



REPUBLIC OF KENYA



KENYA LAW
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**Nyagaka v The East African University (Cause 550 of 2018)
[2023] KEELRC 530 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 530 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 550 OF 2018
NZIOKI WA MAKAU, J
FEBRUARY 27, 2023**

BETWEEN

ALFRED SAGINI NYAGAKA CLAIMANT

AND

THE EAST AFRICAN UNIVERSITY RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondent vide a Memorandum of Claim dated 16th April 2018 for unfair termination and non-payment of terminal dues and compensatory damages. He avers that the Respondent employed him as a Driver from 1st July 2012 and that his last salary was computed at Kshs. 35,000/- per month. It is the Claimant's averment that on 1st February 2018, he was called into the Respondent's HR Office and informed of his summary dismissal for allegedly disclosing confidential information regarding the University to outsiders. He contends that the Respondent's decision to dismiss him was unfair, unlawful and inhumane because the dismissal was for unfounded reasons and due process was not adhered to before his dismissal. He thus claims basic salary for the month of March, one month's salary in lieu of notice, unpaid overtime, unpaid leave, payment in lieu of untaken and unpaid leave for 6 years, service pay at the rate of 20 days salary for every completed year, loss on income earning of 17 months, and 12 months' gross salary as damages for illegal and unfair dismissal from employment.
2. The Claimant further prays for judgement against the Respondent for: a declaration that the Respondent's refusal and/or inordinate delay to recall him back to work amounts to constructive, unfair and inhumane dismissal from his employment; a declaration that he is entitled to payment of terminal dues and damages as prayed; an order for the Respondent to pay him his due terminal benefits and compensatory damages totalling Kshs. 1,677,108/- plus interest thereon; and cost of this suit plus interest thereon.



3. In response, the Respondent filed a Defence dated 3rd June 2019 averring that the Claimant's claim is fatal, inept, incompetent, ambiguous and does not sufficiently disclose the material particulars. The matter proceeded *ex parte*.
4. In evidence, the Claimant stated in his examination-in-chief that the Respondent's Gisele Umugwaneza handed to him the summary dismissal letter and sought a response for the same and that when he did a demand letter to the Respondent, it was not responded to. He referred to the Claimant's Bundle dated 16th April 2018 and the Supplementary List of February 2022, exhibits 1 to 13 and asserted that he had brought all the exhibits being the logbook for overtime, contracts and further documents. He prayed for the Court to rely on them and to consider his claim. The Claimant further testified that he had not yet gotten a job and even left for his rural home as life got difficult for him.
5. The Claimant submits that section 45(2) of the [Employment Act](#) sets out the requirements for considering whether a termination is unfair, that is, if the employer fails to prove: valid and fair reason for the termination, related to the employee's conduct, capacity or compatibility or based on the operational requirement of the employer; and that the employment was terminated in accordance with fair procedure. The Claimant contends that the reason for his termination as stated in the termination letter was never explained further to him as required under sections 41, 43 and 45(2)(a) and (b) of the [Employment Act](#). It is his submission that it is now trite law that even when the employment relationship is untenable, the reasons for separation must be set forth. That his dismissal was unfair and unprocedural and the Respondent has failed to discharge evidentiary burden of proof on the reason(s) for termination.
6. The Claimant relies on the case of [Kenfreight \(EA.\) Limited v Benson K. Nguti](#) [2016] eKLR where the Court of Appeal held that the [Employment Act](#) established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. He further cites the holding of the Court of Appeal in the case of [Postal Corporation of Kenya v Andrew K Tanui](#) [2019] eKLR that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with including the reason for which the employer is considering termination. The Claimant submits that this position was emphasized by the Court of Appeal in the case of [New Kenya Co-op Creameries Limited v Olga Auma Adede](#) [2019] eKLR, where the Court held that the repeated use of the word "shall" in section 41 makes it clear that the section is a mandatory provision and that the hearing provided under the section must be an oral hearing.
7. The Claimant further submits that he is entitled to the prayers sought further because the Respondent did not counter his figures in its response and that he had served the Respondent institution for about six and a half years without any misconduct. He submits further that considering he has not been able to secure an alternative job for about 4 years, he is entitled to an award of salary compensation for the unfair termination as pleaded and as under section 49(1) of the [Employment Act](#). He urges this Court to find his dismissal from employment by the Respondent to be unfair/unlawful as it contravenes various sections of the Employment Act hence, he is entitled to the remedies claimed for in the Memorandum of Claim. The Respondent did not file final submissions.
8. The Court has considered the pleadings and testimony as well as the documentary evidence adduced. It additionally apologises for the late delivery of this decision which was occasioned by service under the Tribunal in which the Court sat as a member. It is regretted that the Court did not anticipate that the work would be so involving as to leave no room for judgment writing.
9. The Claimant herein had unpaid overtime and leave due. He averred the payments covered 6 years. Whereas the Court finds there was non-payment, the Claimant could only claim pay for 3 of the 6 years as he did not pursue payment of the sums alleged to be due within the 3 years limitation period.



Whereas it is unconscionable for an employer to refuse to pay overtime for so long, it was acquiescence on the part of the Claimant to let the Respondent get away with such non-payment. As such the Claimant is only entitled to a portion of his dues as he let the Respondent get away with the unfair practice of non-payment for work done. Employees should not let such issues await their dismissal as it is their right to get paid for work done and dues that accrue are not a favour by the employer to be doled out as and when the employer feel like it.

10. It is uncontroverted that on 1st February 2018, the Claimant was summoned to the Respondent's HR Office and informed of his summary dismissal for allegedly disclosing confidential information regarding the University to outsiders. The Respondent's decision to dismiss him was without a hearing in terms of section 41 of the *Employment Act* and was *ipso facto* unfair and unlawful as due process was not adhered to before his dismissal. The dismissal was in addition, inhumane because the dismissal was for unfounded reasons as no iota of evidence was led as to the information, the extent of disclosure or even (if confidential) what the information related to. The Claimant is therefore entitled to one month's salary in lieu of notice in addition to the payment for leave not taken. As regards the compensation due, given the abrupt and unconscionable manner of his dismissal, the Court finds that an award of 6 months' salary will suffice as recompense. The Claimant is also entitled to costs of the suit and interest on the sums due from the date of judgment till payment in full. In the final analysis, I enter judgment for the Claimant against the Respondent for:-
- i. One month's salary as notice – Kshs. 35,000/-
 - ii. Unpaid leave for one year at the rate of one month for each year – Kshs. 35,000/-
 - iii. Compensation at 6 months' salary – Kshs. 210,000/-
 - iv. Costs of the suit.
 - v. Interest on the sums in i), ii) and iii) above at court rates from the date of judgment till payment in full.
 - vi. Certificate of service in terms of section 51 of the Employment Act.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2023

Nzioki wa Makau

JUDGE

