



**Nanga v Gusii Water & Sanitation Company Limited (Cause
E033 of 2021) [2023] KEELRC 111 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 111 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E033 OF 2021
CN BAARI, J
JANUARY 26, 2023**

BETWEEN

ORSBORN OBAIGWA NANGA CLAIMANT

AND

GUSII WATER & SANITATION COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a statement of claim dated April 1, 2021, and filed before court on even date, the claimant seeks a declaration that his termination from the service of the respondent is unfair, payment of Kshs 8,718,000 comprising of three months' salary *in lieu* of notice, salary arrears and compensation for unfair termination.
2. The respondent entered appearance and filed a statement of response and counter claim dated August 5, 2021, and filed in court on August 10, 2021 through the law firm of Aboki Begi & Associates Advocates.
3. This matter was first scheduled for hearing on November 8, 2021, when it proceeded for hearing without the respondent or their counsel's participation, having been duly served but failed to attend court on the hearing date. An *ex parte* judgment was delivered in favour of the claimant on February 24, 2022, but which judgment was set a side on account of a motion dated March 29, 2022.
4. The matter was then re-opened for hearing on merit and the claimant was heard in support of his case on October 31, 2022. He adopted his witness statement and produced documents filed in support of his case.
5. The respondent cross-examined the claimant but did not call any witness to testify in support of their case.



6. The claimant sought to rely on the submissions they filed earlier. The respondent did not file submissions.

The Claimant's Case

7. The claimant's case is that he was appointed to the position of Managing Director of the respondent on a three (3) year renewable contract of service effective April 5, 2019, at a monthly gross salary of Kshs 300,000.
8. The claimant states that prior to this appointment, he served in the position of Technical Manager with the respondent's company for 4 years.
9. The claimant states that he was suspended from the service of the respondent on March 8, 2021, and shortly thereafter terminated from service on March 23, 2021, for undisclosed reasons. He further states that he was not asked to show cause why he should not be terminated and neither was he taken through a disciplinary process
10. The claimant states that the board of the respondent demanded that he signs appointment letters for employees that the company/respondent had not recruited through the regular procedure, and change the respondent's security company amongst other irregular demands. He states that on declining to sign the letters and change security, the suspension and the eventual termination ensued.
11. The claimant avers that he was not taken through a disciplinary process and neither was he given reasons for suspension and termination. He further states that his employment contract entitled him to three months' salary in lieu of notice, which monies were not remitted upon his termination.
12. The claimant further states that the respondent owes him salary arrears for the months of January, February and March, 2021. He further avers that his employment contract entitled him to gratuitous pay at the rate of 31% for every year served.
13. It is the claimant's case that he has remained jobless to date, even after sitting five interviews, due to the manner in which the respondent terminated his services, as the termination tainted his name to the extend that he is unable to secure alternative employment. The claimant further avers that during his service with the respondent, he got a job elsewhere but the respondent recalled him.
14. It is the claimant's case that the audit issues raised by the respondent in their statement of response are untrue as the same were not brought to his attention, and that the audit report attached to the response is a draft report which report is not signed by its purported maker.
15. The claimant further states that he would have answered to the audit issues had they been put to him, either through a disciplinary process or as the Managing Director of the respondent. He further avers that he was never accused of fraud or asked to explain to any government oversight body issues of misappropriation of funds.
16. The claimant denies the respondent's counter claim in toto. He prays that this court grants him the reliefs listed in his statement of claim.
17. On cross-examination, the claimant states that he reprimanded the respondent's Human Resource Manager, for signing appointment letters for staff who were recruited unprocedurally.
18. The claimant further states that the letter terminating his services is dated March 22, 2021, and that he received it on March 24, 2021, through his email address. It is his further testimony that though the respondent company agreed to pay his gratuity for the period he served, the gratuity has to date not been remitted to his account.



19. The claimant further states on cross-examination that his refusal to sign the appointment letters is not gross misconduct as the appointments were unprocedurally conducted. He further states that his termination was not explained and that he was not called for a disciplinary hearing.

The Claimant's Submissions.

20. It is submitted for the claimant that the respondent bore the burden of proving that the termination of the claimant was fair by giving valid and justified reasons for the termination as required under the *Employment Act*.
21. The claimant further submitted that the respondent contravened section 35 of the *Employment Act*, for not having given the claimant notice prior to his termination.

Analysis and Determination

22. I have considered the pleadings, the claimant's oral testimony and the written submissions by both parties. The issues that present for determination are two:
- i. Whether the termination of the claimant was fair
 - ii. Whether the claimant is entitled to the remedies sought.

Whether the termination of the claimant was fair

23. A determination of fair or unfair termination is premised on the employer's adherence or lack thereof to sections 41, 43, 45 and 47(5) of the *Employment Act, 2007*. These provisions relate to both the procedure adopted by the employer prior to the termination as well as the substantive justification for the termination.
24. Section 41 of the *Employment Act, 2007*, specifically obligates an employer to give an employee a hearing whenever it is contemplating termination for reason of misconduct, poor performance or physical incapacity.
25. Fair hearing is not only a statutory, but also, a constitutional requirement demanded of an employer in a termination/dismissal process. Section 41 states: -

“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.”

26. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, the court stated:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.



Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

27. The claimant stated that he was neither issued with a notice to show cause nor taken through a disciplinary process. The respondent from the evidence before this court did not at all attempt to comply with section 41 of the *Employment Act*.
28. The claimant’s termination failed the procedural fairness test, and I so hold.
29. On the question of substantive justification, the *Employment Act* places the burden of proving that a termination is fair on the employee, and when such prove is given, the burden shifts to the employer to prove that the reasons for the termination are valid fair and justified. In this respect, the employer must give the employee reasons for termination, prove that the reasons are valid and fair, and finally prove that the reasons are justified.
30. The Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR opined thus:

“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”
31. The respondent did not provide the claimant with any reasons for termination. The termination letter being the only document the respondent issued to the claimant in relation to the termination stated thus:

“The Board of Gusii Water & Sanitation Company Limited at its sitting on March 22, 2021 resolved to terminate your appointment as the Managing Director of Gusii Water & Sanitation Company with effect from March 23, 2021 in accordance with the Company’s Human Resources Policies and Procedure Manual and your appointment letter.

Upon clearance you will be paid your benefits and dues less any liabilities due to the company at the time of termination as follows:

 1. Three months’ salary in lieu of notice
 2. Gratuity at the rate of 31% of your basic salary for the period you worked on pro-rata basis up to the date of termination of your services ; and
 3. Unutilized earned leave days up to the date of termination.”
32. The termination letter only informs the claimant of his termination, the date the termination takes effect and his entitlements in as far as the termination is concerned. No reason(s) whatsoever were given for the termination contrary to the clear and mandatory provisions of the *Employment Act*.
33. In *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR it was held that the court looks into the validity and justifiability of the reasons for termination.
34. I find and hold the termination of the claimant both procedurally and substantively unfair.



Whether the claimant is entitled to the reliefs sought

35. The claimant seeks a declaration that his termination from the service of the respondent is unfair, an order for an award of Kshs 8,718,000 comprising of three months' salary *in lieu* of notice, salary arrears and compensation for unfair termination.

Three months' salary in lieu of notice

36. The letter terminating the services of the claimant indicates that he was to be paid three months' salary *in lieu* of termination notice. The appointment letter also provides for a three months' notice period or pay *in lieu* thereof.

37. Section 49(1) (a) provides as follows in regard to pay in lieu of notice:

“Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following –

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;”

38. Although the claimant was informed in the termination letter that he will be paid a three months' salary *in lieu* of notice, no evidence of such payment was adduced before this court.

39. I find the claim for three months salary *in lieu* of notice merited and is hereby awarded.

Salary arrears

40. The claimant averred that the respondent did not pay him salary for the months of January, February and March, 2021. The letter terminating the services of the claimant indicates the effective date of termination as March 23, 2021.

41. Such a claim could only have been controverted by the respondent through production of pay slips or other forms of pay advises. None was produced, leaving the court with no option but to make an award for payment of two months' and 23 days salary in arrears, and which is hereby awarded.

Compensation for unfair termination

42. Termination of the claimant has been found to have fallen short of both the procedural and the substantive fairness tests. This by law entitles the claimant to compensation in accordance with sections 49 and 50 of the *Employment Act*, 2007.

43. The claimant told this court that he has to date not been able to secure alternative employment, and which he attributes to the manner in which the respondent terminated his services.

44. The claimant was in the service of the respondent for four years prior to his appointment to the position of Managing Director, where he served for a further two years.

45. The claimant's last contract with the respondent was a three (3) year fixed term contract. He served for one year and eleven (11) months before the contract was terminated. Had he served his full contract term, he would have exited on the April 4, 2022, assuming that the contract was not renewed though the same was renewable.



46. Taking into consideration the claimant's total length of service with the respondent; his legitimate expectation as to the length of time for which his employment with the respondent might have continued but for the termination; that he has not been able to secure alternative employment, and considering that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but are meant to redress economic injuries in a proportionate way, (See *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR), I award the claimant 7 months' salary as compensation for unfair termination.
47. In whole, judgment is entered for the claimant against the respondent as follows:
- i. A declaration that the claimant termination is unfair.
 - ii. Three months' salary *in lieu* of termination notice at Kshs 1,800,000/-
 - iii. Three months salary arrears at Kshs 1,800,000/-
 - iv. 7 months salary in compensation for unfair termination at Kshs 2,100,000
 - v. Costs of the suit and interest until payment in full.
 - vi. For the avoidance of doubt, all payments shall be subject to statutory deductions.
48. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 26TH DAY OF JANUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ombachi present for the Claimant

N/A for the Respondent

Ms. Christine Omollo C/A

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