



Lenaipa v Namunyak Wildlife Conservation Ltd (Employment and Labour Relations Cause E029 of 2021) [2024] KEELRC 542 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 542 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E029 OF 2021**

ON MAKAU, J

MARCH 8, 2024

BETWEEN

MOSES LENAIPA CLAIMANT

AND

NAMUNYAK WILDLIFE CONSERVATION LTD RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent at Reteti Elephant Sanctuary based in Ngilai Unit, under a contract of five (5) years that was to run from 1st August 2018 to 31st July 2023. He started at a salary of Kshs. 220,000/=, working as a Sanctuary Manager. His services were terminated by a letter dated 10th July 2021 which never cited any reason for termination. He was also not accorded any hearing before the termination. He was aggrieved by the respondent's decision, and approached this Court vide his Statement of Claim dated 20th September 2021 accusing the employer of unfair termination of his contract of employment. The suit seeks for judgement against the Respondent as follows:
 - a. A Declaratory Order that the Claimant's contract of employment was unfairly and wrongfully terminated.
 - b. 3 month's salary in lieu of notice ... $3 \times 269,975 =$ Kshs. 809,925/=.
 - c. Payment of salary for days worked in the month of July 2021 ... $8,999 \times 9 =$ Kshs. 80,991/=.
 - d. Unpaid leave days ... $8,999 \times 25 =$ Kshs. 224,975/=.
 - e. 12 months salary as compensation for the unfair dismissal and or termination ... $Kshs. 269,975 \times 12 =$ Kshs. 3,239,700/=.
 - f. Severance pay.
 - g. An order that the Claimant is entitled to a Certificate of Service.



- h. Interest on b, c, d and e above at court rates from date of accrual.
 - i. Costs of the suit.
 - j. Any other remedy the Court may deem just.
2. The respondent filed a response to the claim dated 24th June 2022 denying the alleged unfair termination and prayed for the suit to be dismissed with costs. It averred that the termination was lawful since it was grounded on a justifiable cause and also effected in accordance with the termination clause in the contract of employment between the parties herein.

Factual background

3. On 12th May 2021, the Claimant was verbally sent on a one-month suspension by the Board of Ngilai Unit of the respondent allegedly to pave way for some investigation. He averred that the suspension was unlawful as the said Board was not his employer and also because he was not subjected to disciplinary proceedings or given a chance to defend himself.
4. While still on suspension, he received an unsigned letter dated 9th July 2021, purporting to terminate his employment. The letter stated that the decision was made during a meeting held on 10th July 2021, one day after the termination letter was written. The claimant averred that his termination was unlawful, irregular and in breach of clause 10 of his employment contract and Section 44 (2) of the [Employment Act](#).
5. He further averred that the Respondent was in breach of section 4 (b) of the Fair Administrative Actions (FAA) Act, and section 41 (2) of the Act for failure to accord him a hearing. He averred that his termination was on grounds of underperformance yet there was no policy in place or good practice to measure performance.
6. The Respondent admitted that it employed the claimant under a contract of service for 5 years which was terminable by any party issuing notice of three months in accordance with clause 10 of the contract. It averred that the suspension was in accordance with clause 10 paragraph 3 which provided for suspension of an employee with full benefits to allow investigation. It averred that the Claimant was paid his full benefits for the suspension period.
7. It averred that the board had the capacity to terminate the Claimant as his contract stipulated his employment was based in Ngilai Unit and the Ngilai Unit Board Chairman executed the contract alongside NWCT Board Chairman. The Respondent indicated that the discrepancy in date on the letter was inadvertent. It further averred that the letter dated 10th July 2021 was the only official termination letter.
8. The Respondent maintained that the termination was lawful because it was grounded on lawful cause, that is, the Claimant's incompatibility with the Community, staff and its partners. Despite there being a lawful cause to justify a dismissal, it opted to invoke Clause 10 of the Contract of employment by offering to pay him three (3) months' salary in lieu of notice. It averred that the termination was in accordance with the [Employment Act](#).
9. It is the Respondent's case that the Claimant is only entitled to the three months' salary in lieu of notice and salary for days worked in the month of July. It averred that the Claimant needs to complete the clearance procedure and handing over in order for his dues to be paid to him. It therefore prayed that the suit be dismissed with costs.



Evidence

10. The claimant testified as CW1 and basically adopted his written statement dated 20th September 2021 as his evidence. He also produced as exhibits the documents in his list of documents dated 20th September 2021 and on 29th September 2022. The production of the said documents was not objected to. He then stated he was employed by the Respondent as a Sanctuary Manager and upon the impugned termination, he secured another employment at the Northern Regular Trust.
11. On cross examination, he contended that his salary was increased from Kshs. 220,000 to Kshs. 269,975 but he had no letter to show the said increased. He admitted that his contract of employment provided for termination by a notice three months or payment of salary in lieu of notice. He reiterated that he received an unsigned termination letter dated 9th July 2021 and a signed one dated 10th July 2021. He admitted that the letters indicated that upon clearance he would be paid his terminal dues. He contended that he took steps to clear with the Respondent and that he had documents to prove the same.
12. In re-examination he stated that he had filed his payslip for June 2021 to prove his salary before termination. He stated that he cleared by surrendering his files to Dr. Stephen Chege who took over from him. He contended that he was neither given 3 months' notice before termination nor was he subjected to any hearing before termination. He stated that he was served with a show cause notice dated 19th March 2019 and thereafter he was invited to a hearing. However, he clarified that the said process did not relate to the impugned termination because he was acquitted after the hearing and then appointed to be in charge of the Sanctuary.
13. Kinyua Langachar, the Respondent's Chairman, testified as RW1 and also adopted his written statement dated 23rd June 2022 as his evidence. He also produced as exhibits the documents in his lists of documents dated 24th June 2022 and 24th October 2022 without any objection. He then stated that the Claimant's performance started having issues in July 2019 leading to strike by workers which ended after RW1 spoke to them.
14. He testified that the Claimant never changed but he neglected work, failed to take care of the elephant calves, and he disrespected the Board and the Community. He was then removed from service to protect him after the employees and the community rose against him. He admitted that the Claimant's terminal dues were yet to be paid but clarified that the delay was caused by the Claimant's failure complete clearance procedure even after being asked to so do.
15. On cross examination he confirmed that the Claimant's employment was terminated because he neglected his duties, and disagreed with the Board, the staff and the community. He contended that the Claimant's salary was never increased, but there were some allowances. However, he did not know if the Claimant paid himself more because the salary came from donors.
16. He admitted that the Claimant was never served with a show cause letter or invited for a hearing contending that the community and the staff were up in arms against him. Therefore, the claimant was only served with a termination. He stated that the Claimant had the similar issues in 2019, and he was warned after the hearing, but repeated the misconduct.
17. In re-examination he stated that in 2019 they heard the workers grievance and then heard the Claimant, but the claimant went back to same conduct. He reiterated that the claimant was not called for a hearing in 2021 because the problem was big. He stated that the task force heard the queries by the Board, staff and community and decided to terminate the Claimant's employment.



Submissions

18. The Claimant filed written submissions dated 16th May 2023 in which he raised the following issues for determination:
 - a. Whether the termination of the Claimant's employment was wrongful, unfair and unlawful.
 - b. Whether the Claimant was entitled to the reliefs sought.
 - c. Who bears the costs of the suit.
19. On the first issue, it was submitted that section 43 of the Act places the burden upon the employer to prove the reasons for termination and failure to which the same is deemed unfair as per section 45. It was further submitted the claimant was dismissed summarily because he was not given the required notice of three (3) months under cause 10 of his contract of employment.
20. Reliance was placed on section 44 (1) of the Act which defines summary dismissal as termination of employment without notice or shorter notice than the term provided by the statute or the contract. Further reliance was placed on the case of *Dairus Kiseu Mwamburi v Cooperative Bank of Kenya Limited* [2021] eKLR where the application of section 44 (4) of the Act was explained. In further support, the Claimant relied on the case of *Mckinley vs BC Tel* where the Court held that in determining whether an employee's conduct warrants dismissal, there ought to be an analysis of the degree of misconduct and the particular circumstances surrounding the behaviour. It was therefore submitted that the legal basis for summary dismissal is fundamental breach of obligations by an employee as provided by section 44 (3) of the Act.
21. It was further submitted that the Respondent acknowledged in its Response that it suspended the Claimant to facilitate investigation and as such, was entitled to be interrogated and also be accorded an opportunity to account for his actions. It was argued that the Claimant ought to have been furnished with a copy of the investigation report to enable him respond accordingly.
22. It was further argued that the failure to inform the claimant about the outcome of the investigation or the allegations against him, and the failure to give him a chance to respond before termination meant that the termination of his contract didn't meet the requirements of fair termination. For emphasis the Court was referred to the case of *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others* [2019] eKLR.
23. It was also argued that the Taskforce Report dated 10th August 2021, produced by the Respondent in its list dated 14th June 2022, was irrelevant to the case since it was prepared long after the Claimant's dismissal and as such it couldn't have formed basis of the dismissal. It was also submitted that the minutes of the Taskforce of 25th May 2021 were irrelevant as the Claimant's conduct was not part of the agenda of the meeting. It was also argued that there was no evidence to prove that the report was tabled before the joint Board meeting of 10th July 2021.
24. It was submitted that no evidence of his incompatibility with the community, staff and partners was produced nor did the termination letter refer to the alleged misconduct. Consequently, it was argued that the Respondent has failed to discharge its burden of proof of valid and fair reason to justify the termination as required under sections 45 (2) (a) and 47 (5) of *Employment Act*. Reliance was placed on the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR to fortify the above argument.



25. On the procedure followed, it was submitted that when RW1 admitted under oath that the Claimant was never subjected to disciplinary hearing before the termination. Reliance was placed on section 41 of the *Employment Act* and the case of Standard Group Limited v Jenny Luesby [2018] eKLR and Janet Nyandiko v Kenya Commercial Bank Limited [2014] eKLR to emphasize the duty of the employer to subject an employee to disciplinary hearing before termination of employment.
26. On reliefs, it was submitted that the Claimant has proved that termination of his employment was unfair and unlawful and therefore he is entitled to the reliefs set out in his claim and under section 49 (1) of the Act. It was further submitted that the Claimant's evidence that he earned Kshs. 269,975 was not rebutted nor was the production of his payslip for June 2021 objected to by the Respondent. It was also submitted that the Respondent had in fact admitted in its Response to Claim that the claimant's salary had been increased.
27. The Respondent filed written submissions dated 28th June 2023 raising the following issues for determination:
 - a. Whether the Claimant was wrongfully terminated.
 - b. Whether the Claimant is entitled to 3 months' salary in lieu of notice, payment for days worked in July, and unpaid leave days.
 - c. Whether the Claimant is entitled to severance pay.
28. On the first issue, it was submitted that clause 10 provided that either party could terminate the contract by giving 90 days written notice or pay salary in lieu of notice. It was submitted that section 36 of the Act also provided for payment of pay in lieu of notice. It was therefore submitted that termination with an offer to pay salary in lieu of notice was lawful and in accordance with contract.
29. It was submitted that the Claimant's erratic behaviour posed a danger to himself and others if he continued holding the position. It was submitted that during the Claimant's tenure, there were conflicts and go slows in 2019 and 2021, which affected the elephant calves who depended on the employees. It was submitted that a taskforce conducted participatory meetings with the community where it was noted that the Claimant had failed to support the Community in accordance with the Memorandum of Understanding.
30. It was submitted that the community was aggrieved by the Claimant's involvement in the election of the Board members which they found to be disrespectful and opted to remove him from the sanctuary. It was submitted that the termination of the Claimant's employment was in best interest of the sanctuary's, community and staff. The Respondent therefore submitted that the reason for the termination was justified and in accordance with contract.
31. For emphasis, reliance was placed on the cases of Kiptum Nyaoke v Kenya Post Office Savings Bank [2022] eKLR and Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, which place the burden of proving that the termination was for valid and fair reasons on the employer.
32. On the second issue, it was submitted that clause 10 of the contract mandated the Claimant to hand over to the Board Chairman or such other person nominated by the Board. It was contended that the Claimant's dues and certificate of service were available upon his proper clearance with the Administration Department. It was submitted that the Claimant failed to clear with the company and a reminder was sent on 28th August 2021, but he again failed to do so in order to facilitate the payment of his terminal dues.



33. On the third issue, it was submitted that section 35 (6) (b) exempts the employer from paying service pay to an employee who is a member of a pension or provident scheme, gratuity or service pay scheme and NSSF. It was argued that the Respondent remitted NSSF contributions on behalf of the Claimant as evidenced in his payslip and as such he is not entitled to payment of service pay. Reliance was placed on the case of *Osota Paul Osiemo v Intersecurity Services limited* [2021] eKLR.
34. Finally, it was submitted that the Claimant has failed to prove his case on a balance of probability and the suit ought to be dismissed with costs.

Issues for determination and analysis

35. Having considered the pleadings, the parties' evidence and submissions it is not in dispute that the Claimant was employed by the Respondent until his employment was terminated by letters dated 10th July 2021. The issues falling for determination by this Court are: -
 - a. Whether the termination was unfair and unlawful.
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the termination was unfair and unlawful.

36. The Claimant brought this claim on grounds he was dismissed unfairly because there was no valid reason and he was not accorded a fair hearing. On the other hand the Respondent contended that the termination was lawful and fair since it was done pursuant to clause 10 of his contract which provided for three months' notice or payment of salary in lieu of the notice.
37. Section 45 (1 & 2) of the *Employment Act* provides for requirements to be considered when determining whether termination was unfair 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.”

38. The above provision of the law precludes an employer from terminating an employee's employment arbitrarily. It is therefore mandatory for every employer to have a justifiable cause and then follow due process before terminating his employee's contract of employment.
39. The procedure for termination is dictated by section 41 of the Act as follows:

- “(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.”

40. The termination letter dated 10th July, 2021 stated as follows:

“Mr.Moses Lenaipa

O Box 7(20603)

Wamba.

Re: Termination of Services

Following the Board meeting held on the 10th July, 2021 the board has finally decided to terminate your services as the Reteti Elephant Sanctuary Manager. The termination of your services comes as a result of the growing lack of confidence from the board, partners and the Reteti workforce and your inability to provide the much-needed leadership to propel the Sanctuary to the next level.

In view of the above the NWCT board is left with no other option than to invoke section 43 of the Employment Act 2007. We regret to inform you that your employment is forthwith terminated immediately w.e.f 10th July.

Your terminal dues will be paid as follows: -

Salary up to 10th July 2021 Payment in lieu of three (3) months notice Any leave days earned and not taken

Please note that all payments is subject to tax recovery of any debts you may owe the company and made upon your clearance with the administration department.

On behalf of Namunyak Wildlife Conservation Trust I take this opportunity to thank you most sincerely for the services rendered in your term in office and wish you all the best in your future endeavours.

Yours Sincerely,

.....

Chairman Namunyak Board chairman Ngilai Unit Board”

41. The above letter indicated that the termination was for a reason related to his performance of duties and relationship with the Board, staff and respondent’s partners. He was suspended to pave the way for investigations, but before long

his employment was terminated with immediate effect from 10th July,2021. As at that time, no investigations had been done save for a community meeting held on 1st of May, 2021 where his dismissal was discussed in his absence.



42. According to the minutes, the community raised genuine concerns which shows that they were not ready to work with the claimant and unanimously resolved that the claimant be dismissed and the Sanctuary be taken over by the KWS Warden as the manager. However, I must say that the claimant was entitled to a chance to defend himself but he was denied the same in the disguise that his contract was terminated under clause 10 of the contract.
43. In the case of *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR the Court Appeal held that :
- “ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”
44. Based on the foregoing binding precedent, the claimant was entitled to be accorded a fair hearing to respond to the allegations made against him by the community, Board and the partners. Failure to afford him a fair opportunity to defend himself rendered the termination unfair within the meaning of section 45 of the Act, notwithstanding the fact that the employer was offering to pay salary in lieu of notice.
45. I am further guided by *George Musamali v 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.”
46. I am further guided by the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the Court held that:
- “ However, 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 ...”
47. Again, the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR laid down the elements of a fair termination as follows:
- “ Four elements must thus be discernible for the procedure to pass muster: -



- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

48. In view of the foregoing matters, I find that the Claimant’s termination was unfair and unlawful for want of procedural fairness.

Whether the Claimant is entitled to the reliefs sought?

49. Having above finding of fact, I proceed to hold that he is entitled to declaration that the termination of the claimant’s contract of employment was unfair, wrongful and unlawful. Accordingly, under section 49 read with section 50 of the *Employment Act*, he is entitled to compensatory damages. The claimant prayed for three (3) months’ salary in lieu of notice plus twelve (12) months’ gross salary as compensation for the unfair termination.

50. In the case of *OlPejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR, the Court of Appeal expressed itself as follows:

“The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months’ pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention.”

51. Guided by the above binding precedent, I have considered the fact that the claimant worked for the respondent for three years out of his contract term of five years. Therefore, he had reasonable expectation to continue working for another two years before the expiry of his contract. I have also considered that he mitigated loss of earnings by securing another job with Northern Regular Trust, though no details were given as to whether the new job was comparable to his employment by the respondent. Finally, I have considered the fact that he contributed to the termination through misconduct highlighted in the termination letter.

52. Accordingly, I award the claimant three months’ salary in lieu of notice as per clause 10 of his contract with the respondent. I also award him three months’ salary compensation for the unfair termination in view of the said considerations. The award is based on the claimant’s salary Kshs. 268,975 which was his last salary as per the pay slip of May 2021 which was not contested by the respondent during the hearing.

53. The claim for salary for the 10 days worked in July 2021 was admitted by the respondent and therefore it is allowed. Likewise, the respondent offered to pay for any leave days not taken. The claimant claimed leave of 25 days which was not rebutted by leave records. The claim for certificate of service was also



not contested and in fact RW1 stated that the same will be issued after the claimant completes the clearance process.

54. Finally, the claimant prayed for service pay but the respondent objected to the same. I agree with the respondent that the claimant was a member of the NSSF and the employer contributed towards his social security in his favour. Under section 35(6) of the Employment Act he is disqualified from claiming service pay.

Conclusion

55. I have found that the claimant's employment contract was unfairly and unlawfully terminated. I have further found that he is entitled to payment of some of the damages sought in the Statement of Claim. Consequently, I enter judgment for him as against the respondent in the following terms:

Notice Kshs. 809,925.00

Compensation Kshs. 809,925.00

Salary for July 2021 Kshs. 89,991.70

Leave Kshs.224,979.20

Total Ksh.1,934,820.90

Costs and interest at court rate from the date of this judgment

The above award of damages shall be paid subject to statutory deductions.

Dated, signed and delivered at Nyeri this 8th day of March, 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

