



**Yahuma v Jianxi Water Limited (Cause 768 of 2018)
[2024] KEELRC 329 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 329 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 768 OF 2018
K OCHARO, J
FEBRUARY 23, 2024**

BETWEEN

VICTOR OCHIENG YAHUMA CLAIMANT

AND

JIANXI WATER LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit vide a Statement of Claim dated 15th March 2018 seeking: -
 - a. A declaration that the Claimant's dismissal was unfair, unlawful and wrongful.
 - b. Terminal benefits and compensatory damages as expounded in paragraph 13.
 - c. Certificate of Service.
 - d. Interest on (b) and (c) above.
 - e. Costs of the suit.
 - f. Any other relief that this Honourable Court may deem fit to grant.
2. Alongside the Statement of Claim dated 15th March 2018, the Claimant filed a Verifying Affidavit sworn on 15th March 2018; Claimant's List of Witnesses dated 15th March 2018; Claimant's Statement dated 15th March 2018; and Claimant's List of Documents dated 15th March 2018.
3. Neither did the Respondent enter appearance nor file a defence in this matter.
4. The matter proceeded for formal proof on 30th May 2023 with the Claimant testifying as CW1.



5. Although this Court directed the Claimant to file written submissions following the conclusion of the formal proof hearing on 30th May 2023, the Claimant failed to do so.

Claimant's case

6. The Claimant's case is that he was employed by the Respondent as a Mason on 1st March 2016. He was, however, never issued a written contract of employment. Despite performing his duties impeccably, the Claimant was summarily dismissed by the Respondent on 3rd November 2017. The circumstances of the dismissal were that the Claimant requested safety gloves for himself and his colleagues after they were instructed to offload large heavy bricks from a truck since he feared that the bricks would bruise him and his colleagues. The Respondent's agent took offence at the Claimant's request and ordered him to leave the premises and never return. During the period of his employment, the Claimant earned but unutilized his leave days as the Respondent didn't allow him to.
7. It is averred by the Claimant that the reason for terminating his employment was unfair and invalid. How the termination was effected was also unfair, unlawful and wrongful. He was not accorded an opportunity to defend himself before the termination. He was also not issued with a notice to show cause why he should not be terminated from employment; he was not given one month's notice of termination; and he was not paid his terminal dues.
8. Despite visiting the labour department to have the issue resolved, the Respondent refused to show up, forcing the Claimant to approach this Court for reprieve. The Claimant avers that the unlawful termination of his employment has gravely affected his economic circumstances as he solely depended on the earnings from the employment for survival. At the time of filing suit, he had not managed to obtain alternative employment.

Analysis and Determination

9. I have reviewed the Claimant's pleadings, and oral and documentary evidence, and return that the issues for determination are as follows: -
- a. Whether the Respondent unfairly terminated the Claimant's employment;
 - b. Whether the Claimant should be awarded the terminal dues sought in his Statement of Claim dated 15th March 2018.

a. Whether the Respondent unfairly terminated the Claimant's employment

10. Preliminarily, I am obliged to state clearly that regardless of the Respondent's failure to enter appearance and/or file a defence, this Court must examine the Claimant's evidence to assess whether it establishes his claim to the requisite standards. This was expressed in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR where the Court held that: -

- “ 15. I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its c too upon a balance of probability whether the evidence in unchallenged or not.



In *Kanyungu Njogu v Daniel Kimani Maingi* (2000) eKLR it was held that:

“ when a court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that probability was more probable than the other.”

11. In the instant case, this Court must interrogate whether the Claimant has proved that there existed an employer-employee relationship between him and the Respondent; whether he has proved that he was terminated from employment; and whether he has proved that the termination was unfair. This burden of proof is imposed on the Claimant by Section 47 (5) of the *Employment Act* 2007 which provides that: -

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

12. On whether the Claimant has proved that he was employed by the Respondent, I rely on the NSSF Statement, and Bank Statements from National Bank presented in evidence by the Claimant. Clearly, they bring forth the Respondent as the employer of the Claimant. Further, the Court notes that from the NSSF statement, the monthly NSSF contributions run from March 2016 to October 2017, except August 2017. Similarly, the Bank Statements dated 30th November 2017, covering the period between 1st April 2016 to 1st December 2017, indicate that the Claimant was paid a monthly salary by the Respondent of between Kshs 11,000/- and Kshs 25,000/- from April 2016 until November 2017. This is consistent with the Claimant’s pleadings. As such, I return that the Claimant has indeed discharged his burden of proof concerning the existence of an employer-employee relationship between him and the Respondent.

13. On whether his employment was terminated, this Court notes that the salary payments appear to have stopped in November 2017, with the last payment from the Respondent per the Bank Statements being made on 29th November 2017, when the Respondent paid the Claimant Kshs 16,024/-. On the NSSF Statement, the last contribution made is for October 2017. I am satisfied that this is ample proof that the Claimant and Respondent separated in November 2017, as claimed by the Claimant herein.

14. On whether the Claimant has proved that the termination of his employment was unfair, the Claimant states that he was summarily dismissed orally on 3rd November 2017. The reason for the dismissal was his demand for safety gloves. The demand aimed at ensuring his safety and those of his colleagues. His evidence as regards how and why he was dismissed from employment was uncontroverted.

15. Section 44 of the *Employment Act* 2007 provides for summary dismissal. It states that:

“ 44. Summary dismissal

- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with



less notice than that to which the employee is entitled by any statutory provision or contractual term.

- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by her conduct indicated that she has fundamentally breached her obligations arising under the contract of service.
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
 - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of her work;
 - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform her work properly;
 - (c) an employee willfully neglects to perform any work which it was her duty to perform, or if she carelessly and improperly performs any work which from its nature it was her duty, under her contract, to have performed carefully and properly;
 - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to her employer or to a person placed in authority over him by her employer;
 - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of her duty to obey, issued by her employer or a person placed in authority over him by her employer;
 - (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
 - (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the



substantial detriment of her employer or her employer's property.”

16. There is no doubt in my mind that the Claimant was summarily dismissed from his employment. The same was effective immediately, without the statutory notice contemplated under section 35 of the *Employment Act*. The Claimant asserted that in the circumstances of the matter, the reason for the dismissal cannot be held to be valid and fair. Further, the dismissal was procedurally unfair.
17. Section 45(2) provides for what constitutes unfair termination as follows: -
- “ (2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”
18. As can be garnered from the above, and from Section 43 of the *Employment Act* 2007, the legal burden to prove the reason[s] for termination, and the validity and fairness of the reason lies on the employer. A further burden is bestowed on the employer by section 41 of the *Employment Act* to prove that fair procedure was employed in the termination. This is the two-prong test for unfair termination. The test was applied in the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where the Court held that:
- “ For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
19. In this case, it is not difficult to conclude that the Respondent didn't discharge the legal burdens above stated. Legal burdens are discharged through the production of evidence. Where a party charged with the responsibility of discharging the burden of proving a fact[s], does not place any evidence before a trial Court, seldom can he be held to have discharged a burden of proof not unless there is an admission by the adversary or the Court has taken judicial notice of the fact.
20. Having not tendered any evidence before this Court, I hold that the Respondent did not prove; the reasons for the dismissal [section 43]; that the reasons were fair and valid [section 45] and; that the cannons of procedural fairness [section 41] were adhered to.
21. A demand for safety gear by an employee cannot be gross misconduct under the provisions of section 44[4] to attract the sanction for summary dismissal.
22. By reason of the foregoing premises, I conclude the Claimant was summarily dismissed from his employment unfairly.



Whether the Claimant should be awarded the terminal dues contained in his Statement of Claim.

23. Having held that the Claimant was indeed unfairly terminated, I now consider the matter of the terminal dues that he is entitled to.
24. The Claimant seeks one month's salary in lieu of notice (Kshs 16,640/-); payment for untaken leave (Kshs 13,440/-); and compensation for unfair termination equivalent to 12 months gross pay.
25. The Claimant's employment was terminable by a twenty-eight days' notice as provided for under Section 35 of (1) (c) of the *Employment Act* 2007. Herein above I have found that he was summarily dismissed from employment without notice. As a result, this Court is driven to grant him notice pay pursuant to the provisions of section 36 of the *Employment Act*. Therefore, Kshs 16,640.
26. An employee's entitlement to annual leave is protected under Section 28 of the *Employment Act* 2007, which provides;

“ Annual leave

- (1) An employee shall be entitled—
 - (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;
 - (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.
- (2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under sub-section (1)(a) into different parts to be taken at different intervals.
- (3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.
- (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.
- (5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.”



27. In the absence of evidence by the employer showing that the Claimant did indeed utilize his leave days, or that he was compensated for earned but unutilized leave days, I find and hold that the Claimant is entitled to leave pay as prayed.
28. I now turn to the prayer for compensation for unfair termination. Under Section 49 (1) (c) of the *Employment Act* 2007, this Court is bestowed with the authority to grant a compensatory relief to the full extent of twelve [12] months' gross salary or wages of the Claimant employee. However, the authority is discretionary and dependent on the circumstances of each case. So whether the grant of the relief shall be to the full extent of the twelve of the twelve months' pay or part thereof or nothing at all, will normally be attracted by the peculiar circumstances of the case.
29. Considering how the Claimant was terminated from employment. The casual disregard for the law by the Respondent, caring not of the procedural and substantive fairness precepts, the reason for the termination which in my view was oppressive and retaliatory, that the Claimant did not cause or contribute to his termination, and his length of service, being roughly 1 year 8 months, I award the Claimant 3 months gross salary as compensation. The Claimant pleads that his daily wage was Kshs 640/- (amounting to Kshs 16,640/- monthly) and has produced documentary evidence showing that this wage was paid monthly. This evidence remains uncontroverted by the Respondent.
30. It is trite law that per Section 51 of the *Employment Act* 2007, the Claimant should be issued with a Certificate of Service.
31. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the Claimant's dismissal was unfair, unlawful and wrongful.
 - b. The Claimant be paid the following terminal dues: -
 - i. Payment for earned but unutilized leave days tabulated at Kshs 13,440/-.
 - ii. Compensation for unfair termination, tabulated at Kshs 49,920/- (Kshs 16,640/- x 3 months)
 - iii. One month's salary in lieu of notice, Kshs 16,640.
 - c. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
 - d. Interest on (b) above at Court rates from the date of judgment until payment in full.
 - e. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 23RD DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Ms. Wandia for Mr. Kagunda for Claimant

No appearance for Respondent

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 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.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA
JUDGE

