



**Joab v Store Sixty Six Limited (Cause 1951 of 2017)
[2023] KEELRC 365 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 365 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1951 OF 2017
SC RUTTO, J
FEBRUARY 10, 2023**

BETWEEN

GEORGINA ATELO JOAB CLAIMANT

AND

STORE SIXTY SIX LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that her employment relationship with the respondent commenced sometimes in September, 2013. That she served as a General Manager and undertook her duties with loyalty and diligence until September, 2014 when the respondent without due regard to the process of the law terminated her employment. Her claim against the respondent is for the sum of kshs 2,085,000.00 being salary for the month of September, 2014, salary in lieu of notice, unpaid annual leave, service pay for one year, unpaid public holidays, commissions earned and compensatory damages for unfair termination.
2. The respondent opposed the claim through its Memorandum of Response, in which it averred that the claimant together with other employees, were summarily dismissed on account of stealing and manipulating the payment system of its shop. That the aforementioned misconduct gave rise to Criminal Case No. 4915 of 2014 in which the claimant was among the accused persons. That it undertook an audit and investigation and the claimant was given a hearing but she failed to give any satisfactory explanation hence her dismissal. Consequently, the respondent has asked the Court to dismiss the suit with costs.
3. In rejoinder, the claimant filed a Reply to the Respondent's Statement of Response, through which she denied the respondent's averments and reiterated her own averments that there was no justified evidence to dismiss her from employment. That she was able to fight the allegations in the criminal case against her.



4. The matter proceeded for hearing on 11th October, 2022 in absence of the respondent who failed to make any appearance despite being served with the day's hearing notice.

Claimant's Case

5. At the trial, the claimant testified in support of her case and at the outset, sought to rely on her Memorandum of Claim, witness statement as well as the documents filed together with her claim to constitute her evidence in chief.
6. It was her evidence that in February, 2014, she was transferred to the respondent's valley arcade branch where she worked as a branch manager from Monday to Sunday with no overtime since the respondent claimed that they had to make profits.
7. That at the end of September, 2014, the respondent caused her to be arrested on claims that she had stolen stock worth kshs 441,050.00. That this was untrue but the respondent insisted that she had stolen by virtue of her position, hence she was charged in Court and was eventually acquitted as the charges against her were dismissed.
8. That in the meantime, the respondent purported to summarily dismiss her even though no congruent or cogent reason was advanced. That she was never paid her salary for the month of September and was also denied commissions she had earned through surpassing her intended targets.
9. Closing her testimony, the claimant asked the Court to allow her claim and grant her reliefs as prayed.

Respondent's Case

10. As stated herein, the respondent did not present oral evidence hence its case remained as per its Memorandum of Response.

Submissions

11. The claimant's submissions were not traceable on the online portal and on the Court's physical record despite its indication that the same had been duly filed.

Analysis and Determination

12. I have considered the issues raised in the pleadings as well as the evidence on record and the following issues stand out for determination: -
 - a) Whether the claimant's termination from employment was unfair and unlawful.
 - b) Is the claimant entitled to the reliefs sought?

Unfair and unlawful termination?

13. The *Employment Act, 2007* prohibits unfair and unlawful termination from employment. In this regard, an employer is required to prove that an employee's termination was not only fair substantively but also procedurally. The legal parameters for determining whether the employer acted fairly and lawfully in terminating the employment of the employee are to be found under sections 41, 43 and 45 of the *Employment Act*.
14. Whereas substantive justification entails proof of the reasons which resulted in an employee's termination, procedural fairness relates to the process applied in effecting an employee's termination from employment. I will start by considering substantive justification.



15. In accordance with section 43(1) of the *Employment Act*, an employer is required to prove the reason or reasons for the employee's termination, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of section 45.
16. Turning to section 45 (2) (a) and (b) of the *Employment Act*, a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
17. Therefore, over and above providing the reasons for an employee's termination, an employer is required to prove that the same were fair and valid and related to the employee's conduct, capacity or based on its operational requirements.
18. The record does not bear the claimant's letter of termination hence the reasons for her termination cannot be discerned therefrom. Be that as it may, drawing from the pleadings by both parties, it was common ground that the claimant was arrested and charged under Criminal Case No. 4915 of 2014. It is also apparent that the criminal charge against the claimant arose from allegations of stealing by servant. It was the respondent's case that these allegations amounted to gross misconduct on the part of the claimant hence it was justified in dismissing her from employment. On her part, the claimant denied any culpability and contended that she was able to fight the allegations in the criminal case, hence her acquittal.
19. In terms of the provisions of sections 43(1) and 45(2) (a) and (b) of the *Employment Act*, the respondent being the employer, had the heaviest responsibility in terms of proof. What this means is that it had the onus of proving that the reasons leading to the claimant's termination were fair and valid. Indeed, this is a burden the respondent could only discharge by way of evidence. As it is, the respondent did not adduce evidence in whatever form or manner, thereby discharging its burden to the requisite standard.
20. Noting the different standards of proof in criminal and civil cases, the respondent was only required to prove its case on a balance of probabilities, in that the claimant was dishonest and had committed acts of gross misconduct hence presenting a justification for her termination from employment. In this case, there was no evidence at all against which to apply the standard of proof. The allegations leveled against the claimant therefore remained largely unsubstantiated.
21. In its response, the respondent alluded to an internal audit and investigations it had undertaken following the alleged theft by the claimant. The question thus, is where is the audit and investigations report apportioning culpability on the claimant for the theft?
22. Furthermore, failure by the respondent to call oral evidence did not help matters either and if anything, impaired its case in a fundamental way.
23. The total sum of the foregoing, is that the respondent did not discharge its evidential burden under sections 43(1) and 45 (2) (a) and (b) of the *Employment Act* hence the claimant's termination was unfair.
24. Turning to the limb of procedural fairness, an employer is required under section 45(2) (c) of the *Employment Act* to prove that an employee's termination was undertaken in accordance with fair procedure. Section 41(1) of the *Employment Act* sets out the specific requirements of what constitutes fair procedure. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a union representative of his or her own choice.



25. In the case at hand, the respondent avers that it gave the claimant a hearing but she failed to give a satisfactory explanation of her gross misconduct hence her dismissal. From the record, these assertions were not supported by evidence.
26. For starters, there was no evidence of a notice issued to the claimant detailing the allegations against her and informing her that the respondent was considering terminating her employment based on the same. Similarly, there was no evidence that the claimant was invited to give her defence in answer to whatever allegations. In the same breath, there was no evidence that a hearing was conducted and the claimant granted an opportunity to respond to the allegations levelled against her.
27. In absence of such evidence, I am led to conclude that the respondent did not subject the claimant to the process contemplated under section 41 of the [Employment Act](#), hence her termination was unlawful within the meaning of section 45 (2) (c).
28. The total sum of my consideration is that the claimant's termination was both unfair and unlawful in terms of sections 41, 43 and 45 of the [Employment Act](#).

Appropriate Reliefs

29. Having found that the claimant's termination was unfair and unlawful, the Court awards her compensatory damages equivalent to two (2) months of her gross salary. This award takes into consideration the length of the employment relationship between the parties as well as the fact that the respondent neither proved the reasons for the claimant's termination nor the fact that it applied a fair process in so doing.
30. Further, as the Court has determined that the claimant's termination was unlawful, she is awarded two (2) month's salary in lieu of notice as per clause 20 of her employment contract.
31. The claimant is also awarded salary for the month of September, 2014 as there is no evidence that the same was paid out to her. There is also no contest that she worked for the respondent during that month.
32. The claim for unpaid leave also succeeds as the respondent did not avail the claimant's leave records in line with its obligations under section 74(1) (f) of the [Employment Act](#).
33. The claimant is also awarded service pay in terms of section 35(5) of the [Employment Act](#).
34. The claim for commissions earned is denied as the same was not proved. Being a specific claim, the claimant was required to not only plead the same specifically but also prove her entitlement. As a matter of fact, the claimant did not lead any evidence to justify her entitlement and moreso, how she arrived at the sum of Kshs 225,000.00.
35. The claim for unpaid public holidays is also denied for want of proof and lack of specificity.
36. My position is fortified by the determination by the Court of Appeal in [Patrick Lumumba Kimuyu v Prime Fuels \(K\) Limited](#) [2018] eKLR, where the learned Judges cited with approval the case of [Rogoli Ole Manadiegi v General Cargo Services Limited](#) [2016] eKLR, thus: -

“ Addressing a similar issue this Court in its decision in [Rogoli Ole Manadiegi v General Cargo Services Limited](#) [2016] eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The



burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

37. I will hold similarly as the claimant has not proved and established the public holidays she was required to work without being compensated accordingly.

Orders

38. In the final analysis, I enter Judgment in favour of the claimant against the respondent and she is awarded:
- (a) Salary for the month of September, 2014 being Kshs 120,000.00
 - (b) Two month’s salary in lieu of notice being the sum of Kshs 240,000.00.
 - (c) Compensatory damages in the sum of Kshs 240,000.00, being equivalent to 2 months of her gross salary.
 - (d) Leave for one year being the sum of Kshs 84,000.00.
 - (e) Service pay for one year being Kshs 60,000.00.
 - (f) The total award is Kshs 744,000.00.
 - (g) Interest on the amount in (f) at court rates from the date of Judgement until payment in full.
39. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Swaka

For the Respondent No appearance

Court Assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

STELLA RUTTO

JUDGE

