



**Rono v Delish Nail and Beauty Limited (Cause E038 of 2023)
[2024] KEELRC 2472 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2472 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E038 OF 2023
CN BAARI, J
OCTOBER 11, 2024**

BETWEEN

AMOS RONO CLAIMANT

AND

DELISH NAIL AND BEAUTY LIMITED RESPONDENT

JUDGMENT

Introduction

1. In a Memorandum of Claim dated 13th June 2023 and filed in court on 14th June 2023, the Claimant sued the Respondent alleging unfair and unlawful termination of employment. He seeks the following reliefs; -
 - a. A declaration that his termination of service was unfair, illegal and unlawful.
 - b. Kshs 1,020,000.00/= in Damages for unlawful termination.
 - c. Notice pay of Kshs 85,000/=
 - d. Kshs 7,189,020/= Compensation for the balance of the contract period
 - e. Exemplary damages
 - f. Reinstatement
 - g. Costs of the suit
 - h. Interest
 - i. Any other relief the honourable court may feel just and reasonable to award.



2. In a response dated 25th February 2024, the Respondent acknowledged the Claimant's employment and avers that their separation was mutual.
3. The matter proceeded for hearing on 11th June, 2024 with the Claimant testifying in support of his case. The Respondent's case was heard on 25th June, 2024, when one Ms. Olivia Wanjiru Mathenge the Respondent's Human Resource Officer testified on its behalf.

The Claimant's Case

4. The Claimant's case is that he was head hunted by the Respondent to serve in the position of Senior Accountant forcing him to resign from his previous employment. He states that the Respondent had issued him with a one year renewable contract.
5. It is his contention that he worked diligently from 13th February, 2023 to 10th May 2023 when his employment was unfairly terminated.
6. It is his case that on the fateful day, the Respondent's Director directed the Human Resource Manager through WhatsApp to terminate his employment. He asserts that when he made a follow up with the Human Resource Manager, he was informed that the Director had already made up her mind and that he should leave the premises immediately.
7. The Claimant states that he was not issued with a termination letter and that he only learnt of his termination through WhatsApp. It is his case that he did not have any disciplinary issues nor issues related to his performance.
8. The Claimant avers that he was not issued with a show cause letter nor called for a disciplinary hearing, and is to date not aware of why he was terminated. The Claimant states that he has to date not been able to secure any employment.
9. The Claimant affirms that the dismissal was without notice, abrupt and lacking reason. Additionally, he avows that the mode of termination through WhatsApp was humiliating and degrading.
10. On cross-examination, the Claimant told court that he was asked to resign and that at the time of termination he had not been confirmed into the Respondent's employ.
11. The Claimant asserts that at the time of dismissal he was earning Kshs 85,000/= . It is his case that he was paid salary for the days worked, but was not paid in lieu of notice.
12. The Claimant prays that his claim be allowed and he be awarded costs of the suit.

The Respondent's Case

13. The Respondent's case is that the Claimant requested to be released having secured employment elsewhere. It is the Respondent's contention that the Claimant worked for less than three months from 20th February 2023 to 9th May 2023, before informing the Human Resource Manager that he was no longer willing to continue working.
14. It is the Respondent's case that the Claimant cited not understanding the Respondent's corporate culture, desire to pursue greener pastures and not being a perfect fit, as the reasons for his departure.
15. The Respondent asserts that the Claimant expressed reservations against his employment being confirmed as he did not wish to be tied down.



16. The Respondent's further case is that prior to requesting to be released, the Claimant had started exhibiting undesirable conduct of lateness, sending the wrong payroll and demanding for cashflow information despite being on probation.
17. Notwithstanding, the Claimant's conduct the Respondent asserts that it treated him with dignity and honoured its contractual obligations. It asserts that the alleged WhatsApp messages were fabrications and did not emanate from them.
18. On cross- examination, RW1 told court that the Respondent paid the Claimant a total of Kshs. 148,041 comprising of net salary, accrued leave and pay in lieu of notice of Kshs. 19,800.
19. It is her case that there was not acrimony between the Claimant and the Respondent at the time of his exit. It is her position that the Respondent cannot reinstate the Claimant since he had said that he was not a perfect fit for the job.
20. It is her evidence that the Claimant did not perform his duties well and that he was issued with a show cause letter which was not before court. She confirmed that the Claimant was on probation and was not given a hearing.
21. It is RW1's evidence that the Claimant was hired competitively and was not head hunted as alleged. She stated that the Respondent did not undertake an appraisal of the Claimant's performance though he showed signs of incompetence.
22. RW1 further told court that she did not have evidence showing that the Claimant had elected to leave voluntary for not being a perfect fit for the job.
23. The Respondent prays that the Claimant's suit be dismissed with costs.

The Claimant's Submissions

24. The Claimant submits that he was entitled to a hearing despite being under probation. He cites the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University & the A.G* [2021] eKLR for the holding that:-

“Under Section 2 of the *Employment Act*, an employee is defined to mean a person employed for wages or salary and includes an apprentice and indentured learner. Although the *Act* defines a probation contract in relation to the duration of the contract it does not segregate or isolate a person employed under a probationary contract from the general definition of an employee. Therefore, a reading of Section 41 together with the implicit provisions of Section 42(2) renders illogical the provisions of Section 42(1). Further, it does not make sense to accord an apprentice and indentured learner who are included in the definition of an employee under Section 2 the procedural benefits of Section 41 but deny the same to an employee simply because they hold a probationary contract. Labour rights are part of the Bill of Rights by virtue of Article 41 of the *Constitution*. Article 24 of the *Constitution* prohibits the limitation of a right or a fundamental freedom in the Bill of Rights except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

25. The Claimant further submits that the provisions of Section 42 (1) of the *Employment Act* to the effect that probationary employees are not entitled to notification and a hearing is inimical to Article 47 and 50 of the *Constitution*. He asserts that a reading of Section 42(1) of the *Employment Act* together with



- Article 27,47,48 and 50 of the Constitution would unearth outright discrimination against employees on probation like himself.
26. Regarding the nature of dismissal, the Claimant submits that it was devoid of reasons as per the provisions of Section 45 (2) of the Employment Act. He avows that there is no evidence that he notified the Respondent of his desire to leave.
27. The Claimant drew the court's attention to the contradictory nature of the Respondent's witness's testimony, where in examination in chief she averred that the Claimant was terminated due to poor performance, but on cross examination alluded to there being no disciplinary issues. He cites the case of Matsesho v Newton [2022] KEELRC 1554 (KLR) where the court opined: -
- “That the law on termination of employment is codified in the Employment Act as read with the Constitution of Kenya 2010. Article 41 of the Constitution provides for the right to fair labour practices. In my view, this right is wide enough to cover the right of an employee to require that a proposed termination of his employment is informed by valid reasons and is processed in a manner that observes the dictates of due process. Under section 41 of the Employment Act, if an employer proposes to terminate services of an employee on the grounds of gross misconduct, poor performance or physical incapacity, the employer must notify the employee of the ground for termination in a language that the employee understands. This information should be given to the employee in the presence of another employee of his choice or a trade union official if he elects. In addition, the employer is obligated to hear the employee's representations in response to the accusations against him.”
28. In further support of the Claim, the Claimant submits that his termination barely 3 months into employment was inhumane and calculated at occasioning him financial embarrassment. He avows that he was neither issued with a show cause letter nor subjected to a hearing contrary to Section 41 (2) of the Employment Act, he relies on the case of Geoffrey Gikonyo Mathu v Intex Construction Company Limited [2017] eKLR where the Court of Appeal held that even if the reasons for termination were valid the employee was still subject to a hearing as per section 41 (2) of the Employment Act.
29. On the claim for damages for embarrassment and psychological torture, the Claimant submits that the sharing of his termination on a platform shared by co-workers was calculated at humiliating him. Additionally, he asserts that the mistreatment and frustrations occasioned him mental anguish. He sought to rely in the case of Johnson v Unisys Ltd [2001] UKHL 13 where Lady Hoffman was of the opinion that loss does not have to be financial, but could include compensation for distress, humiliation and damage to reputation in appropriate cases.
30. Regarding damages for unlawful termination, the Claimant submits that he is entitled to the full 12 months' salary as per Section 49 (1) (c) of the Employment Act. He cites the loss of his sole source of income and his inability to secure commensurate employment. He draws the court's attention to the case of Abisalom Ajusa Magomere v Kenya Nut Company Limited [2014] eKLR where the court awarded the Claimant 12 months' salary compensation for unfair termination.
31. In respect of damages for psychological torture the Claimant submits that he is entitled to Kshs 2,000,000/=.
32. The Claimant finally submits that he is entitled to the costs of the suit.



The Respondent's Submissions

33. It is the Respondent's submission that the authenticity of the messages cannot be vouched for. He cites the lack of a certificate and the case of *Samwel Kazungu Kambi v Nelly Ilongo & 2 others* [2017]eKLR where the court in noting that the conditions of Section 106B of the *Evidence Act* had not been met, stated that no information on the source of the photographs had been supplied.
34. The Respondent submits that there was no distinguishing information such as phone numbers directly identifying the Director and the Human Resource Manager.
35. The Respondent further submits that the Claimant has not proven that an unfair termination has occurred as per the provisions of Section 47(5) of the *Employment Act*. It draws the court's attention to RW1's testimony on the Claimant wanting to leave as he had secured alternative employment.
36. Furthermore, the Respondent asserts that the separation was mutual as evinced by the final dues certificate signed by the Claimant. It cites *Godfrey Allan Tolo v Tobias O Otieno & another* [2022] eKLR where the court acknowledged the rights of parties to a contract to mutually terminate it.
37. Regarding the reliefs sought, the Respondent submits against compensation for unlawful termination on account of the separation being mutual.
38. On pay in lieu of notice, the Respondent avers that it was paid as evinced by the final dues certificate.
39. In respect of salary for the remainder of the contract period the Respondent cites the case of *Osoti v Trees for the Future Inc* KEELRC 962 (KLR) to the effect that it is not envisaged by the *Employment Act* and that there is no guarantee that an employee will serve the full contract term.
40. The Respondent submits that the remedies under Section 49 of the *Employment Act* are sufficient and that the Claimant is not entitled to exemplary damages. Moreover, it avers that there was nothing oppressive or unconstitutional in their actions. It relies on the case of *NCBA Bank PLC v Cyrus Ndung'u t/a Digital Tours And Logistics* [2021] eKLR where the court cited: 'oppressive and unconstitutional action' and 'action calculated to procure some benefit' as the two conditions for grant of exemplary damages.
41. On reinstatement the Respondent submits that it is untenable citing the Claimant's indication that he did not understand the Respondent's corporate culture.
42. The Respondent stakes its entitlement of costs on account of the claim being unmerited.

Analysis and Determination

43. After careful analysis of the pleadings, evidence, testimony and the parties' submissions, the following issues arise for determination: -
 - a. Whether the Claimant's Employment was Unlawfully Terminated
 - b. Whether the Claimant is Entitled to the Remedies Sought.

Whether the Claimant was unlawfully terminated.

44. The Claimant's case is that he was terminated vide a WhatsApp message and was not issued a dismissal letter. The Respondent's contention is that the it separated with the Claimant by mutual agreement.



45. The Respondent's contention that the separation was mutual is not supported by any evidence. The final dues certificate does not in any way indicate the mode of separation, and it is impossible for the court to decipher the mutuality of separation just from a cursory look at the document.
46. RW1's oral testimony on the circumstances leading to the Claimant's dismissal was to say the least contradictory. On one hand, she told court that the Claimant indicated to her that he had secured alternative employment and did not wish to be confirmed, while on the other hand, she testified that the Claimant could not fit into their employ owing to the nature of the Respondent's business. RW1 further told court that the Claimant did not perform well and that she had issued him with a show cause letter, but which she did not produce in court.
47. Save for RW1's testimony which was not credible owing to the contradictions, nothing has been presented to prove that indeed a meeting was held in which the Claimant expressed his desire to leave. The contention of mutual separation has thus not been proven.
48. Turning to the WhatsApp conversations, it is plausible that the same was with regard to the Respondent business as the group is indicated as 'Delish Management'. In as much as the Respondent denied knowledge of the communication or even knowing the persons referred to in the communications, that was all in my view, mere denial.
49. It is not disputed that the Claimant was still on probation as at the time of his dismissal having served for only 2 months and 3 weeks. A probationary contract is a conditional employment contract as the employee's continuation depends on his ability to perform the work in accordance with the expectations of the employer.
50. A probationary contract is defined under Section 2 of the *Employment Act*, 2007, thus: -

“a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period”
51. Ordinarily, an employee is put on probation for six months, but the probation period can be extended for a further six months where an employer is not satisfied with the employee's appraisal report.
52. A probationary contract may be terminated by either party by giving a seven (7) days' notice or seven days' wage in lieu of notice.
53. On whether an employer is compelled to hear any representation by an employee on probation before termination, was a question that was succinctly answered by the court in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University & the A.G* [2021] eKLR, where the court declared Section 41 (2) of the *Employment Act*, 2007 null and void, in so far as it excludes employees on probationary contracts from the procedural safeguards contained in Section 41 of the same *Act*. This in effect goes to say that an employer is under duty to present the employee with formal charges or hear him in his defence.
54. The Claimant's contract with the Respondent carried a 3 months' probation period. The Claimant was dismissed before the end of the three (3) months, and nothing shows that his performance was ever appraised prior to the decision to dismiss.
55. It is also not disputed that the Claimant was neither issued with termination notice nor heard prior to the dismissal. In the premise, the court finds and holds that the Claimant's employment was unfairly terminated.



Whether the Claimant is Entitled to the Prayers Sought

Compensation

56. The Claimant served the Respondent for a period of 2 months 3 weeks. Given the abrupt, demeaning and unexplained nature of his dismissal and the fact that the Claimant was head-hunted for the position and has since not been able to secure comparable employment, I deem an award of 4 months' salary sufficient compensation for the unfair termination, and which is hereby awarded. The Claimant's salary was Kshs 85,000/=. The award under this head would thus be Kshs 340,00/=.

Pay In Lieu of Notice

57. The Claimant was evidently not given the 7 days termination notice, and although the Respondent's witness told court that the Claimant was paid in lieu of notice, no prove had been led in this regard.
58. I find the claim merited and is awarded at Kshs. 19,800/=.

Exemplary Damages

59. The general rule is that exemplary damages are not payable in cases of breach of employment contract (See *Margaret Omondi v Kenya Revenue Authority*).
60. There are however instances that have been held to warrant an award of exemplary damages in addition to compensation for unfair termination. Lord Devlin in *Rookes v Benard* (1964) AC 1129, summarized the three instances where exemplary damages may be awarded as follows:-
- i. For tortuous intrusion or trespass that are profit motivated such as a landlord's wrongful eviction of her tenants;
 - ii. Where there is oppressive conduct by government agents;
 - iii. Where acts of the defendant have caused distress and intolerable anxiety."
61. The circumstances under which the Claimant herein was dismissed, does not meet any of three instances when exemplary damages may be awardable. The awards already granted under Section 49 of the *Employment Act*, are thus sufficient compensation for the unfair and unlawful dismissal.
62. The claim for exemplary damages thus fails and is dismissed.

Salary for the remainder of the contract period

63. An employee is paid a salary for contributing labour, and when there is no contribution, an employee does not deserve compensation. (See *David Mwangi Gioko & 51 others v. Nairobi City Water & Sewerage company Ltd* (2013) eKLR).
64. Section 49 (4)(f) of the *Employment Act* does not open an avenue for this court to award damages equivalent to the remaining term of the employee's contract arising from the unlawful termination of such contract. Payment for the unexpired term of contract is only available where the particular employment contract expressly provides for such payment.
65. It is not lost on this court that loss of earnings is a damage that this court can award, but which is by law capped at the equivalent of 12 months salary irrespective of the duration of contract.



66. Payment for the unexpired term of contract was not provided for in the contract of employment between the parties herein. The claim thus fails and is dismissed.

Reinstatement

67. Reinstatement denotes revival of the contract of employment. It is not an automatic right, but a discretionary remedy that involves the balancing of parties' interests. This court is called upon to consider amongst others, the practicability of recommending reinstatement.

68. The Court of Appeal in *Telcom Kenya Ltd v. Paul Ngotwa* (2013) eKLR had this to say on reinstatement:-

“...a personal employee or an employee of a small firm who has been dismissed or whose service has been terminated should not be imposed on his employer. Such would be casting such employer in servitude which is against public policy...in large organizations where sacked employee is not the immediate junior and/or does not on a day to day basis deal with the officer he has clashed with, or where he can be deployed to another department, and especially so in a country like our where employment opportunities are hard to come by, reinstatement is the most efficacious remedy.”

69. From the evidence adduced, it is clear that the Respondent is a small-sized enterprise which connotes possibility of a close knit relationship between employees. It is also evident that the Claimant and his immediate supervisor, (RW1) who came out as protagonists will be required to closely interact on almost a daily basis.

70. In light of the foregoing, I deem reinstatement impracticable.

Costs

71. The Claimant is awarded costs of the suit.

Conclusion

72. In whole, the Claimant's claim succeeds and orders issued as follows:-

- a. 4 months' salary as compensation for unfair termination at Kshs 340,000/=
- b. Pay in lieu of notice at Kshs. 19,800/-
- c. Costs of the suit and interest until payment in full.

73. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Onyango present for the Claimant

Mr. Wambua present for the Respondent

Mr. Kirui - C/A

