



**Wambua v Newlight Schools Limited (Cause 475 of 2018)
[2023] KEELRC 531 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 531 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 475 OF 2018
NZIOKI WA MAKAU, J
FEBRUARY 28, 2023**

BETWEEN

STEPHEN SYANO WAMBUA CLAIMANT

AND

NEWLIGHT SCHOOLS LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this claim vide a memorandum of claim dated April 5, 2018 seeking relief against the respondent for unlawful and unfair termination of employment and failure to pay terminal dues. He avers that the respondent employed him as a chef on February 8, 2010 and deployed him to work at the respondent's only girls boarding school – Newlight senior girls' school in Kitengela. The claimant avers that the respondent also placed him in charge of stores and made him the supervisor of the other kitchen staff in the said school. That whereas he was not given any formal letter of appointment or contract of service by the respondent, he relies on the respondent's written advices on salary adjustments and his membership in Newlight Sacco Society Limited sponsored by the respondent. He further avers that he served the respondent with diligence and dedication. That his working days commenced at 4.00am and ended at 10.00pm without any compensation for the extra hours worked in the course of his employment. It is the claimant's averment that on the evening of April 8, 2015, the respondent's Director and CEO, Mr Kariuki visited his work station in Kitengela at around 5.00pm and verbally told him that his services were no longer required and gave him 30 minutes to check out from the staff living quarters. That his pleas for an explanation on the abrupt dismissal and for more time within which to vacate the quarters did not elicit any response and he therefore packed his few belongings and left. That as at the date of dismissal from employment, his monthly salary was Kshs 22,000/- but the respondent did not pay him any dues whatsoever. He further avers that the termination of his employment was unprocedural because the respondent did not give him any prior notice of the basis for which his employment was considered for termination particularises nor gave him an opportunity to make any representations.



2. The claimant therefore seeks for payment of her terminal benefits and compensation including: unpaid wages for 8 days worked in April 2015; pro-rated leave for 2015; one month's salary in lieu of notice; unpaid overtime for 5 hours per day for 5 years and 2 months; service pay at the rate of 15% of gross monthly salary for every year of the 5 years worked; and 12 months' pay as damages for unfair and unlawful termination. He thus prays for judgment against the respondent for a declaration that the respondent's termination of his employment was unfair and unlawful, payment of his terminal benefits as set out in his claim plus interest at court rates from April 8, 2015 until payment in full; an order directing the respondent to issue him with a certificate of service forthwith; and any other or further relief as the honourable court may deem fit to grant.
3. In his witness statement, the claimant asserts that he worked for 18 hours daily save for the days when the school was closed for holidays and that the respondent never paid him overtime. That the respondent adjusted his monthly salary to Kshs 22,000/- by way of written notification dated January 30, 2014 with effect from the same month. That he was also aware that the respondent never remitted to the NSSF and neither did it maintain any other pension scheme for its employees during the period he worked for it. The claimant further asserted that no formal letter of termination was given to him nor was he paid after the verbal termination of his employment. He states that the respondent never responded to a demand letter sent to it by his advocates and asks the court to consider the over five years of dedicated service he offered the respondent.
4. In reply, the respondent asserts it filed a response dated August 22, 2018. No such pleading was in the court file nor was any annexed to the bundle of documents by the respondent.
5. In its substituted witness statement made on February 23, 2022, Mr Mathew Ngugi Mbugua, the deputy principal of Newlight senior girls secondary school, states that the claimant's duties as a cleaner in the kitchen included washing students' utensils and the cooking sufurias and pots and cleaning the cooking area and the kitchen. That the claimant never complained about having been added other responsibilities which he denies. He stated that the kitchen staff used to work in two (2) shifts, with the first shift starting from 5.00am to 1.00pm and the second shift from 1.00pm to 6.30pm, after which the kitchen and utensils would be cleaned and the kitchen closed by 8.00pm. He further stated that the claimant cannot claim leave as he was always given a day off on weekly basis, four days off after every six weeks on top of four days every term during the half-term break, five weeks for the December holidays, and about four weeks each for the April and August holidays.
6. Mr Mbugua asserts that on October 25, 2014, the claimant stole 25kgs of white raw rice meant for the students and the respondent had to look for alternative food for the students who had missed their meals. That on January 22, 2015, the claimant took 10kg of raw rice and two packets of 24 pieces of beef sausages, which items were recovered from him by the other kitchen staff. That on March 28, 2015, the claimant was found with four full chicken and 18kgs of raw rice which was meant to be cooked as supper for the students. That together with the fact that the claimant could not work comfortably in the kitchen with especially the female staff, his employment was terminated after several warnings given to him both verbally and in writing. He further asserts that since the relationship between the claimant and the respondent had been eroded due to the claimant's own conduct, the respondent has a duty to protect its dignity, reputation and property which could have been difficult if it retained the claimant as its employee. Furthermore, that making students miss meals could cause a school strike.
7. He contends that the respondent has several employees hence had no reason to only pick on the claimant and leave the rest of the employees. That the supplementary list and bundle of documents are not relevant to this case since they do not state the period when he worked for those two institutions or the reasons for his leaving them and that in any event, the claimant could have changed his



character compared to then. He states that the claimant's breach of trust and actions amounted to gross misconduct and could not be ignored and believes that an employer cannot be forced to retain a person who does not care about its interest in employment. It is his assertion that the claimant's claim is baseless and should be dismissed with costs since the respondent just acted within the law to protect its integrity.

8. Evidence

The claimant adopted his statement and produced his bundle of documents and supplementary bundle which were produced as exhibits 1 to 7. He denied having worked for the respondent as a cleaner or having worked in two shifts as alleged in its response. He testified that there were 12 cooks, 6 bakers and others who worked to cut and butter the bread for the 530 students and that it would take 2 hours to prepare tea for the students. That they would go to the Principal if they had any issue and that they did not sign when reporting to work. Whereas he confirmed having been the custodian of the store's key, he denied the allegations of theft stating that he could not steal food. He explained that the food used to be recorded upon delivery from the market and upon receipt in the kitchen and that the fact some students may be absent did not mean that the food they were to eat was stolen. He further testified that the alleged theft was not reported to the police.

9. In cross-examination, the claimant stated that he had filed the suit within the stipulated three years period. He asserted that they would clean the store and work for about a week after the school had closed and the students had gone home and that this was therefore 3 weeks each end of term in April, August and December. That the school was closed when the termination took place. In reference to his membership to the respondent's sacco, the claimant testified that the Sacco was controlled by the respondent and that he had attached a form he had personally filled. He further stated that he attended a training for chefs when working at Dilbahar and had also done a two weeks refresher course even though he did not produce the training documents in court. He insisted that he did not know the mistake he had made as others were not dismissed. He stated that 10 students did not get food during the exams because students would generally eat too much during exams period causing others to miss food but confirmed that the ration was the same from the store to the kitchen.
10. In re-examination, the claimant confirmed that the portion of the sacco form with the 'official use' was not filled but that the membership card produced in evidence was another document from the sacco. He stated that he was accused of stealing food because 10 students missed food.
11. The respondent's witness, Mr Mathew Ngugu Mbugua, adopted his witness statement and produced the respondent's bundle dated August 22, 2018 as defence exhibits 1, 2 and 3. He testified that the claimant used to be a cleaner at the school where he was a teacher and was not a chef as alleged. He noted that the documents from Fina restaurant in the claimant's bundle has dates that seem to have been tampered with and there was nothing to prove the authenticity of the documents or whether the two restaurants existed. He denied the assertion that some students got more servings and stated that the claimant was dismissed after he took some food and the issue was reported to the CEO.
12. In his cross-examination, he stated that he oversaw the reporting to work of workers in the school and that he used to check on the workers when they served food to the students. Whereas he was aware the respondent had records of its employees, he asserted that he was not in charge of the records. He admitted that the claimant ought to have been issued with an employment letter and that the claimant did indeed have a record with the respondent. He testified that someone else saw the claimant stealing and that it was not necessary to report the matter to the police because the claimant admitted the same and even asked for forgiveness. He noted that the claimant earned Kshs 22,000/- while cooks earned from Kshs 25,000/- depending on when one was employed. In reference to paragraph 1 of the letter



of summary dismissal, he admitted that the indicated allegation that the claimant was found selling buns and bread had not been previously mentioned but insisted that the same was not meant to create a story as it happened. While asserting that the workers signed when reporting and leaving work, or that the respondent had documentation of the workers' leave, he admitted that the said records were not before court. In re-examination, he stated that there was no notice issued to the respondent for production of evidence and that the claimant had the duty to place the letters before court to prove his case. That in any case, the claimant did not say how he got the information about the charge of stealing. That marked the end of oral testimony and parties were to file written submissions.

Claimant's Submissions

13. The claimant submits that since the respondent never pleaded the issue of limitation as part of its defence, this court should ignore that plea as held in the Court of Appeal decision in *Stephen Onyanqo Achola & another v Edward Hongo Sule & another* [2004] eKLR. Further, that the court should find that the evidence on record confirms that there was indeed an employer-employee relationship between the parties herein and that the respondent terminated the claimant from his employment, contrary to the assertions by the respondent.
14. He further submits that section 45(2) of the *Employment Act, 2007* provides that termination of employment is considered unfair if the employer fails to prove that the reason for the termination is valid and fair and that the termination was in accordance with fair procedure. The claimant submits that under section 47(5) of the *Employment Act*, the employer bears the legal burden of justifying the grounds relied upon in terminating employment. He submits that procedural fairness is provided for under the provisions of section 41 requiring an employer notify the employee of the grounds of misconduct upon which termination is contemplated, giving the employee the opportunity to present explanations and to have another employee present during the explanation.
15. It is the claimant's submission as demonstrated in evidence, the respondent completely failed to discharge the onus placed on it under the law that it had a valid and justifiable reason to terminate his employment on account of the allegations of theft. He urges this court to further hold that the respondent has failed in demonstrating occurrence of the alleged acts of sexual harassment as no evidence was put on record to confirm it carried out any internal enquiries or investigations on the allegations. He relied on the case of *Nicholus Muasya Kyula v Farmchem Ltd* [2012] eKLR for this argument. The claimant further submits that prior to his termination he was not accorded the procedural fairness safeguards inbuilt in the provisions of section 41 of the *Employment Act, 2007* and that the Court should thus find that the respondent unfairly terminated his employment. The claimant submits that in the Court of Appeal in *CMC Aviation Limited v Mohammed Noor* [2015] eKLR was categorical that where there is fair reason for terminating an employee's services but the employer does it in a procedure that does not conform with the provisions of a statute, the same still amounts to unfair termination. The claimant submits that he is thus entitled to the reliefs sought. On the claim for service, the claimant submits the court should note that the respondent did not advert to any of the matters set out in section 35(6) of the *Employment Act, 2007* as would have rendered the same unrecoverable. That for the claim on overtime, no material was produced in evidence to confirm the respondent's assertion that its kitchen staff operated on shift basis even though the defence witness indicated that such records were available, and that the claim is well founded. He urges the court to adopt the decision in *Martin Ireri Ndwigwa v Olerai Management Company* [2017] eKLR in this regard. He also urges the Court to consider the period he served the respondent and the callous manner in which his employment was brought to an end and award him maximum compensation.



respondent's Submissions

16. The respondent submits that in its plea for the suit having been filed out of time, it relies on section 90 of the [Employment Act, 2007](#) and the case of [John Kiiru Njiiri v University of Nairobi](#) [2021] eKLR where the court dismissed the claim under similar circumstances. It is the submission of the respondent that summary dismissal is allowed under the provisions of section 44(3) and 44(4)(c) to (f) of the [Employment Act, 2007](#) for a fundamental breach of the employment contract and for gross misconduct that comprises insubordination. The respondent submits that the conduct of the claimant was deliberate being that he was not caught once stealing but on different occasions and that the court should also consider the effects the misconduct would have caused in the school. It relies on the case of [Palluci Home Depot \(Pty\) Ltd v Herskowitz & others](#) [2014] ZALAC 81 as cited in the case of [Christopher Komen Chebet v Brinks Security Services Ltd](#) [2019] eKLR where the court stated that failure of an employee to comply with a reasonable and lawful instructions of an employer may justify a dismissal, provided that it is wilful (deliberate) and serious.
17. The respondent further submits that the evidence in court shows that the claimant got more leave days than the number an employee is entitled to in a year and that the claim for leave cannot stand. That the claimant also never disputed that it made deductions for both NHIF and NSSF on his behalf which automatically disqualifies his claim for service pay as under the section 35(5) and (6) of the [Employment Act](#). The respondent submits that being that there is no evidence adduced to prove any of the claimant's assertions, this case should be dismissed. In this regard, it relies on the authority of [Kipkepe Limited v Peterson Ondieki Tai](#) [2016] eKLR where the court observed that he who asserts must prove his case and that the burden of proof lies with whoever would want the court to find in his favour in support of what he claims. That in this case, the claimant has failed to satiate the burden of proof of unlawful termination of employment as provided under section 47(5) of the [Employment Act](#) and has also not adduced evidence in support of unlawful termination on a balance of probability. That in any event, the claimant has not given any reason why he continuously stole from his employer.
18. The claimant was dismissed from employment by the respondent for alleged theft of food items. It was also asserted, without any proof, that he had been accused of sexual harassment. Granted that this was not made an issue, the court will ignore the insinuations in the testimony of the respondent's witness. The respondent would be obliged to bear in mind the provisions of section 6(2), (3) and (4) of the [Employment Act](#).
19. The respondent asserts the claimant repeatedly stole from it. Whereas this is a ground for dismissal under the [Employment Act](#), it is uncontroverted that the claimant's services were terminated without a hearing being undertaken in terms of section 41 of the [Employment Act](#). Under this section, the employer is required to accord an employee procedural fairness which includes that right to hearing. Since this was not done, the termination of the claimant's services was ipso facto unfair and unlawful. Whereas the claimant sought compensation for overtime for 5 years plus, he did not lay before the court the material necessary for the court to ascertain whether indeed he worked overtime. In addition, the respondent was asserted not to have made NSSF contributions for the claimant. Whereas the claimant was the employee, in the absence of a letter of employment and records from the employer, it cannot be discerned whether the respondent did indeed comply with the requirements of the law on deductions and remittance of NSSF. Since this aspect was not rebutted with sufficiency by the respondent an adverse finding is made that the respondent did not make the said contributions and is thus liable for service pay.
20. In the final analysis, the court enters judgment for the claimant against the respondent for:-



- a. 5 days worked and not paid for – Kshs 4,166/-
- b. One month's salary *in lieu of* notice – Kshs 25,000/-
- c. 3 month's salary as compensation – Kshs 75,000/-
- d. Service pay being 15 days for each completed year of service – Kshs 62,500/-
- e. Costs of the suit.

21 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2023

NZIOKI WA MAKAU

JUDGE

