



**Kosgey v Konyipad Kenya Limited (Cause 1213 of 2018)
[2024] KEELRC 2574 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2574 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1213 OF 2018
K OCHARO, J
OCTOBER 18, 2024**

BETWEEN

WINNIE CHEBET KOSGEY CLAIMANT

AND

KONYIPAD KENYA LIMITED RESPONDENT

JUDGMENT

1. Via the Statement Claim dated 13th July 2018, the Claimant sued the Respondent and sought against it the following reliefs and orders;
 - a. Kshs 37,692/-being the unpaid salary dues for the 14 days worked.
 - b. Kshs 80,769/-being one month's salary in lieu of notice.
 - c. Kshs 97,074/- being monies owed to the former employer in lieu of notice.
 - d. Kshs 256,275.36/-being 33% gratuity that the Claimant would have been paid by her former employer at the end of her contract on 13th June 2018.
 - e. Kshs 1,200,000/- being damages for wrongful dismissal from employment.
 - f. Any other relief that this Honourable court may deem fit and just to award.
2. The Respondent resisted the Claimant's claim through the statement of response dated 29th August 2018, where it admitted that the Respondent was its employee but denied unfairly terminating her employment or owing her any dues.
3. The hearing of this matter proceeded in the absence of the Respondent and its Counsel, who inexplicably were absent from court on the hearing date.



Claimant's Case

4. At the hearing, the Claimant adopted the contents of her witness statement as her evidence in chief.
5. The Claimant states that she first came into the employment of the Respondent on the 19th day of March 2018 as a Senior Tender and Procurement Officer.
6. The Claimant also states that she was previously employed by Kenyatta University (hereinafter referred to as "former employer") under a fixed-term contract that had a lapse date of 13th June 2018. Under the contract, either party would terminate the same by giving a 3-month notice or pay in lieu of notice. Further, after the completion of the contractual period, she was entitled to gratuity, in the sum of Kshs 256,275.36.
7. During the interview for the position in the Respondent Company, the Claimant informed Mr Ahmed Egeh that; her contract with the former employer was set to lapse on 13th June 2018; she was required to either give a three-month notice before termination of the contract or to pay Kshs 97,074.00 in lieu of notice; she was entitled to the Kshs 256,275.36 as gratuity at the end of her contract which benefit was to be forfeited if she resigned.
8. The Claimant contends that Mr. Ahmed Egeh made a representation that the Respondent would pay her former employer the Kshs 97,074 on her behalf and pay her a further Kshs 256,275.36 so that she could take up her position at the Respondent Company immediately.
9. The Claimant consequently resigned from her employer on 19th March 2018 and took up her new position at the Respondent on the same date. Her former employer did not clear her upon resignation because she had failed to give the required notice before the resignation.
10. On 10th April 2018 she was dismissed from employment by Mr. Ahmed Egeh and Ms. Shamis Hussein without being given a reason for their action. No disciplinary hearing was undertaken against her before the dismissal.
11. In the first two months of her employment she was to earn a gross salary of Kshs 70,000 per month. Thereafter, there was to be an automatic upward review to Kshs 100,000. Additionally, she was to be paid a salary of Kshs 35,000.00 for the weeks worked in March 2018.
12. In her letter dated 10th April 2018, she demanded that the Respondent pay her dues but the letter didn't elicit any response from the latter. Subsequently, she sent the said letter under cover of an email, to which Ahmed Egeh responded on 16th April 2018, seeking clarification as to her exit from employment.

Claimant's Submissions

13. The Claimant raised the following issues for determination; Whether the termination of the Claimant's Employment is unprocedural, wrongful and unfair; Whether the Respondent has breached the Claimant's Contract of employment; and Whether the Claimant is entitled to the prayers sought herein.
14. Submitting on the first issue, the Claimant stated that she was summarily dismissed and/or terminated without proper cause and a disciplinary hearing. At all material times, she served the Respondent diligently, and at no point was it expressed to her that her performance was wanting in one way or the other.



15. On 10th April 2018 the Respondent's directors Mr. Ahmed Egeh and Ms. Shamis Hussein verbally terminated her employment without giving any reason. Further, the termination was without procedural fairness. As a result, the termination of her employment was unfair. To buttress this point, she placed reliance on Section 45 of the [Employment Act](#) and the case of [Mary Chemweno Kiptui v Kenya Pipeline Company Limited](#) [2014] eKLR.
16. On the second issue, the Respondent submits that the Claimant has established on a balance of probability that the Respondent unfairly and procedurally terminated the Claimant's employment and this amounted to a breach of contract.
17. On the third issue, the Claimant submitted that having proved her case to the requisite standards, all the reliefs sought should be availed to her thus; the compensatory award for the unfair termination contemplated under section 49[1][c] of the [Employment Act](#), twelve months' gross salary; Kshs 37,692/-being unpaid salary dues for the 14 days worked in March, Kshs 80,769/-- one (1) month's salary in lieu of notice; Kshs 97,074/- that was deducted by her former employer from her dues; and Kshs 256,275.36 being gratuity that she forfeited.

Analysis and Determination

18. I have carefully considered the material placed before this Court, and the following issues emerge for determination;
 - i. Was the Claimant 's employment unfairly terminated?
 - ii. Is the Claimant entitled to the reliefs sought?

Whether the Claimant's employment was unfairly terminated

19. Before I delve further into this issue, I find it imperative to reiterate that despite filing a response to the Claimant's claim, the Respondent for the reason hereinbefore mentioned, absence from court on the date of the hearing, didn't present any evidence to support its defence. It is now trite law that where a Respondent files a statement of response, but nonetheless fails to present evidence, the statement will remain such a statement without any evidential value, and that is how I will look at the statement of response filed herein by the Respondent.
20. Section 47[5] of the [Employment Act](#), places a legal duty on employee claiming unfair termination or summary dismissal to establish that an unlawful termination or wrongful dismissal occurred. Discharge of the burden entails him or her prima facie demonstrating that the termination or summary dismissal didn't conform with the requirements of the law under Sections 41, 43, 45, and 45[7] of the [Employment Act](#). It is only after satisfying this requirement at of the law, that the employer gets enjoined to prove that the termination was lawful and justified. Put in another way, it is at this point that the evidential burden shifts to the employer to demonstrate to the requisite standard; that termination or summary dismissal was procedurally fair [section 41 of the Act]; the reason[s] for the termination or summary dismissal [section 43 of the Act]; that the reason[s] was valid and fair [section 45(2)]; and that they acted in justice and equity [section 47(5)].
21. I have carefully considered the Claimant's unchallenged evidence on the aspect of lack of procedural fairness and substantive justification in the termination of her employment, and hold that she did manage to discharge her legal burden under Section 47[5] of the [Employment Act](#).
22. Section 43 the Act requires the employer in a dispute regarding termination of an employee's employment to prove the reason[s] for the termination, in the defaulting the termination or summary



dismissal shall be deemed unfair by dint of section 45 of the *Employment Act*. Legal burdens are dischargeable by production of evidence. Where a party charged with a legal duty to prove a fact or set of facts, or a matter, but tenders no evidence towards proving, seldom can he be found to have discharged the legal burden. As the Respondent didn't produce any evidence to demonstrate the reason[s] for the termination of the Claimant's employment, I hold that it failed to discharge the legal burden under the stated section. Resultantly, by operation of the law, the termination was unfair.

23. It isn't enough for the employer to prove the reason[s] for the termination or summary dismissal of the employer. The employer must as required by the stipulations of section 45[2] of the Act, demonstrate that the reason[s] was valid and fair. Again, where no evidence is led to establish this, the only inevitable conclusion that a court must arrive at is that the burden contemplated under this provision wasn't discharged. I so hold.
24. The Claimant asserted that the Respondent dismissed her from employment without adhering to the dictates of procedural fairness contemplated under Section 41 of the *Employment Act*. She was verbally dismissed and ordered to leave the Respondent's premises forthwith. Her evidence on this was not rebutted.
25. Duty lay upon the Respondent to prove that the procedural cannons prescribed under this stated section were adhered to. They didn't prove. As a result, there cannot be any justification to hold that the Claimant's position was wrong, and consequently conclude that the dismissal of the Claimant from employment was procedurally fair.
26. In the upshot, I conclude that the Claimant was summarily dismissed from employment, as she was dismissed without the termination notice provided for under section 35 of the *Employment Act*, and that the dismissal was both procedurally and substantively unfair.

Is the Claimant entitled to the reliefs sought?

Kshs 37,692/-being the unpaid salary dues for the 14 days worked

27. The Claimant in her witness statement states that she was employed on 19th March 2018 and dismissed on 10th April 2018. In absence of any evidence by the Respondent, challenging the Claimant's in support of grant of this relief, I hesitate not to conclude that the amounts sought should be granted. The Claimant is awarded Kshs 37,692/-.

Kshs 80,769/-being one month's salary in lieu of notice

28. Having found that the Claimant was unfairly summarily dismissed from employment, I hold that the Claimant is entitled to remedy under this head but only to the extent of Kshs 70,000, the monthly gross salary that he was earning at the time of separation.

Kshs 97,074/- being monies owed to former employer in lieu of notice

29. Via the email dated 14th March, 2018, the Ahmed Egeh on behalf of the Respondent informs the Claimant that, "...We will also pay a lump sum to end your contract with your current employer". No doubt, as was asserted by the Claimant, it was the intention of the parties at the time of entering the contract of employment, that the Respondent was to pay her former employer three months' salary in lieu of notice, as she was existing the latter's employment without the requisite contractual termination notice. The Respondent didn't challenge the Claimant's assertion that this sum was deducted from her final dues by her former employer. The sum should be awarded.



Kshs 256,275.36/-being 33% gratuity that our client would have been paid by her former employer at the end of her contract on 13th June,2018.

30. The Claimant's employment contract with her former employer indicates that her former employer was to pay her gratuity at 31% of her basic salary, at the completion of her contract. Indeed, this was provided for under paragraph 2 of the letter of appointment by the former employer dated 24th May 2016. The manner the paragraph is couched gives an impression that the gratuity was only payable at a successful completion of the contract period. Undeniably, she didn't complete the contract period as she quitted early to join the Respondent's employment.
31. The Respondent doesn't deny by evidence that it did make a representation that it could compensate the Claimant this amount which she forfeited by existing her former employer's employment earlier than the appointed contractual date. They did not prove that they compensated her. By reason of the premises, she deserves an order directing compensation, which is hereby given.

Kshs 1,200,000/- being damages for wrongful dismissal from employment.

32. Section 49[1][c] of the *Employment Act*, bestows upon this Court the power to grant a compensatory relief in favour of an employee who has successfully challenged his or her employer's action of terminating his or her employment, to the maximum extent of twelve months' gross salary. However, it is pertinent to point out that the power is exercised discretionarily depending on the circumstances of each case.
33. I have considered the fact that; the Claimant existed her former employer's employment prematurely to join the Respondent's, only to be summarily dismissed within a month in the new job; the fact that the Respondent inexplicably failed to honour its representations to the Claimant, an act that passes for an unfair labour practice; the Respondent didn't comply with the legal requirements for procedural and substantive fairness; and that the Claimant didn't in an proven way contribute to the summary dismissal, and hold that she is entitled to the award. I hereby award her six months' gross salary, Kshs 420,000.
34. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
 - i. A declaration that the Summary dismissal of the Claimant was unfair.
 - ii. Salary for the days worked in before the dismissal, Kshs 37, 692.
 - iii. Salary in lieu of notice, Kshs 70,000.
 - iv. The sum deducted from her dues by the former employer, Kshs 97, 074.
 - v. Gratuity sum that was payable by the former employer but forfeited by reason of her early exit from the employer's employment, Kshs 256, 275.
 - vi. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, six months' gross salary, Kshs 420,000.
 - vii. Interest on the sums awarded above at court rates from the date of this Judgement till full payment.
 - viii. Costs of the suit.

READ DELIVERED AND SIGNED THIS 18TH DAY OF OCTOBER 2024.

OCHARO KEBIRA



JUDGE

In presence of

Mr. Waingi for the Claimant.

