



**Mwithi (Legal Representative of the Estate of the Late Amos Mutegi
Muchunku Nduyo) v St. Martins Girls Secondary School (Cause
1920 of 2017) [2024] KEELRC 2002 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2002 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1920 OF 2017**

JK GAKERI, J

JULY 31, 2024

BETWEEN

**LUCY KAGENDO MWITHI (LEGAL REPRESENTATIVE OF THE ESTATE OF
THE LATE AMOS MUTEKI MUCHUNKU NDUYO) CLAIMANT**

AND

ST. MARTINS GIRLS SECONDARY SCHOOL RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim on 26th September, 2017 which was amended on 28th July, 2023 following the demise of the Claimant, with one Lucy Kagendo Mwithi, the legal representative as the Claimant.
2. The Claimant alleges that termination of the deceased's employment was unfair, unlawful and wrongful.
3. The Claimant avers that the deceased was first employed by the Respondent as a History, Kiswahili and CRE teacher on 6th January, 2009 and was appointed Head of Department in 2010, Dean of Studies in 2011 and the Deputy Principal in 2012, a position he retained until 19th March, 2017 at Kshs.28,500.00
4. The Claimant avers that on 5th January, 2017, the deceased was diagnosed with Cancer (multiple myeloma) which include a brain tumor and mastalic to the spine at the Nairobi West Hospital.
5. That the deceased was required to undergo 15 sessions of Radiotherapy at Kshs.10,000/= per session and thereafter Chemotherapy and Physiotherapy at Kshs.8,000/= and Kshs.2,800/= per session respectively.
6. That part of the medical expenses were met by NHIF and AON Minet Insurance and spent a total of Kshs.735,664/= for which he claims reimbursement from the employer.



7. That although the Respondent was aware of his condition, it offered no support which was inhumane under Section 34(1) of the [Employment Act, 2007](#).
8. The Claimant avers that by letter dated 15th March, 2017, the Respondent declined to extend the deceased's sick leave sought vide letter dated 13th March, 2017 and summarily terminated his employment on 19th March, 2017.
9. That prior to termination of employment, the Respondent had taken office keys from the deceased and appointed another teacher as Deputy Principal and the deceased could not access the office to collect personal effects and certificates.
10. The Claimant prays for;
 - i. Kshs.735,664/= being reimbursement for all medical expense met by the deceased but which the Respondent was bound to meet.
 - ii. Kshs.64,000/= being 2 months' salary in lieu of notice.
 - iii. Kshs.384,000/= as 12 months compensation.
 - iv. Kshs.352,000/= being damages for breach of the Claimant's fundamental rights to fair treatment and non-discrimination.
 - v. Kshs.128,000/= being service pay at 15 days salary for each year worked.
 - vi. Certificate of service.
 - vii. Access to deceased's office to retrieve personal effects, books, certificates etc.
 - viii. Costs plus interest at court rates.

Respondent's case

11. The Respondent avers that after learning of the deceased's illness, it accorded him 2 months sick leave with full pay and gave him transport to and from hospital and someone to accompany him.
12. It denies having discriminated the deceased or unlawfully terminated his employment as it gave the deceased the requisite notice of termination of employment and paid all his dues and treated him fairly.
13. It is the Respondent's case that termination of employment was lawful.

Claimant's evidence

14. On cross-examination, the Claimant's legal representative confirmed that the deceased was her husband, Deputy Head teacher of the school and housed by the school.
15. That after termination of employment, they remained in the compound illegally, but had no evidence of any demand by the Respondent to vacate the house.
16. That he was not paid anything after termination of employment.
17. The witness confirmed that the deceased's salary vouchers availed showed that NHIF and NSSF deductions were being made and the same were evident on his NHIF statement and the NHIF card was used to pay for part of the hospital charges.
18. The witness confirmed that the letter from Dr. Ndiritu dated 24th February, 2017 and the document from the Nairobi West Hospital had no school stamp as evidence of having been received by the school.



19. That the deceased did not work from January to March 2017.
20. The witness confirmed that under the contract of employment, the Claimant was entitled to 7 days sick leave on full pay and a further 7 days on half pay every 12 months.
21. That the deceased was paid the salary for March 2017 and employment was terminated vide letter dated 15th March, 2017 and the school did not help them.
22. It was her testimony that the deceased had insurance cover with AON Minet and NHIF paid for hospital bed only.
23. On re-examination, the witness testified that the deceased worked for the Respondent from 30th September, 2010 till the date of termination of employment and was not notified of the termination.

Respondent's evidence

24. After closure of the Claimant's case on 7th February, 2015, counsel for the Respondent informed the court that he could not trace his witness and hearing was adjourned to 15th April, 2024 when counsel for the Respondent notified the court that he had no witness and wished to close the Respondent's case and directions on the filing and exchange of submissions were given.

Claimant's submissions

25. Counsel for the Claimant submits that the Respondent had no reason to terminate the Claimant's employment on 15th March, 2017 while responding to the Claimant's letter on extension of sick leave which was declined and was asked to hand over all school property and responsibilities by 20th March, 2017.
26. Counsel urges that the provisions of the *Employment Act*, 2007 were not complied with.
27. On payment of dues, counsel submits that the Respondent did not tender evidence of having paid the Claimant's dues.
28. On reliefs, counsel submits that the Claimant was entitled to all of them under Section 34(1) for the refund, Section 36 for pay in lieu of notice, compensation under Section 49(1)(c) of the *Employment Act*, 2007, damages for discrimination and unfair treatment and service pay under Section 35(5) of the Act.
29. That the Respondent should be directed to return the deceased's personal items in his former office.

Respondent's submissions

30. Counsel submits that the Claimant led no evidence to prove that he contracted multiple myeloma during the course of his employment and in any case NHIF and AON Minet paid for the bills.
31. Reliance was made on the sentiments of the court in *Ogada V Multimedia University of Kenya* (2023) KEELRC 2973 KLR where an employee had contracted COVID-19.
32. Counsel urges that the claim for reimbursement of Kshs.735,664/= is misguided.
33. Reliance was also made on the decision in *Kollengode Venkatachala Lakshminarayan V Intex Construction Ltd* (2020) eKLR to reinforce the submission and urge that the Respondent ensured that the deceased had sufficient and proper medical care and gave him 2 months sick leave with full salary and transport to and from the hospital.



34. That the Claimant has not adduced evidence of unfair termination or discrimination and the suit ought to be dismissed.

Analysis and determination

35. It is common ground that the deceased was an employee of the Respondent from sometime in 2010 under fixed term contracts which the Respondent appear to have renewed routinely.

36. It is equally not in dispute that the deceased was a diligent employee as exemplified by his rise from a teacher to the Deputy Head Master within 4 years and had no recorded case of misconduct.

37. Equally not in contest is the fact that in January 2017, the Claimant was diagnosed with multiple myeloma and underwent radiotherapy, chemotherapy and physiotherapy regularly at enormous expense beyond the NHIF and AON Minet Insurance cover.

38. It is also not in dispute that by letter dated 15th March, 2017, the Respondent refused to extend the Claimant's sick leave any further and directed him to hand over all school property and responsibilities by 20th March, 2017 and thanked him for his services.

39. The Claimant construed this as a termination letter and although the Respondent averred that it gave the Claimant requisite notice of termination of his employment, it did not provide any other letter of termination save the one dated 15th March, 2017. This was to all intents and purposes the letter of termination of employment.

40. CWI provided no evidence on what transpired thereafter and had no evidence of any eviction from the Respondent's house in the school

41. After careful consideration of the pleadings, evidence and submissions, the issues for determination are;

- i. Whether termination of the Claimant's employment by the Respondent was unlawful.
- ii. Whether the Claimant is entitled to the reliefs sought.

42. Before delving into the issues herein above, it is essential to dispose of the principles that govern undefended suits.

43. In *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, Maureen Onyango J. stated;

“In the case of *Monica Kanini Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”

44. In this case, the Respondent admits that the Claimant was its employee.

45. Relatedly, it is the duty of the Claimant to prove that termination of employment was unfair and as held in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2018) eKLR, the obligation to prove his case does not become any less because the suit is undefended or the Respondent is absent at trial.

46. See also *Casmir Nyankuru Nyaberi V Mwikikar Agencies Ltd* (2016) eKLR.



47. On the first issue, it requires no belabouring that the principles and provisions of law on termination of employment are well-settled.
48. The provisions of Sections 43, 44, 45 and 47(5) of the *Employment Act*, 2007 are explicit that for a termination of employment to pass the fairness test, it must be proved that the employer had a valid and fair reason relating to the employee's conduct, capacity or compatibility or operational requirements of the employer to terminate the employment relationship and additionally that the termination was conducted in accordance with a fair procedure.
49. In other words, there must have been not only a substantial justification for the termination but also procedural fairness as captured by Linnet Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR.

Reason(s) for termination

50. Evidence on record reveal that by letter dated 13th March, 2017, the Claimant sought extension of sick leave by one (1) month as he had completed radiotherapy sessions and doctors had advised him to take time off.
51. The Claimant acknowledges that he had been away from work for some time, over two months but hoped that the Respondent would appreciate his circumstances and extend the sick leave.
52. The Respondent's response dated 15th March, 2017 communicated its unwillingness to extend the Claimant's sick leave owing to financial constraints and advised him to hand over to the school administration.
53. Regrettably, the Respondent's letter provided no reason why it was terminating the Claimant's employment or payment of dues.
54. It is discernible that the Respondent appear to have reached the end of the tether as far as the Claimant's indisposition was concerned and wanted a way out.
55. It is unclear to the court why the Respondent could not engage the Claimant and propose an amicable way of separation as a last resort.
56. Having supported him since January 2017, it was incumbent on the employer to ensure that the separation was fair.
57. Puzzlingly, the Respondent's letter makes no reference to the Claimant's circumstances or the support the Respondent was willing to provide to ensure that the Claimant had a softer landing without employment.
58. A negotiated arrangement would have been fair to both parties.
59. No doubt the Respondent had supported the Claimant, which he acknowledged in writing and although 2 months of not rendering services is long, it behoved the Respondent to explain to the Claimant its position and hopefully arrived at an amicable separation.
60. As adverted to elsewhere in this judgment, the Respondent's letter dated 15th March, 2017 had no reason for termination of the Claimant's employment, though the Respondent may have had a justifiable reason touching on capacity of the employee to discharge his duties as agreed. The letter makes no allegation against the Claimant.



61. Flowing from the foregoing, it is clear that the Respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant's employment on 15th March, 2017.

Procedure

62. 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 sets out the tenets or elements of a fair termination of employment where employment is being terminated on the grounds of poor performance, physical incapacity or misconduct including explanation of the reason in a language understood by the employee in the presence of another employee of the employee's choice or the shop floor union representative, entitlement to have that other person's right to make representations and the same be heard and considered by the employer in making the determination.

63. See *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR.

64. The Respondent adduced no evidence to show that it took the Claimant through any process before termination of employment.

65. The totality of the evidence on record is that the Respondent has failed to prove on a balance of probabilities that it had a substantive justification to terminate the Claimant's employment and did so in accordance with a fair procedure.

Appropriate reliefs

i. Reimbursement Kshs.735,664/=

66. The Claimant argues that the Respondent is liable to reimburse the medical expenses incurred by the deceased over and above the NHIF and AON Minet Insurance by virtue of Section 34(1) of the *Employment Act*, 2007.

67. Section 34 provides that;

1. Subject to sub-section (2), an employer shall ensure the sufficient provision of proper medicine for his employees during illness and if possible medical attendance during serious illness.
2. An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

68. The foregoing provision is reticent on who shoulders the costs of the medicine unlike Section 31 on the housing which is explicit that housing is at the expense of the employer.

69. Although the law does not require employers to take out insurance cover on employees, all employees are obligated to be members of the Government insurance under the National Health Insurance Fund (NHIF) previously, and now the Social Health Insurance Fund (SHIF) effective 1st July, 2024.

70. Under the National Health Insurance Fund Act (repealed), both employer and employees contribute to the fund as is the case under the *Social Health Insurance*, 2023.

71. More significantly, government health facilities offer services at affordable rates under the operative cost-sharing regimes introduced to support dwindling allocations to the health sector.

72. As Section 34(1) of the *Employment Act* is silent on who shoulders the cost for medicine in the event of an employee's illness and no reimbursement policy has been availed by the Claimant for scrutiny by the court, the claim for reimbursement is unproven and is declined.



ii. 2 months' salary in lieu of notice

73. The Claimant has not provided any factual or legal basis to justify the prayer for 2 months' salary in lieu of notice as the contract between the parties provide for one (1) month's notice or pay in lieu of notice.
74. It is also noteworthy that although the Respondent averred that it gave the Claimant requisite notice, it availed no evidence of the notice.
75. The claim for 2 months' salary in lieu of notice is unjustifiable.
76. The Claimant is however awarded one (1) month's salary in lieu of notice Kshs.28,500/=.

iii. Service pay Kshs.128,000/=

77. CWI confirmed on cross-examination that the Respondent was deducting NSSF and NHIF dues as evidenced by copies of the Claimant's salary vouchers on record.
78. The Claimant relies on the provisions of Section 35(5) of the Employment Act, 2007 to justify the claim for service pay.
79. However, the provisions of Section 35(6)(d) of the Act disqualifies employees who are members of the National Social Security Fund and the Claimant has not demonstrated that he was not a member of this compulsory social security scheme.
80. Contrary to the Claimant's counsel's submission that the contract of employment provided for gratuity, which is true, gratuity and service pay are different.
81. While the former is gratuitously given by the employer under the contract of employment or a CBA, service pay is statutory.
82. The prayer for service pay is unproven and is rejected.

iv. Damages for breach of the Claimant's fundamental rights Kshs.352,000.00

83. Regrettably, neither the Claimant's written statement or oral evidence nor the claim itself itemises particulars of the alleged unfair treatment or discrimination.
84. On the alleged unfair treatment in his written statement, the deceased alleged that the Respondent did not give him an aide, but the Claimant adduced no evidence to demonstrate that the Respondent was bound to provide one.
85. As regards payment for radio and chemotherapy, the Claimant has not proved that the costs were supposed to be borne by the employer or it had agreed to reimburse the Claimant.
86. Without credible evidence of unfair treatment, it is difficult for the court to find or hold that the Claimant was treated unfairly.
87. Discrimination on the other hand implicates a comparison.
88. The term discrimination has been defined variously. For instance, it has been defined as "unfair treatment or denial of normal privileges to persons because of their race, age or sex . . . a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured".



89. In *Peter K. Waweru V Republic* (2006) KLR, the court stated as follows;

“ . . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

90. Wilson J. expressed similar sentiments in *Andrews V Law Society of British Columbia* (1989) 1 SCR 321.

91. In the absence of evidence to prove that the Respondent used to pay medical bills for employees or reimburse monies spent in health facilities or were accorded aides to assist them or were accorded more than the 2 months sick leave, it is difficult for the court to find or hold that there was discrimination or unfair treatment.

92. The claim for damages for breach of fundamental rights is unproved and is declined.

v. 12 months compensation

93. Having found that termination of the Claimant’s employment was unfair for want of a substantive justification and procedural fairness, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*, 2007.

94. The court has taken into consideration the fact that the Claimant was an employee of the Respondent for about 8 years under different contracts of service, had no record of misconduct and his absence from work contributed to the termination of employment. The Claimant did not express his wish to remain in the Respondent’s employment or appeal the decision.

The Claimant had not rendered any services to the Respondent for over 2 months on account of indisposition.

95. In the circumstances, the court is satisfied that the equivalent of 4 months’ gross salary is fair, Kshs.114,000/=.

Total award Kshs.142,500.00

vi. Certificate of service

96. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007 within 30 days.

vii. Personal documents and effects

97. The same be handed over to the Claimant’s legal representative within 30 days.

98. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;

a. One month’s salary in lieu of notice Kshs.28,500.00

b. Equivalent of 4 months gross salary Kshs.114,000.00

Total Kshs.142,500.00

c. Certificate of service



d. Personal effects of the deceased be handed over to the legal representative.

99. In the circumstances of this case, it is only fair that parties bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JULY 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

