



Ayanga v Shah (Cause 1333 of 2017) [2024] KEELRC 1620 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1620 (KLR)

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

CAUSE 1333 OF 2017

K OCHARO, J

JUNE 24, 2024

BETWEEN

DISMAS MOKWERI AYANGA CLAIMANT

AND

MAHENDRA SHAH RESPONDENT

JUDGMENT

Introduction

1. At all material times to this suit, the Claimant was an employee of the Respondent as a night watchman. His employment came to an end on or about 30th June, 2016. Holding that his employment was terminated unfairly by the Respondent, he has filed suit the latter through the memorandum of claim herein dated 17th May 2017, seeking various reliefs, a declaration that the termination was unfair, illegal, unlawful, unconstitutional and contrary to the tenets of natural justice, an award of KShs.1,625,528.00, and issuance of a certificate of service in its favour.
2. The Respondent resists the Claimant's claim through a statement of response dated 25th May 2022. In it the Respondent charges that the termination was fair and therefore the Claimant is not entitled to the reliefs sought.
3. When this matter came up for hearing on the 16th May 2023 the parties recorded the following consent;
 - “(a) That the matter be determined on the basis of the parties' pleadings, documents and witness statements.
 - (b) The Claimant to file and serve written submissions within 14 days of the day.
 - (c) The Respondent to file and serve its submissions within 14 days of service of the Claimant's.”
4. In compliance with the consent order, the parties filed their respective submissions.



The Claimant's case

5. The Claimant's case as can be gathered from his pleadings and witness statement is straight forward and not complicated. He came into the employment of the Respondent on 1st September 1998, as a night watchman/security guard, at a starting monthly salary of KShs.2800.00 excluding house allowance. Over time, the salary was increased to KShs.11,000.00, a salary that he was earning at the time he exited the employment.
6. He stated that he worked for the Respondent diligently until 30th June, 2016 when the Respondent unfairly terminated his employment – through an email. The termination was not preceded with any notice or payment of his dues.
7. Further, it was his case that throughout his employment of service, the Respondent underpaid him by KShs.3,054 per a month, for 18 years.
8. At the time of separation, he had 21 leave days, earned but unutilized.
9. The Claimant stated further that the Respondent unlawfully failed to remit statutory deduction to the relevant authority (National Social Security Fund).
10. He asserted that he worked 12 hours daily (7 p.m. to 7 a.m.) from Monday to Sunday. Therefore, he worked four hours over time daily. He was never compensated for the overtime worked.
11. The Claimant claimed:
 - a. One month's salary in lieu of NoticeKShs.11,000.00
 - b. Underpayment of wages for 18 yearsKShs.756,364.00
 - c. Annual leave allowance.....KShs. 12,306.00
 - d. House allowance for 18 yearsKShs.356,400.00
 - e. Severance pay.....KShs. 105,480.00
 - f. Overtime allowancesKShs.190,000.00
 - g. Compensation for unfair termination..... KShs.143,553.00
 - h. Baggage allowance.....KShs.50,000.00

The Respondent's Case

12. In line with the above stated consent, the Respondent's case can be deduced from the statement of response hereinabove alluded to, the documents that were filed under a list of documents dated 31st May 2022, and the witness statement of Mahendra Shah.
13. According to the Respondent the Claimant was employed as a night watchguard by Samat Shah (deceased), the Respondent's father. In addition to being a night watchguard, the Claimant performed additional duties as gardening and car cleaning.
14. The Respondent stated that at the beginning of his employment with the deceased, the Claimant earned a gross monthly salary of KShs.3,500.00. This was spelled out in the contract of employment dated 2nd September 1998.



15. Following the deceased's death on 23rd July 2004, the Claimant continued serving his family. The family and their neighbours took up the responsibility of paying the Claimant's monthly salary.
16. The Respondent asserted that the Claimant's salary was adjusted upwards. At the time of termination, he earned a gross salary of KShs.12,221.00.
17. The Respondent stated that sometime in June 2016, the deceased's family lawfully terminated the Claimant's employment, as he; persistently reported to work late, and performed his duties negligently, carelessly, and improperly contrary to his contract of employment.
18. The Claimant was paid one month's salary in lieu of notice in the sum of KShs.12,221. Additionally, he was paid in full all his terminal dues which included an overtime allowance for working on Sundays and all public holidays, leave days and his National Social Security Fund (NSSF) pension contributions.
19. The Respondent alleged that the Claimant was not entitled to a house allowance since his salary was a consolidated amount. Further, as the Respondent's father and his estate duly remitted contributions towards the NSSF pension scheme, service pay cannot be availed to him.
20. The Claimant's claim for baggage stands on quick stand. It does not find anchor on any contractual term.

The Claimant's submissions

21. The Claimant identified three issues for determination thus;
 1. Whether the Claimant had a contract of employment with the Respondent and the Respondent's deceased's father.
 2. Whether the termination of the Claimant's employment contract was lawful/fair.
 3. Whether the Claimant is entitled to the reliefs sought?
22. The Claimant contends that the Respondent pleads knowledge his employment, save that he was employed by his late father Samat Shah who has since passed on. However, a keen look at the documents tendered by the Respondent including the contract of employment and payslips reveals that none of them bear the name of the employer, or the payee of salary or his signature. As a result, the Respondent's claim that the Claimant was an employee of his late father lacks foundation. The Respondent was under duty pursuant to section 107 and 108 of the Evidence Act to prove his allegation(s).
23. It is not in dispute that the Claimant's employment was terminated in the month June 2016. There is no evidence that the procedural fairness contemplated under section 41 of the Employment Act was adhered to. The section is couched in mandatory terms.
24. He was not notified of any intention by the Respondent that he was intending to terminate his employment, given an opportunity to defend himself and accorded the right of accompaniment. All these rendered the termination procedurally unfair. To support this submission, he placed reliance on the decision in Janet Nyandiko vs. Kenya Commercial Bank Ltd (2017) eKLR.
25. The Claimant submits further that the termination was without any valid reason. The allegation that the termination was as a result of the Claimant's habit of reporting late to work and negligence in the discharge of his duties, was not proved. Therefore, under the provisions of section 45 of the Employment Act, the termination was unfair. To buttress this submission, he placed reliance on the case Pius Machafu Isindu vs. Lavington Security Guards Limited (2017) eKLR.



26. On the reliefs sought, the Claimant submits that his employment was terminable by one-month's notice or pay in lieu thereof in accordance with the provisions of section 35(1) of the Employment Act. Further, the Respondent's assertion that he was paid in lieu of notice is untrue. The document relied on by the Respondent in support of the assertion is incapable of belief. He did not sign against the figure purported to be notice pay. This court should conclude therefore, that he is entitled to one month's pay in lieu of notice.
27. The Claimant abandoned the claim under the head "underpayment of wages for 18 years, KShs.756,364.00."
28. He further abandoned the claim for severance pay as the same was paid as part of the terminal dues on 6th October 2017.
29. The Claimant argued that under the provisions of section 28 of the Employment Act, he is entitled to compensation for the 42 unutilized leave days, KShs.12,306.00.
30. He further submits that house allowance is a right under section 31 of the Employment Act, for an employee. Throughout the time he worked for the Respondent, the Respondent never provided him with housing accommodation or paid him house allowance. The Respondent's assertion that his salary was inclusive of house allowance, is a fact that the Respondent did not prove. As such, the Claimant is entitled to the KShs.356,400 sought.
31. The Claimant urges this court to grant him a compensatory relief under section 49 of the Employment Act to the extent of 12 month's gross salary. In awarding the compensation, the court should consider that the Respondent unfairly terminated his employment without care to the statutory requirements of procedural and substantive fairness, and the fact that he did work for the Respondent for 13 years 7 months.

The Respondent's submissions

32. The Respondent distilled three issues for determination;
 - I. Whether the Claimant's termination from employment was for lawful and valid cause.
 - II. Whether the Respondent complied with procedural requirements in the termination of the Claimant and,
 - III. Whether the reliefs sought by the Claimant are merited.
33. On the first issue, the Respondent submitted that section 43 of the Employment Act places the burden of proving the reason for termination, and that the reason was fair and valid, on the employer. The burden of proof is on a balance of probabilities. To fortify this point, he placed reliance on the case of Kenya Revenue Authority vs. Reuwel Waithaka Gitahi (2019) eKLR.
34. The Respondent was emphatic that the Claimant's employment was terminated on account of his persistent reporting to duty late and negligent performance of his duty. These were acts of gross misconduct. He was entitled to summarily dismiss the Claimant under the provisions of section 44 of the Act.
35. On the reliefs sought by the Claimant, the Respondent submitted that at the time of termination, the claimant accepted payment of one month salary. In actual sense, he owed the estate of the deceased a salary allowance of one month as evidenced in the documents filed by the Respondent. Having accepted the payment, he is estopped from claiming further terminal dues.



36. The relief sought for house allowance is unfounded. The salary paid was a consolidated salary therefore inclusive of the allowance. The Respondent urges this court to be inspired by the decision in Peter Munyoki Nzivo vs. Nguru Construction & Mining Co. Ltd (2022) eKLR.

Analysis and Determination

37. I have carefully considered the parties pleadings, witness statements and submissions and the following issues emerge for determination;
- a. Whose employee was the Claimant?
 - b. If he was the Respondent's, was the termination of his employment fair.
 - c. Is the Claimant entitled to the reliefs sought?

Whose employee was the Claimant

38. The parties took diametrically opposite positions as regards how the Claimant came into employment, and whose employee he was at all material times. The Claimant pleaded and maintained that he was an employee of the Respondent from 1998 to 30th June 2016, when the Respondent terminated his employment.
39. The Respondent on the other had took the position that the Claimant first came into employment on 2nd September 1998, as an employee of his father, Samat Shah (deceased) and after the demise of Mr. Shah, continued to serve his estate till the estate dismissed him from employment in June 2016.
40. Time and again this court has stated that it does not matter what label the parties or one of them have placed on their relationship. In situations where the justice of a matter demand, the court will not hesitate in cutting the label so as to reveal the true relationship between the parties.
41. The Respondent contended that the employment relationship between his late father and the Claimant was under the contract dated 2nd September 1998. I have carefully considered the document, the document mentions not, the name of Samat Shah as the employer. It does not bear a signature by the employer. Further, I have scanned through the documents presented herein by the Respondent, there is none from which one can see a clear revelation of who the employer of the Claimant was. As a result, the Respondent failed to rebut the Claimant's evidence that he (the Respondent) was his employer.
42. Assuming I am wrong in the above conclusion, I will still hold the Respondent as the employer of the Claimant at all material times to this suit for the reason hereunder.
43. The Respondent contended that after the demise of his father in 2004, the Claimant continued to serve the deceased's family, and that the estate of the deceased continued paying him until June 2016, when it dismissed him from employment.
44. I have carefully considered the Respondent's pleadings, witness statement and submissions, and I am of a clear view that assuming the Claimant was an employee of the deceased up to 2004, the Respondent has not denied expressly that thereafter, there did not exist a relationship between him and the Claimant, that equated an employer-employee relationship. This assertion that the estate continued to pay the Claimant and eventually terminated his employment is so vague an assertion in the circumstances of the matter.
45. As a result, I hold that the Respondent was at all material times an employee of the Respondent.



Of whether the Claimant's employment was fairly terminated

46. In interrogating presence or otherwise of fairness in the termination of an employee's employment, or dismissal from employment, the court must consider two aspects that have been anchored in statute, procedural fairness and substantive justification. It is now trite that absence of both or any one of these aspects in the termination of an employee's employment, renders the termination unfair. This position has been affirmed in a numerous inspicial decisions among them, Pius Machafu Isundu vs. Lavington Security Guards Limited (2017) eKLR, where the court of Appeal held;

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

47. The duty to prove that the mandatory procedure set out in paragraph 41 of the Act was adhered by the Respondent. I have carefully considered the material placed before me and hold that the Respondent did not put forth any evidence to demonstrate that before the Claimant was dismissed; it did inform him that it contemplated dismissing him, and the grounds the basis for the contemplation; accorded him an adequate opportunity to prepare for and make a representation on the grounds; and that it considered the representation before reaching the decision to dismiss.

48. I have no hesitation to return that the dismissal was procedurally unfair by dint of the provisions of section 45 of the *Employment Act*.

49. As indicated hereinabove, section 43 of the *Employment Act*, places a duty on the employer to prove the reason(s) for the termination of an employee's employment. Proving does not equate to just stating. It is deeper and wider than the latter. The Respondent in my view, just stated that the Claimant was dismissed for his habit of reporting late to work and negligent performance of his work. Such broad and vague statements will never be what the provision contemplates.

50. Where an employer asserts that the employee negligently performed his duty, it will be expected of the employer to give details as regards the expected standard of performance and the employee's extent of deviation therefrom. This the Respondent did not provide.

51. A reasonable employer who dismissed his or her employee on account of late reporting cannot fail to give testimony respecting when the employee was supposed to report to duty daily, those dates when he reported late, and here a clock in register will come in handy; and whether the employee was given any warnings concerning the infraction. Again, the Respondent did not bother to present any material of this kind, to fortify the assertion that it had reason(s) to dismiss the Claimant.

52. Section 45 of the *Employment Act* places a further duty on the employer to demonstrate that the reason(s) was valid and fair. By reason of the foregoing premises, I further hold that the Respondent did not discharge his duty under section 45(2).

53. In conclusion, the dismissal of the Claimant from his employment was subdsstantively unfair.



Whether the Claimant is entitled to the reliefs sought

54. The Claimant sought inter alia compensation for unfair termination. Section 49(1) (c) bestows upon the court, power to grant in favour of an employee who has successfully assailed, his or her employer's decision to terminate his employment, compensatory damages up to a maximum of twelve months' gross salary. However, it is pertinent to point out that the power is exercised discretionarily. As to whether the remedy should be availed and to what extent, heavily depends on the circumstances of each case.
55. I have carefully considered the manner in which the Claimant's employment was terminated, in destituteness of substantive justification and procedural fairness; the length of period the Claimant was in the employment of the Respondent; and that the Claimant did not in any proven manner contribute to the dismissal, and hold that he is entitled to the remedy, and to the extent of ten (10) months' gross salary.
56. Section 31 of the Employment Act places a duty on the employer to provide his or her employee with reasonable accommodation, or payment of a reasonable amount to enable the employee secure accommodation. In a bid to demonstrate that this is a duty he at all material times discharged. The Respondent contended that the Claimant's salary was inclusive of house allowance. It was a consolidated salary. I see no evidence from which I can draw the conclusion that the KShs.12,221.00 was inclusive of house allowance. As a result, I am not persuaded that the salary was a consolidated one.
57. However, considering the provisions of section 90 of the Act, I can only award the unpaid house allowance only to the extent of three years immediately before the date of filing the suit herein. Therefore $12,221 \times 15/100 \times 3 \times 12 = 65,953.4$.
58. I decline to award the relief sought under the head "unpaid leave". In his pleadings, the Claimant asserted that he at the time of exit had 21 days earned but unutilized leave days. He stated not when the days were earned. He did not provide any evidence to show that indeed, he had unutilized leave days.
59. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms:
- a. A declaration that the dismissal of the Claimant from employment was unfair.
 - b. Compensation pursuant to the provisions of section 49(1)(c) of the Employment Act, ten (10) months gross salary, KShs.122,110.00.
 - c. Compensation for unpaid leave allowance – KShs.65,953.40.
 - d. The Respondent to issue the Claimant with a Certificate of Service, within 30 days of today.
 - e. Interest on the sum awarded above, at court rates from the date of this judgment till full payment.
 - f. Costs.

READ, SIGNED AND DELIVERED THIS 24TH DAY OF JUNE, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Nyanchwa for the Respondent

No appearance for 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.

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OCHARO KEBIRA

JUDGE

