



**Ochieng v Techno Service Limited (Cause 1506 of 2016)
[2024] KEELRC 1161 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1161 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1506 OF 2016**

K OCHARO, J

APRIL 26, 2024

BETWEEN

MOSES FELIX OCHIENG CLAIMANT

AND

TECHNO SERVICE LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of claim dated 18.07.2016 and filed in Court on 01.08.2016 through the firm of Githinji & Associates Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the respondent's action to summarily dismiss the claimant from employment was illegal, unlawful, unfair and inhumane.
 - b. An order for the respondent to pay the claimant his terminal dues and compensatory damages as pleaded in paragraph 7 herein totaling to Kshs 455,800/-
 - c. An order for the respondent to pay the claimant costs of this claim plus interest thereon.
2. The Claimant's case is that he was employed by the respondent on 02.11.2009 in the position of a junior technician and was earning a monthly salary of Kshs 23,100/-. He further states that he performed his duties diligently and to the respondent's satisfaction until 31.03.2016 when he was unfairly and unlawfully summarily dismissed from work for reasons that he took a two-week paternal leave despite giving sufficient notice to the respondent on the same.
3. The claimant argues that the respondent's actions are unlawful, unfair and contrary to the provisions of Section 29 (8) of the *Employment Act*.
4. It is further pleaded that the respondent's action to summarily dismiss the claimant was contrary to the basic tenements of fair labour practice as enshrined in the *Employment Act* and the *Constitution* of



- Kenya, 2010. He urged this Honourable Court to find his claim with merit and to allow it in terms of the reliefs sought therein.
5. In response to the memorandum of claim, the respondent filed a reply to the Memorandum of Claim dated 22.09.2016 through the firm of Henia Anzala & Associates Advocates, in which it admitted having engaged the Claimant. The respondent further averred that upon receipt of the claimant's request to proceed on paternal leave, it did write back to the him approving the request. However, due to the work load, it indicated to him that the leave could be available to him in May, 2016.
 6. The respondent argued that the claimant absconded duties for a period of 19 days. As a result, it was justified, and lawful for it, to summarily dismiss him from employment. In the circumstances, the dismissal was fair and just, and was done in line with the terms of his employment contract as read with Section 44 (4) (a) of the *Employment Act*, 2007.
 7. The respondent further argued that prior to the claimant's summary dismissal, it had sent several notices requiring the claimant to report back to duty, which requests went unanswered.
 8. The respondent further stated that due process was followed in the dismissal of the claimant. This Court should find the claim without merit and dismiss it in its entirety with costs to the respondent.
 9. The matter proceeded for hearing on 23.03.2022, 26.04.2022 and 18.04.2023 with the claimant testifying as CW1 and calling one witness to testify on his behalf as CW2. The respondent on the other called one witness to testify on its behalf.
 10. In evidence CW1 reiterated the averments made in his Memorandum of claim, adopted the contents of his witness statement dated 18th July 2016 as his evidence in chief, and urged this Court to find his claim with merit and to allow it in terms of the reliefs sought therein.
 11. Cross-examined by Counsel for the Respondent, the Claimant testified that at the time of separation, his monthly salary was Kshs 23,100. Further, the termination letter was sent to him via email, while he was away in Hospital with his expectant wife. At all material times, he kept the Respondent abreast of his whereabouts.
 12. The birth notification document is a testament that there was a birth. Further, though the document doesn't contain his name, it does contain three names of his son. The document was issued to the mother.
 13. The claimant testified further that on the very day he left the office, he wrote an email, explaining that he had so left due to an emergency. He left the office three days before the birth of his son on the 20th of March 2016.
 14. In his evidence under re-examination, the claimant testified that during the period he was out of office, he could communicate with the Respondent via email. Further, communication through email was a common practice at the Respondent's.
 15. Emily Chemutia is his wife, with whom he has been in marriage for more than 7 years.
 16. CW2, Dr. Beatrice Bonyo, a medical director and gynaecologist testified that the claimant's baby was delivered at her hospital on 20.03.2016 and a notification of birth was issued on 23.03.2016. She further testified that on the notification, the name of the father is normally not indicated.
 17. The Respondent's witness, RW1, Bulent Gulbahar, adopted his witness statement dated 21st October 2022 as his evidence in chief. In his statement, RW1 stated that the claimant was granted authority to



proceed on paternity leave. However, he was required to provide proof of paternity, which he failed to avail to the respondent.

18. RW1 further testified the claimant failed to return to work after his leave and did not communicate or explain his absence. He therefore absconded duty. Several correspondences were sent out to him requiring his return to duty, however the same went unanswered.
19. RW1 stated that in the circumstances, the Respondent summarily dismissed the claimant from employment, an act which it was entitled to under the law and the employment contract.
20. The witness stated further that when the claimant eventually returned to work, he was allowed to explain why he absconded duty and also provide proof of paternity but he failed to do so. Instead, he caused a disturbance and had to be removed from the premises forcefully.
21. The witness reiterated that the summary dismissal was both procedurally and substantively fair and that the claim before the court is without basis thereby urging the court to dismiss it with costs to the respondent.
22. Cross-examined by counsel for the claimant, the witness testified that the claimant worked for the respondent for about five years. His starting salary was between Kshs 15000-20000.
23. The witness stated that the claimant requested for the leave via email. However, the same was not approved due to the short notice. Further, he had not informed the respondent that he was married.
24. The claimant informed the respondent that his wife was expectant a month before her date of delivery. Through email, the claimant promised that he was to provide a birth certificate to the respondent.
25. After his leave, the claimant failed to report back to duty. The respondent was constrained to try and reach him through emails and phone calls, but all didn't yield fruit. The claimant didn't respond. This prompted the respondent to terminate his employment on 31st March 2016. However, a termination letter was not delivered to him as he was not available.
26. The witness stated further that when the claimant reported back to work on the 6th of April 2016, he was given an opportunity to explain himself as to why he didn't report back to work within 14 days and whether he had a wife who had given birth. He didn't give any sufficient explanation. It was then that he was given the letter dated 31st March 2016. The letter was prepared before the claimant was given an opportunity to explain himself.
27. The witness alleged that a notice to show cause was issued to the claimant. The email correspondence is a testament.

Submissions by the parties

28. In his submissions the Claimant maintains that he acted under the provisions of section 29 (8) of the *Employment Act*, 2007 which requires an employee to notify the employer once he proceeds on paternity leave. He further argues that the provision does not necessarily require the permission of the employer. The claimant argues that this provision is meant to deter employers from abusing the provision as is in this instant case.
29. He further submits that his termination was unlawful and unfair as he was neither served with notice to show cause nor was he accorded a hearing prior to his termination. He submits that his termination letter had already been written even before he could avail the documents for scrutiny by the respondent.



30. In support of his claim the claimant relies on the court findings in the cases of *Harun Musee Paul v Biashara Selection Limited* (2021) eKLR, *Jared Aimba v Fina Bank Limited* (2016) eKLR and *Shivanyilu v Kenya Union of Domestic, Hotels Educational Institutions and Hospital Workers (KUDHEIHA)* (2022) eKLR.
31. In conclusion the claimant urges this Court to find his claim with merit and to allow it in terms of the reliefs sought therein.

Respondent's submissions

32. The respondent on the other hand submits that the claimant's termination was fair both procedurally and substantially. It duly complied with the mandatory provisions of section 41 of the *Employment Act*, 2007.
33. The respondent further submits that the claimant unlawfully absented himself from duties for a total of 19 days under the pretext that he was on paternity leave, which by law is only 14 days after the birth of the child. To fortify this argument, the respondent cited and relied on the provision of section 29 (8) of the *Employment Act* and the findings in the case of *Peter Kegode v United Millers Limited* (2019) eKLR on paternity leave.
34. The respondent maintains that the claimant had not provided proof of paternity on the day he left duty (on 18th March 2016) and as a result, his right to such leave had not crystallized. The respondent further submits that the claimant had a duty to prove such paternity before proceeding with such leave. For emphasis, the respondent relied on the findings in the case of *Hamisi Madzungu v Pride Inn Hotels & Investment Limited* (2017) eKLR where the court held that an employee must avail evidence of paternity to warrant an order for paternity leave. The respondent also relied on the Court findings in the case of *Peter Okumu Oloo v Simba Pharmaceuticals Ltd* (2013) eKLR.
35. The respondent further submits that the contention by the claimant that his termination was due to his taking of paternal leave remains a mere allegation that has not been proved as the reason for his termination as indicated in his termination letter dated 31.03.2016 was absenting himself from work without permission. The respondent urged this Honourable Court in the absence of any evidence to discard this allegation.
36. The respondent further submits that in the claimant's absence, it did communicate through email requiring an explanation as to his absence. No response was forthcoming until 6th April, 2016. The claimant failed to justify his absence despite being accorded a chance to do so. To bolster this argument the respondent relied on the provision of section 41 of the *Employment Act* and the Court findings in the cases of *Peter Opiyo Mc'Odero v Laikipia University* (2015) eKLR and *GMK v Kenyatta National Hospital* (2020) eKLR.
37. The respondent further submits that the claimant failed to discharge the burden of proving his case as against the respondent in line with the provisions of section 47 (5) of the *Employment Act* and as such the claim lacks feet to stand on and should be dismissed with costs to the respondent.

Analysis and Determination.

38. I have carefully considered the pleadings by the parties herein, their evidence, and respective submissions and the following issues emerge for determination;
- I. Whether the summary dismissal of the claimant from employment was fair.
 - II. Whether the reliefs sought are available to the claimant.



Whether the summary dismissal of the claimant from employment was fair.

39. The *Employment Act*, of 2007, recognizes situations where an employer can terminate the employment of a worker and the termination will be considered fair. Fair termination may be understood as the termination of a worker's employment for a lawful reason or a reason permissible by statute. Grounds for fair termination are set out in section 41 of the Act, misconduct, poor performance, or physical incapacity, and section 40, redundancy.
40. Imperative to state that there are those grounds that are expressly prohibited grounds for termination, according to section 46 of the *Employment Act*. Any termination of employment based on any of those grounds shall automatically be deemed unfair.
41. Section 45 of the *Employment Act*, prohibits unfair termination of an employee's employment. Termination or summary dismissal of an employee's employment will be deemed unfair if the employer fails to prove that the reason for the termination is fair and that the termination or summary dismissal was made in accordance with a fair procedure.
42. In the instant matter, the Respondent contended that the dismissal of the claimant was on account of his misconduct, in fact, gross misconduct. The duty lies on the employer to prove that the termination of the worker's employment was fair. Where the employer alleges that the summary dismissal was on account of gross misconduct, as did the respondent herein, to justify the fairness of the dismissal, the law requires that the gross misconduct be proved. That is to say that it must be demonstrated by credible evidence that the employee indeed committed an act of misconduct. Therefore, a mere allegation that the employee committed an act of misconduct cannot yield a fair termination or summary dismissal.
43. The respondent asserted that the claimant was summarily dismissed on the 31st of March 2016. The Court notes that this was communicated to him via email on the same day at 1:26 pm. The email puts forth the reason for the summary dismissal as absence from duty without permission. The question that comes up then is, has the respondent presented credible evidence that the claimant was absent from duty without permission? In my view, not. Shortly hereinafter will come out the reason why this view.
44. I note that the respondent does not in its pleadings filed, or in the email correspondence state the specific dates when the claimant was absent from duty without its permission. Further, an assertion that the claimant was absent without permission, runs counter to the contents of the witness statement [turned evidence in chief] of RW1. The statement read in part;
- “ 3. At the outset, I wish to state that the claimant was granted leave to proceed on paternity leave. He was nonetheless required to provide proof of the alleged paternity which he failed to. [emphasis mine]”
45. With this, no reasonable man can assert that the claimant was out of duty without permission. His witness statement, [evidence in chief], notwithstanding, the respondent's witness changed tune, and testified under cross-examination that the claimant did not resume duty, after his paternity leave. This evidence, I think was aimed at trying to fill the gap in the dismissal correspondence, to show that the absence was after his paternity leave. Still, in my view, this piece of evidence makes no sense, as I shall demonstrate shortly hereunder, the claimant returned to work on the fifteenth day of the date he proceeded for paternity leave.



46. This Court has not lost sight of the fact that at some point in his evidence under cross-examination, the witness gave another version of the paternity leave in issue. He stated that the Respondent allowed the claimant to proceed for the leave reluctantly, as he insisted to. Whether reluctantly or not, this amounted to permission by the employer.
47. As a result, I am unable to conclude that the respondent has presented credible evidence to the effect that the claimant was at any time absent from duty without permission.
48. Part V of the *Employment Act* provides for Rights and Duties in employment. Section 29 [8] provides a male employee with the right to a paternity leave of two weeks with full pay. In my view, a corresponding obligation is on the part of the employer to allow the employee to proceed on the leave upon application.
49. The *Employment Act* does not define what paternity leave is in the context of it as a right under the Act. In my view, it is a period of absence from work granted to a male employee shortly before or after the birth of his child. The provision for paternity leave is well-intentioned. To allow the father to bond with his kid, and help the mother of the child shortly before, and through part of her maternity period. Reasonably, therefore, it cannot be available for the employer only to allow the male employee to proceed for the leave way after the birth of his child.
50. Through his letter dated 4th February 2016, the claimant notified the respondent that though he didn't know the exact date, his wife was to deliver their baby in March. Further, he was to take his paternity leave in that month. There was back-and-forth correspondence on this issue of leave. However, I will not venture into the details of all of them, as, as indicated hereinabove, the respondent's witness made an express admission that the leave was allowed.
51. However, the respondent's email dated 21st March 2016, has caught the attention of this Court. It requires a comment thereon. The respondent demanded proof that the mother of the child was a recognized wife of the claimant. It should not be forgotten that in an email dated 8th March 2016, the respondent demanded for a marriage certificate. With great respect, these were unreasonable demands that were not anchored on any provision of the law. All that a father needs to do in circumstances that require justification for paternity leave is produce a birth notification or any other document as proof of the birth and his paternity. And indeed, the claimant did promise to produce the notification.
52. Having allowed the claimant to proceed on paternity leave, the claimant could only be accused of having committed an act of misconduct if, he didn't produce the birth notification within the time set out in its employer's (Respondent's) Human Resources Manual, or upon return from the leave. The respondent didn't assert and tender evidence that it had a manual that provided for paternity leave. Looking at the email correspondence, one will gather a clear impression that there wasn't.
53. The claimant asserted that he had the birth notification to give his employer, the respondent upon resuming duty. However, the respondent summarily dismissed him before he could. This assertion is corroborated by the respondent's witness's evidence under cross-examination where he stated that the decision to dismiss the claimant was made before he gave any explanations.
54. The claimant's witness's evidence that the child was born at her Hospital and that the claimant was the father, was not challenged.
55. I note that the claimant contended through his email dated April 6, 2016, that he commenced his leave on the 19th of March 2016. This fact has not been contested by the respondent at all. In the respondent's witness's testimony, the claimant reported back to work on the 6.04.2016. I note that the 19th of March 2016 was a Saturday. In my view, the computation of the leave days could then be



from the 21st. Excluding weekends, it is clear that the claimant returned to work within the two weeks allowed under Section 29[8] of the Act.

56. As a result of the above premises, I hold that the reason for the summary dismissal of the claimant's employment was not valid and fair. The dismissal was therefore not substantively fair.
57. Section 41 of the Act, provides for a mandatory procedure that any employer contemplating terminating an employee's employment on account of any of the three grounds set out thereunder, must adhere to. The employer must inform the employee of its intention and the reasons the basis for the intention. He should then allow the employee to make a representation on the reasons. Lastly, the employer must consider the representations made before making the decision to terminate or dismiss. The respondent's witness admitted in his evidence under cross-examination that the decision to terminate the claimant's employment was reached before he could be allowed an opportunity to make the representation. He was therefore not heard, in my view. The respondent didn't consider his defence, before taking the decision. In the circumstances, I find no difficulty in concluding that there was non-adherence to procedural fairness. The summary dismissal was procedurally unfair.

Whether the claimant is entitled to the reliefs sought.

58. The claimant sought for inter alia, one month's salary in lieu of notice. Having found that the summary dismissal was unfair, I hold that this is a relief that the claimant is obviously entitled to under section 36 of the *Employment Act*. His contract of employment was one terminable by a twenty -eight days' notice under section 35 of the Act. It is clear that no notice was given.
59. The claimant further sought for compensation for the leave days, prorated, that he had earned in 2016, but which he didn't utilize. Annual leave is a statutory right for an employee, according to section 28 of the *Employment Act*. Where the employee earns leave but nonetheless does not utilize the same, he is entitled to compensation. As a result. I do not hesitate to find that he is entitled to the relief under his head, thus, $23,100 \times 21 / 100 \times 3 / 12 = 4,042.5$.
60. The respondent didn't tender evidence resisting the claimant's claim for service pay. The respondent didn't assert and show by evidence that the claimant falls under the category of those employees excluded under section 35[5] of the Act, from the right to the benefit, service pay. Accordingly, I grant him service pay, $23,100 \times 15 / 30 \times 21 / 4 =$ Kshs 60,400.
61. Section 49[1] of the *Employment Act*, 2007, bestows this Court with the authority to grant an employee who has successfully challenged the termination of his employment, as did the claimant herein, a compensatory relief up to a maximum of twelve months' gross salary. Imperative to note that the award is discretionary. The award depends on the peculiar circumstances of each case.
62. I have carefully considered that; the claimant was summarily dismissed from employment without a valid and fair reason, in a manner that could easily equate to unfair labour practice, he was not given an opportunity to defend himself, and the length of service with the respondent, and conclude that he is entitled to the relief under the stated provision and to an extent of six [6] months' gross salary, Kshs 138,600.
63. In the upshot, Judgment is entered in favour of the claimant in the following terms;
 - i. A declaration that the summary dismissal against him was unfair.
 - ii. Payment in lieu of notice Kshs 23,100.00
 - iii. Compensation for unutilised leave days Kshs 4,060.50



- iv. Service Pay Kshs 60,400.00
- v. Compensation pursuant to section 49[1][c] for unfair dismissal Kshs 138,600.00
- vi. Interest at court rates from the date of this Judgment till full payment.
- vii. Costs of this suit.

READ SIGNED AND DELIVERED THIS 26TH DAY OF APRIL, 2024.

OCHARO KEBIRA

JUDGE.

In the Presence of:-

Mr. Okonju for Claimant

Mr. Ataka for the Respondent

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

