



Bishar & 3 others v World Assembly of Muslim Youth (WAMY) EA & 3 others (Employment and Labour Relations Cause E002 of 2023) [2024] KEELRC 206 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 206 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E002 OF 2023
ON MAKAU, J
FEBRUARY 9, 2024**

BETWEEN

**BONAYA OSMAN BISHAR 1ST CLAIMANT
BONAYA OSMAN BISHAR 2ND CLAIMANT
DIBA H HUSSEIN 3RD CLAIMANT
DIBA H HUSSEIN 4TH CLAIMANT**

AND

**WORLD ASSEMBLY OF MUSLIM YOUTH (WAMY) EA 1ST RESPONDENT
YOUTH(WAMY) E.A 2ND RESPONDENT
WAMY CHILDREN HOME-ISIOLO 3RD RESPONDENT
WAMY CHILDREN HOME-ISIOLO 4TH RESPONDENT**

JUDGMENT

1. The Claimants were employed by the respondents as night watchmen in the years 2007 and 2013 respectively. Their monthly salary was Kshs. 6000/=, and it was remitted by the 1st Respondent to their bank accounts. It is the Claimants case that they served the 2nd Respondent with no complaints of indiscipline or misconduct, until 4th August 2021 when their services were terminated. As a result, they filed the Memorandum of Claim dated 9th February 2023 seeking the following reliefs:
 - a. Termination letters be struck out of the file and be declared null and void;
 - b. A declaration that the Claimants’ dismissal was wrongful, unlawful, unfair and unprocedural and the Claimants be compensated as per section 49 of the Employment Act 2007.



- c. The Claimants be paid their withheld salaries for the months of May, June, July and August 2021;
 - d. The Claimants be paid their terminal dues for the years worked as follows:
 - i. 1-month notice
 - ii. Service gratuity
 - iii. House allowance
 - iv. Underpayment of wages
 - e. Certificate of service
2. The Respondents failed to enter appearance or file Response to the Claim and thus the matter proceeded by way of formal proof on 12th June 2023 and thereafter the Claimant filed submissions in the matter.

Factual background

3. The claimants supported the Claim with written statements and a bundle of documents. In brief, the Claimants' case is that the 2nd Respondent's manager accused them of theft of food stocks and as a result, they were arrested on 18th May 2021 and thereafter arraigned in criminal court. On 25th May 2021, they were released on bond and reported to work but the 2nd respondent's manager informed them to wait until the criminal case was completed.
4. The claimants then reported the same to their union on 1st July 2021 and it wrote to the 2nd Respondent manager requesting for the Claimants' May and June salaries since they were on suspension pending the determination of their criminal case. The demand was ignored and instead they 2nd respondent's manager called them on 6th August 2021 to collect termination letters. Since they were illiterate, they declined to collect the letters and sent the union to collect for them on 16th August 2021.
5. The Claimants averred that the Respondent framed the allegation of theft with the intention of terminating their services to avoid payment of their salaries before the determination of their case. They averred that despite demanding for payment of salaries for the months of May, June, July and August, the Respondents refused to pay save for half salary for the month of May which the Union rejected.
6. As a result of the above matters, the Union reported the dispute to the Labour Office on 29th September 2021 and a conciliator was appointed on 8th December 2021. A meeting was convened on 19th January 2022 where the 2nd Respondent's manager attended but no settlement was reached prompting this suit.
7. The claimants contended that their dismissal was unfair and unlawful because the reason for the dismissal was their agitation for a better pay which did not go down well with the 2nd respondent's manager. Further they were not accorded a hearing before the termination. Consequently, they prayed for the reliefs sought in their memorandum of claim.

Claimants' submissions

8. The Claimants filed submissions dated 14th June 2023. In brief, they submitted that the termination of their employment was unlawful, unfair and unjustified as the Respondents didn't adhere to section 41 (1) and 43 of the Employment Act. They maintained that they were not accorded disciplinary hearing and the reasons for the termination were not valid and hence the termination was unfair within the



meaning of section 45 of the Act. For emphasis reliance was placed on the case of Pius Munguti Charo v Board of Management Mirithu Secondary School [2021] eKLR.

9. The claimants further submitted that the respondent violated Regulation 23 (2) of Regulation of Wages (Protective Security Services) Order (the Regulations) which provides for a period of suspension of only two months with half pay plus house allowance in full pending investigations of the commission of the offence.
10. On the basis of the above breaches, the Claimants submitted that they were entitled to relief sought. They cited the case of Emmanuel Simiyu v Board of Management Sipala Fym Primary School [2019] eKLR to fortify their arguments.
11. They specifically prayed for one-month notice pay since they were not given notice of termination. They further prayed for 12 months' salary compensation since having worked for the Respondent for a long time. To support this submission, they relied on the case of Pius Munguti supra.
12. In further submission, the Claimants relied on the provision of the Regulations of wages (General) Order, 2018 to argue that the payment of Kshs. 6,000/= was below the minimum wages of Kshs. 8,636.30, which was exclusive of housing. They urged the Court to award them the difference of the wages from the date the Regulations came to effect. Finally, they submitted that they were entitled to service gratuity as they had worked for the Respondents for over 5 years.

Issues for analysis and determination

13. Having considered the pleadings, the evidence and the submissions on record, the following issues fall for determination:
 - a. Whether the Claimants' termination was wrongful, unfair and unprocedural; and
 - b. Whether the Claimants are entitled to the reliefs sought.

Unfair and unlawful termination

14. The Claimants' case has not been controverted. There is no denial that they were dismissed from service by the employer for alleged theft. The respondents never contested the claimants' evidence that the termination was done without taking them through a disciplinary hearing. Further, the respondent did not adduce any evidence to substantiate the alleged theft after the claimants denied the offence.
15. In determining whether or not, the dismissal was unfair, I am guided by Section 45 (1) & (2) of the Employment Act which provides as follows:

” (1) No employer shall terminate the employment of an employee unfairly.

(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 employee's 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.”
16. This provision precludes an employer from terminating an employee's employment arbitrary and without observing due process. It codifies the rules of natural justice which is now anchored firmly in



our Constitution under Article 47. Consequently, for a termination of employment to meet the legal threshold of fairness, it must be grounded on a valid reason and a fair procedure followed.

17. As regards the reason for termination, sections 43(1), 45(2) and 47(5) of the Act lays the burden of proof upon the employer in the following mandatory terms:

“43(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.”

“47(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 the employment or wrongful dismissal shall rest on the employer.”

18. The Courts have been consistent in enforcing the above provisions of the law. An example is the *George Musamali versus G4S Security Services Kenya Ltd* [2016] eKLR where the court stated that:

“14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the Employment Act or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

19. The termination letters on the other hand cited the reason for termination as follows:

“Due to the theft incidence which occurred at the centre while you were on duty on 16 May 2021 and disappearance of food stock from the store and your vanishing without reporting the incidence, coupled with your disrespectful behaviour, the management has decided to terminate your services with immediate effect.”

20. It is apparent from the above excerpt of the letter that the Claimants were not taken through any disciplinary procedure before the termination. Section 41 of the Employment Act provides that: -

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”



21. The only reference that was made was to the Claimants' behaviour and their failure to report the alleged incident. Consequently, I find that the Respondents never followed a fair procedure before terminating the services of the Claimants and as such the termination was unfair within the meaning of section 45 of the Act.

Reliefs sought

22. The Claimants prayed for their salary for the months of May, June July and August 2020 when they were on suspension and based their argument on Clause 23 (2) of the Wage Regulations. The said Regulation provides for the conditions under which an employee in the sector may be suspended. It is a requirement that the employee be paid half pay with full housing pending investigation and upon being found innocent paid the remaining half. The mere fact that the Claimants were suspended from May to August, without any pay by itself is in contravention of the legal requirement and amounts to unfair labour practices.
23. The claimants further prayed for salary in lieu of notice plus compensation for unfair termination and I agree since the termination was unfair contrary to section 45 of the Employment Act. Considering their long service and the fact that no misconduct was proved against them, I award each claimant 6 months' salary compensation for the unfair termination.
24. They are further awarded house allowance of 15% of the basic pay since they were neither housed nor paid housing allowance. The claim for gratuity is declined since the employer remitted contributions to NSSF and as such the claimants are disqualified from double benefit under section 35(6) of the Employment Act.
25. The claim for Certificate of Service is granted as prayed by dint of section 51 of the Act.

Conclusion

26. On the basis of the reasons highlighted above I enter judgement for each Claimant in the following terms:
- i. Kshs. 34,545.20 being 4 months' salary for the months of May, June, July and August to be paid in full;
 - ii. One-month's salary as payment in lieu of notice;
 - iii. Kshs. 51,817.80 being an equivalent of six months' pay as compensation for unfair termination;
 - iv. Kshs. 73,816.40 being compensation for underpayment for 28 months;
 - v. Housing allowance at the rate of 15% of the basic pay.
 - vi. Costs of this suit plus interest at court rates from date of this judgement.
 - vii. The award is subject to statutory deductions. They will also have Certificate of Service.

DATED, SIGNED AND RECTIFIED AT NYERI THIS 16TH DAY OF FEBRUARY, 2024.

ONESMUS N MAKAU

JUDGE

Order



This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

