



**Mutungi v Kamwathi (Employment and Labour Relations Cause
1435 of 2017) [2023] KEELRC 473 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 473 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1435 OF 2017**

K OCHARO, J

FEBRUARY 9, 2023

BETWEEN

RONALD WAMBUA MUTUNGI CLAIMANT

AND

KENNEDY KAMWATHI RESPONDENT

JUDGMENT

1. Through a statement of Claim dated the July 20, 2017, the Claimant instituted a claim against the Respondent seeking the following reliefs:
 - (a) A declaration that the Respondent unfairly and unjustifiably terminated the Claimant's employment.
 - (b) A declaration that the Respondent breached the employment agreement it entered with the Claimant.
 - (c) A sum of Kshs 20,000 being salary for the month of December 2016.
 - (d) A sum of Kshs 20,000 being salary payment in lieu of notice.
 - (e) A sum of Kshs 120,000 being the service pay computed at the rate of 15 days' pay for every completed year of service.
 - (f) A sum of Kshs 240,000 for compensation for unfair termination.
 - (g) A sum of Kshs 240,000 being payment in lieu of twelve (12) years calculated for twelve (12) years.
 - (h) General damages for frustration of employment agreement and for the unlawful and unfair termination of employment equivalent to twelve (12) years gross salary.



- (i) Cost of the suit plus interest thereon from the date of the award.
 - (j) Any other relief that this Honourable` court may deem fit and just to grant in the circumstance.
2. The statement of the claim was filed contemporaneously with the Claimant's witness statement, and the list of documents dated the July 20, 2017, under which the documents that the Claimant intended to place reliance as his documentary evidence, were filed.
 3. The Claimant served the Respondent with the summons to enter appearance together with the statement of claim and the list of documents on the October 9, 2018.
 4. The Respondent did not enter appearance or file a response to the claim. Consequently, on the November 11, 2021 the court directed that the matter proceeds as an undefended claim.
 5. When the matter came up for hearing the Claimant sought, and the court allowed that reliance be placed on his pleadings, witness statement as his evidence in chief and the filed documents as his documentary evidence.

The Claimant's case.

6. The Claimant stated that he was orally employed by the Respondent from the December 28, 2004 to the December 23, 2016 as Chef for a monthly salary of Kshs 20,000.
7. The Claimant avers that he continuously worked and served the Respondent faithfully, diligently and with utmost dedication discharging his duties as agreed under the oral contract.
8. The Claimant stated that during his period of service, he used to work from 7.00 am to 11.30 pm, therefore working overtime 7 ½ hours per day.
9. It was asserted that on the December 23, 2016 the Respondent unlawfully terminated his employment in breach of his employment rights.
10. The Claimant stated that in terminating his employment in the manner he did, the Respondent committed an act of unfair labour practice as,
 - a) No prior notice was given to him outlining reasons for his dismissal and that no payments thereof were made in lieu of notice.
 - b) No reasons or justification for the termination were offered to him.
 - c) The Respondent did not accord him an opportunity to be heard before termination of his employment.
 - d) The Respondent did not give the him any leave he was entitled to under the law.
 - e) No payment for the overtime work was made, to him.
 - f) No certificate of service upon the termination of his employment was issued to him and that the Respondent withheld his benefits including the December, 2016 salary.
11. It was his case that the Respondent violated his rights to fair labour practices guaranteed by the Constitution and the Employment Act, and in consequence of which he suffered loss and damage.



11. The Respondent terminated his services on the December 23, 2016. The Respondent had sent him, but he got stuck in the traffic jam. When he reached home the Respondent could not take his explanation, he told him to leave. He did not pay him for the days he had worked in December 2015.

The Claimant's submissions

13. The Claimant's counsel filed his submissions on the July 12, 2022 and distilled three issues for determination thus;
- i) Whether there was unfair termination of the Claimant's employment with the Respondent.
 - ii) Whether there was frustration of the performance of the agreement of employment.
 - iii) Whether the Claimant is entitled to the reliefs sought.

14. On the first issue the counsel for the Claimant submitted that the Claimant was unlawfully and unfairly terminated from his employment by the Respondent. He did discharge his legal burden under section 47 [5] of the [Employment Act](#). He relied on the case of [International Planned Parenthood Federation v Pamela Ebot Arrey Effiom \[2016\] eKLR](#) where the court stated that:

' 21. 'Under section 47(5) of the [Employment Act](#), for any complaint of unfair termination of employment or wrongful dismissal lodged, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employee'

15. On the second issue the counsel submitted that it was clear that the Respondent frustrated the performance of the Agreement of employment by ensuring that there was no formal written contract in place, forcing the claimant work overtime without pay and beyond normal working hours and public holidays, refusing to award him pay for his accrued leave and lastly failing to pay him salary in lieu of notice including his terminal dues. Counsel in fortification of his submission placed reliance on the case of [Elizabeth Wasbeke & 62 Others v Airtel Networks \(K\) Ltd \[2013\]](#).

16. On the last issue whether the claimant was entitled to the reliefs sought, counsel submitted that the claimant is entitled to the salary of the month of December as he was terminated on the December 23, 2016 without pay. He relied on the cases of [Joseph Muriungi Rukioya v Methodist Church of Kenya \[2021\] eKLR](#) and the case of [Ben Opondo & 2 Others v Vianzi Limited \[2013\] eKLR](#).

17. For the relief of service pay, he submitted that the Claimant had worked for twelve years until he was unlawfully terminated on the December 23, 2016. That the Claimant was entitled to the payment computed at fifteen (15) days' pay for every completed year of service. He relied on the case of [Martin Ireri Ndwiga vs Olerai Management Company 2017 eKLR](#) where the court held;

' 24. Service pay is dues to an employee who has not enjoyed the benefit of statutory deductions and thus covered under section 35(5) and (6) of the [Employment Act](#), 2007. The claimant had no written contract, no written statement of payments is submitted and in essence, the respondent does not make any effort to demonstrate that as the employer they complied with statutory requirements and regulations to deduct and remit the applicable statutory dues to Kenya Revenue Authority, to the Kenya National Social Security Fund and to the National Hospital Insurance Fund as required by law. Failure to



abide mandatory provisions of the law in this regard, the claimant is entitled to his claim for service pay.'

18. For the unpaid leave the counsel submitted that the Claimant had worked for twelve years without going for leave and thus was entitled to the same. He cited the case of *Fancy Jeruto Cherop & another v Hotel Cathay Limited* [2018] eKLR where the court stated;

Section 28 of the *Employment Act*, 2007 gives every employee a right to take annual leave. The employer has the duty to ensure every employee has taken annual leave as and when due. The defence that the claimants failed to take annual leave and thus forfeited the same is not a position supported in law as held in the case of *Rajab Barasa & 4 Others v Kenya Meat Commission* [2016] e-KLR. The employer must ensure each employee has taken the annual leave when due or make payment in lieu thereof.'

19. The counsel further submitted that it was illegal for the Respondent to withhold the certificate of service. He relied on section 51 of the *Employment Act* which obligated the employer to issue the Certificate of service to the employee and the case of *Angela Wokabi Muoki v Tribe Hotel Limited* [2016]eKLR, where the court in its judgment stated; .

' 95. 95. Upon termination of employment, the Certificate of Service should go with it unconditionally. Whatever reasons and or grounds leading to termination or dismissal, the issuance of a Certificate of Service is mandatory and not based on the wishes, discretion or regulation of the employer. Section 51(1) of the *Employment Act* is set out in mandatory terms'

Analysis and Determination.

20. From the material placed before this court, the following broad issues emerge for determination, thus;
- (a) Whether the termination of the Claimant from employment was fair and lawful.
 - (b) Whether the Claimant is entitled to the reliefs sought.
 - (c) Who should pay the cost of the suit.

a) Whether the termination was fair and lawful.

21. The *Employment Act* 2007 puts forth two aspects that must be considered by the court whenever called upon to interrogate fairness of an employee's dismissal or his/her termination from employment. The aspects being procedural fairness and the substantive justification.

22. Section 41 of the *Employment Act* provides the structure for procedural fairness. It provides;

' Subject to section 42(1), an employer shall, before terminating the employment, on the grounds of misconduct, poor performance or physical incapacity explain to the employee is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the hearing.

- (2) Notwithstanding standing any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person if any, chosen by the employee within subsection (1).'



23. The provision is couched in a mandatory manner; any form of non-adherence to it, legally renders the termination or summary dismissal unfair pursuant to the provisions of section 45 of the Act.
24. It is trite that procedural fairness entails the duty on the employer to explain to the employee clearly the nature of the accusations for which it is contemplated that his employment be terminated, an opportunity for the employee to make representations on the grounds, and consideration by the employer of the representations before taking a decision.
25. By dint of the provisions of section 45(2), the duty to prove that there was procedural fairness in the termination or summary dismissal lies on the employer. The Respondent neither filed any response to the claimant's claim nor did lead any evidence to establish presence of procedural fairness in the Claimant's summary dismissal. Therefore, the Respondent didn't discharge its burden under section 45(2).
26. Looking at the materials placed before this court, one cannot find any difficulty in being persuaded by the evidence of the Claimant that the Respondent did not follow the basic prescript of the Employment Act and by reason of the foregoing premises I find that the summary dismissal was procedurally unfair.
27. On the substantive justification of the dismissal, section 43 of the Employment Act commands that whenever there is dispute regarding termination of an employee's employment, the employer bears a duty to prove the reasons for the termination. Section 45 places a further burden on the employer, of proving that the reason[s] for the termination was valid and fair. Where the employer fails to discharge the first burden, no doubt, it isn't possible for him or her to discharge the second one under section 45.
28. A legal burden is ordinarily discharged by adduction of evidence. In this matter, the Respondent neither filed any pleadings nor adduced any evidence to justify the dismissal of the Claimant by demonstrating the reason for the termination and that the reason was valid and fair. I conclude that in view of this, the dismissal of the Claimant from his employment was substantively unjustified.
29. Further, there cannot be any doubt, upon basis of the Claimant's unchallenged evidence that his employment was brought to termination through a summary dismissal. According to section 44[3] of the Employment Act, an employer may summarily dismiss an employee when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. The Claimant testified before court that he had been sent by the Respondent but got stuck in the jam, on arriving at the Respondent's home he was not given a chance to explain himself but rather the Respondent immediately told him off and terminated his services. In these circumstances, it cannot be reasonably stated that the Claimant was by conduct in breach of his obligations. The delay in reaching home, in the circumstances of traffic jam, cannot in my view, amount to one of those actions and inactions contemplated under section 44[4], to fit in the description, gross misconduct.
30. I conclude that the summary termination of the Claimant by the Respondent was both procedurally and substantively unfair and unlawful in complete violation of the mandatory provisions of section 41 of the Employment Act.

b) Whether the Claimant is entitled to the reliefs sought.

i) One month's Notice pay.

31. The Claimant sought for one month's salary in lieu of notice, Ksh 20, 000. Before I delve further into this issue, it is imperative to state that the Claimant testified that at the termination of his employment he was earning Kshs 20,000 and his pay record book reflect a lesser amount than the one stated by the



Claimant. I see no evidence to sufficiently placed before this court or at all, to justify the amount of Kshs 20,000, in the place of Kshs 15000, that clearly obtains on his pay book presented before the Court.

32. There is no contention that the termination of the Claimant's employment was through a summary dismissal. This court having found that the dismissal was procedurally and substantively unjustified, it hereby awards the Claimant Kshs 15,000 as salary in lieu of notice.

ii) Salary for the month of December 2016.

33. It is clear and in any event on record, that the Claimant was terminated on the December 23, 2016 and at the time of the termination he was not paid his December salary. Consequently, he is hereby awarded salary for the month of December as follows $15,000 \times 23/31 = \text{Kshs } 11,129$.

iii) Service pay for the completed years of service.

In the case of *Martin Ireri Ndwiga v Olerai Management Company* [2017] eKLR, the learned judge held as follows:

' Service pay is dues to an employee who has not enjoyed the benefit of statutory deductions and thus covered under section 35(5) and (6) of the *Employment Act*, 2007. The claimant had no written contract, no written statement of payments is submitted and in essence, the respondent does not make any effort to demonstrate that as the employer they complied with statutory requirements and regulations to deduct and remit the applicable statutory dues to Kenya Revenue Authority, to the Kenya National Social Security Fund and to the National Hospital Insurance Fund as required by law. Failure to abide mandatory provisions of the law in this regard, the claimant is entitled to his claim for service pay.

In view of the above the Claimant is hereby awarded service pay for the completed 12 years of service at the Respondent as tabulated herein $(15000/2 = 7500 \times 12) = \text{Ksh } 90,000$

iv) Compensation for the unfair termination.

34. The authority for the court to make the award flows from the section 49(1)(c) of the *Employment Act*. The same authority is exercised depending on the circumstances of each case. The circumstances influence the grant and the extent thereof. I have considered that, liability in this matter attaches against the Respondent on both procedural and substantive aspects of dismissal, the length of period the Claimant had worked for the Respondent, and the fact that it has not been demonstrated that he influenced the dismissal in any manner, and conclude that the Claimant is entitled to compensation to an extent of 10 months' gross salary for unfair termination taking into account the length of period he had worked for the Respondent; thus Kshs 150,000.

Vi. General damages for Frustration of employment agreement.

35. Having awarded the Claimant damages for the unfair termination as I have hereinabove, it would be unfair for me to award the him under this head. In any event, he did not place before this court any evidence in prove that he, tried persuading the Respondent to reduce the oral agreement into writing and, worked for the extra hours as alleged. I am unable to decipher what really informs the claim under this head.

c) Who should pay the cost of the suit.

36. The costs of this Claim to be borne by Respondent

37. In the upshot, judgment is hereby entered in favour of the Claimant against the Respondent in the following terms;



- (a) A declaration that the Claimant's termination from employment was both procedurally and substantively unfair
- (b) One month's Salary in lieu of notice. Kshs 15,000.
- (c) Salary for the days worked in December 2016. Kshs 11,129.00.
- (d) 10 Months compensation for unfair termination. Kshs 150,000
- (e) Service pay for the years worked, computed at the rate of 15 days. Kshs 90,000
- (f) Costs of the suit.
- (g) Interest at court rates from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

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OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Botany for the Claimant

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 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.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

