



REPUBLIC OF KENYA



KENYA LAW
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**Nzuki v Tea Hotel Ltd (Cause 1213 of 2016)
[2023] KEELRC 229 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 229 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1213 OF 2016
AN MWAURE, J
JANUARY 26, 2023**

BETWEEN

JOSEPH MUINDE NZUKI CLAIMANT

AND

TEA HOTEL LTD RESPONDENT

JUDGMENT

1. The claim before Court was instituted by the memorandum of claim dated the June 20, 2016 and filed on the June 21, 2016. The Claimant claims that his discharge from employment was unlawful and unfair.

Claimant's Case

2. He claimed unlawful and wrongful termination. He says that he was employed with the Respondent in the year 1990 as a waitress at a salary of Kshs 620/=. The salary, he says, was not reviewed to align with the minimum wages. It is averred that he was unlawfully and unreasonably discharged from his services as a waiter on the 6/4/2015. He avers that he had served the Respondent with dedication, loyalty and diligence.
3. The Claimant prays for the following:
 - a. A declaration that the termination of employment of the Respondent was unlawful and amounts to wrongful dismissal
 - b. The Respondent pays the Claimant terminal dues of ksh 2,095,023/=
 - c. The Respondent pays the Claimant general damages.
 - d. Costs of the claim and interest of b) above at Court rates



Respondent Case

4. The Respondent in his response admits that the Claimant was employed from the year 1990 as a waiter but says he was not terminated illegally. He says his wages were reviewed as per the law and it dismissed the Claimant after due notice and for gross misconduct. It says that it calculated the terminal dues for the Claimant amounting to ksh 105,403/= and deposited the same with Machakos District Labour Offices which the Claimant refused to accept.
5. The Respondent states that the Claimant is not entitled to the reliefs sought on the basis of facts of the case as presented and on the basis of statute and prays that the Claimant's claim be dismissed with costs.

Claimant's Evidence

6. Claimant witness Joseph Muinde Nzuki gave sworn testimony and adopted the witness statement dated the June 20, 2016 which he adopted as part of his evidence in chief. He also adopted documents contained in the list as part of his exhibits in the case being numbers 1-11 accordingly. He also asked the Court to consider his claim, witness statement and documents to render its judgment.
7. The case proceeded without the participation of the Respondent who did not give evidence in the case and neither did he file submissions.

Claimant's Submissions

8. The Claimant submits that the letter of termination dated the 6/4/2015 terminating the Claimant's services for declining to honour company guidelines on employment and inability to follow directions was vague. It does not disclose which company guidelines the Claimant flouted and which directions he did not follow. The Claimant argue that the letter is vague in the least for failing to lay out the guidelines or directions not followed and at what time.
9. Claimant further submits that the Respondent did not take the Claimant through any disciplinary process. He says that by failing to do so it can only be deduced that the Respondent was exercising the power to summarily dismiss an employee under section 44 of the *Employment Act*. The Claimant contends that the reasons listed in the letter are so general and vague such that they cannot be brought under the provisions for summary dismissal.

Issues for Determination

The issues that fall for determination are:

- a. Whether the Claimant was unfairly dismissed
 - b. Whether the Claimant is entitled to the remedies sought.
10. It is now well settled law that for termination of employment to be deemed lawful and fair, it must conform both to the procedural and substantive requirements under the law. See *Walter Ogal Anuro versus Teachers Service Commission* 2013 eKLR.
 11. The law on termination of contracts of service in Kenya is now largely governed by the *Employment Act*, 2007 and of significance in this respect are sections 41, 43, 44, 45 and 47 of the Act.
 12. The Respondent did not tender any evidence in the case regarding the circumstances of the termination. The Claimant adopted the witness statement dated the 21/6/2016 where it is narrated that whilst on normal duties on the 6/4/2015 he was given letter by his employers asking him to stop working as from 7/4/2015. This evidence was not contested. The termination letter dated the



6/4/2015 simply states that the Claimant declined to follow company guidelines and directions. It is general and one cannot know with certainty the guidelines and directions being referred to.

13. Section 45 of *Employment Act* 2007 provides that no employer will terminate employment of an employee illegally. The termination is illegal where the employer has no valid reason to terminate employee from his job. The respondent did not give a valid and clear reason as to why he terminated the claimant from employment.
14. Further to that there is no evidence of any hearing having taken place. Without hearing, there is no proof of the grounds of termination. Section 41 of the *employment Act* provides:

“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.
15. There are myriad of cases that provide that the employer must show substantive justification to terminate an employee. This has to do with a valid reason further as provided in the often cited case of *Walter Ogal Onuro vs Teachers service Commission* (2013) eKLR provides that:

“In order for an employer to terminate the employment of an employee he must show substantive justification as well as procedural fairness.”
16. The employer cannot just ask the employee to leave employment without giving him a chance to be heard. Where the employer flouts one of the above or both then this Court must find the termination is unfair and wrongful and unprocedural.
17. The Court has found and declares the Claimant’s dismissal unlawful and unprocedural and hence unfair for violating the rules of natural justice. This finding entitles the Claimant to compensation in accordance with the provisions of Sections 49 and 50 of the *Employment Act*.

Remedies

18. The Claimant has prayed for salary underpayment amounting to ksh 493,351/=. In my view, the prayer is in the nature of what would be a special damage that has to be specifically pleaded and proved at trial. The claim is mentioned under paragraph 8 of the claim with no particulars on how the figure has been arrived. The Court cannot work out the requisite underpayments simply by reference to the Wage Order. There is also no reference in the adopted statement on the issue of underpayments. This particular prayer is therefore declined.
19. Similarly prayers for days of rest is not proved and is declined.
20. The salary for 6 days worked in April 2015 is awarded.
21. He is also awarded one month salary *in lieu* of notice.
22. The claimed leave days are also in abstract with no proof and so will be declined.
23. The service pay is not awarded as there are records to show NSSF dues were being remitted.
24. The Claimant had worked for the Respondent company for 25 years at the time of dismissal. Based on the evidence presented before Court he cannot be said to have contributed in any way to the



termination. The Court awards the Claimant 12 month's gross salary compensation under section 49 (1) (c) of *Employment Act*.

25. The Court in all sincerity is unable to give final award as there are no records of Claimant's salary. The Claimant is to present whatever records he has of his salary at termination on 13/2/2023 to enable the Court give the final award.

26. Claimant is awarded costs and interest at Court rates from date of judgment till full payment.

Orders accordingly.

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

ANNA N. MWAURE

JUDGE

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 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.

ANNA N. MWAURE

JUDGE

