



Odoyo v Invesco Assurance Company Limited (Employment and Labour Relations Cause 672B of 2014) [2024] KEELRC 1270 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1270 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 672B OF 2014**

MN NDUMA, J

MAY 23, 2024

BETWEEN

ELVIS ODHIAMBO ODOYO CLAIMANT

AND

INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The suit was brought by way of a memorandum of claim on 25/4/2014 by the claimant against the respondent seeking the following reliefs:
 - a. One month's salary in lieu of notice Kshs. 44,000/=
 - b. Payment in lieu of leave days not taken for 5 years Kshs. 220,450/=
 - c. Salary for the remainder of the contract being 25 years Kshs. 13,227,000/=.
 - d. Gratuity (severance pay) calculated at 15 days salary for six years Kshs. 1,584,000/=.
 - e. Damages
 - f. Provision of certificate of service.
 - g. Costs and interest.

Facts of the claim

2. CW1 the claimant adduced evidence relying on the statement of claim dated 8/4/2014 and the verifying affidavit and a witness statement filed on 25/4/2014 that he was employed by the respondent by a letter of appointment dated 27/9/2004 in the position of cashier at the Thika office at a basic salary of Kshs. 20,000/=. The salary was increased to Kshs. 22,500/= on 6/10/2010 and to Kshs. 24,000/= in the year 2012.



3. That the claimant served diligently until the 25/11/2013 when he was dismissed from employment without notice or justifiable reason. That upon dismissal he was not paid in lieu of notice nor was he paid any terminal benefits including payment in lieu of leave days not taken.
4. The claimant stated that, prior to the dismissal on 12/7/2013, he was issued with a notice to show cause for alleged gross misconduct. That the claimant was also placed on suspension.
5. The notice to show cause produced by the claimant indicates that the claimant was accused of executing duties negligently which led to the company losing funds in the sum of Kshs. 2,118,257/=.
The claimant was given 14 days to show cause why disciplinary action should not be taken against him.
6. The claimant responded to the notice to show cause by a letter dated 17/7/2013. The claimant asked to be given office space and opportunity to reconcile and account for the alleged missing funds in the sum of Kshs. 2,118,257/=. The claimant said he was not the only cashier in the office and that he was on paternity leave and the colleague took maternity leave when he came back and that is when the audit exercise was undertaken in her absence. The claimant said all cashiers needed to check their accounts at the branch and come up with reports and compare that with audit reports from head office which has been the norm.
7. The claimant stated that he was only given scanty details for only two files on diverse dates between the 2nd and 6th September 2013 relating to the period in question. That the files were given to him by one manager called John Mwaniki Mwangi. That upon carrying out reconciliation, the claimant was able to show that only a sum of Kshs.188,130/= was missing based on the two files only. That he was not given all the files to complete the reconciliation. The claimant said that the purported discrepancies arose when he was on leave.
8. The claimant added that however the respondent summarily dismissed the claimant for occasioning the company loss of Kshs. 627,017/=. That the claimant was not given a hearing before the summary dismissal. That there was no evidence adduced to show that the claimant caused the alleged lost funds.
9. That the dismissal without notice, notice pay and justifiable reason was unlawful and unfair. That the claimant be granted the reliefs set out in the statement of claim in the sum of Kshs.13,447,450/= plus interest and costs.
That despite demand notice sent to the respondent the respondent declined to settle the claim.
10. The respondent filed a statement of defence in which it offered a general denial of the claim. The respondent did not tender any evidence in defence of the suit.
11. The evidence adduced by the claimant has therefore not been rebutted. The decision of the Court of Appeal in *Civil Appeal No. B13 of 2012 KPLC Ltd versus Pamela Ogunyo [2015]* eKLR is on point in that respect.
12. The claimant however bears the burden of proving the claim on a balance of probability in terms of sections 107 and 108 of the *Evidence Act*, Cap 80 Laws of Kenya.
13. The claimant filed submissions in support of the claim in which he restated the facts adduced before court and the law applicable.



14. The claimant relied on the Court of Appeal decision in Civil Appeal No. 127 of 2015, *Postal Corporation of Kenya versus Andrew Tanui [2019]* eKLR in which Waki, Musinga and Kiage JJA held:

“It is our further view that section 41 provides the minimum standard of a fair procedure that an employer ought to comply with ----- four elements must thus be discernible for the procedure to pass muster: -

- i. An explanation of the grounds of termination in a language understood by the employee;
 - ii. The reason for which the employer is considering termination;
 - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) Hearing and considering any representations made by the employee and the person chosen by the employee.”
15. The respondent failed to tender any evidence to prove that it had a valid reason to summarily dismiss the claimant which reason was arrived at in strict adherence to the requirement of section 41 of the *Employment Act* 2007, set out above by the Court of Appeal.
16. In conclusion the court finds that the respondent violated sections 36, 41, 43 and 45 of the *Employment Act* 2007. The summary dismissal was not for a valid reason and the respondent did not follow a fair procedure in summarily dismissing the claimant.
17. Accordingly, the claimant is entitled to compensation in terms of section 49(1)(c) and 4 of the *Employment Act* 2007 and to payment of terminal benefits which he has proved to be due and owing to him as follows: -
- a. The claimant was not given notice of termination as he was summarily dismissed. The court finds that the claimant is entitled to payment of 0 months’ salary in lieu of notice in the sum of Kshs.44,090/=.

b. Leave pay

18. The claimant had not taken annual leave for a period of five (5) years. However, the claimant did not adduce evidence to prove why this was the case. The court finds that the claim was not proved on a balance of probability and is dismissed.

Gratuity/severance pay

19. The claimant produced a letter of appointment which indicates that the claimant was entitled to Group Life Assurance, Group Personal Accident and pension fund during the tenure of his employment. The claimant did not adduce any evidence to show that he was entitled to payment of termination gratuity or severance pay. The court finds these two claims have not been proved on a balance of probability and are dismissed.



Compensation/damages

20. In terms of the Supreme Court decision in the case of Ken freight EA Limited versus Benson K Nguti 2019 eklr, Petition 37 of 2018

“The Act does provide for a number of remedies for unlawful and wrongful termination under section 49 and it is up to the Judge to exercise discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same were challenged in a court of law and where a court found the same to be unfair or unlawful, section 49 applies.”

21. The court upon finding that an employee has been unlawfully and unfairly dismissed is mandated to provide the remedies provided under section 49(1) and (3) thereof as guided by the principles set out under sub-section 49(4) thereof. The court is in this respect mandated to award compensation limited to a maximum of twelve (12) months' salary in compensation for the unlawful and unfair termination/dismissal.
22. Where constitutional violations of rights or fundamental freedoms are proved, the court may in addition award general damages and aggravated damages for such breach or violations.
23. In the present case, the claimant has only proved that he was unlawfully and unfairly dismissed from employment. The court shall consider an award of compensation only in that respect as guided by the Act.
24. In this respect the claimant earned a monthly salary of Kshs.44,090/=; the claimant served the respondent diligently for a period of five months; and the claimant lost his employment unlawfully and unfairly. The claimant was not paid any terminal benefits upon the summary dismissal. The claimant was not compensated for the loss. The claimant was not given a certificate of service to help him get alternative employment. The claimant suffered loss and damage due to the sudden loss of income without notice and lost prospects of continued employment by the respondent till retirement for the next 25 years.
25. Having regard to the case of Kenfrieght (Supra), the court awards the claimant the equivalent of eight (8) months' salary in compensation in the sum of Kshs. (44,090 x 8) = 352,720/=.
26. In the final analysis judgement is entered in favour of the claimant against the respondent as follows:
- Kshs. 44,090/= in lieu of notice.
 - Kshs. 352,720/= compensation
Total award Kshs. 396,810/=
 - Interest at court rates from date of judgment till payment in full
 - Costs of the suit
 - Provision of certificate of service within 30 days of this judgment.

DATED AT NAIROBI THIS 23RD DAY OF MAY, 2024.

Mathews Nderi Nduma

JUDGE

Appearance:



Mr. Jaoko for claimant

Mr. Kemboi, Court Assistant

