



Ngatia v Tusker Mattresses Ltd & another (Employment and Labour Relations Cause 2202 of 2017) [2023] KEELRC 453 (KLR) (22 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2202 OF 2017**

JK GAKERI, J

FEBRUARY 22, 2023

BETWEEN

STEVE GITHINJI NGATIA CLAIMANT

AND

TUSKER MATTRESSES LTD 1ST RESPONDENT

ARTEMIS OUTSOURCING LTD 2ND RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on November 6, 2017 alleging wrongful termination of employment.
2. The Claimant avers that he was employed by the 1st Respondent through the 2nd Respondent from October 1, 2015 to April 1, 2016 as a Cashier at the 2nd Respondent's Nairobi Branch.
3. That the 1st Respondent had advertised for internships on January 15, 2015 effective August 2015 for 6 months and some of the interns would be absorbed. That he enrolled for the internship programme and was posted to in its branch by the 2nd Respondent on 1st October to December 31, 2015 and due to his competence, he was absorbed as an employee after 3 months effective January 1, 2016.
4. That during the internship, he was entitled to Kshs 15,000/= per month and was suspended without pay from April 1, 2016 to April 15, 2016 for awarding Loyalty points irregularly.
5. It is the Claimant's case that he was summoned to the 2nd Respondent's office on April 15, 2016 where he received a termination letter for the alleged fraud and the effective date was April 1, 2016.
6. That of the Kshs 15,000/= due to the Claimant, the 2nd Respondent retained Kshs 5,000/= per month for tax avoidance and the same was refundable at the conclusion of the internship but the sum was not refunded.



7. That he was entitled to a monthly net pay of Kshs 21,647/= after deductions.
8. The Claimant avers that the alleged fraud was a scapegoat for the dismissal from unlawful employment as the fraud was not proved and he was not accorded an opportunity to be heard.
9. That the contract of employment required a one (1) month's notice.
10. The Claimant faults the Respondents for non-payment of wages due, failure to provide a letter of employment or certificate of service and notice.
11. The Claimant prays for:-
 - i. 12 months compensation, Kshs 259,764.00.
 - ii. Salary for 1st April to April 15, 2016, Kshs 10,823.50.
 - iii. One month's salary in lieu of notice, Kshs 21,647.00.
 - iv. Unpaid leave 21 days, Kshs 15,152.90.
 - v. Amount withheld, Kshs 15,000/=.
 - vi. Costs of the suit.
 - vii. Interest at court rates from October 1, 2015 to April 15, 2016.

1st Respondent's case

12. The Respondent filed a Statement of Response on September 28, 2018 denying that it employed the Claimant through the 2nd Respondent and avers that he was an employee of the 2nd Respondent. It admits the internship programme and the Claimant's enrolment.
13. The 1st Respondent denies the sum allegedly payable to interns.
14. It is the 1st Respondent's case that the Claimant admitted fraudulently awarding himself and his sister loyalty points on several occasions in lieu of the rightful customers of the Respondent.
15. The 1st Respondent denies having had a contract of employment with the Claimant or having caused his termination or dismissal from employment and denies liability.
16. Finally, the 1st Respondent prays for dismissal of the suit with costs.
17. The 2nd Respondent did not file a response.

Claimant's evidence

18. The Claimant adopted the witness statement which rehashes the contents of the Memorandum of Claim.
19. The Respondents did not participate in the proceedings as they were not in court on November 17, 2021, January 25, 2022, February 23, 2022, July 19, 2022, October 25, 2022 and December 5, 2022 notwithstanding service of hearing notice October 19, 2022.

Determination

20. The issues for determination are;
 - i. Whether the Claimant was an employee of the 1st or 2nd Respondent.



- ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
21. As to who employed or engaged the Claimant, the parties adopted different averments. While the Claimant averred that he was employed by the 1st Respondent, through the 2nd Respondent, the 1st Respondent maintained that there was no employment contract between the Claimant and the 1st Respondent.
 22. The 1st Respondent however admitted that it advertised a six (6) month's internship programme in early 2015 and the Claimant was enrolled in October 1, 2015 to December 31, 2015 but denies having employed him thereafter.
 23. In analysing this issue, the court is guided by the sentiments of Onyango J in *Humphrey Munyithya Mutemi V Soluxe International Group of Hotels & Lodges Ltd (2020) eKLR* as follows;
 - ' In the case of *Monica Karimi Mutua V Al-Arafat Shopping Centre & another (2018) eKLR*, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.'
 24. To prove his case, the Claimant provided copies of an advertisement feature of the internship programme published by the Daily Nation Newspaper on January 15, 2015, written contract of employment dated December 29, 2015 between the Claimant and the 2nd Respondent executed on November 7, 2015, payslip from the 2nd Respondent for March 2016, suspension and summary dismissal letters from the 2nd Respondent, NHIF statement for January, February and March 2016 and the NSSF statement for 2015 and 2016. The statements do not indicate who the Claimant's employer was.
 25. Section 2 of the *Employment Act* defines an employee as a person employed for wages or salary and includes an apprentice and indentured learner.
 26. Employer on the other hand means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent foreman, manager or factor of such person, public body, firm, corporation or company.
 27. Finally, contract of service means an agreement whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership.
 28. Flowing from the foregoing, it is evident that the Claimant was an employee.
 29. The position is buttressed by a copy of the Letter of Offer/contract of employment dated December 29, 2015 availed by both parties and executed by both.
 30. The letter of offer sets out the duration of the contract, position, salary of Kshs 25,000/= per month, probation, annual leave and termination among others.
 31. The contract of employment coupled with the payslip, suspension and dismissal letters establish beyond per adventure that the Claimant was an employee of the 2nd Respondent as averred by the 1st Respondent.



32. Guided by the mantra that whoever lays a claim before the court is duty bound to prove it by evidence, the court is satisfied and finds that the Claimant has on a balance of probabilities failed to prove that he was an employee of the 1st Respondent.
33. As to whether termination of the Claimant's employment was unfair, the Claimant testified that the termination was unlawful as he was given neither a notice nor opportunity to be heard.
34. The provisions of the [Employment Act, 2007](#) are explicit on the various attributes of a fair termination of employment such as notice, reason(s) for termination, burden of proof, procedure among others.
35. Section 45 of the [Employment Act](#) provides;
2. A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason –
 - i. Related to the employee's conduct, capacity or compatibility or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.
36. In their construction and application of the relevant provisions of the [Employment Act](#), courts have been authoritative that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as held by Ndolo J in [Walter Ogal Anuro V Teachers Service Commission \(2013\) eKLR](#) as follows;
- ' For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.'
37. As regards the reason for termination of the Claimant's employment, the dismissal letter dated April 15, 2016 makes reference to two incidents where the Claimant had wrongfully used Loyalty Point Cards to award customer loyalty points to himself if a customer had no card and doing the same in respect of the sister's Loyalty Points Card. The 2nd Respondent characterised the Claimant's conduct as fraud and had been suspended from April 1, 2016 to April 14, 2016.
38. Evidence on record reveals that the incidents occurred in December – January, 2016 and in March 2016.
39. In the first instance, where the Claimant had awarded himself Loyalty points, the Claimant tendered a written apology dated January 23, 2016 and assured the 1st Respondent that he would not do it again and would abide by the rules and regulations as prescribed.
40. The second incident occurred in late March 2016 when he used the sister's card and by letter dated April 1, 2016, the Claimant apologised. The Claimant asked for pardon stating that that would be his last time to commit such a wrong 'or any other mistake related to my carelessness.'
41. Instructively, the Claimant admitted having used his card and the sister's card to earn points from customers who had no cards in both instances the Claimant was fully aware that it was wrong to do so as evidenced by the apology letters dated January 23, 2016 and April 1, 2016.



42. The Claimant appears to have taken the old adage that we learn from mistakes too far.
43. In the circumstances, the court is satisfied and finds that the 2nd Respondent had on a balance of probabilities demonstrated that it had a good reason to suspend and summarily dismiss the Claimant.
44. As regards the procedure employed by the 2nd Respondent, there is no evidence to demonstrate that the tenets prescribed by Section 41 of the Employment Act were complied with.
45. The Respondent did not avail evidence of a notice to show cause or invitation of the Claimant to a disciplinary hearing, minutes of proceedings or other material.
46. Granted that the provisions of Section 41 of the Employment Act are mandatory as has been held by this court and the Court of Appeal in legions of decision, it is the finding of the court that the termination of the Claimant's employment was not conducted in accordance with a fair procedure and was thus unfair within the meaning of Section 45 of the Employment Act.
47. As regards the reliefs sought, the court proceeds as follows;

One (1) month's salary in lieu of notice

48. Having found that 2nd Respondent had a justifiable ground or reason to terminate the Claimant's employment, the Claimant is not entitled to notice pay.
The prayer is declined.

Unpaid leave days

49. The Claimant was in the 2nd Respondent's employment for a duration of 6 months only and is entitled to prorated leave for the duration.

Amount withheld by the 2nd Respondent on his behalf, Kshs 15,000/=

50. In his written statement, the Claimant testified that the 2nd Respondent was withholding Kshs 5,000/= per month due to him during the entire period of internship, a total of Kshs 15,000/= and the sum was not refunded. The 2nd Respondent adduced no evidence to justify its action. The prayer is allowed.

Compensation for loss of earning

51. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the Claimant is entitled to the relief provided by Section 49(1)(c) of the Employment Act.
52. As ordained by the provisions of Section 49(4) of the Act, the court has taken into consideration the following;
 - i. The Claimant served as an intern for 3 months and as an employee for a further 3 months before termination, a total of 6 months which is a very short time.
 - ii. The Claimant used his and the sister's Loyalty Card to earn points from customers who had no cards in two instances in the December 2015 – January, 2016 season and late March 2016 while aware that it was prohibited and apologised in writing and was suspended on 1st April, 2016.
 - iii. The Claimant did not appeal the decision or demonstrate his wish to continue in the 2nd Respondent's employment.
53. In the circumstances, the court is satisfied that the equivalent of one (1) month salary is fair.



54. In the end, judgement is entered for the Claimant against the 2nd Respondent in the following terms;
- a. Prorated leave for 6 months.
 - b. Amount withheld by the 2nd Respondent, Kshs 15,000/=.
 - c. Equivalent of one (1) month's salary.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2023

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

