



**Wantahe v St Paul’s Catholic University Chapel (Cause 2192 of 2015)
[2024] KEELRC 238 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 238 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2192 OF 2015
NZIOKI WA MAKAU, J
FEBRUARY 14, 2024**

BETWEEN

BABERE ISAAC WANTAHE CLAIMANT

AND

ST PAUL’S CATHOLIC UNIVERSITY CHAPEL RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent on 9th December 2015 claiming wrongful and unfair termination of his services and the Respondent’s refusal to pay him terminal dues. He averred that his claim included monthly salary for June 2013, one month’s pay in lieu of notice, public holiday allowance, leave allowance, travelling allowance, and service pay all amounting to Kshs. 103,013/-. He further averred that for the 1½ years that he worked for the Respondent Church, he was in charge of 20 guards every Sunday of the week for both day and night shifts.
2. In response, the Respondent filed a Statement of Response dated 24th May 2021 wherein it denied unlawfully terminating the Claimant’s employment contract whether expressly and/or constructively. It averred that the relationship, if any, that existed between the Claimant and the Respondent entailed the provision of security services and was not an employment as alleged by the Claimant or at all. The Respondent’s case was that the Claimant absconded, deserted and/or abandoned the discharge of his duty to provide security services to the Respondent’s premises and purported to unprocedurally terminate the same, effectively forcing it to engage alternative sources for the said services. It further averred that the Claimant created disharmony among other workers, which issue he had been advised and warned against severally but in vain. Moreover, the Claimant unprofessionally engaged a stranger to work as a night guard on his behalf while disguising that it was him without the knowledge and authority of the Father/Chaplain in Charge of the Respondent, thus causing security risks at the Respondent premises.



3. According to the Respondent, the Claimant's conduct amounts to gross misconduct warranting termination of his services and that if therefore there was any termination, the same was done lawfully. It denied owing the Claimant any money as pleaded in his claim or at all, maintaining that it paid all his dues as at the time he absconded duty and that there was thus no sustainable claim against the Respondent. It further refuted ever denying the Claimant a chance to be heard and averred that it accorded him sufficient opportunity to be heard thereby discharging its mandate as required by both the law and the rules of natural justice. The Respondent prayed that the Claimant's Memorandum of Claim be dismissed with costs to the Respondent.
4. The Respondent also filed a Witness Statement made by Father Kanja P. Wachira, who stated that the Claimant was employed as a Night Security Guard from 1st January 2012 and whose duties were to ensure general security at the Respondent's premises. He asserted that as the Father in charge of the Chapel, his responsibilities included being the overall supervisor of the Church's employees and other service providers, meaning he had the authority to recruit employees and also terminate their services. Father Kanja confirmed having recruited the Claimant and the Claimant having worked for the Respondent for 1½ years as a night guard. He denied the assertion that the Claimant was in charge of other guards and averred that the Claimant never worked during day time since the guards providing security services at the premises during the day were assigned by a security firm they had engaged. Father Kanja further stated that within the period that the Claimant worked for the Respondent, he had verbally warned the Claimant against sleeping during working hours, creating disharmony among his co-workers and engaging other persons to work as night guards without the knowledge of the Father in Charge.
5. Father Kanja asserted that the Respondent issued the Claimant with a notice and hearing before terminating his services and that it also complied with all the procedural aspects of termination of employment as required by law. He asserted that the Claimant was informed of the reasons for his termination both verbally and through the notice of termination and denied that the Respondent unlawfully terminated the Claimant's employment. He further denied that the Claimant worked overtime and on Sundays without any pay and stated that the Claimant duly applied for leave during the period he worked for the Respondent and the same was granted. He notified the Court that the Claimant was paid for the month he had worked and one month's salary in lieu of notice.
6. The Respondent also filed a Supplementary Witness Statement made by its Caretaker, Mr. Leonard Njau on 16th June 2023. Mr. Njau stated that he also witnessed the Claimant sleeping while at work and that he was with Father Kanja on the night they caught the Claimant sleeping. He asserted that he was assigned to oversee the premises before the Respondent could get the Claimant's replacement after his services were terminated.
7. Evidence
The Claimant testified that he was paid Kshs. 12,904/- every month and that he worked from Monday to Saturday and rested on Sunday. He noted that the Respondent was to pay him in cash for the off day and testified that when he fell ill, they told him that he was not needed and dismissed him. He asserted that he had never been called to a disciplinary hearing and was simply told to go to the Respondent's advocate to collect his dues. Under cross-examination, the Claimant pointed out that he had brought to Court the letter showing he was supervising the guards he was in charge of and evidence of his attendance at the Respondent's premises and having worked for 54 days. He stated that they wrote to him on 4th June 2013 terminating his services and recounted that he also worked on Sundays as overtime and did not therefore rest. He further stated that he did not sign any letter to show he was paid and maintained that he did not receive any pay.



8. The Court closed the Defence Case after they failed to appear in court for hearing.
9. Claimant's Submissions

According to the Claimant, the issues arising for this Court's determination are as follows:

 - a. Whether the Claimant was an employee of the Respondent;
 - b. Whether the Claimant's service was unlawfully and unfairly terminated by the Respondent?
 - c. Whether the Claimant is entitled to the reliefs sought?
 - d. Who should bear costs of the suit?
10. The Claimant submitted that where there is denial of employment, the courts are obliged to first determine whether one was an employee and whether there was an employer-employee relationship. He cited section 2 of the *Employment Act* that defines an "employee" as a person employed for wages or a salary and submitted that in his case, the Respondent failed to issue him with a contract of service or itemized statement of pay contrary to the provisions of the *Employment Act*. That the Leave Form and Termination Letter he produced in court establish an irrefutable nexus between him and Respondent and serve as unequivocal proof of his employment. In addition, the evidence that his employment was between 1st January 2012 to 4th June 2013 was uncontroverted and unchallenged. The Claimant thus urged this Court to return a finding that he was an employee of the Respondent.
11. It was the Claimant's submission that having been dismissed on account of alleged misconduct, his suit is under the purview of section 41 of the *Employment Act*. That in the case of Kenya Union Of Commercial Food & Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR (Cause No. 74 of 2013), the Court held that whatever reason(s) arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act* both in a case for termination as well as in summary dismissal. The Claimant further cited the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR in which the Court of Appeal held that the employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); and prove that the grounds are justified (section 47(5)) amongst other provisions and that a mandatory and elaborate process should then be set up under section 41 requiring notification and hearing before termination. He also relied on the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR in which the Court stated that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.
12. On substantive justification, the Claimant submitted that the reasons outlined by the Respondent in the Termination Letter dated 4th June 2013 were never corroborated by evidence before this Court as contemplated by section 43 of the *Employment Act*. That as such, the said reasons cannot be deemed to be valid reasons contemplated under section 45 of the Act. That this Court has therefore been left to its own devices to determine whether or not these events occurred and whether they are meritorious, which the Claimant submitted are fictitious and should not be considered by the Court. It was the Claimant's submission that in light of the foregoing, the Respondent had failed to prove that the reasons for terminating his employment were valid and lawful.
13. As regards procedural fairness, the Claimant submitted that no evidence was tendered before this Court to establish that any show cause letter or notice of disciplinary hearing was given prior to the termination of his employment. That despite being accused of various misconducts by the Respondent, the mandatory procedural guidelines set out in section 41 of the *Employment Act* were contravened as the Respondent did not hear and consider any representation he may have had for the



alleged gross misconduct. He asserted that he had demonstrated that the Respondent did not subject him to a disciplinary hearing and submitted that a reading of his Appeal Letter dated 5th June 2013 reveals that he denied the allegations made against him and ought to have been heard on the same. That the Respondent on the other hand did not produce any written minutes to establish that it subjected him to a disciplinary hearing. The Claimant further submitted that whereas the Respondent alleged that he absconded duty, it failed to prove that it tried to trace him and or give him reasonable notice of its consideration to terminate his services on the grounds of desertion. Furthermore, that there is no evidence that his desertion was ever reported to the labour office nearest to where he worked. It was the Claimant's submission that it follows therefore that his dismissal without being heard and given justifiable reasons for termination amounted to unfair termination.

14. The Claimant submitted that pursuant to section 74 of the *Employment Act*, the Respondent is obliged to keep all records pertaining his employment and to produce such records whenever there is an employment dispute. That however in the instant case, the Respondent did not adduce any cheque or bank statements to establish that it paid the Claimant his terminal dues and that it also did not call any witness to corroborate payment of the Claimant's terminal dues, including leave pay, overtime, public holiday allowance, and travelling allowance. He asserted that he is entitled to notice pay as provided under section 35(1)(c) of the *Employment Act* having demonstrated that he was dismissed without notice yet there was no just cause to warrant the dismissal. He further submitted that he is entitled to 12 months' salary compensation as under section 49(1)(c) of the Act pursuant to the unlawful termination of employment. On the issue of unpaid service pay, he noted that section 35(5) of the Act provides that an employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. He submitted that the Respondent having not adduced any evidence to demonstrate that it paid statutory dues into his NSSF or that it enrolled him to any registered pension or provident fund scheme, he is entitled to service pay for the 1½ years he worked. It was the Claimant's submission that since costs follow the event, the Court should award costs to the Claimant.

15. Respondent's Submissions

The Respondent submitted that the law regarding summary dismissal is expressed under section 44 of the *Employment Act*. That the Claimant having been dismissed without notice for reasons of gross misconduct, it exercised its discretion under section 44(3) of the Act and dismissed him, given his conduct fundamentally breached his obligations arising from his work. It asserted that the reasons given in the Termination Letter are also indicated at section 44(4) of the Act as amounting to gross misconduct that justifies summary dismissal of an employee. In this regard, the Respondent relied on the holding of the Court in the case of *Phoebv Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR para 39. The Respondent urged this Court to find that it was just and equitable for the Claimant's employment to be terminated.

16. The Respondent maintained that the Claimant was paid Kshs. 20,000/-, including monthly pay and notice pay, for which he acknowledged receipt as shown in the Respondent's documents and that he was thus not entitled to the same. That in light of section 47(5) of the *Employment Act*, it had fully and satisfactorily justified the grounds for dismissing the Claimant's employment to the required standard and threshold. That the Claimant, on his part, had failed to prove that his termination was unfair and should thus not be entitled to the reliefs sought. For overtime allowance, it submitted that the Claimant had not laid sufficient evidentiary basis to warrant the grant of the said prayer given that the time/day logs he presented were scanty and did not cover the entire period he was in employment. It was the Respondent's submission that public holiday allowance is not provided for under statute and that in any case, the Claimant had not laid sufficient evidentiary basis to warrant the grant of the said prayer



and the logs in court did not include public holidays. It submitted that a written agreement must exist for a claim on travelling allowance to be allowed and in the absence of such evidence in this case, the prayer should be disallowed.

17. The Respondent concluded that the Claimant had failed demonstrate his case on a balance of probability that the decision to terminate his employment fell below the expected substantive fairness. It relied on the case of *John Kisaka Masoni v Nzoia Sugar Co. Limited* [2016] eKLR and urged this Court to be guided by the same in dismissing the Claimant's claim in its entirety with costs.
18. The Claimant was an employee of the Respondent. The Respondent admitted as much since it averred the Claimant provided night guard services at its premises. This can be contrasted against the Respondent's averment that there was a security guard company contracted to provide day time guard services. There is a marked difference between the employment of the guards that guarded the premises during the daytime hours and the Claimant's services. I find the Claimant was hired as an employee directly by the Respondent and was not an independent contractor as the Respondent would want us to believe. The Respondent was an employer in terms of section 2 of the *Employment Act* and is estopped from denying the relationship between it and the Claimant.
19. The Claimant avers he was dismissed without due regard to the dictates of natural justice as well as the provisions of section 41 of the *Employment Act*. The Claimant avers he was told not to report to work. The Respondent's case was that the Claimant absconded, deserted and/or abandoned the discharge of his duty to provide security services to the Respondent's premises. It was asserted the Claimant thus unprocedurally terminated provision of his services, forcing the Respondent to seek alternatives. It further averred that the Claimant created disharmony among other workers, which issue he had been severally advised and warned against albeit in vain. The Respondent asserts the Claimant also unprofessionally engaged a stranger to work as a night guard on his behalf while disguising that it was him without the consent or knowledge and/or authority of the Father/Chaplain in Charge of the Respondent. The Respondent asserts this caused security risks at the Respondent premises.
20. It seems therefore, the Claimant was accused of engaging in misconduct at the Respondent's premises. As such, given the provisions of section 41 of the *Employment Act*, the Claimant was entitled to a hearing. Other than saying that the Claimant was afforded a hearing, there was no evidence tendered to dislodge the Claimant's assertions that he was unfairly terminated. The Respondent had a burden under section 43 to demonstrate that there was cause for the termination – the justification matrix under the law. This was not discharged and as such, an inference is drawn there was unfairness in the manner of termination. The Respondent was required to demonstrate the termination was justified. An employer has that burden and the Respondent woefully did not discharge it.
21. The Claimant sought salary for June 2013, one month's pay in lieu of notice, public holiday allowance, leave allowance, travelling allowance, and service pay all amounting to Kshs. 103,013/-. At no point did the Claimant demonstrate that he had sought payment of the holiday allowance, leave which was subsequently denied or travelling allowance to warrant an award for the same. The Claimant as employee had a burden to discharge – that he had valid claims presented to the employer who failed to meet them. The Claimant did not give any note showing his leave requests. As such he would not recover since there is no evidence that he sought for leave and the same denied by the Respondent. The Claimant had attached as proof of claim, some handwritten notes on supervision of guards on Sunday yet in his pleadings he indicated he had a day off each week. These are not in keeping with his claim and they are of doubtful provenance. The Court accordingly will not pay much regard to them as they seem to have been manufactured for the purposes of this case. The Claimant asserts he was not paid for his services in June. If he worked for some days in June or the entire month of June he would be entitled to pay. He however sent an appeal letter on 5th June 2013 after termination on



4th June 2013. He cannot claim salary for June as he worked for only 4 days in the month. In addition, the Respondent did actually pay the Claimant for the days worked as well as a month's salary in lieu of notice. The Claimant is only entitled to recover the following from the Respondent – service pay calculated at 15 days for each completed year of service as well as 3 month's pay as compensation for the unlawful termination of service. The Claimant earned Kshs. 12,941/- a month which means he would get Kshs. 6,470.50 as service pay for the 1½ years he worked for the Respondent. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 6,470.50 being service pay
- b. Kshs. 38,823/- being 3 month's salary as compensation
- c. Costs of the suit.
- d. Certificate of service in terms of section 51 of the *Employment Act*.
- e. Interest on the sums in (a) and (b) above at court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

