



REPUBLIC OF KENYA



KENYA LAW
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**Nanjala v Brookview Limited (Cause 405 of 2016)
[2023] KEELRC 123 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 123 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 405 OF 2016
K OCHARO, J
JANUARY 26, 2023**

BETWEEN

LEONIDA AYUMA MBINI NANJALA CLAIMANT

AND

BROOKVIEW LIMITED RESPONDENT

JUDGMENT

1. Through her statement of claim dated March 8, 2016, the Claimant sued the Respondent for the following reliefs:
 - a. Declaration that the Respondent's action was unlawful, unprocedural and contrary to the *Employment Act*.
 - b. Loss of job expectation 12,500 x 12 – Kshs 150,000
 - c. Hardship allowance 12,500 x 5 – Kshs 65,000.
 - d. General damages for defamation.
 - e. Costs.
 - f. Any other relief that this Court may find fair and just.
2. The Respondent opposed the Claimant's claim through its Memorandum of Response dated April 26, 2016. It denied the claim in total, and the Claimant's entitlement to the reliefs sought.
3. At the close of pleadings, the matter got destined for hearing on merit. The Claimant's case and that of the Respondent was heard on March 23, 2022.



The Claimant's Case

4. At the hearing, the Claimant moved the Court to adopt her Witness Statement of March 8, 2016 as evidence in chief and the documents that she had filed herein contemporaneously with the statement of claim as her documentary evidence. Her plea was allowed.
5. It was the Claimant's case that she came into the employment of the Respondent through a letter dated April 12, 2011 as a domestic staff. Her starting salary being 8,000.
6. On November 16, 2015, she received a text message from her employer instructing her to report to its offices at Elgeyo Marakwet road instead of her usual work station. She obliged. However, she was told to revisit the office on November 25, 2015, by the secretary to her boss, the employer.
7. In her testimony in Court, she alleged that she was terminated through sms. There was no termination letter issued to her.
8. She asserted that prior to the termination of her employment, she was not accorded an opportunity to defend herself against the accusation[s] levelled against her.
9. She further stated that she was not at any time involved in the act of theft alleged or found with any stolen property. The termination was without any justification.
10. The Claimant contended that at the material time she was working at the same place with more than two other people. Consequently, it was discriminative for the Respondent to act as it did, yet nobody had pointed at her as the person responsible for the theft. Her constitutional right against being discriminated upon was violated.
11. The Claimant alleged that she was defamed as the Respondent portrayed her as a thief in the eyes of the public.
12. Cross examined by counsel for the Respondent Mr. Manda, the Claimant at first, asserted that she was not served with any termination letter. She however changed this position and admitted that she was served with the letter, service which she acknowledged by putting her signature thereon.
13. The Claimant stated that she received Kshs 21,746 as her terminal dues.
14. In her employment, she carried out house chores at the residence of Mr. Sadradin and Marie Christine. In the course of her said employment she would have access to every part of the premises.
15. During the year 2016, Ms Christine was very ill constraining Mr Sadradin to take care of her during the entire period of her illness. At this time Mr. Hamish Govan became her direct supervisor.
16. She served alongside Mr Samuel Matiso and Ms Nzambi. The letter was assisting her in the house chores.
17. The Claimant asserted that she was summoned to the office via sms by Mr Sadradin. However, when she went there, she did not meet him. She met the secretary who explained to her why she had been called there.
18. The Claimant stated that she was informed of the accusations against her. She was accorded an opportunity to explain herself on the same.
19. The employment letter was silent on the notice period. The Respondent paid her one month's salary in lieu of notice and for her untaken leave days.



20. In her evidence under re-examination, the Claimant asserted that she was first terminated through the sms. The termination letter was served on her nine [9] days later.
21. The house would be accessed by the five of them. There were no restrictions. Even the cook [Simon] would access the bedroom.

The Respondent's Case

22. The Respondent presented three witnesses to testify in support of their defence to the Claimant's case. RW1, Hamish Govan urged the Court to adopt his witness statement filed herein as his evidence in chief and the documents, the Respondent's documentary evidence. They were adopted as such.
23. The witness stated that the Claimant was employed by the Respondent on April 12, 2011 to work at his parents' [Mr Sadradin and Ms Marie Christine's] home. The two were also Directors of the Respondent Company. The Claimant's duty was to carry out household chores and help look after Ms. Christine who was unwell and suffering from dementia.
24. The witness contended that during the course of the Claimant's employment there were numerous complaints from other members of staff that the Claimant had been taking without consent personal effects including bags, shoes, dresses handbags and jewellery belonging to Ms. Christine. The items were taken from Ms. Christine's room and wardrobe. The Claimant was the only member of staff who could access thereto.
25. He alleged that he gave the Claimant verbal warnings regarding her conduct.
26. The Claimant testified that on or about October 27, 2015, one of the other house helps, employed to work at the witnesses' parents' home, Ms. Winfred Nzambi, showed his father photographs which she had taken using her phone, of the Claimant's handbag, with Ms. Christine's two handbags concealed in it. In the same month Samuel Mutiso, the cook had informed Mr. Govan that on several occasions he had seen the Claimant's bag with rolls of tissue papers hidden in it. Tissue papers which she regularly took without permission.
27. On or about November 15, 2015, the two members of staff above-stated, showed Mr. Govan the Claimant's handbag with a bottle of Jamson Whiskey, which the Claimant had picked without permission and concealed therein. With this, on November 16, 2015, Mr. Govan sent the Claimant an sms, requiring her to report to the Respondent's office.
28. On November 16, 2015, the Claimant attended the office and was given an opportunity to respond to the accusation of stealing the personal effects of Ms. Christine, household items, and the bottle of whiskey. Despite the evidence, she denied the allegations.
29. On November 25, 2015, the Respondent issued the Claimant with a letter of termination, notifying her that her employment had been terminated. She was paid a sum of Kshs. 21,746. She countersigned a copy of the termination letter acknowledging her understanding of the same and acceptance of the amount paid to her.
30. The witness asserted that the Claimant committed a criminal offence by stealing their property. Consequently, the Respondent was justified to summarily dismiss the her.
31. In his evidence under cross examination by Mr. Wakiaga, the witness stated that he was one of the Directors of the Respondent Company, the Claimant's employer.
32. The Claimant's contract could be terminated if she misconducted herself. He received numerous complaints from other members of staff that she was engaging herself in acts of theft.



33. The Claimant's conduct of taking items without the consent of the owners was not reported to the police. Following the complains from the witness's mother and the other members of staff, the witness warned the Claimant severally over the conduct.
34. The termination was based on the evidence that she had been stealing, including the photos in regard to the whisky.
35. In his evidence in re-examination, the witness testified that he did not report the matter to the police as during the material time his family was under stressful moments as a result of his mother's illness. They would not get time to report the matter to the police.
36. The other 5 employees are still working for the Respondent.
37. The second witness, Samuel Mutiso, too asked the Court to adopt his witness statement dated March 28, 2019 as his evidence in chief. It was his evidence that he had been in the employment of the Respondent for a period of more than 10 years. He was in the employment as a cook, while the Claimant was a house help.
38. The witness contended that while in his said employment, he noticed that various items like dresses, socks, handbags, jewellery, belonging to their employer were missing from the house.
39. In the month of October 2015, he saw several rolls of tissue papers in the Claimant's bag, rolls that she had taken from the house. The witness showed the bag to Mr. Sadradin. Later in November 2015, a bottle of whisky which the Claimant had picked from the employer's cupboard in the sitting room was found in her bag.
40. Cross examined by counsel for the Claimant, the witness testified that he used to work with the Claimant in same house.
41. The witness reiterated that he saw the several rolls of tissues in the Claimant's bag and that he informed his co-worker to confirm the same and she did. The witness and the co-worker acted in the manner, to avoid a situation where they would be implicated too.
42. In her evidence in chief contained in her witness statement, the third witness, Winfred Nzambi, largely reiterated the evidence of the first two witnesses concerning the Claimant's conduct.
43. She added that she learnt that the Claimant had been summoned to the Respondent's office when she called the witness and pleaded with her to help her keep her job.
44. Cross examined, the witness stated that the Claimant was her co-worker. As at the time of the latter's dismissal she had worked with her for three months.
45. The witness stated that she took photographs of the whisky. However, she could not produce photos in evidence as her phone got virus infected and the photos got damaged.

The Claimant's Submissions

46. As at the time of preparation of this Judgment, the Claimant had no submissions filed. The Judgment is therefore without the benefit of considering her submissions.

The Respondent's Submissions

47. The Respondent's counsel identified the following issues for determination:
 - i. Whether the Claimant's termination of employment was unfair or procedural.



- ii. Whether the Claimant is entitled to the claims sought.
 - iii. Whether the Claimant has proved her claim of defamation.
 - iv. Costs of the suit.
48. On the first proposed issue, it was submitted that by dint of the provisions of Section 45 of the Employment Act, termination of an employee's employment is deemed unfair, if it is without, a valid, and fair reason and, due regard to procedural fairness.
 49. The Claimant was summoned by the Respondent over the theft allegation, this much she admitted in her evidence under cross-examination. She too testified that she was accorded an opportunity to explain herself on the allegation. This supports the Respondent's position that the dismissal was procedurally fair.
 50. According to the Respondent, there is ample evidence that the dismissal was on a fair and valid reason. The Claimant engaged herself in acts of stealing her employer's property. The reason for the dismissal was therefore valid and fair.
 51. On the 2nd issue it was submitted that the contract of employment was silent on notice period. Consequently, considering the mode of payment of her salary, she was entitled to one month's notice or salary in lieu thereof. She was paid the notice pay and for her outstanding leave days.
 52. The Claimant's claim for hardship allowance does not find any anchor in the contract of employment between the parties. The Claimant cannot be heard to make a claim for it.
 53. Lastly it was submitted that employment defamation takes place when an employer publicises or causes to be published, statements that stigmatize the employee. The Claimant did not bring evidence to prove these ingredients.
 54. Costs follow the event. The Claimant should be condemned to bear the costs of this suit, upon its dismissal.

Determination

55. From the material placed before this Court by the parties, the following issues emerge for determination:
 - i. Whether the dismissal of the Claimant from her employment was fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Who should bear the costs of this suit?

Whether the dismissal of the Claimant from her employment was fair.

56. It is imperative to state from the onset that the Claimant was summarily dismissed from her employment. Section 44 [3] provides for when summary dismissal can occur, thus:

“ 44 [3] :

Subject to the provision of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached obligations arising under the contract of service.”



Considering the mode of payment of the Claimant's salary, at the end of every month, her employment was terminable by a one month's notice.

57. Whenever a court is called upon to interrogate fairness in an employee's dismissal from employment, the Court has to consider two kinds of fairness, Procedural fairness and Substantive fairness. Presence of both will lead to conclusion that the dismissal was fair. Absence of both in or any of them, to a conclusion that the dismissal was unfair.
58. Section 45 of the *Employment Act* dictates that no employer shall terminate the employment of an employee unfairly. Section 45 [2] [c] provides for procedural fairness, and a statutory consequence whenever the process leading to the termination of an employee's employment or an employee's dismissal is destitute of procedural fairness. The termination or dismissal shall be found to be unfair.
59. Section 41 of the *Employment Act*, 2007, supplies the structure of procedural fairness. There is now firm jurisprudence that the procedure provided for in the provision is mandatory and non-adherence to the same has the effect of rendering the termination of an employee's employment or summary dismissal of an employee, unfair pursuant to the provisions of Section 45 of the Act. See *Pius Machefu Isundu -vs- Lavington Security Guards* [2017] eKLR.
60. This Court has held before that the procedure contemplated in Section 41 of the *Employment Act* has three components, the information, hearing and consideration components. The procedure runs from the contemplation by the employer to take action against the employee to the communication of the decision by the employer to the employee.
61. In her evidence under cross examination, the Claimant testified that the accusation[s] that were being levelled against her were put forth to her. She was given an opportunity to explain herself on the accusation[s]. This evidence supported the Respondent's defence.
62. In the upshot, I find that the summary dismissal was procedurally fair.
63. I now turn to consider whether the dismissal was substantively fair. Section 43 of the *Employment Act* places an obligation upon an employer to prove the reason[s] for termination of an employee's employment whenever the termination is a subject matter of a dispute. Section 45 of the Act places a further burden on the employer, to prove that the reason[s] for the termination were valid and fair.
64. It was the Respondent's case that the Claimant was dismissed from her employment as a result of her conduct of stealing her employer's property. The Claimant asserted that she did not.
65. I have carefully considered the rival evidence by the parties on this aspect. The Respondent's witnesses' evidence was consistent. The Claimant did not posit that the witnesses did have a reason to assert against her as they did, other than stating the true situation that was. The material before me does not suggest in any manner that the Respondent's witnesses had an ulterior motive in testifying the way they did.
66. A party who wishes a court to believe his or her evidence must put forth her or his evidence in a manner testament of the desire. I am afraid that the Claimant did not present herself as such a party. Her testimony in court, in chief, contradicted her pleadings and witness statement, and to be specific on the manner of her dismissal. In her pleading and witness statement she asserted that the same was upon a termination letter while in her said testimony, she stated that the dismissal was absent of any letter. In her evidence under cross examination, the Claimant started off by asserting that she was not given any termination letter, however, shown the documents that she herself had presented to court, she retreated on the assertion.



67. As indicated herein before, the Claimant both in her pleadings and witness statement contended that she was not given an opportunity to defend herself on the accusations that had been levelled against her. However, under cross examination she gave testimony that was totally contradictory to the position.
68. It is by reason of the foregoing premises that I find convinced that the Claimant was dismissed on the reason[s] put forth by the Respondent both in its pleadings and evidence presented before court.
69. I now turn to determine the validity of the summary dismissal of the Claimant from her employment. In the case of *Samuel Onderi Choi vs. Absolute Security Limited*, Cause No. 1815 of 2015, ELRC, Nairobi, this Court provided a yard stick for determining validity of the reason for a summary dismissal, thus:
- “ 92. In determining validity and fairness of the reason for summary dismissal of an employee one must take into account the provision of Section 44 [3] & [4] of the *Employment Act*, 2007,”
70. Section 44 [3] provides:
- “ Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached obligations arising under the contract of service.”
71. By employing the term fundamental breach, the provision demands that the nature of conduct of the employee be repudiatory. In the employment contract an employee may be said to have repudiated a contract where his or her conduct and the character it reveals, is such as to undermine, or seriously impair, the essential trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship – see *Hunter Engineering Co v Syncrude Canada Limited* 1989, LII 129 [SCC].
72. To decide whether a misconduct constitutes a valid and fair reason for summary dismissal, the Court must consider the nature of the misconduct, and the consequences arising from the misconduct, within the totality of the employment including the nature and history of the employment relationship – *Geluck v Rockdale Golf ASSA* 2004 [Can. LII 145666 [ON SC].
73. The conduct of the Claimant, considering the nature of her employment that included taking care of an old lady suffering from dementia, and having full access even of her bedroom, no doubt was one that would undermine, seriously impair and undermine a reasonable employer’s essential trust and confidence on an employee in the circumstances of Claimant’s employment. Consequently, I find that the Claimant committed a fundamental breach of her employment.
74. Section 44 [4] of the *Employment Act* lists misconduct that may amount to gross misconduct so as to warrant a summary dismissal. I conclude that the conduct of the Claimant falls within those contemplated in the provision of the law.
75. Consequently, it is hereby concluded that the Claimant was summarily dismissed on a valid and fair ground. The dismissal was substantively justified.

Whether the Claimant is entitled to the reliefs sought.

76. Having found that the dismissal was both substantively and procedurally fair, it goes without saying therefore that, those reliefs that the Claimant sought upon basis of the alleged unfairness must collapse.



Therefore, the declaration, loss of job expectation and general damages for employment defamation sought.

77. The Court has not lost sight of the relief sought for hardship allowance of Kshs. 65,000. There was no evidence placed before the Court to demonstrate that the claim flowed from a term of the contract, a practice or statutory provision. There can be no justification therefore for a grant of the same. It is hereby declined.

78. In the upshot, the suit is hereby dismissed with costs.

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

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr Mendo for the Respondent.

Mr Waki for the Claimant.

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 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

