



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kagai v Kenga Equatorial Hotels Limited t/a Mombasa Continental Resort (Cause E021 of 2022) [2024] KEELRC 2641 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2641 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**CAUSE E021 OF 2022**  
**AK NZEI, J**  
**OCTOBER 25, 2024**

**BETWEEN**

**BENSON MURIITHI KAGAI ..... CLAIMANT**

**AND**

**KENGA EQUATORIAL HOTELS LIMITED T/A MOMBASA CONTINENTAL RESORT ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 24<sup>th</sup> March, 2022 and filed in court on 25<sup>th</sup> March, 2022 and pleaded:-
  - a. That vide a letter dated 14<sup>th</sup> September, 2021 and signed by the Respondent's directors, the Claimant was employed by the Respondent as a Purchasing Manager at a gross monthly salary of Kshs.250,000/=; and that this was the third time that the Respondent was re-engaging the Claimant after two previous engagements which resulted in unfair terminations of the Claimant.
  - b. That the agreement between the Claimant and the Respondent was that the Claimant would report directly to the Finance Director. That between September 2021 and December 2021, the Claimant faced serious frustrations from the Finance Manager and the Operations Manager who thought and purposed that the Claimant should report to them.
  - c. That the Finance Manager could prepare budgets and funds transfer and omit various departmental purchase requests, thus causing endless complains from other departmental heads and affecting the Claimant's performance.
  - d. That the Respondent's Board is moribund. That there is a board management committee whose Chairman is a non-executive/non-official director, a Mr. A.S. Getambu. That in or about October 2021, Mr. Getambu alluded to fraudulent procurement of fish supplies under



the Claimant's watch, which turned out to be untrue as the fish supply reported "undelivered" had actually been delivered but the two delivery notes had been deliberately removed from the pay advices.

- e. That the Claimant continued to face hostilities from Mr. Getambu (director), the Finance Manager (Mr. Fred Chege) and the Operations Manager (Mr. Chrispus Mwamidi), and that it all came to bear in a meeting that was called by the Operations Manager on 14<sup>th</sup> February, 2022 to discuss a Purchase Order for the Respondent Hotel Linen that had been made in December 2021, and which the supplier had not supplied. That the delay in delivery had been caused by the fact that the initial payment cheque by the Respondent to the Supplier (Endeavour Limited) had bounced; and for this reason the said supplier had become apprehensive regarding payment and had demanded payment of 50% of the whole order to guarantee any supply delivery. That the whole supply order was worth Kshs.2,700,000/=.
  - f. That the Finance Manager declined to issue a subsequent payment and the whole order stalled; this despite the Claimant's efforts of having other company officers travel to the supplier's factory in Industrial Area, Nairobi and confirming that the Order (linen) was ready for dispatch to the Respondent.
  - g. That on 14<sup>th</sup> February, 2023, the Operations Manager called a meeting to discuss the linen supply. That the meeting was attended by two directors, the said board Chairman, the Operations Manager, the Finance Manager, and the house keeper. That the meeting was very hostile to the Claimant, and the said Board Chairman said that procurement of the linen was fraudulent; and accused the Claimant of having caused a loss of Kshs.500,000/= by engaging a con artist to swindle the company, and of furthering the con game by requesting for more payment.
  - h. That the meeting sought to know how the said supplier had been engaged in the first place, and the housekeeper explained that she had introduced the supplier to the Claimant, and that the purchase was above board upto the time that the part payment cheque bounced and the supplier refused to supply.
  - i. That the Claimant and the housekeeper were dismissed from the meeting by a director (Mr. Gathuri) who scornfully told the Claimant that he was negligent, and had caused the loss of Kshs.500,000/= through engagement of a con artist.
  - j. That the aforesaid meeting was a coordinated effort to disparage the Claimant and had nothing to do with finding a solution to the delayed supply of linen.
  - k. That on 22<sup>nd</sup> February, 2022, the Operations Manager called the Claimant to his office and issued him with a termination letter dated 21<sup>st</sup> February, 2022. That the said letter, signed by Mr. Gathuri (a director), Mr. Gatembu (a director) and the Operations Manager (Mr. Mwamidi) did not explain the reasons for termination.
  - l. That the Claimant informed his Supervisor (the Finance Director) about the termination and sought to know the reasons thereof; but the said director told the Claimant that he was on leave and did not know.
2. The Claimant further pleaded that upon his termination, the Respondent agreed with the Supplier (Endeavour Limited) on a 50% payment and a payment plan for the balance, and that on or about 21<sup>st</sup> March, 2022, the said supplier confirmed receipt of payment and a scheduled delivery.
  3. The claimant sought the following reliefs:-



- a. Compensation for unfair termination of employment equivalent to 12 months' pay at a gross salary of Kshs.250,000/=, being Kshs.3,000,000/=.
  - b. Costs of the suit and interest.
  - c. Certificate of service.
4. Documents filed alongside the Claimant's Memorandum of Claim included the Claimant's witness statement dated 24<sup>th</sup> March, 2022 and a list of documents listing 9 documents. The listed documents included a letter of employment dated 14<sup>th</sup> September, 2021, a termination letter dated 21<sup>st</sup> February, 2022, and a demand letter dated 23<sup>rd</sup> February, 2022, among others.
  5. The Respondent filed Response to the Claimant's claim on 7<sup>th</sup> May, 2022 and denied the Claimant's claim. The Respondent pleaded:-
    - a. That the Memorandum of Claim was fraudulent and was intended to taint the Respondent's good reputation, and that the Claimant was lawfully dismissed in accordance with his contract of employment and as consented by him when he was employed by the Respondent in September 2021.
    - b. That the Respondent's freedom of enterprise, which is protected by Article 19(3)(b) of *the Constitution*, entitles it to terminate the services of an employee with a fundamental character defect which is embodied in the statement of claim and is admitted by the Claimant in the submissions quoted in the Judgment of this court in Mombasa Employment and Labour Relations Court Cause No. 635 of 2017, which character defect tends to make the Claimant to have frosty relationship with his superiors.
    - c. That the Claimant breached Clause 5 of his contract of employment which provided:-
 

"In pursuance of these and any other duties lawfully prescribed, you will not without prior approval of the company enter into any contract on behalf of the company or otherwise commit the company to a particular cause of action."
    - d. That refusal by the Claimant to accept payment in lieu of notice was a breach of contract on his part, and that the Claim herein is based on the Claimant's wrong. That the Rule in Nabro Properties Limited –vs – Sky Structures Ltd (2002) applies to the case herein.
  6. Documents filed alongside the Respondent's Response included a witness statement of Eng. S. M. Gathuri dated 9<sup>th</sup> May, 2022 and a list of documents dated 7<sup>th</sup> May, 2022, listing four documents. The listed documents were the Claimant's contract of employment dated 14<sup>th</sup> September, 2021, the termination letter dated 21<sup>st</sup> February, 2022, a demand letter dated 23<sup>rd</sup> February, 2022 and the Respondent's response to demand letter dated 28<sup>th</sup> March, 2022.
  7. The Claimant filed additional documents on 23<sup>rd</sup> May, 2022, which included WhatsApp messages, copies of Local Purchase Orders, payment advices and payment cheque to Endeavour Limited and an email dated 23<sup>rd</sup> October, 2021.
  8. On 5<sup>th</sup> July, 2022, the Respondent filed a witness statement of Robin Muriuki Ndegwa, dated 4<sup>th</sup> July, 2022. The Claimant filed an affidavit in response to the aforesaid witness statement of Robin Muriuki Ndegwa, sworn by him on 18<sup>th</sup> July, 2022.
  9. Trial opened before me on 9<sup>th</sup> November, 2022. The Claimant adopted his filed witness statement and affidavit sworn on 18<sup>th</sup> July, 2022 as his testimony, and produced in evidence the documents referred



to in paragraphs 4 and 7 of this Judgment, save for one document (a payslip) which was not included in the bundle of evidential documents filed in court by the Claimant.

10. On application by Counsel for the Respondent, part of paragraph 1 of the Claimant's aforesaid witness affidavit that negatively accused the Respondent's Counsel was withdrawn by the Claimant.
11. The Claimant testified that he was employed by the Respondent on 14<sup>th</sup> September, 2021 and was terminated on 21<sup>st</sup> February, 2022 without being given reasons for the termination. That he was earning a monthly salary of Kshs.250,000/=.
12. Cross-examined, the Claimant admitted having previously worked for the Respondent from the year 2009 to 2013. That he was re-engaged by the Respondent towards the end of 2015 and was terminated on 30<sup>th</sup> April, 2016. That he previously sued the Respondent twice as it employs and fires without following the law. That the previous suits included this Court's Cause No. 635 of 2017 whereon Judgment was delivered on 27<sup>th</sup> November, 2018 and that the other suit is referred to at paragraph 18 of the said Judgment. That he (the Claimant) was awarded Kshs.720,000/= in the 2013 suit.
13. The Respondent called two witnesses. The first witness, Sammy M. Gathuri (RW-1), adopted his filed witness statement which he told the court incorporated the Respondent's response to the claim, as his testimony. He also produced in evidence the Respondent's documents referred to in paragraph 6 of his Judgment. The witness further testified that the Finance Manager was above the Claimant (the Procurement Manager), and that the Procurement Manager had to consult with the Finance Manager before any procurement was done. That the Operations Manager was above the Finance Manager and therefore above the Procurement Manager (the Claimant), as he co-ordinated all the operations. That the Claimant was a person who took no orders from anyone, that it was just his word. That the Claimant's termination letter stated that he had been terminated pursuant to paragraph 18 of his contract.
14. It was RW-1's further evidence that pursuant to Clause 5 of the Claimant's contract, the Claimant had to seek approval of the Finance Manager and the Board of Management or the Board of Directors before committing the company on anything.
15. Cross-examined, RW-1 testified that he did not have any evidence of any misconduct that had been reported to the Board before termination. That the Claimant, however, misconducted himself by committing the Respondent Company to the tune of Kshs.500,000/= without prior approval. RW-1, however, admitted that the Purchase Orders in issue (exhibited by the Claimant) had been signed by the Respondent's General Manager, the Finance Manager and the Claimant; and that the payment advice and the payment cheque did not bear the Claimant's signature. That the two documents had been signed by RW-1 himself (among other signatories) as he (RW-1) was a signatory to the Respondent's bank. That what was in issue and which partly led to termination of the Claimant's employment was the supply of linen; though the termination letter did not state so. That the Kshs.500,000/= cheque was in part-payment of the sum stated in the pay advice.
16. RW-2, Robin Muriuki Ndegwa, adopted his filed witness statement as his testimony. Cross-examined by the Claimant, RW-2, a director of the Respondent, testified that he had written an email stating that for accountability purposes, the Claimant's office was to handle purchases.
17. Having considered the pleadings filed herein and evidence presented thereon, issues that emerge for determination, in my view, are:-
  - a. Whether termination of the Claimant's employment by the Respondent was unfair.
  - b. Whether reliefs sought by the Claimant are merited.



18. On the first issue, for fairness to be attained in termination of an employee's employment, there must be both procedural and substantive fairness in effecting the termination. It was held as follows in the case of Walter Ogal Anuro – vs – Teachers Service Commission (2013) eKLR:-

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

19. The Claimant's termination letter dated 21<sup>st</sup> February, 2022 stated as follows:-

“Re: Termination of Employment

On behalf of the Board of KEHL, the Proprietor of the Mombasa Continental Hotel, I wish to inform you that in exercise of its powers under Clause 18 of the contract of employment entered by you with it on 14.9.2021, it is terminating your contract forthwith by paying you one month's salary in lieu of one month's notice. I attach a cheque for Kshs.378,393/= (As per the attached schedule) for which kindly acknowledge receipt by signing and returning the counterpart of this letter.

The Board wishes you well in your future endeavours.

Yours faithfully,

Eng. S.M. Gathuri

Chairman – BOD”

20. It is worthy noting that the foregoing letter did not state the reason for terminating the Claimant's employment. The fact that Clause 18 of the Claimant's employment contract provided that either party could terminate the contract by giving the other a one month notice or by paying one month pay (salary) in lieu of notice did not mean that the Respondent could terminate the Claimant's employment without a valid reason. The said clause could only be invoked by the Respondent if it had a valid reason to terminate the contract of employment.

21. Section 43 of the *Employment Act*, 2007 provides as follows:

1. In any claim arising out of a termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

22. Section 45(2)(a) of the said Act provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid. As already stated in this Judgment, the Respondent, being the employer, did not state in the termination letter any reason for terminating the Claimant's employment.

23. Section 43(2) of the *Employment Act*, 2007 provides as follows:-

2. The reason or reasons for termination of a contract 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.”

24. The import of the foregoing, in my view, is that where a letter of termination of employment is issued by an employer, the reason or reasons for terminating the employee's contract must be stated in that



letter. It is that reason or reasons whose validity the employer would be required to prove in any claim arising out of the termination of contract.

25. An employer who chooses not to state the reasons for terminating an employee's contract of employment in the letter of termination of employment cannot be allowed to come up with "reasons" after a claim is filed by an employee challenging the fairness of his termination.
26. The Respondent's contention at the trial that the Claimant had breached Clause 5 of his contract of employment by committing the Respondent in a Purchase Order for Hotel Linen is coming too late in the day, and cannot be the subject of consideration at this point when it was not an issue at the time when the Claimant's employment was terminated. This notwithstanding, the Respondent (RW-1) testified, under cross-examination by the Claimant, that Purchase Orders on the hotel linen in issue had been appropriately approved, and that payment advice and payment cheque thereon had been appropriately signed by the Respondent's bank signatories RW-1 being one of them.
27. The Respondent's attempt to state at the trial that the Claimant had a character defect that caused frosty relationships with his superiors, or was in other words incompatible, can also not be considered at this point in time as it was not in issue at the time when the Claimant's employment was terminated, and was not stated in the termination letter as a reason for the termination. If it was, it would have been stated in the termination letter.
28. On procedural fairness, Section 45(2)(c) of the [Employment Act](#) provides that termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. This fair procedure is set out in Section 41 of the Act, which provides as follows:-
  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 provisions of this Part, an employer shall, before terminating the employment of an employee 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."
29. The Respondent did not demonstrate that it complied with the foregoing procedure, or any other form of fair procedure. It did not demonstrate that it acted in accordance with justice and equity in terminating the Claimant's employment as stated in Section 45(4)(b) of the [Employment Act](#).
30. The Court of Appeal stated as follows in the case of Kenfreight (E.A) Limited – vs – Benson K. Nguti (2016) eKLR:-

“ Apart from issuing a proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract.

In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken . . .”



31. The Court further stated in the Kenfreight (E.A) Limited case (Supra):-

“ . . . It is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, and that the reason related to the employee’s conduct, capacity, compatibility or is based on operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure . . . ”

32. Further, in the case of Janet Nyandiko – vs – Kenya Commercial Bank Limited (2017) eKLR, the Court of Appeal stated as follows:-

“Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said Section, a termination of employment is deemed unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively, that the employer acted in accordance with justice and equity.

The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment are inbuilt in the same provision . . .

Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that he understands, the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and to consider any representations which the employee may advance in response to the allegations levelled against him by the employer.”

33. In the instant case, the Respondent did not demonstrate that any reason for the termination of employment was communicated to the Claimant prior to termination, and in the manner mandatorily provided by the statute. Further, the Respondent did not demonstrate that the Claimant was given an opportunity to be heard before termination of his employment. Indeed, no proceedings of any hearing were exhibited by the Respondent.

34. I find and hold that termination of the Claimant’s employment by the Respondent was procedurally and substantively unfair.

35. On the second issue, I have taken note of the fact that the Claimant worked for the Respondent for only five (5) months, from 14<sup>th</sup> September, 2021 to 21<sup>st</sup> February, 2022, during his third contract of employment with the Respondent.

Section 45(3) of the [Employment Act](#) provides as follows:

3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”



36. In the case of Benson Muriithi Kagai – vs – Kenga Equatorial Hotels Limited t/a Mombasa Continental Resort (2018) eKLR, this Court (Ndolo, J) stated as follows:-

“ 24. I am also persuaded by the decision by Lenaola J (as he then was) in Samuel G. Momanyi – vs – Attorney General & Another (2012) eKLR where Section 45(3) of the Employment Act which places a 13 months minimum employment period as a condition for claims of unfair termination, was declared unconstitutional.”

37. I am also persuaded by the aforementioned decision of the High Court, and having made a finding that termination of the Claimant’s employment by the Respondent was unfair, and taking into account the short period that the Claimant was in the Respondent’s employment and the manner in which his employment was terminated, I award the Claimant the equivalent of five (5) months’ salary as compensation for unfair termination of employment. It was a common ground that the Claimant’s gross monthly salary at the time of termination was Kshs.250,000/=. His contract of employment stated as much. The equivalent of five (5) months’ salary is Kshs.250,000 x 5 = Kshs.1,250,000/=, which I award the Claimant.

38. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.

39. The Claimant is awarded costs of the suit and interest. Interest shall be calculated at court rates from the date of this Judgment.

40. The Respondent shall issue the Claimant with a Certificate of Service pursuant to Section 51(1) of the Employment Act. This shall be done within thirty days of this Judgement.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER 2024**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

