



**Andete v Steel Structures Limited (Cause 177 of 2017)
[2024] KEELRC 13185 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13185 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 177 OF 2017
SC RUTTO, J
NOVEMBER 22, 2024**

BETWEEN

JOHN OCHIENG ANDETE CLAIMANT

AND

STEEL STRUCTURES LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim which was amended on 22nd March 2022, the Claimant avers that he was employed by the Respondent as a Labourer on a monthly salary of Kshs 18,407.00. He was not issued with a letter of appointment but his employment is confirmed by the National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) member statements.
2. The Claimant further avers that the Respondent did not give him a letter of appointment until 29th March 2016. According to him, this was illegal. He further contends that the Respondent kept him on probation for the entire six years of his employment with the Respondent.
3. It is the Claimant's case that the Respondent terminated his employment without notice and valid reasons. He asserts that his termination from employment was wrongful and unlawful. On this account, the Claimant prays for the sum of Kshs 644,245.00 being notice pay, compensatory damages for unfair termination, leave allowance, and loss of job expectation. The Claimant has further prayed for a declaration that the Respondent's conduct was illegal. He further seeks to be awarded the costs of the suit plus interest.
4. The Respondent opposed the Amended Memorandum of Claim through its Amended Response dated 20th July 2022. Putting the Claimant to strict proof, the Respondent denies the Claimant's assertions that he was unlawfully and unfairly terminated from employment. It is the Respondent's assertion that the Claimant's termination from employment was within the provisions of Section 42 of the *Employment Act*.



5. The Respondent further contends that the Claimant is not entitled to the reliefs sought and consequently, has asked the Court to dismiss the Claim with costs.
6. The matter proceeded for hearing on diverse dates during which both parties called oral evidence.

Claimant's Case

7. The Claimant testified in support of his case as CW1. To start with, he adopted his witness statement and the list and bundle of documents filed alongside his Claim, to constitute his evidence in chief.
8. It was the Claimant's testimony that he was employed by the Respondent on or about 1st January 2009. According to him, he served the Respondent with loyalty and diligence until 29th July 2016 when the Respondent wrongfully and unlawfully terminated his services. He was not given a reason for his termination from employment and was not subjected to a disciplinary hearing. That further, he was not paid terminal dues or given a certificate of service.
9. Mr. Anthony Simiyu, who identified himself as an employee of the NHIF testified in support of the Claimant's case as CW2. Mr. Simiyu told the Court that he has been an employee of the NHIF since October 2006.
10. It was Mr. Simiyu's evidence that the name "Andete Ochieng John" is contained in the records held by the NHIF. That the said Andete Ochieng John was registered with the NHIF on 24th October 2012 and his employer is indicated as Steel Structures Limited. Mr. Simiyu proceeded to produce the Claimant's NHIF statement member data summary as an exhibit before Court.

Respondent's Case

11. The Respondent called oral evidence through Mr. Joseph Njuguna Maina, who testified as RW1. He identified himself as the Respondent's Administrative Assistant and similarly, he sought to rely on his amended witness statement, as well as the list and bundle of documents filed on behalf of the Respondent, to constitute his evidence in chief.
12. RW1 told the Court that the Claimant was employed by the Respondent on 29th March 2016 and was issued with a letter of appointment. That he only worked for the Respondent for four months.
13. It was RW1's testimony that the Claimant's letter of appointment expressly stated that he was employed under probation for the first three months. That having unsatisfactorily completed his probation, the probation period was extended for a further one month to 28th July 2016.
14. That despite the Claimant having been given an opportunity to prove his capability and the company's expectation, after the extended probation period, his employment was terminated on 21st July 2016.
15. RW1 further averred that the Claimant's dues were computed and paid to him but he declined to receive his payment cheque and the same was returned to the company's Accounts Department for safe custody. That the Respondent does not owe the Claimant the sum of Kshs 644,245.00.
16. According to RW1, the Claimant's suit is an afterthought and should be dismissed with costs.

Submissions

17. Upon close of the hearing on 18th July 2024, the Court directed both parties to file written submissions and to this end, issued timelines. The Respondent was the only one who complied and filed written submissions which the court has considered.



18. The Respondent has submitted that the Claimant was taken through a fair procedure and that there was a valid reason leading to his termination from employment; the reason being poor performance.
19. It was further submitted that in terms of Section 44(4) (c) of the *Employment Act*, summary dismissal is allowed where an employee is unable to perform his duties. In the same vein, the Respondent submitted that the Claimant's probation was extended in a bid to give him an opportunity to improve his performance.
20. In support of the Respondent's submissions, reliance was placed on the cases of Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR) and Mckinley v BC Tel (2001) 2 SCR 161,2002 SCC 38 [CanLII].

Analysis and Determination

21. Flowing from the pleadings by both parties, the evidentiary material before me as well as the Respondent's submissions, the issues falling for the court's determination can be distilled as follows: -
 - i. Whether the Claimant's termination was fair and lawful; and
 - ii. Whether the Claimant is entitled to the reliefs sought.

Unfair and unlawful termination?

22. In terms of Section 45(2) of the *Employment Act*, termination of an employee's contract of service is unfair where the employer fails to prove that it was based on a fair and valid reason related to the employee's conduct, capacity or compatibility. Further, the employer is duty-bound to prove that the termination from employment was in accordance with fair procedure. Differently expressed, an employer is enjoined to prove that termination of employment was fair substantively and procedurally.
23. I will start by considering whether the Respondent has proved that it had a fair and valid reason to terminate the Claimant's employment.
24. The record bears that the Claimant was terminated from employment with effect from 21st July 2016. It is discernible from the Claimant's letter of termination that he was not given any reason for the termination of his employment.
25. It is worth pointing out that during the hearing, RW1 testified that the Claimant's performance during his probation period was unsatisfactory hence the reason for his termination from employment. Be that as it may, this was not indicated in the Claimant's letter of termination.
26. Indeed, one wonders why the Respondent did not expressly state the reason for the Claimant's termination as being unsatisfactory performance in the event that was really the case.
27. What's more the Respondent did not lead evidence to prove that the Claimant had failed to perform his duties satisfactorily. I say so noting that there is no evidence on record to demonstrate that the Claimant was evaluated and if so, against what targets.
28. As a matter of fact, the Respondent did not adduce evidence to demonstrate that the Claimant had been issued with specific measurable targets that he was required to meet within specified timelines. Further, the Respondent did not prove that it had put in place measures to evaluate the Claimant's performance against any set targets. Additionally, there was no report or such other document constituting the Claimant's overall performance evaluation.



29. On this issue, the Court is guided by the determination in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010*; (2010) LLR 255 (ICK) (September 2013) that it does not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established. This position was reiterated by the Court of Appeal in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR.
30. It is against this background that I am led to conclude that the reason now being advanced by the Respondent that the Claimant's performance was unsatisfactory, is a mere afterthought and is not connected to the Claimant's termination from employment.
31. Needless to say, the Respondent has failed to discharge its evidential burden by proving that it had a valid and fair reason to terminate the Claimant's employment based on his performance. To this end, the Claimant's termination from employment was not substantively justified.
32. With respect to procedural fairness, Section 45 (2) (c) of the *Employment Act* places the burden on the employer to prove that termination of employment was in line with a process that is fair. Further to this, Section 41 (1) makes specific requirements regarding the process to be complied with by an employer. This process entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
33. In this case, the Respondent has maintained that the Claimant was terminated from employment during probation in line with the provisions of Section 42(1) of the *Employment Act*.
34. Section 42(1) of the *Employment Act* (now declared unconstitutional) provides as follows:

“The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.”
35. Fundamentally, prior to Section 42(1) being declared unconstitutional through the decision in the case of *Monica Munira Kibuchi & 6 others vs Mount Kenya University* (2021) eKLR, an employer was excused from complying with the requirements of Section 41 in the event an employee was terminated from employment while still serving on probation. In this regard, the only requirement was the issuance of a seven-day notice prior to termination of the employment.
36. Worthy to note is that at the time the Claimant was terminated from employment, Section 42(1) of the *Employment Act* was still good law.
37. In the case herein, the Respondent has averred that the Claimant was employed on 29th March 2016 hence was terminated during probation. This contradicts the Claimant's position that he was employed with effect from 1st January 2009 and was only issued with a letter of appointment on 29th March 2016.
38. In support of his case, the Claimant exhibited copies of his NHIF and NSSF member statements. In this regard, the Claimant's NHIF statement member data summary indicates that the Respondent commenced contributions to the Fund in October 2012. Notably, the said contributions were regular up to and including July 2016. This position was confirmed by Mr. Simiyu, an employee of NHIF, who produced the Claimant's NHIF statement member data summary.
39. The foregoing discounts the Respondent's position that the Claimant was employed on 29th March 2016 and that he was terminated from employment during his probation.



40. This being the case, it follows that the Respondent was bound to comply with the requirements of Section 41 of the [Employment Act](#) by subjecting the Claimant to the process contemplated thereunder.
41. From the record, there is no evidence that the Claimant was put on notice that the Respondent was contemplating termination of his employment for whatever reason. Coupled with that, there is no evidence that the Claimant was given an opportunity to give his explanation to whatever allegations the Respondent may have had against him.
42. I find it imperative to underscore that the provisions of Section 41 of the [Employment Act](#) are mandatory hence it follows that anything short of that process, is unprocedural unfair. This position was buttressed in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR in which the learned Judges of the Court of Appeal expressed themselves as follows:
- “It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....Four elements must thus be discernible for the procedure to pass muster:-
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
43. Guided by the authority above, it is this Court’s view that the Claimant herein was not accorded a fair hearing as envisaged under the [Employment Act](#), prior to the termination of his employment. As such, his termination from employment was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the [Employment Act](#).
44. The total sum of my consideration is that the Claimant’s termination was unjustified in all respects.
45. That said I now turn to consider the appropriate reliefs to be awarded in this case.

Reliefs?

46. As the Court has found that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant’s employment and that it subjected him to a fair process prior to termination, the Court awards him one (1) month’s salary in lieu of notice and compensatory damages equivalent to six (6) months of his gross salary. This award takes into consideration the length of the employment relationship as well as the circumstances attendant to the Claimant’s termination from employment.
47. The claim for unpaid leave succeeds as the Respondent did not exhibit the Claimant’s leave records. It is worth pointing out that under Section 74(1) (f) of the [Employment Act](#), the Respondent being the employer in this case was required to maintain all leave records in respect of its employees. As there is no evidence in the form of the Claimant’s leave records, it follows that the Claimant is entitled to leave pay. However, as per Section 28(4) of the [Employment Act](#), this award is limited to 18 months preceding the termination of the Claimant’s employment.
48. The claims for loss of job expectation and hardship allowance are declined.



Orders

49. In the final analysis, the Court enters Judgment in favour of the Claimant against the Respondent and he is awarded:
- a. One (1) month's salary in lieu of notice being the sum of Kshs 18,407.00.
 - b. Compensatory damages in the sum of Kshs 110,442.00 being equivalent to six (6) months of his gross salary.
 - c. Unpaid leave in the sum of Kshs 23,929.00.
 - d. The total award is Kshs 152,778.00.
 - e. Interest shall apply on the award at (d) above at court rates from the date of Judgment until payment in full.
 - f. The Claimant shall also have the costs of the suit.
50. As the employment relationship is admitted, the Respondent shall issue the Claimant with a Certificate of Service within 30 days from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant No appearance

For the Respondent No appearance

Court Assistant Millicent

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 had 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.

