



**Oyugi v SOS Children’s Villages - Kenya (Cause 485 of 2019)
[2024] KEELRC 866 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 866 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 485 OF 2019**

**JK GAKERI, J
APRIL 22, 2024**

BETWEEN

DOMINIC ODONGO OYUGI CLAIMANT

AND

SOS CHILDREN’S VILLAGES - KENYA RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim dated 11th July, 2019 alleging unfair termination of employment.
2. The Claimant alleges that he was employed by the Respondent as a Village Director- Kisumu on 21st February, 2011 and was confirmed in the said position on 1st May 2012, at a basic salary of Kshs.105,966.65 per month.
3. The Claimant further states that sometime in January 2018 while he was on leave, the Respondent through an undated Notice to Show Cause made several accusations against him regarding handling of the case of a class 6 child, Sarah Nyaboke. That he responded to the notice to show cause, vide a letter dated 2nd March, 2018.
4. The Claimant states that a disciplinary committee was convened and he defended himself appropriately and continued working for the Respondent until 22nd March, 2018 when his services were unfairly terminated on the ground of gross misconduct.
5. The Claimant faults the termination and states that it was unfair as he confirmed that the subject child attended counselling at Kenya Institute of Professional Counsellors and he did not give the space of the subject child at the Village to another child as alleged by the committee as only the National Director could approve such an act.



6. The Claimant further states that during the handover of the Subject child, the Child Protection team and the mother were present and minutes were taken. It is the Claimant's case that he involved his superiors at the National office and he did not take any unilateral decision as alleged.
7. The Claimant avers that as a Village Director he was the 'Father' of the child and did not do anything wrong by taking the child for counselling and the allegation of emotional abuse of the child is unfounded.
8. The Claimant avers that the counselling was conducted by Jane Atieno from Kenya Institute of Professional Counsellors and the age of the child's pregnancy determined.
9. The Claimant states that he did not wilfully disobey his seniors as alleged.
10. The Claimant prays for;
 - i. 12 months' salary in terms of employment Act @ Kshs.111,967/= per month
.....Kshs.1,343,604/=
 - ii. General damages for breach of Contract of Employment and loss of Employment at Kshs.5,000,000/=

Total Kshs.6, 343, 604/=
 - iii. Costs and interest.

Respondent's case

11. In its response filed on 30th August, 2029, the Respondent admits that the Claimant was its employee.
12. It is the Respondent's case that the notice to show cause was served upon the Claimant on the 18th January, 2018 requiring him to appear before a disciplinary committee and since he was on leave it was followed up with a phone call and the Claimant promised to collect the letter on 5th February, 2018 but failed to do so.
13. The Respondent states that the Claimant responded to the notice to show cause vide a letter dated 2nd March, 2018.
14. The Respondent further avers that the grounds for termination were fair and further states that the grounds were arrived at by the Disciplinary Committee after the disciplinary hearing and approval by the Regional Director.
15. The Respondent reiterates that the Claimants termination was lawful as it was necessitated by gross misconduct and urges the court to dismiss the claim with costs.

Claimant's evidence

16. On the 16th October, 2023 the matter proceeded for hearing with the Claimant testifying in support of his claim while the Respondent called one Dorcas Cherop who joined the Respondent in 2002.
17. CWI testified that his dismissal was unfair and unprocedural. The Claimant states that as the Village Director was the father of the children in the village, which explains why he followed up with the school of the child because she was pregnant and the Head teacher allowed him to take the girl for counselling but no documentary evidence was issued by the counsellor.
18. The Claimant further confirmed that he involved the child protection team but did not explain at what stage he did so and no minutes were generated at the meeting, if any.



19. The witness further states that the subject girl attended counselling and he had provided the name and the contact address of the counsellor who counselled her.
20. The witness further states that he involved the child protection team but they were not invited to give their evidence during the disciplinary hearing.
21. Further, the witness confirmed that the child was re-united with her family for purposes of giving birth.
22. It is the Claimant's evidence that the child was reintegrated to SOS village Kisumu where she stays.
23. The Claimant admitted that he received the invitation for the hearing and attended the meeting on 2nd March, 2018 and defended himself and did not file any appeal but was notified of his rights.
24. The Claimant, on re-examination testified that he received the invitation on the date of hearing and the committee did not accommodate him as it had travelled from Kisumu.
25. That no advance copy had been sent on email. That no investigation report was tabled and he did not sign the minutes. He denies having confessed anything at the hearing.

Respondent's evidence

26. RWI, Dorcas Cherop, an employee of the Respondent confirmed that between 2014 and 2018, the Claimant was the Director and her boss and was conversant with the facts of the case.
27. The witness states that she was a member of the Child Protection Team which was never convened and the Director, the Claimant, handled the matter of the subject Child by himself. She confirmed that failure by the Claimant to involve the committee amounted to insubordination and non-adherence to the laid down instructions.
28. The witness testified that she was not aware of any counsellor that was appointed by the Respondent to counsel the subject child.
29. The witness confirmed that she was not a member of the disciplinary committee meeting.
30. The witness further testified that the minutes did not indicate whether witnesses testified against the Claimant.
31. RWI confirmed that she was a member of the child protection committee and the Claimant had not given the name of the counsellor he allegedly had taken the child to.
32. It was here testimony that the Claimant denied the Children protection team the opportunity to probe the issue as he tore a letter written by witness.
33. The witness confirmed that he had no evidence of the confession.
34. That the Claimant refused to report to the office as instructed and extended his leave without authority.
35. That counsellors who counselled children at the village issued reports.

Claimant's submissions

36. The Claimant's counsel highlighted two issues for determination, namely;
 - i. Did the Respondent unfairly terminate the Claimant's employment?
 - ii. Is the Claimant entitled to the reliefs sought?



37. Counsel cited the provisions of Sections 43 and 45 of the *Employment Act*, 2007 to urge that the Respondent did not discharge the legal burden of prove that the substantive and procedural fairness test was complied with in terminating the Claimant. Reliance was placed on the decision in *CMC Aviation Ltd v Mohamed Noor (2015) eKLR*.
38. It is the Claimant's submissions that the Respondent did not adhere to procedural fairness as the notice to show cause is undated and was delivered while the Claimant was on leave.
39. Counsel further submits that the Claimant was not given sufficient time to respond and prepare for the disciplinary hearing as the notice to show cause was served on him on the 2nd March, 2018 on the day when the disciplinary hearing took place.
40. Counsel further submits that the Claimant denied all the allegations made in the termination letter and states that the Claimant followed due process in the reintegration of the subject child into the Village after miscarriage.
41. It is the Claimant's submission that the reasons for termination stated in the letter of termination were not true as the Respondent did not have a substantive reason to terminate his employment and the termination was unfair.
42. Finally, the Claimant submits that having proved that the termination was procedurally and substantively unfair, he is entitled to the reliefs sought.

Respondent's submissions

43. Counsel for the Respondent highlighted two issues for determination;
 - a. Whether the Claimant's employment was unfairly terminated.
 - b. Whether damages equivalent to pay for unserved term is available as remedy for the claimant.
44. On the first issue, counsel submitted that due procedure leading to termination of the Claimant's employment was followed in compliance with the provisions of Section 45 (5) of the *Employment Act*, 2007 and that the Claimant has not discharged the burden of proving unfair termination of employment under Section 47(5) of the *Employment Act*, 2007.
45. Counsel cited the sentiments of the court in *Anthony Mkala Chitavi V Malindi Water and Sewerage Co. Limited (2013)* cited with authority in *Langat V Uniliver Tea Kenya Limited (Cause E004 of 2021 (2022) KEELRC 1238)* that;

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the Employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.”
46. It is the Respondent's submission that the notice to show cause issued to the Claimant was lawful and clearly spelt out the charges the Claimant was facing relating failure to adhere to the laid out procedure on the issue of the subject child.
47. Counsel submits that the Claimant was lawfully terminated for having exposed a minor to psychological torture by handing her to her aunt and causing her to stay in Eldoret where she had possibly been sexually abused by her cousin.



48. Counsel urges that the right procedure was followed in dismissing the Claimant from employment and cited the decision in *Kenya National Private Security Workers Union v Security Guards Services Limited* (2020) eKLR.
49. Finally, counsel submits that the prayer for general damages of Kshs.5,000,000/= sought in the statement of claim is not awardable as was held by the Court of Appeal in *Kenya Broad Casting Corporation vs Geoffrey Wakio* (2019) eKLR that;
- “It is trite law that general damages are not awardable for wrongful termination. Previous decisions of the court have stated that damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice”.

Determination

50. The issues that commend themselves for determination are;
- i. Whether termination of the Claimant’s employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
51. On the 1st issue, counsels have adopted opposing positions with the Respondent’s counsel maintaining that the Claimant’s employment was lawfully terminated. The Claimant’s counsel urges that the termination of employment was unfair.
52. It need not be gainsaid that the provisions of the *Employment Act*, 2007 provide the architecture on termination of employment from notice, reason for termination and proof thereof, validity and fairness of the reason, grounds for summary dismissal, justification of the ground and procedural precepts.
53. These requirements are set out in Sections 35, 41, 43, 44(4), 45 and 47(5) of the *Employment Act*, 2007.
54. In a nutshell, the foregoing provisions are unambiguous that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason to terminate the employee’s employment and did so in accordance with fair procedure.
55. In *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, Ndolo J. aptly captured the requirements in the following words;
- “. . . 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. 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.”
56. The Court of Appeal made similar sentiments in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR.

Reason for termination

57. The Respondent terminated the Claimant from employment vide a letter dated 22nd March, 2018 for insubordination and failure to adhere to the laid out procedure in handling the case of the Sarah Nyaboike, a child.



58. Evidence on record reveal that the Claimant went to child's school, picked her and allegedly took her to a counsellor but had no shred of evidence to prove that any counselling took place at any place.
59. Similarly, the Claimant tendered no evidence to prove that he involved the Child Protection Team on the issue yet he was the Chairperson.
60. For unexplained reasons, the Claimant opted to handle a girl child's case without involving any of the mother's at the Village, a fact he admitted in the response to the notice to show cause.
61. According to the Claimant, the issue of the subject child was handled as required and that she never replaced her with any other child. The Claimant did not furnish the court with evidence of minutes taken during the hand-over of the child. Equally, he did not avail evidence to confirm that indeed the child attended a counselling session. The Respondent's witness, who was a member of the child protection team confirmed that no meeting took place regarding the subject child's case.
62. Based on the evidence on record, the Respondent has established that the Claimant failed to follow the laid down procedures.
63. Significantly, Section 43(2) of the [Employment Act](#), 2007 provides that;

“The reasons or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
64. Legions of decisions have held that a termination of employment will pass the substantive fairness test if the employer demonstrates that there was a reasonable basis for genuinely believing that the grounds relied upon existed.
65. In Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (2019) eKLR, the Court of Appeal expressed itself as follows;

“The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services. That is a partly subjective test.”
66. The foregoing is consistent with the so called “band (range) of reasonableness test” as captured by Lord Denning MR in British Leyland UK Ltd V Swift (1981) IRLR 91 that as long as a reasonable employer would have dismissed the employee in those circumstances, the dismissal will pass as fair and the converse applies.
67. While picking the subject child from school by the Claimant was not of itself culpable, the manner in which the Claimant did was suspicious as he did not involve any of the mothers at the Village yet the subject child was a girl and the matter was not placed before the child protection team, coupled with the fact that no evidence of a counselling session having taken place was adduced in court.
68. For the foregoing reasons, it is the finding of the court that the Respondent has on a preponderance of probabilities demonstrated that failure of the Claimant to follow the laid down procedures in handling the subject child's case amounted to a valid and fair reason to terminate the Claimant's employment.



Procedure

69. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the elaborate procedure prescribed by Section 41 of the *Employment Act*, 2007 is mandatory for a termination of employment to pass as fair.
70. As regards the procedural precepts of Section 41 of the *Employment Act*, 2007 in *Postal Corporation of Kenya V Andrew K. Tanui* (Supra), the Court of Appeal pronounced itself 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 are made;
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
71. The Claimant faulted the procedure employed by the Respondent in terminating his employment on account that sometimes in January 2018, a notice to show cause was delivered to him when he was on leave. According to the Claimant, he did not receive the letter until 2nd March, 2018 when he resumed work but was aware of its content.
72. That on the same day he resumed from leave, he responded to the notice to show cause and attended a disciplinary hearing, which was slated that afternoon.
73. The Respondent on the other hand availed copies of letters dated 5th February, 2018 and 7th February, 2018 recalling the Claimant from leave to respond to the notice to show cause. Noteworthy, a disciplinary hearing notice for 2nd March, 2018 was also sent to him on the 26th February, 2018.
74. From the copies of emails on record dated 6th and 7th February, 2018, it is evident that the Claimant was recalled from leave, initially through his mobile phone and subsequently by email and a copy of the notice to show cause was attached.
75. The Claimant did not deny having been contacted to resume duty and respond to the notice to show cause having received the notice to show cause or invitation to attend a disciplinary hearing.
76. At all material times, the Claimant was aware that he was expected at the workplace but took no steps to respond to the calls or emails or explain why he could not report back to the workplace.
77. The Respondent deemed the charges the Claimant faced serious but the Claimant did not and only reported to the workplace after his leave ended.
78. Was the Respondent’s request to the Claimant to resume duty reasonable bearing in mind that he was on officially sanctioned leave?
79. Regrettably, none of the counsels addressed this issue.
80. In determining this question, the court ought to consider whether recalling an employee from leave is a good practice and the prejudice the employee is likely to suffer by the recall.



81. Typically, employers re-call staff who are on leave based on exigencies of duty and specifically unforeseen circumstances which necessitate recalling of an employee.
82. It is trite that annual leave is one of the statutory rights of an employee under Section 28 of the *Employment Act*, 2007. The provision entitles the employee to at least 2 weeks of uninterrupted working weeks, unless otherwise agreed, irrespective of the total number of days of leave. This provision would appear to impliedly sanction interruption of annual leave by the employer outside the two (2) weeks.
83. In the instant case, the Claimant adduced no evidence as to when he proceeded on leave and whether the provisions of Section 28(3) of the *Employment Act*, 2007 were violated.
84. Similarly, it is trite law that the right to fair labour practices is a constitutional imperative under Article 41 of *the Constitution* of Kenya, 2010, and in the court's view, the right to uninterrupted annual leave is an integral part of the reasonable working conditions an employee is entitled to.
85. Ordinarily, when an employee proceeds on leave, another employee holds the fort till the substantive holder of the office resumes duty.
86. This however, is sometimes difficult in certain situations where the duties or obligations or personalized by the appointment letter or the obligation in question can only be discharged by the particular employee.
87. Owing to exigencies of duty and dynamism at the workplace, and an employer may exceptionally recall an employee from annual leave to attend to unforeseen circumstances, it is however, in the court's view, not a good practice and ought to be resorted to as the last option having regard to the prejudice it is likely to occasion on the part of the employee.
88. In this case, the Respondent wanted the Claimant who was on leave to respond to a notice to show cause. Evidence on record reveal that the Respondent delivered a copy of the notice to show cause to the Claimant, submitted the same on email and even called him severally to implore him to resume duty and respond to the notice to show cause.
89. Regrettably, neither of the Respondent's actions elicited a response or explanation from the Claimant. A response would have demonstrated the circumstances in which the Claimant was in and in particular why he could not resume duty.
90. In the circumstances, it is difficult to find any prejudice the Claimant stood to suffer if he resumed duty other than transport charges which are recoverable from the employer.
91. In the circumstances, the court finds no reason to fault the process of termination of the Claimant's employment.
92. The court is persuaded that the Claimant was accorded sufficient time to respond to the notice to show cause and also prepare for the hearing but declined to adhere to the notices and only responded on the day of the disciplinary hearing.
93. In sum, it is the finding of the court that the termination of the Claimant's employment by the Respondent was substantively justifiable and was conducted in accordance with a fair procedure.
94. Concerning the reliefs sought, the court proceeds as follows;



i. Compensation for unfair termination

95. Having found that the termination of the Claimant’s employment was substantially justifiable and procedurally fair, the prayer for compensation is unsustainable and is declined.

ii. General damages for breach of contract

96. The Claimant adduced no evidence of entitlement to this prayer.

97. The court is guided by the sentiments of the Court of Appeal in *Kenya Broadcasting Corporation V Geoffrey Wakio* (2019) eKLR cited by the Respondent’s counsel.

The prayer is dismissed.

98. In the upshot, the Claimant’s case against the Respondent is dismissed for want of merit.

99. Each party to bear its own cost.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

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 *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.

DR. JACOB GAKERI

JUDGE

