



**Mutua v Kenwan Services Limited (Cause 1979 of 2016)
[2024] KEELRC 213 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 213 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1979 OF 2016
SC RUTTO, J
FEBRUARY 9, 2024**

BETWEEN

RODGERS MULONZYA MUTUA CLAIMANT

AND

KENWAN SERVICES LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim filed on 26th September 2016, the Claimant avers that he was employed by the Respondent with effect from 7th February 2013 as a technician. It is the Claimant's case that he was unlawfully and unfairly dismissed from employment hence seeks against the Respondent the sum of Kshs 578,666/= being one month's salary in lieu of notice, unpaid public holidays and compensatory damages.
2. The Respondent countered the Claim through its Response to Claim dated 10th May 2022, in which it has denied the Claimant's assertions and put him to strict proof. According to the Respondent, the Claimant absconded duty and never reported back to the workshop. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.
3. The matter proceeded for hearing on 15th June 2022, during which both sides called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and for starters, he sought to adopt the Memorandum of Claim, his Witness Statement and all the documents filed on his behalf to constitute his evidence in chief.
5. It was the Claimant's evidence that on 26th October 2015, he was called by the Logistics Manager by the name Mr. Mukami who informed him that he was to travel to a site in Lodwar. He (Claimant)



requested the said Manager to organize for his travel funds in advance to enable him prepare for the journey.

6. He received the money to travel to Lodwar on 27th October 2015 at about 10:30 pm. Since the money was remitted to him late, he had no option but to travel the following day on 28th October 2015. On the said day, he received a call from Mr. Mukami inquiring whether he had travelled to Lodwar. He (Claimant) told him that since he received the money late, he was making arrangements to travel on the evening of 28th October 2015.
7. That soon thereafter, he was called by the Company's CEO, Mr. Kungu who informed him that since he did not travel to Lodwar, his services were no longer required. He averred that he was never issued with a notice by the Respondent of the intention to terminate his employment.
8. According to the Claimant, the Respondent's action to summarily dismiss him from employment was unfair and unlawful in that he had done nothing wrong to warrant being summarily dismissed from employment, was never issued with a notice to show cause before he was dismissed and no hearing took place before the decision to dismiss him was arrived at.

Respondent's case

9. The Respondent called oral evidence through its Director, Mr. Eliud Kungu who testified as RW1. It was his evidence that if at all the Claimant received the money, he should have proceeded to Lodwar. RW1 told the Court that the Claimant took the money on Saturday and went with a coworker by the name Raphael and never reported back.
10. It is worth mentioning at this juncture that RW1 sought leave to call an additional witness by the name Mr. Makumi on the basis that the Claimant was dealing with him. Despite being granted leave, the Respondent failed to present the said witness. As a matter of fact, he did not file a witness statement in respect of the said intended witness, as directed by the Court. Subsequently, on 16th October 2023, the trial was marked as closed and parties were directed to file written submissions.

Submissions

11. It was submitted on behalf of the Claimant that the Respondent's Managing Director was not the person who dealt with the Claimant on a day to day basis and has no idea what time the travel funds were given to him. It was further submitted that the Claimant was never given an opportunity to defend himself before the verbal dismissal.
12. On the Respondent's part, it was submitted that the Claimant without a valid reason, cause or permission, intentionally opted to abandon his work commitments. It was further submitted that the Claimant has raised flimsy excuses to explain his abandonment and has not even demonstrated that he made any effort to inform the Respondent of the same prior to his dismissal.
13. It was further submitted that the Claimant has misdirected this Court that he was verbally dismissed yet he is in possession of a summary dismissal letter dated 23rd September 2015 clearly outlining the reason for his dismissal as lying that he was unwell yet he had taken up work from the Respondent's clients and failed to report the same to the Respondent and kept the payment of the same remitting none of it to the Respondent yet he masqueraded as working on its behalf.

Analysis and determination

14. Flowing from the pleadings on record, the evidentiary material placed before me as well as the opposing submissions, it is apparent that this Court is being called to resolve the following questions: -



- a. Whether the Claimant's termination was unfair and unlawful;
- b. Is the Claimant entitled to the reliefs sought?

Whether the Claimant's termination was unfair and unlawful

15. Section 45(2) of the *Employment Act*, qualifies a termination of employment by an employer 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. Fundamentally, an employer ought to prove that an employee's termination was fair substantively and procedurally. Substantive fairness which is also addressed under Section 43 of the *Act*, relates to the reasons for which the employee's employment was terminated while procedural fairness has to do with the procedure applied in effecting the employee's employment.
17. I will start by considering substantive fairness.
18. For starters, I find it worth pointing out that none of the parties herein exhibited the Claimant's letter of termination before the Court. Therefore, the reasons leading to the severance of the employment relationship cannot be ascertained therefrom.
19. From the record, both parties have taken different positions with respect to the reasons leading to the separation. Whereas the Claimant avers that he was verbally terminated by the Respondent's Director after he failed to travel to Lodwar on 26th October 2015, the Respondent on the other hand contends that the Claimant absconded duty.
20. According to the Claimant, he failed to travel to Lodwar as required since he received the funds he was to utilize for his journey on 27th October 2015 at about 10:30 pm. He averred that this was late hence he had to travel the following day being 28th October 2015. That it is on the said date that he was called by the Respondent's Director and informed that since he was not in Lodwar, his services were no longer required.
21. Notably, the Respondent did not refute the Claimant's assertions by way of evidence, that the funds were sent in good time and that it is the Claimant who absconded duty instead of travelling to Lodwar.
22. Indeed, during cross-examination, RW1, testified that he was not sure when the Logistics Manager sent the money to the Claimant hence the reason he sought the court's leave to have the said Manager testify.
23. Revisiting the provisions of Section 45(2) (a) and (b) of the *Employment Act*, the burden of proof lay on the Respondent to prove the reasons for the Claimant's termination and that the same was fair, valid and related to his conduct, capacity or compatibility.
24. Essentially, the Respondent was bound to establish that indeed, the Claimant absconded work and that it took reasonable steps to establish his whereabouts.
25. In any event, absence from work without permission constitutes one of the grounds for summary dismissal under Section 44(4) (a) of the *Employment Act*. Hence, if indeed the Claimant was absent



- from work without permission, why didn't the Respondent exercise this option under the [Employment Act](#) and put him on notice that his employment was bound to be terminated if he failed to show cause why he absconded work?
26. The bottom line is that it was not sufficient for the Respondent to allege that the Claimant absconded duty without proving the said absence or demonstrating the steps it had undertaken to ascertain his whereabouts.
 27. The total sum of my consideration is that the Respondent has failed to prove that the Claimant absconded duty hence his termination from employment was substantively unfair.
 28. On the question of procedural fairness, the Respondent was required to prove that it complied with the requirements of a fair process. Pursuant to Section 41 of the [Employment Act](#), the Respondent was required to notify the Claimant of the intended termination in a language he understands and in the presence of another employee.
 29. It is also notable that during cross-examination, RW1 testified that after the Claimant absconded duty, he used to pass by to check some generators belonging to some customers. Therefore, if RW1's version is correct, it follows that he had an opportunity to ask the Claimant to show cause why his services should not be terminated for absconding duty.
 30. By law, it was incumbent upon the Respondent to notify the Claimant of the intended termination, the reasons thereof and accord him an opportunity to defend himself. From the record, there is no evidence that the Respondent complied with the requirements under Section 41 of the [Employment Act](#).
 31. In the circumstances, I arrive at the inescapable conclusion that the Claimant's termination from employment was procedurally unfair hence unlawful.
 32. In view of the foregoing, I cannot help but find that the termination of the Claimant's employment was neither fair nor lawful for want of compliance with Sections 41, 43 and 45 of the [Employment Act](#).

Reliefs

33. As the Court has found that the Claimant's termination was substantively and procedurally unfair, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to five (5) months of his gross salary. This award further takes into consideration the length of the employment relationship as well as the circumstances surrounding the Claimant's termination from employment.
34. The claim for unpaid public holidays is declined for want of proof.

Orders

35. Against this background, I enter Judgment in favour of the Claimant against the Respondent in the following manner: -
 - a. A declaration that the Claimant's dismissal from employment was unfair and unlawful.
 - b. The Claimant is awarded the sum of Kshs 40,000.00 being one (1) month's salary in lieu of notice.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 200,000.00 being equivalent to five (5) months of his gross salary.
 - d. The total award is Kshs 240,000.00.



- e. Interest shall apply to the amount in (d) at court rates from the date of Judgment until payment in full.
- f. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant No appearance

For the Respondent No appearance

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

