



**Timase v Karen Country Club (Cause 1485 of 2018)
[2024] KEELRC 344 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 344 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1485 OF 2018
JK GAKERI, J
FEBRUARY 26, 2024**

BETWEEN

EVA ROBI TIMASE CLAIMANT

AND

KAREN COUNTRY CLUB RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 31st October, 2018 alleging unfair termination of employment.
2. The Claimant prays for;
 - i. A declaration that termination of employment by the Respondent was unfair.
 - ii. Sum of Kshs.1,502,268/= equivalent of 12 months income based on the last remuneration.
 - iii. General damages for unfair and unlawful termination of employment.
 - iv. Any other remedy as this court may deem just and expedient in the circumstances of this case.
 - v. Costs.

Claimant's case

3. The Claimant avers that she joined the Respondent on 1st January, 2013 as a massage and beauty therapist on a one year contract expiring on 31st December, 2013 and the contract was renewed consistently until 8th June, 2018 when her employment was terminated.
4. The Claimant avers that her salary was commission based initially at 50% of all fees paid by clients attended to after deducting costs of consumables incurred by the employer but subsequently the employer introduced some specific rates of remuneration.



5. The Claimant asserts that she served the Respondent with dedication and passion until 31st May, 2018 when she was summoned to the Assistant Human Resource Manager's Office and given a suspension letter for 7 days allegedly for being involved in fraud against the Respondent and required to show cause why disciplinary action should not be taken against her and she responded but when she resumed duty on 8th June, 2018, she was given a summary dismissal letter.
6. The Claimant faults the termination of her employment on the ground that she was not accorded an opportunity to be heard and her response to the show cause letter was not considered.
7. That the 1st ground of termination of employment was a new issue that had not been brought to her attention.
8. The Claimant denies having committed any fraud.

Respondent's case

9. It is the Respondent's case that the Claimant was engaged under service contracts payable on commission basis for the services rendered in a month.
10. It is the Respondent's case that on or about 12th February, 2016, the Claimant signed a contract of employment with the Respondent remuneration was dependent on the number of services rendered to the Respondent's clients and the contract was renewed twice with the last due to expire on 31st December, 2018.
11. That towards the end of May, the Respondent received complaints from its clients for having been charged for services that had not been provided by the Claimant or charged for services other than those rendered, a suspected case of falsification of records for more commission as evidenced by increase in the premium services offered by the Claimant.
12. That the Respondent conducted investigations which showed that the Claimant had falsified records, was invited for a disciplinary meeting on 8th June, 2018, was heard and subsequently terminated from employment.
13. It is the Respondent's case that the Claimant was not an employee as remuneration varied from month to month, did not pay income tax and other statutory deductions were not made, paid VAT and was thus not entitled to compensation for unfair termination of employment.
14. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

15. On cross-examination, the Claimant confirmed that she was not paid anything after termination of employment but the salary for May 2018.
16. That the entitlements mentioned in the termination letter were not paid.
17. The witness confirmed that she received a notice to show cause and attended a disciplinary hearing.
18. It was her testimony that payment for the services rendered were monthly.
19. That it was a contract commission paid for monthly dependent on the work done and VAT was deducted and no other statutory deductions were made.



20. On re-examination, the witness testified that the Respondent gave her an employment contract and she provided a passport size photograph, copy of identity card, certificate of good conduct, Pin certificate and the NHIF and NSSF cards.
21. It was her testimony that when she delivered the response to the notice to show cause, there was a meeting she was unaware of and those present were the Human Resource Manager, Assistant Human Resource Manager, the Gymkana Manager, the Claimant and another lady.
22. That she had not been informed of her rights.

Respondent's evidence

23. RWI confirmed that he was the Sports Manager of the Respondent and knew the Claimant and they worked in the same department.
24. It was his testimony that the Claimant was dismissed for misrepresentation of the services rendered to clients after some members of the club raised issues and Mr. Ian Mbuthia was one of them.
25. RWI testified that Mr. Ian Mbuthia was not invited during the hearing and the invoices were produced at the hearing.
26. The witness confirmed that he was not present at the hearing.
27. Finally, RWII testified that the Claimant was paid her terminal dues though he had no supportive evidence of payment.

Claimant's submissions

28. Counsel addressed three issues.
29. As to whether termination of the Claimant's employment was unfair, counsel submitted that in cases of alleged unfair dismissal or termination, the law requires the employer to prove the reason for termination and fair procedure.
30. Reliance was placed on the sentiments of the court in *Muthaiga Country Club V Kudheihia Workers* (2017) eKLR as well as the provisions of Section 43(1), 45(2) and 47(5) of the *Employment Act, 2007*.
31. On substantive justification, counsel quoted the sentiments of the court in *Evans Kamadi Misango V Barclays Bank of Kenya Ltd* (2015) eKLR and *John Jaoko Othino V Inter Health International* (2022) eKLR to reinforce his submission.
32. Counsel submitted that the allegation that the Claimant used the clients' products was not part of the notice to show cause and only came up at the hearing and the Claimant had not addressed it.
33. On falsification of records, counsel argued that Claimant was unequivocal in her response to the notice to show cause that she offered premium services and had challenged the Respondent to invite Mr. Ian Mbuthia to explain his complaint and the Respondent adduced no evidence that Mr. Ian Mbuthia denied having had the services alleged.
34. Counsel invited the court to find that the Respondent had failed to prove that it had a reason to terminate the Claimant's employment.
35. As regards the reliefs sought, counsel submitted that the court had discretion to award various remedies including damages and relied on the sentiments of the Supreme Court of Kenya in *Kenfreight (EA) Ltd*



V Benson K. Nguti (2019) eKLR to urge the court to award the Claimant the sum of Kshs.1,502,268/ = being 12 months compensation for unfair termination of employment.

Respondent's submissions

36. By 30th January, 2024 when the court retired to prepare this judgement, the Respondent had not filed submissions.

Findings and determination

37. The issues for determination are;

- i. Whether the Claimant was an employee of the Respondent or a consultant.
- ii. Depending on the answer to (i) above –
Whether termination of the Claimant's employment was unfair.
- iii. Whether the Claimant is entitled to the reliefs sought.

38. As to whether the Claimant was an employee or not, the Claimant pleaded, testified and submitted that she was an employee of the Respondent, paid on a monthly basis for the services rendered as agreed upon in a written agreement.

39. On his part, the Respondent's witness admitted in his written statement that the Claimant signed an employment contract with the Respondent and her salary was commission based paid monthly.

40. Section 2 of the *Employment Act*, 2007 provides that employee means a person employed for wages or a salary and includes an apprentice and indentured learner.

41. Similarly, Section 2 defines a contract of service as;

“an agreement whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies.”

42. In this case, it is common ground that the Claimant and the Respondent had a written agreement from 1st January, 2013 to 31st December, 2013 which was continuously renewed until termination of the relationship.

43. Copies of the four (4) contracts on record show that while some are identified as service contracts or fixed service contract, the first and the last on record 2013 and 2016 describe the agreement as an “Employment Contract”.

44. The Claimant was engaged as a Massage and Beauty Therapist for a duration of one (1) year reporting to the Gymkhana Manager, remuneration was on commission basis per month less consumables used during the month and the required statutory deductions.

45. The Claimant would work for 6 days a week according to the Respondent's shift schedule and had one (1) day off and could be required to work on other days or hours.

46. The Respondent offered meals at its cafeteria and meal break was one (1) hour.

47. The contract was terminable by a 15 days notice or salary in lieu of notice.



48. The contract required the Claimant to avail two passport size photographs, copies of the national identity card, certificate of good conduct, Pin certificate, NSSF and NHIF cards, failing which the contract would be invalid.
49. Similarly, the Claimant had a job description.
50. Finally, the agreement was explicit that the Claimant was not eligible for any fringe benefits or retirement programs offered by the Respondent.
51. A panoramic view of the documents availed by the Respondent leave no doubt that the Respondent regarded the Claimant as its employee.
52. Evidently, the Respondent had control over the Claimant's work day and week, facilitated her in her work, remunerated her and she was reporting to the Gymkhana Manager and enjoyed meals at the Respondent's staff cafeteria.
53. Relatedly, the Spa was an integral part of the Respondent's establishment as a private members club.
54. The Respondent's documentary and oral evidence of having issued a notice to show cause, to the Claimant, her attendance of the disciplinary hearing and notice of termination of contract are consistent with the existence of an employment relationship between the parties.
55. Finally, the letter of termination of the contract dated 8th June, 2018 identifies the Claimant's entitlement as leave dues earned but not utilized, if any and certificate of service.
56. The Claimant testified that she was only paid the salary for May 2018, evidence the Respondent did not controvert.
57. From the foregoing and based on the evidence on record, it is the finding of the court that the Claimant was an employee of the Respondent within the meaning of Section 2 of the *Employment Act*, 2007.
58. As to whether termination of the Claimant's employment was unfair, the homeport are the sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, which buttress the provisions of Section 41, 43, 44, 45(2) and 47(5) of the *Employment Act*, 2007 where the learned judge expressed herself 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 . . .”
59. Under Section 45(2) of the *Employment Act*, 2007, a fair termination of employment requires a valid and fair reason related to the employee's conduct, capacity or compatibility or the operational requirements of the employer and a fair procedure.
60. As correctly submitted by the Claimant's counsel, in cases of alleged unfair termination of employment, the law places an onerous duty on the employer to demonstrate that it had not only a valid and fair reason to terminate the employee's employment but also that it conducted it in accordance with a fair procedure.

Reason for termination

61. By its suspension letter dated 31st May, 2018, the Respondent accused the Claimant of suspicious entries on her monthly beauty and therapy tabulations.



62. The letter promised further investigations and the Claimant's response by 8th June, 2018 on which date the Claimant handed in a response of even date.
63. In her response, the Claimant denied the charge and challenged the Respondent to contact the client on the issue of falsification of records.
64. The Claimant expressed her disappointment with the Respondent on the premise that she had rendered excellent services but was being victimized.
65. In an email from Phaniel Yonge to Millie Wanjala dated 8th June, 2018, Phaniel discloses that their sampling of the club membership revealed that one Mr. Sebastian Mwarania stated that he had done facial but with another employee not the Claimant and Mr. Kibe had not done it yet both were billed by the Claimant.
66. According to Phaniel, the Claimant was diverting massage revenue to facial so as to earn more.
67. That whereas the ladies sampled stated that they did facial once or twice a month, most men were emphatic that they had not done it yet one appeared to have been doing it every other day and in some cases back to back.
68. That the Claimant had conducted a facial to a client in the Respondent's towel store with no proper bed, facial machine or hot water yet the same were available at the spa.
69. In the termination letter dated 8th June, 2018, the Claimant was accused of non-disclosure of use of clients' products without authorization from the Head of Department or the Respondent.
70. The second charge was fraudulent entries on the Claimant's monthly sales tabulation.
71. The Respondent relied on the provisions of Section 44(4)(g) of the Employment Act, 2007 to summarily dismiss the Claimant but accorded her a 15 days notice.
72. During the hearing, when asked about some clients having been billed for facial yet they had not done it, such as Mr. Kibe, the Claimant did not respond but stated that some clients preferred doing facial treatments on a daily basis.
73. The Claimant admitted having used clients' products when they requested her to do so on the premise that she could not decline so as to keep the client.
74. In the case of Mr. Mbuthia, the Claimant explained what she did on him from 14th May, 2018 to 31st May, 2018 and members of the committee appear to have been convinced.
75. However, the question of members being billed for services they had not received remained unanswered.
76. As to why the Claimant had conducted a massage in the towel room, the Claimant stated that the clients had no problem with it.
77. Section 43(2) of the Employment Act, 2007 provides that;

“The reason or reasons for termination of contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
78. This provision requires the employer to demonstrate that it had a reasonable basis for the belief that it had a reason(s) to terminate the employee's employment.



79. The foregoing comports with the sentiments of the Court of Appeal in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR, as follows;
- “The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant’s services. That is a partly subjective test.”
80. Finally, the foregoing resonates with the sentiments of Lord Denning MR in *British Leyland (UK) Ltd V Swift* (1981) I.R.L.R 91 on the range or band of reasonableness test as follows;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view . . .”
81. In the instant cases, the Respondent’s suspicion that the Claimant may have falsified records so as to earn more commission was vindicated in at least 2 cases of Mr. Kibe and Mr. Murarana who records reveal were billed but had not done facials on the alleged date or at all.
82. The case of Mr. Ian Mbuthia was unique as he appears to have been doing facials continuously and having complained, he ought to have been invited either before or during the hearing to substantiate his allegations and respond to the Claimant’s questions, if any.
83. In sum, the court is satisfied that the Respondent had a reasonable basis to suspect that the Claimant falsified records in respect of some clients for extra commissions for the services allegedly rendered and thus had a substantive justification for terminating the Claimant’s employment.

Procedure

84. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, Section 41 of the *Employment Act*, 2007 prescribes a mandatory procedure to be complied with before terminating an employee’s employment and several decisions of this court and the Court of Appeal have endeavoured to itemise the elements or essentials of Section 41 of the Act. (See *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR.)
85. The Claimant faults the procedure employed by the Respondent in that;
- i. one of the grounds of termination had not been brought to her attention for a response
 - ii. she was not invited for the disciplinary hearing slated for 8th June, 2018 and
 - iii. her rights were not explained and as an addendum, the disciplinary process was never concluded.
86. On the first ground, it is evident that the first ground of dismissal had not been brought to the Claimant’s attention for rebuttal. The notice to show cause made no reference to it.
87. One of basis tenets of the principles of natural justice and in particular fair hearing is that the accused person must be made aware of all the charges levelled against him or her so as to prepare to respond to them.



88. Introduction of a new ground of termination of employment in the termination letter runs contra to the right to fair hearing as it is tantamount to condemning the employee unheard.
89. There is sufficient judicial authority from this court for the proposition that an employee's employment cannot be terminated on a reason or ground not previously brought to his or her attention for rebuttal.
90. In sum, the alleged non-disclosure, in the court's view could not be a ground for termination of the Claimant's employment.
91. On invitation to attend the disciplinary hearing, the Respondent tendered no evidence of an invitation letter or any indication that it had notified the Claimant.
92. The Respondent scheduled the hearing on the date the Claimant was to report back after the seven (7) days suspension but did not inform her to enable her prepare for the hearing.
93. It requires no belabouring that invitation to a disciplinary hearing is a critical component of the right to fair hearing. The notice recapitulates the charges or makes reference to the notice to show cause or other document which contains the charges as communicated to the employee. Similarly, the notice forewarns the employee of the charges he/she has to confront at the hearing.
94. Relatedly and equally significant, the notice informs the employee his right to adduce evidence at the hearing including the right to call witnesses and be accompanied by a colleague of his/her choice or the shop floor representative.
95. Finally, the notice informs the employee the date, time and venue of the hearing.
96. The minutes of the meeting make reference to an invitation letter or the notice to show cause.
97. In this case, it is discernible that the Respondent ambushed the Claimant with a disciplinary hearing on the day she reported back to work after the suspension.
98. In the court's view, the fact that the Respondent did not invite the Claimant for the disciplinary hearing slated for 8th June, 2018 rendered the hearing irregular.
99. Finally, the penultimate page of the minutes of the disciplinary hearing signed by three members of the panel state that the meeting was adjourned to await further communication after discussions between the H.O.D (representative) and union representatives.
100. The minutes make no reference to the continuation of the hearing or when the discussions envisaged would take place.
101. Equally, for unexplained reasons, the Claimant did not sign the minutes and the rest signed them on 9th June, 2018, one day after the Claimant's summary dismissal.
102. From the records, it is unclear to the court as to when the decision to terminate the Claimant's employment was arrived at as she was given the letter of dismissal on the same day.
103. From the foregoing, it is surmisable that the Respondent did not comply with the provisions of Section 41 of the Employment Act, 2007 for the termination of the Claimant's employment to pass the procedural fairness test.
104. The process was patently irregular and does not meet the threshold of procedural fairness.
105. In sum, it is the finding of the court that termination of the Claimant's employment was unfair for want of procedural propriety.



106. On the reliefs sought, the court proceeds as follows;

Declaration

107. Having found that termination of the Claimant's employment by the Respondent was unfair for want of procedural fairness, a declaration to that effect is merited.

General damages for unfair and unlawful termination of employment

108. The Claimant tendered neither evidence nor legal justification for the award of general damages for the unfair termination of employment.

109. Significantly, neither the provisions of Section 49(5) of the [Employment Act](#) nor Section 12(3) of the [Employment and Labour Relations Court Act, 2011](#) confer upon this court jurisdiction to award general damages for unfair or unlawful termination of an employment contract.

The prayer is dismissed.

Compensation for unfair termination

110. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act, 2007](#).

111. In determining the quantum of compensation, the court has considered that;

- i. The Claimant was an employee of the Respondent for a duration of about 5 years and 11 months which is not a long time.
- ii. The Claimant did not appeal the Respondent's decision to the Board of directors of the Respondent or express her wish to continue in the Respondent's employment.
- iii. The Claimant substantially contributed to the termination of employment by engaging in unprofessional conduct.
- iv. The Claimant had no recorded case of misconduct or discipline and served the Respondent diligently.

112. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair.

113. The salary shall be the average of the last three payments the Claimant received as salary from the Respondent.

114. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant's employment was unfair.
- b. Equivalent of 3 months' salary.
- c. Costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 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

