



**Malalu v Radar Limited (Cause 515 of 2018)
[2023] KEELRC 40 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 40 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 515 OF 2018
BOM MANANI, J
JANUARY 19, 2023**

BETWEEN

PATRICK EBICHONDO MALALU CLAIMANT

AND

RADAR LIMITED RESPONDENT

JUDGMENT

1. Until his termination on October 13, 2017, the claimant was employed by the respondent as a security guard. It is the claimant's case that the respondent unfairly terminated the contract of employment between the parties in the manner pleaded in the Statement of Claim. And hence this action for compensation for unfair termination.
2. On the other hand, the respondent denies that it unlawfully terminated the claimant. It is the Respondent's position that the claimant was lawfully summarily terminated for gross misconduct. As such, this claim ought to be dismissed with costs.

Claimant's Case

3. The claimant has given evidence indicating that he was employed by the respondent as early as the year 2003. According to the claimant, he was first engaged on temporary employment for quite some while before the respondent offered him permanent employment in the year 2017.
4. It is the claimant's case that on October 12, 2017 as he was going to work, his motorbike broke down. He says that he promptly alerted the security guard that he was going to take over from about this development and indicated that he will be late. The claimant also indicates that he alerted his supervisor, one Stephen Okasiba, about his predicament and asked that he be permitted to report to work late that evening.



5. As he took his motor bike for storage, the claimant asserts that he received communication that the respondent had already deployed a new guard to replace him for the assignment that evening. Meanwhile, he was asked to report to the Respondent's offices the following day (October 13, 2017) for further directions.
6. On reporting to the office on October 13, 2017, the claimant asserts that he was served with a letter for summary dismissal. He alleges that he was not paid salary for the days worked in October 2017.
7. It is the claimant's case that his termination was unfair. The claimant says that he was not given an opportunity to defend himself before the decision to terminate his contract of service was taken.
8. The claimant has prayed for various reliefs including inter alia: compensation for unfair termination; reimbursement of welfare dues made to the Staff Welfare Fund; and release of unremitted National Social Security Fund dues.

Respondent's Case

9. On its part, the respondent contends that the claimant failed to report to work on October 12, 2017 without permission from his immediate supervisor. The respondent denies that the claimant called the office to explain why he was not able to report to work on the material date.
10. It is the respondent's case that the claimant's case was one of absconding duty. That the claimant had developed the habit of reporting to work late without permission. That as a result, the respondent was left with no alternative but to summarily terminate the claimant's contract of employment.
11. The respondent asserts that it offered the claimant an opportunity to be heard before he was terminated. That however, the claimant did not take advantage of the chance as he failed to show up for the disciplinary session.
12. The respondent contends that the claimant was not entitled to notice before termination as his was a case of gross misconduct. It is also the respondent's case that the claimant is not entitled to the remedies sought in his claim for similar reasons.
13. As relates the claim for welfare contributions, it is the respondent's case that the Staff Welfare Association is a distinct entity from the respondent. Consequently, the respondent is not bound to shoulder welfare claims meant to be directed at the Association.

Issues for determination

14. After analyzing the pleadings and evidence on record, it is clear to me that the parties are in agreement that the claimant was an employee of the respondent at the time that is material to this case. The only issues in dispute are:-
 - a. Whether termination of the aforesaid contract of employment between the parties was lawful.
 - b. Whether the parties are entitled to the reliefs sought in their respective pleadings.

Analysis

15. It is perhaps necessary to start by restating the law on termination of contracts of employment that is relevant to the dispute before me. This is to be found in the [Employment Act](#) as read with article 41 of the [Constitution](#) on the right to fair labour practice.



16. Section 41 of the [Employment Act](#) (EA) entitles the employer to terminate an employee for gross misconduct, incapacity or incompetence. However, before the employer issues the termination, he is obliged to inform the employee the reason for the proposed termination. This communication should be made in a language that the employee understands and in the presence of a fellow employee or shop-floor representative if the employee so desires. Further, the employer is required to allow the employee the opportunity to respond to the charges against him and defend himself at a disciplinary session (see [Chairman Board of Directors \(National Water Conservation and Pipeline Corporation\) v Mesback M. Saboke & 2 others](#) [2019] eKLR).
17. It is recognized that under section 44 of the [EA](#), the employer is permitted to dispense with the requirement of notice if the termination of the employee is for reasons of gross misconduct. However, section 41(2) of the [EA](#) makes it mandatory for the employer to hear the employee if the employee challenges the validity of the proposed ground for termination under section 44 aforesaid.
18. Consequently, it is always prudent that the employer allows the employee the opportunity to ventilate his defense before the decision to terminate even where the employer proposes to terminate the contract of service on grounds of gross misconduct. This is necessary in order to avoid the possibility of falling into the trap of non-compliance with section 41(2) of the [EA](#) (see [H. Young \[EA\] Limited v Samuel Gikunda Mbiuki](#) [2020] eKLR).
19. Under section 43 of the [EA](#), the employer bears the burden of proving that the decision to terminate an employee's contract of employment was backed by valid reasons (see [Muthaiga Country Club v Kudbeiba Workers](#) [2017] eKLR). The law requires the employer to prove the reason for termination and demonstrate that he allowed the employee the chance to defend himself before the decision to terminate employment was arrived at.
20. It is recognized that section 47(5) of the [EA](#) requires the employee to prove that the termination of his contract of employment is unlawful and for the employer to justify the grounds for termination. However, all that this provision requires is that the employee tenders prima facie evidence demonstrating that there has been a termination of the contract of service and that the circumstances for termination appear unjustified. Once the employee provides this preliminary evidence, the burden shifts onto the employer to justify the decision to terminate the contract of service in terms of section 43 of the [EA](#). And if the employer fails to do so, then in terms of section 45 of the [EA](#), the resultant termination is deemed unlawful (see [Muthaiga Country Club v Kudbeiba Workers](#) [2017] eKLR).
21. In the case before me, it appears that after the claimant failed to report to work on time on October 12, 2017, the respondent took an immediate decision to summarily terminate him the following day. Although the respondent asserts that it allowed the claimant the opportunity to defend himself, there is no evidence placed before me to confirm this assertion. In any event, if the claimant is accused of having failed to report to work on the night of October 12, 2017 and the decision to terminate him was taken the following day, hardly twelve hours down the line, it is difficult to justify the assertion by the respondent that it offered the claimant a reasonable opportunity to defend himself but he failed to take advantage of it by failing to show up for the disciplinary session.
22. When was the claimant invited for the disciplinary session within the twelve or so hours between the time of the incident and the time of the decision to terminate him? If at all it's true that the claimant was asked to defend himself, was there sufficient time provided to him to offer a defense?
23. From the evidence on record, the respondent summoned the claimant to the respondent's office on October 13, 2017 when he was handed the letter of termination. Is it not a contradiction in terms for the Respondent to assert that the claimant failed to show up for the alleged disciplinary session on



- October 13, 2017 whilst at the same time acknowledging that it gave him the letter of termination on October 13, 2017?
24. The respondent's witness asserts that the claimant did not notify the respondent that he was unable to report to work on time on October 12, 2017. Yet, the claimant states that he relayed this information to his co-employee that he was to replace at Tipuana Park Karen and his immediate supervisor. It is noteworthy that whilst the respondent denied knowledge of the claimant's predicament on October 12, 2017, it did not call the individuals the claimant says that he reported his difficulties to in order for them to controvert the claimant's version of evidence.
 25. In the face of these facts, it appears to me that the claimant had a genuine reason to be late from work on October 12, 2017. The respondent's reaction to the challenge that the claimant experienced on the material date was unduly harsh and unwarranted. There was no basis to hold that the claimant had absconded duty in the circumstances in order to justify the summary termination of his contract of service.
 26. In any event, where an employee has challenged the validity of the ground for summary termination, the employer has a duty to hear the employee out in terms of section 41(2) of the EA. There is no evidence before me to demonstrate that the respondent afforded the claimant this opportunity. In the premises, I find that the respondent had no valid reasons in terms of section 43 of the EA to terminate the claimant. The termination of the claimant's contract of service was unfair. Perhaps a warning letter would have been sufficient punishment in the circumstances of this case.
 27. The next question I have to determine relates to the reliefs to grant to the parties. In this respect, I am guided by the provisions of section 49 of the EA.
 28. From the evidence on record, the claimant had served the respondent for approximately 14 years from 2003. There is no record of blemish on the claimant for all this while. In fact, the letter granting the claimant permanent employment status appears to confirm this when the respondent's Operations Director said of the claimant thus: "we hope you will maintain the same standards in executing your duties and we wish you the best of luck in your appointment."
 29. In terminating the claimant, the respondent did not take into account his past exemplary record. And neither was consideration given to the challenge the claimant experienced the evening of October 12, 2017. To say the least, the respondent's reaction to the claimant's failure to report to work was quite insensitive. I see nothing that the claimant did that contributed to this harsh treatment against him.
 30. Taking all these factors into consideration I consider this a fit case to award the claimant substantial compensation for unfair termination. I award him damages for unfair termination equivalent to his gross salary for ten (10) months. I also award him salary for one month in lieu of notice. I also award the claimant salary for the days worked in the month of October 2017.
 31. I note that the claimant's contributions to the Welfare Association were made to an independent entity with its own Constitution. It appears to me that the entity was registered under the Societies Act. Any claim by the claimant in this respect must therefore be directed to the Association as opposed to the respondent. Consequently, the claims relating to reimbursement of welfare dues are hereby dismissed.
 32. I also dismiss the claims for unpaid National Social Security Fund (NSSF) dues. Such claims can only be at the instance of the Fund.
 33. I will however award the claimant interest on the award for compensation for wrongful termination. The interest will accrue at court rates from the date of institution of the suit till payment in full. The respondent shall also pay the claimant costs of the case.



34. For avoidance of doubt, the award for compensation is subject to the applicable statutory deductions under section 49 of the EA.

Summary of Award

35. In summary judgment is entered in favour of the claimant as follows:-

a.

Termination of the claimant's employment is declared unfair and therefore wrongful.

b.

The claimant is awarded compensation for wrongful termination equivalent to the claimant's gross salary for ten (10) months which works out to Ksh. 187,060/=.

c.

The claimant is awarded one month's salary in lieu of notice to terminate which is equivalent to Ksh. 18,706/=.

d.

The claimant is awarded salary for the eleven days worked in October 2017 totaling Ksh. 6,859/=.

e.

The claims for welfare funds and NSSF dues are declined.

f.

The claimant is awarded interest on the award for compensation for wrongful termination to accrue at court rates from the date of institution of the suit till payment in full.

g.

The claimant is awarded costs of the case.

h.

For avoidance of doubt, the award for compensation is subject to the applicable statutory deductions under section 49 of the EA.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF JANUARY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

