



Mwandikwa v Athi River Shalom Community Hospital (Employment and Labour Relations Cause 350 of 2017) [2023] KEELRC 367 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 367 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 350 OF 2017**

**SC RUTTO, J
FEBRUARY 10, 2023**

**BETWEEN
NICHOLAS MWANZIA MWANDIKWA CLAIMANT
AND
ATHI RIVER SHALOM COMMUNITY HOSPITAL RESPONDENT**

JUDGMENT

1. The claimant initiated the suit herein vide a memorandum of claim dated October 28, 2016, through which he avers that he was employed by the respondent as a patient porter from October 1, 2013 until October 14, 2015 when his employment was terminated. He avers that he worked with diligence and to the satisfaction of the respondent. That his dismissal came on October 14, 2015 through the respondent's managing director, Dr Onyango. He contends that the same was without any cause as he had done nothing wrong to warrant summary dismissal. It was the claimant's case that he was not issued with a notice prior to his dismissal. It is against this background that the claimant seeks against the respondent the sum of Kshs 384,433.00 being one month's salary in lieu of notice, overtime pay, unpaid house allowance, compensatory damages and prorated leave in respect of 2015.
2. The respondent entered appearance and filed a Response to the Memorandum of Claim, through which it avers that the claimant frequently reported to work late, was insubordinate, disobeyed orders from his supervisors and used insulting language. That on numerous occasions, the claimant was warned of his poor performance and gross violations but he ignored. The respondent further contends that the claimant was far from a stellar employee and due to his underperformance and gross violation, he was summoned by the managing director, to explain his actions before a disciplinary committee. That the claimant was unable to explain his actions hence his summary dismissal. Consequently, the respondent has asked the Court to dismiss the suit with costs.



3. The matter was set down for hearing on October 3, 2022. Despite the hearing date being taken mutually by both parties in Court, the respondent's side was absent from Court hence did not participate in the hearing.

Claimant's case

4. The claimant testified in support of his case and at the outset, sought to rely on his witness statement and bundle of documents filed together with his claim, to constitute his evidence in chief.
5. It was his evidence that although he was employed by the respondent on October 1, 2013, he was given a written contract on October 1, 2014.
6. That while undertaking his duties on October 14, 2015, he was summoned by the respondent's managing director, to his office where he was immediately dismissed together with one of the matrons by the name Ms Sylvia. That they were just informed that their employment was over.
7. He further told the Court that his termination was unprocedural and unlawful as he was neither issued with a charge nor given a hearing where he could be given an opportunity to present himself. It was the claimant's further testimony that when he was called to the office of the managing director, the human resource officer was also called and notified of the claimant's termination from employment.
8. He further denied being an underperformer and stated that he had earned an award for the best performer in 2017. That further, during his employment with the respondent, he was never given any warning.
9. The claimant further told Court that he was only paid basic salary exclusive of house allowance and that upon his termination, he was not paid any money.
10. In closing his testimony in chief, the claimant asked the Court to allow his claim.

Respondent's case

11. As there was no appearance by the respondent, the trial was marked as closed upon the claimant's testimony in chief. The respondent's case therefore remained as per its Response to the Claim.

Submissions

12. The claimant filed written submissions through which it was stated that there was no cogent reason for his termination. That his testimony was uncontroverted as the respondent failed to appear in Court. That further, evidence of his poor performance and alleged gross misconduct was not tabled before Court. He therefore argued that there were no valid reasons for terminating his employment as required under section 45 of the [Employment Act](#). In support of his arguments the claimant placed reliance on the case of *Jane Samba Mukala vs Ol Tukai Lodge Limited Industrial Case No 823 of 2010 LLR 255 (ICK)*.
13. It was further submitted by the claimant that the respondent never followed due process as required under section 41 of the [Employment Act](#) and that the summons by the respondent's managing director did not meet the threshold of a disciplinary hearing. To buttress its submissions, the claimant cited several authorities including [Nelson Nyabuto vs Irianyi tea Sacco \(2014\) eKLR](#), [Mary Chemweno Kitui vs Kenya pipeline company Limited \(2014\) eKLR](#) and [Kenya Ports Authority vs Fadhil Juma Kisuwa \(2017\) eKLR](#).
14. The respondent did not file any written submissions.



Analysis and determination

15. Flowing from the pleadings on record as well as the evidentiary material placed before Court, the issues falling for the Court's determination can be distilled as follows: -
- a. Was the claimant's termination unfair and unlawful?
 - b. Is the claimant entitled to the reliefs sought?

Unfair and unlawful termination?

16. In terms of the *Employment Act*, termination of employment ought to be substantively and procedurally fair. Substantive fairness relates to the reasons for which an employee is terminated, while procedural fairness has everything to do with the procedure applied in terminating an employee from employment. In a nutshell, an employer must justify that there was reason to terminate the services of an employee and that such termination was undertaken in accordance with fair procedure.

Substantive justification

17. Section 43(1) of the *Employment Act*, 2007 (Act), places the burden of proving reasons for termination on an employer and in default, such termination is rendered unfair. In addition, section 45 (2) (a) and (b) of the Act, provides that a termination of employment is unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
18. What this means is that beyond providing reasons for termination, an employer is required to prove that the same meet the fairness and validity test. What amounts to fair and valid varies from case to case hence the test is fairly subjective.
19. In the instant case, the claimant averred that his termination was unfair as there was no plausible reason or justification for the same. On the other hand, the respondent stated in its Response that the claimant's termination was justified as he frequently reported to work late, was insubordinate, disobeyed orders from his supervisors and used insulting language.
20. In light of the statutory provisions aforesaid, the respondent was required to prove the reason for the claimant's termination and more importantly, prove that the said reasons were fair and valid.
21. As stated herein, the respondent did not participate in the hearing hence did not tender oral evidence. Therefore, the contents of its filed witness statement by Jane Nyakio Okatch remained mere assertions. Coupled with that, it is worth noting that the respondent did not annex any documentary evidence to its Response. In any event, the same would have been of little evidential value for having not been produced as exhibits before Court.
22. The net sum of the foregoing is that the respondent did not tender evidence to prove the allegations against the claimant. Therefore, it did not justify the reasons for which the claimant was terminated. To this end, the claimant's assertions that his termination was unfair was not discounted by the respondent. Undoubtedly, it is only through evidence that the respondent could have discharged its evidential burden.
23. In absence of evidence, the reasons for which the claimant was terminated remained unsubstantiated. What this boils down to, is that the claimant's termination was therefore unfair within the meaning of sections 43 (1) and 45(2) (a) and (b) of the *Employment Act*.



Procedural fairness?

24. Section 45 (2) (c) of the Act, requires an employer to prove that an employee's termination from employment was in accordance with fair procedure. Section 41(1) of the Act elaborates what entails fair procedure. In line with this, an employer is required to notify an employee of the intended termination in a language he or she understands and in the presence of another employee or a shop floor union representative.
25. In this case, the claimant stated that he was called into the office of the respondent's managing director and informed that his employment had been terminated. That although the same was done in the presence of the human resource officer, he was not issued with a charge or given an opportunity to defend himself. The respondent holds otherwise and contends that the claimant was given an opportunity to explain his underperformance and gross violations before a disciplinary committee.
26. Despite its assertions, the respondent did not tender evidence in whatever form or manner in support. In this regard, there was no evidence in the form of a notice informing the claimant of the allegations against him and requiring an explanation from his end. Similarly, there is no evidence that a disciplinary hearing was convened and the claimant invited to attend so as to give his version of the story. In absence of such evidence, I cannot help but conclude that the respondent did not undertake the process contemplated under section 41 of the Act.
27. In analyzing the import of section 41 of the Act, the Court of Appeal had this to say in the case of *Postal Corporation of Kenya vs Andrew K Tanui [2019] eKLR*: -

' It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for: -

Four elements must thus be discernible for the procedure to pass muster:-

 - (i) An explanation of the grounds of termination in a language understood by the employee;
 - (ii) The reason for which the employer is considering termination;
 - (iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) Hearing and considering any representations made by the employee and the person chosen by the employee.'
28. I fully adopt and reiterate the above position particularly on the mandatory nature of the provisions of section 41.
29. It was therefore improper and unprocedural for the respondent to terminate the claimant's employment without subjecting him to a fair process. This was in violation of section 41 of the Act.
30. In light of the foregoing, and having found that the respondent has not proved the reasons for the claimant's termination, and taking into account that the termination was without notice, the Court arrives at the inescapable conclusion that the claimant's termination did not meet the legal threshold set out under the *Employment Act*.
31. In the circumstances I find and hold that the claimant's termination was unfair and unlawful in terms of section 45 of the *Employment Act*.



Available Reliefs

32. Having found that the claimant's termination was unfair and unlawful, I will award him compensatory damages equivalent to five (5) months of his gross salary. This award has been informed by the length of the employment relationship as well as the fact that the respondent did not prove that the claimant's termination was fair in substance and procedure.
33. I further award the claimant one (1) month's salary in lieu of notice as the Court has found that his termination was unlawful.
34. With regards to the claim for house allowance, it is notable that the claimant's contract of employment only provides for the component of 'basic salary' and does not state that it was gross or consolidated to include house allowance. It is on this basis that the claimant is awarded house allowance pursuant to the provisions of section 31 of the [Employment Act](#).
35. My finding is fortified by the determination of the Court of Appeal in [Grain Pro Kenya Inc Ltd vs Andrew Waitbaka Kiragu\[2019\] eKLR](#) where it was held that:-

' (13)Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to re-write a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the respondent was to be paid 'other benefits as required by law. We cannot fault the Judge for that interpretation because house allowance is a benefit that is required under the [Employment Act](#) and the contract did not provide that house allowance was consolidated in the basic wage. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause 'other benefits as required by law' in the contract to award house allowance. We would have applied Section 31 (2) (a) of the [Employment Act](#) to exclude it. To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.'
36. The upshot of the foregoing is that the claimant is entitled to house allowance at the rate of 15% of his basic salary.
37. The claimant is also awarded leave for 2015 as there was no evidence that he had utilized the said leave days. This finding is compounded by the fact that the respondent failed to produce the claimant's leave records in line with its obligation under section 74(1) (f) of the [Employment Act](#).
38. With regards to overtime pay, the claimant's contract of employment provides the working hours as follows: day shift: 7:30 am to 6:30 am night shift 6:30 am to 7:30 pm. Therefore, it is evident that the claimant was required to work for 11 hours per day.
39. Pursuant to Regulation 5(1) of the Regulation of Wages (General Order), 1982, an ordinary work schedule is 52 hours over a period of six days. This is approximately 8 hours per day. Accordingly, any time served over and above such time, amounts to overtime and payment is due at the stipulated rate under the said Wage Order.
40. It therefore follows that clause 9 of the claimant's contract of employment was not in compliance with the law. Further, there is no evidence from the respondent's end that it paid the claimant for hours worked in excess of the legal maximum. He is therefore entitled to compensation for the period he worked overtime.



Orders

41. In the final analysis, I enter Judgment in favour of the claimant against the respondent and he is awarded:
- a. Compensatory damages in the sum of Kshs 50,000.00 which sum is equivalent to 5 months of his gross salary.
 - b. One month's salary in lieu of notice being Kshs 10,000.00.
 - c. Unpaid house allowance being Kshs 36,000.00 calculated as follows: $(10,000 * 15 / 100 * 24)$.
 - d. Unpaid overtime calculated at the rate of 1.5 which is in respect of normal working hours. This translates to Kshs 126,000.00 calculated as follows: $(10,000 / 30 / 8 * 3 * 1.5 * 28 * 24)$.
 - e. Leave pay for 2015 which upon proration comes to Kshs 8,333.25 calculated as follows: $(30 / 12 * \text{Kshs. } 333.33 * 10 \text{ months})$.
 - f. The total award is Kshs 230,333.25.
 - g. Interest on the amount in (f) at court rates from the date of Judgement until payment in full.
42. The claimant shall also have the costs of the suit.

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

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Omamo

For the Respondent Mr. Omondi instructed by Mr. Omari

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 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 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

