



**Mulama v Cezam & Associates Limited (Cause 152 of 2019)
[2024] KEELRC 1173 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1173 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 152 OF 2019
K OCHARO, J
APRIL 30, 2024**

BETWEEN
DESTERIUS SHITSAMA MULAMA CLAIMANT
AND
CEZAM & ASSOCIATES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit vide a Statement of Claim dated 27th February 2019 seeking: -
 - a. A declaration that the Respondent intentionally breached the provisions of Section 41 of the Employment Act 2007, and Articles 10,28, 41,47 and 50 of the Constitution of Kenya 2010.
 - b. A declaration that the Claimant suffered unfair and wrongful termination of his employment.
 - c. An order of permanent injunction to quash the termination letter dated 30th November 2018 issued by the Respondent.
 - d. An order for reinstatement of the Claimant to his former position without any loss of benefit and/or seniority and continuity of service.
 - e. In the alternative, the payment of the Claimant’s actual pecuniary loss suffered since the date of his termination from employment including payment of salary/wages as would have been earned, house allowance together with all accrued allowances for the balance of the contract period, being Kshs. 4,671,600/-.
 - f. Maximum compensation for loss of employment being 12 months.
 - g. Certificate of Service.



- h. General damages.
 - i. Aggravated and exemplary damages.
 - j. Any other and further relief that the Honourable Court may deem fit to grant.
 - k. Costs of this suit with interest.
2. Alongside the Statement of Claim, the Claimant filed a Witness Statement dated 27th February 2019, and various documents under a List of Documents dated 27th February 2019. He subsequently filed a further witness statement dated 1st October 2019.
 3. The Respondent entered appearance on 2nd April 2019 and filed a Response dated 21st May 2019 in answer to the Claimant's pleadings. It denied the Claimant's claim in toto and his entitlement to the reliefs sought.
 4. Noting that the Respondent and its Counsel had not been attending court whenever the matter was placed before it and that on the 6th March 2023 when the matter came up before me for hearing, without any shown sufficient reason neither the Respondent nor its Counsel were in attendance of Court, I directed the matter to proceed their absence notwithstanding. Thereafter, the Claimant filed submissions dated 4th April 2023.

The Claimant's Case.

5. At the hearing, the Claimant adopted his witness statements hereinabove mentioned as his evidence in chief and the documents he filed under the list alluded to, as his documentary evidence. The Claimant's case is that he was employed by the Respondent on 9th January 2012 and served in various capacities including as a Financial Officer and Program Coordinator. His employment was terminated on 30th November 2018. At the time of the termination, he was under a fixed-term contract [one year] dated 1st November 2018 that was set to expire on 31st October 2019.
6. The Claimant stated he was in charge [as a Program Coordinator] of the United States African Development Foundation (USADF) Program in Turkana and its subsequent rollout throughout the country.
7. The Claimant further stated that in his said position, he singlehandedly created a team that was on various occasions used by the Respondent to train other program teams all over Africa. His program was variously lauded as one of the best in Africa and the standards he and his team set were adopted by other country programs all over the continent. Further, the Claimant and his team's performance was so exemplary that on more than one occasion, the Respondent chose the Kenyan program to pioneer various initiatives before programs were fully adopted in other African Countries.
8. To evidence his honesty and diligence, the Claimant asserted that the program successfully underwent seven [7] financial audits, and one program audit by the Office of the Inspector General (OIG) of the US Government.
9. He further stated that on or about 27th March 2018, he was summoned by the Respondent to explain some alleged anomalies in the program's financial records. The issue was discussed then between him and three (3) directors of the Respondent. In the meeting, the financial records were considered and it was ascertained that no money was lost. The issue was then settled.



10. To his surprise, on 30th November 2018 at around 6.00 p.m., he received a termination letter. The letter referred to that matter which was raised and dispensed with on 27th March 2018, as the subject of the termination. At the separation, his monthly gross salary stood at Kshs. 389,300/- plus benefits.
11. The Claimant contends that in terminating his employment, the Respondent failed to adhere to the various statutory provisions that govern termination of employees' employment, Sections 41, 43, and 45. Further, the Constitutional stipulations embodied in Articles 41, 47 and 50 of the Constitution of Kenya.
12. The Respondent's action was strange and surprising, it had just renewed his contract on or about 1st November 2018.
13. The Claimant stated that before the termination, the Respondent didn't, issue him with any Notice to Show Cause or invite him to any disciplinary hearing, therefore he was not accorded a hearing and an opportunity to defend himself. The termination did not accord with the relevant legal requirements.
14. The Respondent didn't have any fair and valid reason to terminate his employment. The allegation that he forged receipts was unfounded. All expenses incurred were supported by original receipts at all times.
15. As his contract of employment had been renewed on 1st November 2018 for a term of 1 year, he had a legitimate expectation that he would continue to serve the Respondent until 30th October 2019 when his contract was set to lapse by effluxion of time. Further, he acted on this legitimate expectation by taking credit facilities. The Claimant also states that he had a legitimate expectation that the Respondent would comply with the provisions of the law when terminating his employment.
16. In addition, the Claimant avers that the Respondent owed him a duty of care to terminate his employment in accordance with the terms of his employment contract and the law. The Respondent breached its duty to act honestly and in good faith by failing to follow the procedure set out in the Employment Act 2007 while terminating his employment. Further, the termination of his employment was effected maliciously as evidenced by the violations of the law and the humiliating manner in which he was subjected, for instance, a junior officer being sent to deliver the letter of termination to him.
17. As a result of the unlawful and unfair termination of his employment, he lost his earnings for the duration he was to serve under his contract. He suffered mental distress, inconvenience and psychological injury, and his reputation was destroyed as he was painted as a dishonest and fraudulent person. He was also rendered unable to meet his financial obligations including servicing his credit facilities.
18. In his submissions dated 4th April 2023, the Claimant identified three issues for determination thus; Whether there were valid reasons to warrant termination of the Claimant's employment; whether the procedural requirements set out in section 41 of the Employment Act were observed; and whether the Claimant is entitled to the prayers sought.
19. The Claimant submitted that under Section 43 of the Employment Act, a burden lay upon the Respondent to prove the reason[s] for the termination of his employment. A further legal burden was on it under the provisions of Section 45 of the Act, to demonstrate that the reason[s] for the termination was fair and valid. A failure to discharge both the burdens or any of them could render the termination unfair. To buttress this submission, reliance was placed on the Court of Appeal decision in the case of Ken Freight (EA) Limited vs Benson K. Nguti [2016] eKLR. The Respondent didn't



place forth any evidence to establish, the reason for the termination, and that the reason if any was valid and fair.

20. It was further submitted that Section 41 of the Employment Act speaks to a mandatory procedure that an employer contemplating terminating an employee's employment must follow. The Respondent failed to adhere to the procedure. It didn't; inform the Claimant that it intended to terminate his employment and the reason the basis for the intention; allow him an opportunity to prepare and represent on any accusations against him, accord him the right to accompaniment by a colleague; and as a result, it cannot be said that it considered representations made by the Claimant, before deciding to terminate.
21. The Claimant maintained that he was never issued with a notice to show cause or subjected to a disciplinary hearing. The meeting on 27th March 2018 was not a disciplinary hearing.
22. While the termination letter refers to the contravention of Clause 11.1 of the employment contract by the Claimant, the Respondent's policies and procedures, the Respondent didn't present any policy or procedure before the Court.
23. On the reliefs sought, the Claimant submits that having proved that the termination of his employment was unfair, this Court should find that he is entitled to all those reliefs he has sought in his Statement of Claim.

Analysis and Determination

24. I have reviewed the parties' pleadings, the Claimant's oral and documentary evidence, and his submissions, and the following issues emerge for determination: -
 - a. Whether the Respondent unfairly terminated the Claimant's employment;
 - b. Whether the Claimant is entitled to the reliefs sought.

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

25. From the onset it is imperative to state that where a Respondent files a Statement of Response to a Claimant's pleadings but presents not any evidence during trial in support of the response, the Statement of Response will remain just that statement without any evidential value, and that is the case in this matter.
26. Further, this Court is cognizant of the legal position that even where the Respondent has not testified at trial and the consequence mentioned above attaches, the Claimant is still bound to produce sufficient evidence and discharge the legal burden[s] imposed on him or her by law, for him or her to succeed in his or her case. The Employment Act is uniquely crafted, it expressly places different legal burdens on the employer and the employee, in a dispute regarding termination of employment or summary dismissal of an employee from employment.
27. Section 47 (5) of the Employment Act 2007 places a specific burden on the employee [the Claimant in the instant matter]. The section 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."



28. The question that springs up then is, what is this burden under the provision? how does the employee discharge the same? The employee is obligated to prove that a termination occurred and establish prima facie that the termination was unfair. I have carefully considered the material placed before me by the Claimant on the want of procedural and substantive fairness in the termination, evidence which remains unchallenged, and hesitate not in concluding that, prima facie, the termination was unfair.
29. Once a Claimant has discharged their burden of proof, as did the Claimant herein, the burden shifts to the employer [Respondent], to prove the reason[s] for the termination [section 43 of the Act.] and that the reason [s] was valid and fair reasons [Section 45 of the Act], Further, that the termination accorded with procedural fairness [section 41].
30. Time and again, this Court has held that where a party is charged with the duty to discharge a particular legal burden, seldom can he or she be held to have discharged the same without presenting sufficient evidence to prove the facts or matters it is obliged to. In the instant matter, the Respondent didn't tender any evidence to establish the presence of substantive and procedural fairness contemplated in the foretasted provisions. This leads me to conclude that the termination of the Claimant's employment was unfair. See *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.”

31. There is no doubt that the Claimant's employment was terminated through the letter dated 30th November 2018. It reads:

“I hereby inform you that following the board meeting of the directors of Cezam and Associates Ltd (CEZAM) held on 30th November 2018 it has been decided that your contract of employment dated November 1, 2018 be terminated with immediate effect in accordance with Paragraphs 11.1 (a), 11.1 (d), and 11.1 (g) of your contract of employment.

Following the recent conclusion of the investigations that the directors carried out on the matters communicated to you in my email of 26th March 2018 (with attachment letter dated 26 March 2018 - Special Report re Unsupported Costs) and discussed with you and the directors on 26th March 2018 it has been determined that your employment be terminated without notice in accordance with your contract because:

- a. In the sole opinion of the CEZAM directors you were found dishonest and you perpetrated a misconduct that you have failed to remedy as requested by the directors. In this regard, your response contained in your emails dated 27 March 2018 was found unsatisfactory as communicated to you in my emails of 27 March 2018 as you failed to rectify the situation as demanded by the directors (refer to paragraph 11.1(a) of the employment contract). Please note that you still have the obligation to remedy the misconduct as demanded in my email and letter dated 26th March 2018.
- b. In the sole opinion of CEZAM directors your conduct has the potential to bring CEZAM and USADF into disrepute (refer to paragraph 11.1(d) of the employment contract).



- c. Your actions, that remain unrectified, may be construed as undermining the success of USADF's objectives in the Cooperative Agreement signed between USADF and CEZAM (refer to paragraph 11.1 (g) of the employment contract).

In view of the above, and in accordance with paragraph 11.1 of your contract of employment you will with immediate effect surrender to Mr. Moses Mwendwa who is CEZAM's director responsible for human resource matters (or as he will suitably delegate) all documents papers and property which may have been made or prepared by or have come into your possession or under your control in the course of your employment or which relate in any way to the business and affairs of CEZAM and USADF. In addition, all bank signature mandates delegated to you by the directors have henceforth been terminated.

In accordance with the terms of the Cooperative Agreement CA 4925 KEN signed between CEZAM and USADF the decision to terminate your contract will be communicated to USADF; but please note that your contract of employment states that in the event that either party terminates your employment as herein agreed, the decision of either party will be final and will not be subject to any arbitration from whatever source.

We wish you the best in your future endeavours.”

32. The termination was with immediate effect. Therefore, a summary dismissal under Section 44 of the Employment Act. The section strictly regulates summary dismissals, by providing when a summary dismissal may occur and commissions and or omissions on the part of the employee that can attract the sanction. It provides 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 wilfully 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.”

33. For an employer to successfully assert that summary dismissal was fair, he or she must demonstrate that the employee's conduct could have the effect contemplated under sub-section 3, above, and that its character fits in the catalogue under sub-section 4. This the Respondent didn't do as it didn't provide any evidence. The Respondent didn't therefore establish the substantive justification for the summary dismissal.

34. I will not do justice to this matter if I do not render myself on whether the meeting of 27th March 2018, constituted a disciplinary hearing. In my view, it didn't. It was just a discussion on the anomalies allegedly identified in the financial records. A disciplinary hearing must be preceded by a clear notification that the employee is accused of such and such misconduct and an express invitation to a disciplinary hearing. In the instant matter, this wasn't the case



35. The Court of Appeal considered a similar issue in *Standard Group Limited v Jenny Luesby* [2018] eKLR, where it held that:

“With respect, we think the trial court was on firm ground in such finding. As stated above, the procedure under section 41 of the Act is mandatory. Apart from a mere assertion that there was an attempt made on 14th November 2013 in a meeting with the HR Director and respondent in the CEO’s office, where the incident was discussed and the respondent is said to have apologized, there was nothing on record to show that the requirements of section 41 were complied with...

It follows that the act of summarily dismissing the respondent without giving her an opportunity to be heard amounted to unfair termination as defined in section 45 of the Act. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure.' See *Kenfreight (E. A) Limited vs Benson K. Nguti*, [2016] eKLR.”

Whether the Claimant is entitled to the reliefs sought.

36. Having held that the Claimant was indeed unfairly terminated, I now consider the matter of the reliefs he is entitled to.
37. The Claimant sought for reinstatement to his position. This Court is clothed with the jurisdiction to make an order of reinstatement by Section 12 (3) (vii) of the Employment and Labour Relations Court Act which provides that:

“(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:

(viii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law”

38. In the case of *Kenya Airways vs Aviation & Allied Workers Union* (2013) eKLR the court held as follows as regards the remedy of reinstatement:

“As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the Employment Act and Section 12(3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such a relationship against the will of one of them. That will engender friction, which is not healthy for businesses unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.”

39. Section 12 [3][vii] of the Employment and Labour Relations Court Act, fetters the discretion of the Court to grant an order for the reinstatement of an employee to the extent that it prohibits the grant



three years after the date of termination of the employee's employment. The Claimant herein was dismissed on 30th November 2018 meaning that more than five years have elapsed since the date of the dismissal. Parliament in its wisdom deemed it necessary to impose the limitation. The wisdom has not been challenged. However, in this Court's view, the provision needs to be re-looked. In some situations, it might occasion diminishment of an employee's right to equal treatment under the law, and a breach of a legitimate expectation that Courts of law are supposed to ensure that matters where reinstatement has been sought, are determined within three years, to avoid a situation where the remedy will be lost, notwithstanding that the affected employee didn't contribute at all to the delay in conclusion of the matter.

40. By dint of the provisions of the above-stated section, the remedy for reinstatement cannot be availed to the Claimant in the instant matter.
41. The Claimant asked this Court to award him a payment of salary/wages and benefits for the remainder of his contract period. I am not inclined to grant the prayer for the reason that shortly hereunder, I will award a compensatory relief pursuant to the provisions of Section [49][1][c], and granting the relief sought under this head, will amount to an overcompensation.
42. On the prayer for general and exemplary/punitive damages, the Court notes that the Claimant didn't provide evidence from whence the justification for a grant of the relief can be discerned. Further, submissions by his Counsel on the relief were very casual. Having said this, it is my view, however, that general damages are not awardable for wrongful dismissal. See also Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR.
43. Exemplary damages are granted in exceptional cases, and only where the party seeking the same has established the known necessary conditions. See *Rooks vs Benard* [1964] 1 ALL ER, 367, and *Haria Industries vs P.J Products Limited* [1970] E.A. The Claimant didn't lay any foundation for the relief sought. He didn't establish the conditions pre-requisite for the grant. The prayer is rejected.
44. I now turn to the prayer for compensation for unfair termination. Section 49(1)(c) of the Employment Act 2007 donates power to this Court to award compensation for unfair termination up to a maximum of 12 months' gross salary. The award of this relief is discretionary, it depends on the circumstances of each case.
45. I have considered the manner through which the Claimant's employment was terminated; the casual disregard for the law by the Respondent, and more specifically that which speaks to procedural and substantive fairness; the wishes of the Claimant that were, to continue serving the Respondent up to the appointed date for the elapse of the contract, he was serving under; his legitimate expectation that the Respondent could terminate the contract in accord with the law and the contractual terms, expectation which was breached; and his length of service, being roughly 6 years and 10 months, and hold that he is entitled to the compensatory relief and to an extent of 10 months' gross salary.
46. Imperative to state that the Claimant pleaded and adduced evidence, which remains uncontroverted, that his gross salary was Kshs. 389,300/- at the time of termination.
47. It is trite law that per Section 51 of the Employment Act 2007, a Certificate of Service is a legal entitlement to a dismissed employee.
48. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
 - a. A declaration that the Claimant's dismissal was unfair and wrongful.



- b. The Claimant be paid compensation for unfair termination, tabulated at Kshs. 3,893,000/- (Kshs. 389,300/- x 10 months)
- 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 this judgment until payment in full.
- e. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 30th DAY OF APRIL, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms. Oduo for the Claimant

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.

OCHARO KEBIRA

JUDGE

