



**Kodi v Safarilink Limited (Cause E744 of 2021)
[2024] KEELRC 2348 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2348 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E744 OF 2021
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

REHEMA KODI CLAIMANT

AND

SAFARILINK LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 9th September, 2021 alleging wrongful termination of employment and non-payment of terminal dues.
2. The Claimant joined the Respondent on 1st June, 2006 as a Customer Service Officer and worked for 6 days and alternated between day and night shift during the weekend.
3. That her salary was Kshs.123,744.48.
4. The Claimant avers that the Respondent did not allow her to proceed on leave and was not paid in lieu nor compensated for overtime and worked for long hours.
5. The Claimant alleges that she was summoned on 19th May, 2021 for disobeying orders from her seniors having received and responded to a notice to show cause and invited for a disciplinary hearing.
6. The Statement of Claim was amended on 5th October, 2023.
7. The Claimant prays for;
 - i. A declaration that termination of employment was unfair and unlawful.
 - ii. One month’s salary in lieu of notice.
 - iii. Unpaid leave days.
 - iv. Unpaid house allowance.



- v. Service pay.
- vi. 12 months compensation.
- vii. General and special damages.
- viii. Costs of the suit.
- ix. Interest at court rates.
- x. Any other relief that the Court may deem fit to grant.

Respondent's case

8. The Respondent admits that the Claimant was its employee effective 1st June, 2006 and her duties included assisting Operations and Reservations Staff as requested by the Operation's Manager at 42.5 hours per week and could work on weekends and public holidays as exigencies of duty dictated and was paid for extra hours worked.
9. That owing to the lockdown necessitated by the COVID-19 Pandemic, the Operations and Reservation teams were directed to report on duty on 27th and 28th March, 2021.
10. That the Claimant refused to report to work on 27th and 28th March, 2021 despite having been called by the Sales and Marketing Manager and her employment was terminated.
11. That her gross salary was Kshs.109,280.00 per month.

Claimant's evidence

12. The Claimant admitted that she was aware of the reason for termination of employment namely, negligence and absence from the work place and it was her off-day and the contract provided for working on weekends.
13. That she disobeyed the Managing Director.
14. The Claimant testified that although she had proceeded on leave, she had not utilized all the days and her salary was Kshs.123,744.45 and her employment was terminated on 19th May, 2021.
15. That the payslip for July 2021 showed that the total earnings were Kshs.109,280/=.
16. The Claimant admitted having received and responded to a notice to show cause, invited and attended a hearing, appealed the decision and was heard on appeal.

Respondent's evidence

17. RWI, Anne Kimani confirmed that she joined the Respondent in 2018.
18. It was her testimony that untaken leave days were compensated and all leave days taken were approved.
19. That the Claimant was called to report to work on an off-day and communicated with the superior.
20. On re-examination, the witness confirmed that the Claimant was not supposed to be on duty on that day, but could work on public holidays and weekends and had promised to report to work but did not for 2 days.
21. That the Claimant was paid for overtime and leave days as her payslips revealed.



22. That her basic salary was Kshs.109,280.85 and was a member of the Employers Pension Scheme and was paid all terminal dues.

Claimant's submissions

23. On termination of employment, counsel submits that the reason for termination was contrary to the letter of appointment as only the disobedience of the Managing Director could occasion disciplinary action yet the letter mentioned superiors.
24. Reliance was made on the sentiments of the Court in *Daniel Gisora Nyakundi V Kenya Airways Ltd* (2018) eKLR and *Michael Namuwa Wanyera V Central Isiolo Ltd* (2023) eKLR to urge that the termination of employment was unfair.
25. On leave days, counsel submits that there was no year the Claimant utilized all her leave days and some Leave Application Forms were not signed (at least 8), some had altered dates or cancellations, signatures differed, days taken not indicated, signatures not similar to that of the Claimant, cancelled and no leave form for 2006 and 2014 were produced and leave days were only paid for in 2019 and 2021 and some days were brought forward.
26. On reliefs, counsel submits that the Claimant was entitled to service pay under Section 35 of the *Employment Act* as the Claimant worked for 16 years and was in the pension fund for only 3 years.
27. On house allowance, reliance was made on *Wayera V Central Isiolo Ltd* where the Court awarded compensation.
28. On one month's salary, reliance was made on *Kenfreight (EA) Ltd V Benson K. Nguti* (2016) eKLR.
29. Counsel urges the Court to find the Respondent liable to pay the Claimant 12 months' salary for unfair termination of employment.

Respondent's submissions

30. On termination, the Respondent cites the sentiments of the Court in *Joseph Mwaniki Nganga V United Millers Ltd* (2022) eKLR, *Reuben Ikatwa & 17 others V Commanding Officer British Army Training Unit Kenya & another* (2017) eKLR and *David Wanjau Muboro V Ol Pejeta Ranching Ltd* (2014) eKLR among others, to urge that in this case, the Respondent had a valid and fair reason to terminate the Claimant's employment as she disobeyed legitimate instructions from a supervisor/superior to report on duty.
31. Reliance was made on the band or range of reasonable responses test.
32. On procedural fairness, the Respondent cited the sentiments of the Court in *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* (2013) eKLR to submit that the Claimant was afforded an opportunity to respond to the allegations in writing and by word of mouth at the disciplinary hearing and appealed the decision to terminate her employment.
33. On the reliefs sought, the Respondent submits that the Claimant did not lay a basis for the award of any of the prayers sought.
34. The Respondent prays for dismissal of the Claimant's suit with costs.



Analysis

35. Briefly stated, the Claimant was employed by the Respondent in June 2006 and served diligently until 19th May, 2021 when her employment was terminated for failure to obey legitimate instructions from superiors to report to work on 27th March, 2021 which led to disruption in operations department as all employees were required to be on duty.
36. The Claimant testified that it was her off duty day.
37. The Claimant's letter of employment provided that the Respondent could terminate the Claimant's employment if she "disobeyed a legitimate instruction from the Managing Director . . ."
38. Records filed reveal that employees of the Respondent had been notified at 21.29 pm that they were required at the workplace on 27th March, 2021 to enable the Respondent cope with the situation occasioned by the COVID-19 Pandemic. It was an appeal to staff to report on duty and the Claimant had confirmed that she would be present but did not report for two days on account of intoxication.
39. The issues for determination are;
 - i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
40. Concerning termination of employment, the Claimant testified and counsel submitted that it was unfair as the instructions the Claimant allegedly ignored or disobeyed came from a person other than the Managing Director.
41. The Respondent's witness testified that the termination was in accordance with the law.
42. For a termination of employment to pass muster, it must be shown that the employer had a valid and fair reason to do so and conducted the termination in accordance with a fair procedure as ordained by the provisions of Section 41, 43, 44, 45 and 47 (5) of the *Employment Act*.
43. The essentials of a fair termination of employment are a substantive justification and a fair procedure. See *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR, *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR and *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR among others.

Reason for termination

44. The notice to show cause dated 8th April, 2021 accused the Claimant of refusal to report to the work place on 27th and 28th March, 2021 necessitated by workload occasioned by the COVID-19 Pandemic.
45. That even after promising the Sales and Marketing Manager that she would report on 27th March, 2021 had not by 14.30 and when called, claimed intoxication and did not report on duty on 28th March, 2021 with no communication.
46. In her response dated 12th April, 2021, the Claimant stated that the weekend of 27th and 28th March, 2021 was a weekend off duty and had planned to travel to Kajiado.
47. That having registered that she would be off-duty, the Claimant started drinking at 4.00 pm and was aware of the Respondent's rule on intoxication and opted to staying at home.
48. The termination identifies the reason for termination of employment as failure to obey legitimate instructions from superiors to report to work on 27th March, 2021.



49. Evidence of communication between Issadin and employees reveal that his appeal for employees to report on duty was made on 26th March, 2021 at 21.29 pm and was to all employees to report on 27th March, 2021 and only some would report on Sunday 28th March, 2021.
50. It is decipherable that the Claimant had not reported to work by 14.29 pm and had not called and when asked to report, responded that she was intoxicated yet she had promised that she would report to the work place.
51. If the Claimant's WhatsApp messages and response to the notice to show cause are to be believed, she started drinking on 26th March, 2021 at 4 pm until 3 am on 27th March, 2021 while aware that she was supposed to report to the workplace and having confirmed that morning only to change the story after 3 pm that she would report on 28th March, 2021 but did not and did not communicate with her supervisor.
52. No doubt off-days are days when an employer and employee have consensually agreed that the employee should not be at the workplace.
53. The law provides for one (1) rest day as a minimum every week.
54. The employee has control over how to utilize the off-days and if requested to work must be compensated accordingly.
55. If an employee is requested to report for duty on an off-day and happens to have prior commitments which render the employee practically unavailable, communicating the same to the employer is essential for other arrangements to be made.
56. This is because exigencies of duty may require an employee to be on duty during the weekend, public holiday or on off-day(s).
57. It is common ground that 27th and 28th March, 2021, a weekend and were the Claimant's off-days and cannot be faulted for starting her weekend early and she was supposed to do was to confirm her unavailability on account of prior commitments but did not nor report to work until contacted later in the afternoon when she offered to report on 28th March, 2021 but again did not.
58. Could she have been intoxicated like the day before? Regrettably, no evidence was led as to her status.
59. Section 44(4)(e) of the *Employment Act* provides inter alia;
An employee knowingly fails or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
60. From the letter of appointment dated 30th June, 2006, the Claimant's supervisor was the Operations Manager and further provided that the Claimant was to carry out any other tasks as reasonably requested by the Operations Manager, Directors or other senior person in the company.
61. Clearly, in the ordinary course of her employment, the Claimant worked under the Operations Managers, Directors and other seniors in the company and any of them could make reasonable requests to the Claimant as Issadin, the Sales and Marketing Manager did on 26th March, 2021.
62. Contrary to the Claimant counsel's submission that the contract was specific that only disobedience of the Managing Director's instructions could occasion termination, it is generally accepted that Managing Directors delegate most of the operational matters to Senior Managers of the organization as they stand in the place of the Managing Directors.



63. Moreover, the provisions of Section 44(4)(e) of the *Employment Act* are unambiguous that the command may be from the employer or any other person placed in authority over the employee, as was the case here.
64. Similarly, Section 43(2) of the *Employment Act* provides that;
The reason or reasons for termination are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
65. As held in *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR, all that the employer is required to show is that it had a reasonable basis for the genuine belief under Section 43(2) of the *Act*.
66. In *Kenya Revenue Authority V Reuwell Waitbaka Gitahi & 2 others* (2019), the Court of Appeal expressed itself as follows:
“ . . . 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.”
67. These sentiments comport with the range or band of reasonable responses test applied by Lord Denning in *British Leyland UK Ltd V Swift* (1981) IRLR 91.
68. For the foregoing reasons, the Court is persuaded that the Respondent has demonstrated that it had a substantive justification to terminate the Claimant’s employment.
69. Having confirmed that she would report to work on her off-duty days, it behooved the Claimant to do so or explain why it was impracticable. Having agreed to report to work, the argument that it was her off-days could not avail the Claimant.
70. An employment relationship is a serious legal engagement with attendant rights and obligations for both parties. It requires no emphasis that being truthful and forthright with the employer is essential in the employment space. The Claimant was not.
71. Similarly, a reasonable degree of trustworthiness is essential in an employment relationship.

Procedure

72. As held in catena of decisions, the procedural requirements of Section 41 of the *Employment Act* are mandatory for a termination of employment to pass the fairness test. (See *Pius Machafu Isindu V Lavington Security Guards Ltd* (Supra).
73. The Claimant did not fault the process of termination of her employment and admitted on cross-examination that she received the notice to show cause dated 8th April, 2021 and responded vide letter dated 12th April, 2021 and had been accorded sufficient time.
74. Relatedly, the Claimant admitted that she was invited for a disciplinary hearing, attended, received a letter of termination dated 19th May, 2021, appealed the decision and was heard on the appeal.
75. According to RWI, Anne Kimani, the Respondent had a valid and fair reason to terminate the Claimant’s employment and did so in accordance with a fair procedure and was paid all terminal dues.



76. Having not contested the procedural aspects of termination of the Claimant's employment, the Court is satisfied that it was conducted in accordance with the provisions of the *Employment Act* and was thus fair.
77. Under Section 45(5) of the *Employment Act*, in determining whether a termination of employment was unfair, the Court is enjoined to assess all the circumstances of the case to ascertain whether the employer acted in accordance with justice and equity and must consider the procedure adopted by the employer, communication of decision, handling of any appeal, conduct and capability of the employee, compliance with statutory provisions including Section 41 and 51 of the *Employment Act*, previous practice of the employer in termination of employment and warning letters to the employee.
78. Taking into consideration these parameters, it is the finding of the Court that in the circumstances of this case, the employer acted in accordance with justice and equity and the termination of the Claimant's employment was neither unfair nor unlawful.
79. It therefore follows that the Claimant's claim for unfair or unlawful termination is unsustainable and it is accordingly dismissed.

Appropriate Relief

i. Declaration

80. Having found as above, the prayer for a declaration that termination of the Claimant's employment was unfair is unmerited and is declined.

ii. Salary in lieu of notice

81. Having found that the Respondent had a valid and fair reason to terminate the Claimant's employment on 19th May, 2021, the claim for pay in lieu of notice is not sustainable.
82. Relatedly, the Claimant's payslip for May 2021 shows that she was paid Kshs.62,290.08 for the days worked in May 2021.

The prayer is declined.

iii. Unpaid leave days

83. Puzzlingly, the Claimant prays for 30 days leave per year for 15 years which would appear to suggest that she was entitled to 30 days leave per year and never proceeded on leave for a single day for 15 years which is not supported by any evidence.
84. On cross-examination, the Claimant testified that she had been on leave but had not utilized all leave days. This evidence contradicts the written witness statement and the claim.
85. The elemental question is, how may leave days are outstanding?
86. It is trite law that special damages must be specifically pleaded and strictly proved.
87. The Claimant has not shown when she did not proceed on leave and how many days were utilized. Leave days are countable and days carried forward are certain.
88. It behooves the Claimant to provide indicative figures and when the days were unutilized. In the absence of such particulars, the claim lacks supportive evidence and is unsustainable.



89. The Claimant did not allege that she did not complete the Leave Application Forms on record or did not proceed on leave the absence of the Director/Managers signature notwithstanding.
90. Notably, the payslip for August 2019 show that the Claimant received the sum of Kshs.54,640.40 as leave days.
91. This claim lacks supportive evidence and fails.

iv. Unpaid house allowance

92. The Claimant prays for house allowance for 15 years, the entire duration of employment.
93. It is trite law that housing is a statutory right of the employee and must be provided by the employer at his cost or pay an allowance as rent over and above the wage or salary under Section 31 of the [Employment Act](#).
94. However, house allowance is not payable where the employment contract or the Collective Bargaining Agreement (CBA) contain a provision which consolidates the salary or wage payable to an employee.
95. The Claimant's Appointment Letter dated 30th June, 2006 provided for payment of "Bank gross salary" which in essence is neither basic nor gross salary and the starting salary was Kshs.15,500.00 per month.
96. Was this sum inclusive of housing allowance?
97. The Court is not so persuaded and this view is fortified by the copies of the payslips on record, which though not a contractual document, demonstrates the intention of the employer as it is its document and the Claimant has no role in its preparation.
98. Copies of the payslips on record refer to the Claimant's salary as basic income and the documents have no entry for housing allowance. Overtime was sometimes paid.
99. In the Courts view, none of the phrases used by the Respondent in the Letter of Appointment or Payslip appear to suggest that the Claimant's salary was inclusive of house allowance and being a statutory prescription, the Claimant was entitled to it and the same is awarded at 15% of the basic salary for 3 years, Kshs.590,116.54.

v. 12 months gross salary

100. Having found that the Claimant has failed to prove that termination of his employment by the Respondent was unfair, the claim for compensation is unmerited and is declined.

vi. Service pay

101. Copies of the Claimant's payslips availed by the Respondent show that NSSF deductions were being made and the Claimant did not plead or allege or even testify that she was not a member of the National Social Security Fund (NSSF).
102. Counsel's attempt to justify the claim on the ground that the Claimant was a member of the employers pension scheme for only 3 years cannot avail the Claimant as she was at all material times a member of the NSSF which effectively disqualifies her from service pay by dint of Section 35(6)(d) of the [Employment Act](#).

The prayer is declined.



vii. General damages and special damages

103. The Claimant adduced no evidence to demonstrate entitlement to general and special damages from the Respondent. The two claims lack supportive evidence and are dismissed.

104. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms:

- a. Unpaid house allowance Kshs.590,116.54
- b. In the circumstances of this case, it is only fair that parties bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 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

