



**Maina v Squid Kenya Limited (Cause 2430 of 2017)  
[2023] KEELRC 132 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 132 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2430 OF 2017  
K OCHARO, J  
JANUARY 26, 2023**

**BETWEEN**

**ZACHARY MOKAYA MAINA ..... CLAIMANT**

**AND**

**SQUID KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a memorandum of claim herein dated December 7, 2017, against the Respondent seeking the following reliefs and orders:
  - i. Certificate of service.
  - ii. A declaration that the termination of his employment was unfair and unlawful.
  - iii. The sum of Kshs 528,000 as particularized in paragraph 3 of the statement of claim.
  - iv. Costs of this suit.
  - v. Interest on [ii] and [iii] above.
  - vi. Any other relief as the Court may deem fit.
2. Upon being served with summons to enter appearance and file a response to the claim, the Respondent did not within the stipulated time or at all. Faced with this, on the February 21, 2018, the court directed that the matter does proceed as an undefended cause.
3. By a Notice of motion application dated May 28, 2018, the Respondent sought to have the order above-mentioned set aside, and that it be allowed to enter appearance and file a response to the statement of claim, out of time. On the September 28, 2018, the Court rendered itself on the application, allowing the same conditionally.



4. The foregoing premise notwithstanding, the Respondent did not file a memorandum of appearance and or a response to the claim. Consequently, the matter had to be re-slated for formal proof.

### **The Claimant's Case**

5. On the October 6, 2022, when the matter came up for formal proof before this Court, the Claimant sought that his witness statement herein dated December 7, 2017 be adopted as his evidence in chief and the document that he filed under the list of documents of the even date as his documentary evidence.
6. The Claimant stated that he came into the employment of the Respondent on the April 1, 2015, as a driver for a basic salary of Kshs 25,000. The appointment was under the letter of April 1, 2015.
7. The Claimant contended that at all material times in the course of his said employment he undertook his duties and responsibilities with passion, earnest zeal and dedication.
8. The Claimant further stated that in December 2015, by a phone call, the Managing Director of the Respondent company, summarily dismissed him from employment, when he directed him not to report back to work after the December holidays.
9. It was the Claimant's case that the Managing Director's action was arbitrary, unprocedural and unlawful.
10. At the time of the said dismissal, the Claimant was earning a gross salary of Kshs 30,000.
11. The Claimant asserted that by reason of the premises foregoing, he is entitled to:
  - i. An order directing the Respondent to issue him with a certificate of service.
  - ii. Payment in lieu of notice, Kshs 30,000.
  - iii. A compensatory award for wrongful dismissal, twelve months' gross salary, Kshs 360,000.
  - iv. House allowance, Kshs 90,000; and
  - v. Advocates debt collection fees, Kshs 48,000.
12. The dismissal was unprocedural and unfair and a breach of the stipulations of the *Employment Act, 2007*, he asserted.

### **Determination**

13. Section 43 of the *Employment Act* places upon the employer, in a dispute concerning a termination of an employee's employment, a duty to prove the reasons for the termination, where the employer fails to, the termination shall be deemed unfair pursuant to the provisions of Section 45 of the *Employment Act*.
14. Where a statute places a legal burden of proof on a party, the burden can only be discharged by way of adduction of evidence. The Respondent did not place any evidence before this Court from which one can pick the reason[s] for the dismissal of the Claimant from his employment. Consequently, I hold that the legal burden under Section 43 of the *Employment Act* was not discharged.
15. Section 45 of the Act imposes a further legal burden on the employer, the burden to prove that the termination was with a valid and fair reason. Again, without any evidence by the Respondent, it is difficult to state that the burden was discharged by the Respondent.



16. By reason of the foregoing premises, I find that the summary dismissal of the Claimant from his employment was substantively unfair.
17. Imperative to state that the Claimant's evidence as regards his dismissal and how, has not been challenged, it remains unrebutted. I am convinced that he has discharged his legal burden under Section 47 [5] of the *Employment Act*.
18. Section 41 of the *Employment Act* provide for procedural fairness. The provision dictates a mandatory procedure that an employer contemplating to terminate his or her employee's employment or summarily dismiss him or her must adhere to, before reaching the decision to terminate or dismiss. A fair procedure entails notification – the employer notifies the employee of the intention and the grounds upon which the action to determine the employment shall be based on; hearing – allowing the employee to make representations on the grounds and consideration – the employer making a determination by considering the employee's representations.
19. It was the responsibility of the Respondent to, under the provisions of Section 45 [2] [c] of the *Employment Act*, prove that the fair procedure postulated in Section 41 was adhered to. In absence of any evidence by the Respondent, I can only but agree with the Claimant that the dismissal was through phone, and without fair procedure.
20. By reason of the premises foregoing, I come to an inevitable conclusion that the termination was procedurally unfair.
21. Having determined as I have that the termination was procedurally and substantively unfair, and considering the circumstances of how the same occurred which can easily pass for an unfair labour practice, the substantial deviation by the Respondent from what the law expected of it, the fact that the Claimant did not contribute to the termination, and the length of time that the Claimant was in the Respondent's employment, I am persuaded to grant the Claimant the compensatory relief contemplated under Section 49 [1] [c] of the *Employment Act*, and to the extent of 6 [six] months' gross salary, Kshs 180,000.
22. By dint of the provisions of Section 35 as read together with Section 36, the Claimant's employment was one that was terminable by a one month's notice or salary in lieu thereof. There is no doubt, no notice was issued by the Respondent, to the Claimant. He is therefore entitled to one month's salary in lieu of notice Kshs 30,000.
23. The Claimant sought for a certificate of service, alleging that the Respondent did not provide him with one upon the dismissal. The right to a certificate of service for an employee whose employment has been terminated or who has been summarily dismissed is a statutory right and inviolable. Since there is no evidence rebutting the Claimant's assertion that the certificate was not issued to him, I find that he is entitled to the same and direct that the Respondent issues the same to him within 30 days from the date hereof.
24. The Claimant sought for House allowance of Kshs 90,000 and Advocates debt collection fees. These are sums that have just been thrown to court. There is no evidence in support of the claim in regard, thereto. Consequently, I have no justifiable reason to grant the same.
25. In the upshot, I enter Judgment in favour of the Claimant in the following terms:
  - a. A declaration that the dismissal of the Claimant from employment was procedurally and substantively unfair.



- b. Compensation pursuant to the provisions of Section 49 [1] [4] of the Employment Act, 6 [six] months' gross salary, Kshs 180,000.
- c. Salary in lieu of notice, Kshs 30,000.
- d. Interest on [b] and [c] above at Court rates, from the date of this Judgment, till full payment.
- e. Costs.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JANUARY, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In presence of

Mr. Nyaga for the Claimant.

No appearance for the Respondent.

**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 March 15, 2020 and subsequent directions of April 21, 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

