



**Omondi v Action Against Hunger (USA) (Cause E159 of 2023)
[2024] KEELRC 996 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 996 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E159 OF 2023**

JK GAKERI, J

APRIL 15, 2024

BETWEEN

GRACE OMONDI CLAIMANT

AND

ACTION AGAINST HUNGER (USA) RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 21st February, 2023 alleging unfair and unlawful termination of employment.
2. The Claimant prays for;
 - a. A declaration that the termination of the plaintiff's employment was wrongful, unfair, unlawful null and void.
 - b. Specific performance of the contract of employment including being given a fair opportunity to be heard before her contract can be terminated.
 - c. Reinstatement on the same terms and conditions.
 - d. Alternatively and without prejudice to the foregoing, general and special damages for wrongful termination.
 - e. Unpaid salary and allowances upto and including all the days the Claimant worked for the Respondent.
 - f. A certificate of service without blemish.
 - g. Exemplary, punitive and or aggravated damages for violation of constitutional rights.
 - h. The cost of this suit.



- i. Interest on damages and costs.
 - j. Further or other relief deemed just.
3. The Claimant avers that she was employed by the Respondent on 6th April 2018 as a Logistic Advisor and her title was later changed to Regional Logistics Specialist.
4. It is the Claimant's averment that by a letter dated 26th January, 2023, the Respondent terminated her employment on alleged grounds of insubordination while was serving under a contract that was running from 1st January, 2022 to 31st December, 2023.
5. The Claimant avers that the termination of employment was unlawful, null and void in that;
 - a. The allegation was false, and the Respondent knew that the allegation was false.
 - b. The Respondent's line manager who initiated the termination was actuated by actual malice, as the line manager was unhappy with an official whistle blowing report prepared by the Claimant.
 - c. The Claimant was not given an opportunity to show cause.
6. The Claimant avers that the termination was in violation of the Constitution, Employment Act and the Respondents own internal policies.
7. It is the Claimant's case that the impact of the termination of employment was so immense that the claimant was severely depressed and had to seek medical attention.
8. The Claimant further avers that as a result of the unfair termination and violation of her fundamental rights to fair labour practices she was depressed, suffered loss and damages.

Respondent's case

9. The Respondent filed a response to the Statement of Claim dated 27th March, 2023.
10. The Respondent denies having terminated the Claimant's employment unlawfully and states that the Claimant's contract of employment was lawfully and summarily terminated.
11. It is the Respondent's case that the Claimant's contract was terminated on the 26th January, 2023 on the grounds of insubordination and by an email dated 31st January, 2023, the Claimant acknowledged the termination and preferred an appeal to the Respondent's Chief Executive Officer which appeal is yet to be determined.
12. The Respondent avers that the legal procedure was followed in terminating the Claimant's employment and the reasons for termination were valid and fair, contrary to the Claimant's allegations.
13. It is the Respondent's case that the suit is premature as the Claimant appealed to the Chief Executive Officer and the appeal is pending determination.

Claimant's evidence

14. The Claimant testified in support of her claim and adopted the witness statement dated 29th September, 2023.
15. The witness testified that the background of the termination of employment was a report she had prepared entitled "The Haiti Report" which caused bad blood between her and the line manager.



16. The Claimant confirmed that there was a meeting on 24th January, 2024 and no other meeting took place. It was her testimony that no meeting took place on 25th January, 2023 and Loise did not call her. She stated that she was not aware of any complain against her.
17. The witness further stated that she did not receive any call form the Human Resource Department and was not given a notice to show cause as alleged.
18. The witness further confirmed that she filed an appeal on the 31st January, 2023 and filed the instant suit on 28th February, 2023.
19. The witness testified that she was not aware of the alleged insubordination.
20. It was her evidence that the correct procedure for termination of employment was not followed.

Respondent's evidence

21. The Respondent called one Loice Birgen to testify on its behalf and she adopted her witness statement and produced the exhibits.
22. In her evidence, the witness stated that on the 24th January, 2023, a meeting was convened via email and later adjourned to 25th January, 2023 but no meeting took place. The witness admitted that no notice to show cause sent to the Claimant.
23. It was her testimony that the meeting held on 24th January, 2023 ended pre-maturely and when the Claimant was called for a meeting on 25th January, 2023, she did not attend and the management decided to terminate her employment.
24. The witness confirmed that the Claimant had worked with the Respondent for more than 4 years and had not been issued with a warning letter.
25. The witness further testified that the Respondent did not have an opportunity to determine the appeal as the Claimant filed the instant suit before it could do so.
26. RWI confirmed that no disciplinary meeting was held in respect of the Claimant and she had no record of minutes of the meeting held on 24th January, 2023.
27. It was her testimony that due process was followed in the summary termination of the Claimant's employment as per the Respondent's HR Manual.
28. On re-examination, the witness testified that the Claimant's salary as at the date of termination was Kshs.671,630.00.
29. RWII, Mr. James Mathenge confirmed that Claimant had disrespected her line manager and the Human Resource Manager. The witness admitted that he was the Claimant's line manager and had made a complaint to the HR Manager verbally.
30. It was his testimony that the Claimant left Haiti without authority but had notified him about the illness and felt unsafe there.
31. RWI further testified that the email dated 24th November, 2022 was rude and disrespectful and in Haiti there was a Logistics team, not the Claimant.
32. That the Claimant refused to give rights for no apparent reason and her employment was terminated for insubordination, refusal to give approval rights and verbal insults to officers in Haiti.



33. The witness could not recall attending a meeting on 24th November, 2023 and was unaware of the outcome.
34. The witness confirmed that the Claimant was in charge of 4 countries and there were no complaints in any of the other countries, namely; Kenya, Ethiopia and Tanzania.

Claimant's submissions

35. Counsel for the Claimant highlighted the following issues for determination:
 - i. Whether the Respondent in terminating the Claimant complied with the relevant provisions of *Employment Act*, 2007.
 - ii. Whether the Claimant has sufficiently brought out grounds of consideration with regard to reinstatement.
 - iii. In the event the Claimant is not reinstated, what would be sufficient quantum with regard to the prevailing circumstances leading to the institution of this suit?
 - iv. Whether punitive damages would be appropriate.
 - v. What order as to cost.
36. On the first issue, counsel submitted that a termination of employment that does not comply with the requirements of the *Employment Act*, 2007 is unfair and therefore wrongful and unlawful.
37. Counsel relied on the holding in *Jared Aimba v Fina Bank Limited* (2016) eKLR where the Court of Appeal held that;

“However, under Sections 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination.”
38. Counsel submits that termination of the Claimant's employment was motivated by ulterior motives of the line manager who was unhappy with the official report prepared by the Claimant and the Claimant seeks to be reinstated as she is still within the three year time limit for reinstatement with full benefits.
39. On the third issue, counsel submits that should the court not grant reinstatement, it could award 12 months compensation and relied in the holding in *Titus Muriuki Ndirangu v Beverly School of Kenya Limited* (2022) eKLR where the court awarded 6 months' salary as damages for wrongful termination of the claimant who was a high school teacher.
40. Further, reliance was also made on *Gas Kenya Limited v Odbimbo* (Appeal E006) 2022 where the court awarded 12 months' salary on the basis of long service and exemplary damages.
41. Counsel submits that as the Respondent had withheld the Claimant's salary for January 2023, the court ought to award the Claimant exemplary damages as was held by the Court of Appeal in *Barclays Bank of Kenya Limited v Mema*, Civil Appeal E011 of 2021.

Respondent's submissions

42. Counsel for Respondent highlighted the following issues for determination;
 - i. Whether there were valid reasons to warrant summary dismissal.



- ii. Whether due process was accorded to the claimant before dismissal.
 - iii. Whether the claimant ought to be reinstated to her position.
43. On the first issue, counsel submits that the Respondent convened a meeting between the Claimant and the senior officials to discuss the Claimant's complaint against the line manager and during the meeting the line manager also made a complaint against the Claimant for insubordination.
 44. That the meeting was adjourned to 25th January, 2023 for the claimant to show cause why her employment should not be terminated but she failed to attend the meeting.
 45. It is the Respondent's Submission that the termination of the Claimant's employment was due to none adherence of the Respondent's organization's values and disrespect for her immediate line manager and other senior organization officials.
 46. The Respondent submits that due process was followed and claimant was granted an opportunity to be heard as provided under Section 41 of the *Employment Act*, 2007 which she openly declined.
 47. Concerning reinstatement, counsel submits that notwithstanding the fact that the three year limitation period for reinstatement had not lapsed, the Claimant's poor working relationship and her non-adherence to the organization's values, she would not fit in the organization.
 48. Counsel relies on the holding on the Court of Appeal decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (2014) where the court held that;

“The remedy for reinstatement is discretionary and an industrial court is required to be guided by factors stipulated in Section 49(4) of the *Employment Act* which includes practicability of reinstatement and re-engagement and the common law principle that specific performance in a contract for employment should not be ordered unless on very exceptional circumstances.”
 49. Counsel further submits that the Claimant's service was governed by the provisions of the contract of employment and there was no room for general damages
 50. Reliance was made on the holding in *Alfred Githinji vs Mumias Sugar Company limited* Civil Appeal No. 194 of 1991 (unreported) where the Court of Appeal held that;

“Upon termination of employment of an employee he is entitled to only the amount specified in his contract of service in lieu of notice and not to general damages at large.
 51. Similarly, in *Central Bank of Kenya vs Julius Nkonge* (2002) eKLR, the Court of Appeal held that the trial court erred by computing damages beyond the notice period. It was the courts view that on the assumption that the respondent's dismissal was wrongful he was only entitled to damages equivalent to the salary he would have earned for the period of notice, namely; three months and that the trial judge erred in awarding him more.
 52. Notably, the foregoing decisions predate the *Employment Act*, 2007 and the *Constitution* of Kenya, 2010.
 53. On special damages, the Respondent's counsel submits that such damages must be proved. Counsel further submits that the Claimant pleaded non-payment of salary for January 2023 and the remainder of the contract due to lapse in December 2023.



54. It is the Respondent's submission that the suit was filed pre-maturely without exhausting all avenues of dispute resolution and the Claimant is not entitled to special damages but for the days worked in January 2023 and her bonus.
55. The Respondent further submits that the Claimant has not proved her claim for exemplary damages.
56. It is the Respondent's submissions that when the Claimant clears with the Respondent, a certificate of service will be issued.

Determination

57. The issues for determination are;
 - i. Whether the Claimant's employment was unfairly terminated by the Respondent.
 - ii. Whether the Claimant had exhausted the internal dispute resolution mechanisms.
 - iii. Whether the Claimant is entitled to the reliefs sought.
58. As regards termination of employment, the *Employment Act*, 2007 and the case law are consistent that for termination of employment to pass muster, it must be demonstrated that the employer had a valid and fair reason to terminate the employment and he did so in accordance with fair procedure.
59. The foregoing has been reinforced by legions of decisions such as *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where Ndolo J. underscored the need to establish a substantive justification for the termination and procedural fairness for a termination to pass the fairness test, which was emphasized by the Court of Appeal in *Naima Khamis V Oxford University Press EA Ltd* (2017) eKLR.
60. In this case, the Claimant was employed by the Respondent on 6th April, 2018 for a duration of more than 4 years till 26th January, 2023 when her employment was terminated.

Reasons for termination

61. The Claimant's employment was terminated vide a letter dated 26th January, 2023, which read in part;

“This letter is to inform you that as of January 26th, 2023 your employment with Action Against Hunger (HEAR) is terminated. You are being terminated for cause specifically, insubordination based on your line manager's work related instructions.....”
62. Strangely, the letter of termination makes no reference to the particulars of the alleged insubordination.
63. *Black's Law Dictionary* (10th Edition) defines insubordination as;

A wilful disregard of an employer's instruction. An act of disobedience to proper authority especially a refusal to obey an order that a superior officer is authorised to give.
64. The letter makes no reference to what the Claimant did or did not do and when.
65. It is the Claimant's evidence that what triggered her termination was a report she had prepared on the Haiti as it created bad blood between herself and her line manager.
66. RWI testified that a meeting was convened on the 24th January, 2023 following a complaint by the Claimant against her line manager, one Mr. James Mathenge. The line manager in response to the complaint stated that the Claimant's report on Haiti was not disputed, but added that the context was fragile and Haiti needed a forensic audit. He also raised the issue of the Claimant shouting and walking



- out on him in a meeting held on 23rd January, 2023, which action he stated was disrespectful adding that the Claimant had been subordinating his efforts to carry out duties as line manager.
67. RWII confirmed on cross-examination that the complaint against the Claimant made to the Human Resource was verbal and cited the emails on Haiti.
68. In determining whether the Respondent had a valid and fair reason or justification to terminate the claimant's employment, the court is guided by the provisions of Sections 43(2) of the [Employment Act, 2007](#) and judicial pronouncements.
69. Section 43(2) of the [Employment Act, 2007](#) provides that;
- “The reason 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.”
70. In [Galgalo Jarso Jillo v Agricultural Finance Corporation](#) (2021) eKLR, B.O. Manani J. states as follows;
- “In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.”
71. Similarly, in [Kenya Revenue Authority v Renwel Waitihaka Gitahi & 2 others](#) (2019) eKLR, the Court of Appeal laid it bare that;
- “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 claimant's services. That is a partly subjective test.”
72. The foregoing sentiments resonate with the sentiments of Lord Denning in [British Leyland \(UK\) Ltd v Swift](#) (1981) IRLR 91 on the band of reasonableness test that;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view . . .”
73. It is common ground that the Respondent did not issue a notice to show cause to the Claimant and thus the charges the Claimant was to confront were never brought to her attention for a rebuttal.
74. Equally, the letter of termination accuses the Claimant of insubordination without setting out any particulars.
75. From the foregoing it is the finding of the court that the Respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant's employment on the 26th January, 2023.

Procedure

76. As emphasized by the Court of Appeal in [Pius Machafu Isindu v Lavington Security Guards Ltd](#) (2017) eKLR, Section 41 of the [Employment Act, 2007](#) prescribes an elaborate and mandatory process to be complied by the employer in effecting a termination of employment.



77. The specific elements of procedural fairness have been elaborated upon in legion of decisions such as *Loice Otieno v Kenya Commercial Bank* (2013) eKLR by Radido J. and the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR among others
78. The tenets include; reason(s) for which termination of employment was being considered, explanation of the grounds of termination in a language understood by the employee, entitlement of the employee to the presence of another employee of his choice as well as hearing and considering the representations made by the employee and/or the person chosen by the employee.
79. The Respondent's witness stated that the line manager in responding to the allegations made by the Claimant stated that the Claimant had shouted at him and walked out on him, which he found disrespectful and further alleged that the Claimant had been subordinating his efforts to carry out his duties. The Respondent tendered no evidence as to when and in what circumstances the alleged occurrences took place.
80. As adverted to elsewhere above, the Respondent neither issued a notice to show cause nor grant the Claimant an opportunity to respond or rebut the allegations of insubordination.
81. More significantly, RWI confirmed that no disciplinary meeting was held and she had no minutes of what transpired on 24th January, 2023 or 25th January, 2023 when the decision to terminate the Claimant's employment was made.
82. Evidently, the procedural precepts attendant to a fair termination of employment were not complied with
83. The Respondent's Human Resource Manual outlines the disciplinary procedure which entail; verbal warning, written warning, performance improvement plan, final warning and termination. It also provides that the Respondent reserves a right to terminate any employee in the case of gross misconduct or non-adherence to the Respondent's policies and values.
84. In the instant case, the Respondent terminated the Claimant's employment in total disregard of the provisions of its Human Resource Manual and the law.
85. Section 41 of the *Employment Act*, 2007 provides;
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 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."
86. As demonstrated elsewhere in this judgment, these mandatory provisions were not complied with by the Respondent.
87. From the foregoing reasons, it is the finding of the court that the termination of the Claimant's employment was not conducted in consonance with the provisions of Section 41 of the *Employment Act*, 2007 and was thus unfair within the meaning of Section 45 of the *Employment Act*, 2007.



Whether the Claimant is entitled to the reliefs sought

a. Declaration

88. Having found that the Respondent failed to prove that it had a substantial justification to terminate the Claimant's employment and did not adhere to the prescribed procedure in termination of the Claimant's employment, a declaration is merited that termination of the Claimant's employment was wrongful, unfair and unlawful.

(b) Reinstatement

89. As correctly submitted by the Claimant's counsel, although the remedy of reinstatement is available within 3 years from the date of termination of employment or dismissal and the period is yet to lapse, the remedy is discretionary as aptly captured by Githinji JA and also by Maraga JA (as he then was) in *Kenya Airways Ltd v Aviation & Allied Workers Union (K) Ltd & 3 others* (Supra) and the court must consider all the relevant particulars under Section 49(4) of the *Employment Act*, 2007.
90. It is common ground that the Claimant expressed his wish to remain in the Respondent's employment by praying for the remedy of reinstatement at the interlocutory stage and in the main suit.
91. Second, the Claimant may have contributed to the separation as gleaned from the email communication between her and the line manager.
92. Third, practicality is an important consideration as it entails the employees fitting back at the place of work. It responds to the question as to whether the parties can continue in an employer/employee relationship and as explained by the New Zealand Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* (1994) ERNZ 414, the remedy is not automatic even where there is a finding that the termination of employment was unjustified.
93. The sentiments of the court in that case were cited with approval by the Court of Appeal in *Kenya Power & Lighting Co. Ltd v Aggrey Lukorito Wasike* (2017) eKLR where the court set aside the order of reinstatement and dismissed the Claimant/Respondent's suit in its entirety.
94. In the instant case, the Claimant has been an employee of the Respondent for about 4 years which is not long and the contract was scheduled to lapse on 31st December, 2023 and renewal was by mutual consent.
95. Similarly, the Claimant has not demonstrated the exceptional circumstances required by the provisions of Section 49(4)(d) of the *Employment Act*, 2007.
96. Finally, it is notable that the Claimant filed the instant suit before the internal processes had been complied with as the appeal had not been determined.
97. Finally, considering the manner in which the Claimant left employment, the court is not persuaded that it would be opportune to order reinstatement.

The prayer is declined.

In the alternative,

a. Unpaid Salary and allowances

98. In the alternative to reinstatement, it is not in dispute that the Claimant was not paid her salary for the month of January 2023, a fact acknowledged by the Respondent.



99. The claim for unpaid salary and allowances due and payable to the Claimant upto the date of termination of employment is granted.

b. Compensation for unlawful, wrongful and unfair termination of employment

100. Having found that the termination of the Claimant's employment was substantively and procedurally unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.

101. In determining the quantum of compensation, the court has taken into consideration the fact that Claimant worked for the Respondent for a duration of about 4 years and had no warning letter or allegation of misconduct. The claimant may have contributed to the termination of employment as evidenced by emails on record and expressed her willingness to continue working for the Respondent through the prayer for reinstatement. However, although the Claimant appealed the Respondent's decision, she instituted the instant suit before the appeal was heard and determined.

102. In the circumstance, the court is satisfied that the equivalent of 6 months gross salary is sufficient compensation for the termination of employment.

c. Aggravated, exemplary damages or punitive damages

103. The Claimant adduced no evidence of entitlement to this prayer and it is accordingly dismissed.

d. Certificate of service

104. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

105. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;

- a. Declaration that termination of employment was unfair.
- b. Unpaid salary and allowances due as at the date of termination.
- c. Equivalent of 6 months gross salary.
- d. Certificate of service.
- e. Costs of this suit.
- f. Interest at court rates from date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH 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

