitled to the reliefs sought

25. The Claimant in her Memorandum of Claim had sought Kshs. 236,000.116 as terminal dues comprising 1 month’s pay in lieu of notice, pro rata leave, unpaid balance of salary, overtime, house allowance, under payment and 12 months’ compensation for unlawful termination.

a. One-month pay in lieu notice

Having found that the termination of the Claimant’s employment was unfair, she is entitled to pay in lieu of notice. I therefore award her the same at Kshs 13,715.36 being the minimum wage applicable at the time inclusive of 15% house allowance as per sections 48 of the *Labour Institutions Act* as read with section 26 and 49(1) of the *Employment Act*.

b. Pro rata leave

From the evidence on record, the Claimant worked for the Respondent for only 4 months. She is therefore entitled to leave at 1.75 days for each month worked as provided in section 28(1)(b) of the *Employment Act*. I award him 7 days leave which translates to Kshs. 3,211.

c. Overtime

The Claimant was employed as a security guard. Her evidence that she worked from 6.30 am to 5.30 pm was not controverted. It is common ground that the court takes judicial notice of that security guards work on shifts of 12 hours between 6am and 6 pm or 6 pm and 6 am. The Claimant is thus entitled to overtime pay. Having worked from 1st May to 30th July 2017 with 4 rest days every month, the Claimant is entitled to overtime of 3.5 hours per day for 13 days in march and 26 days for 4 months from April to July 2017. This works out to 409 hours. The statutory minimum wage for municipalities



at the material time was for day guards was Kshs. 11,926. At the rate of 1/225 of basic minimum wage per hour payable at 1.5 times the hourly rate, I award the Claimant Kshs. 32,518 as overtime.

d. House allowance

Section 31(1) of the *Employment Act*, 2007, provides that an employer should either provides an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. Under the Regulation of Wages Orders, house allowance is 15% of statutory minimum rate of pay. Based on the statutory minimum wage of Kshs. 11,926 per month, I award the Claimant Kshs. 1,788.9 per month for 4.5 months being Kshs. 8050.05 as house allowance.

e. Underpayment

The Respondent in both its defence and in the Witness Statement of Patrick Kisiero, its Manager, as well as the bundle of documents stated that the Claimant was paid a salary of Kshs. 5300 per month. By virtue of section 26 of the *Employment Act* as read with section 48 of the *Labour Institutions Act* she is entitled to the minimum wage of 11926. Having been paid Kshs. 5300 as pleaded by the Respondent, I award the Claimant the difference of Kshs. 6,626 for the 4.5 months worked being Kshs. 29,817.

f. 12 months' compensation

The Claimant sought maximum compensation for the unlawful termination. Considering that the Claimant had only served the Respondent for 4 months, I am of the opinion that 2 months' compensation would be reasonable taking into account all the relevant factors under section 49(4) of the *Employment Act*. I award the Claimant 2 months' compensation being Kshs. 23,852 (11,926 x 2).

26. Consequently, Judgment is entered in favor of the Claimant in the following terms:-

- a. A declaration be and is hereby made that the termination of the Claimant's employment by the Respondent was unlawful and unfair.
- b. The Claimant is awarded payment of her dues as follows:
 - i. One month notice in lieu Kshs. 13,716
 - ii. Pro rata leave Kshs. 3,211
 - iii. Overtime Kshs. 32,518
 - iv. House allowance Kshs. 8,050.05
 - v. Underpayment Kshs. 29,817
 - vi. 2 month's compensation
 - vii. for unfair termination Kshs 23,852.80Total..... ..Kshs. 111,164.05

27. The Claimant is awarded costs and interest which shall accrue at Court rates from the date of Judgment until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE

