



**Nyangena v Hi-Tech Inks and Coating Limited (Cause 851 of 2019)
[2023] KEELRC 304 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 304 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 851 OF 2019
K OCHARO, J
FEBRUARY 9, 2023**

BETWEEN

SHEM MOGOI NYANGENA CLAIMANT

AND

HI-TECH INKS AND COATING LIMITED RESPONDENT

JUDGMENT

Introduction

1. Through a statement of Claim dated the 11th November 2019, the Claimant instituted a claim against the Respondent seeking the following reliefs:
 - (a) A declaration that the said termination of the Claimant's services and/or employment by the Respondent was unlawful, unfair and illegal.
 - (b) An order directing the Respondent to pay the Claimant the sum of Ksh 1,994,435 as particularized in paragraph 16 above.
 - (c) An order directing the Respondent to issue a Certificate of Service to the Claimant.
 - (d) Costs of the suit and interest thereon at the court rates.
 - (e) Any relief as the court would deem just and expedient.
2. The statement of the claim was filed contemporaneously with the Claimant's witness statement, and documents under the list of documents dated the 11th November 2019, documents that he intended to place reliance on as his documentary evidence.
3. The Claimant served the Respondent with the summons to enter appearance together with the statement of the claim, witness statement and the list of documents at their Advocates' office, court process which they duly received.



4. The Respondent entered appearance on the 14th January 2020 and filed a response to the statement of the claim on the 10th February 2020 together with the Respondent's witness statement and list of documents.

The Claimant's case.

5. The Claimant was employed by the Respondent from June 2018 to the 24th September 2019 as an accountant for a monthly gross salary of Ksh. 134,995.00. He was to work with a colleague Mukti Shah and report to the Finance Manager.
6. The Claimant stated that he was neither issued with a written contract of employment and or a job description, at the time of his employment or before he started working for the Respondent on the 4th June 2018. He constantly reminded the Finance manager of the fact, the latter always promised that the same would be availed but that never happened.
7. The Claimant stated that he was orally assigned to work on the company payroll, VAT returns, costing of imported materials, Petty cash management, Debtors and Creditors analysis as well as handling other duties assigned by the Finance Manager.
8. The witness further stated that his colleague Mukti Shah handled Bank reconciliation duties. The Finance Manager was the overall Head of the Finance and Accounting Department and was to represent the Department in Management meetings, advice on matters related to finances of the Respondent company among other responsibilities.
9. The Claimant further stated that during the currency of his employment, the Respondent would occasionally experience financial challenges in meeting its obligations as and when they fell due. He attributed this to financial commitments that it had entered into with other financial institutions which financed the purchase of land and company premises it was occupying, machines and other assets used in its manufacturing operations.
10. The commitments affected the Respondent's cash flow which ultimately affected timely payment of monthly statutory returns as well as payments to local and import suppliers. Occasionally delay in payment of end mid and end month salaries would delay for the same reason.
11. The Claimant alleged that there was a high employee turnover within the Respondent Company more especially the finance department due to misunderstandings between the department and senior management, as well as the cash flow constraints. He asserted that he competently executed his duties with diligence, enthusiasm, reliability, honesty and in a responsible manner.
12. On or about the 16th March 2019, he received a warning letter concerning penalties that arose as a result of late payment of PAYE on the Respondent's tax. The Claimant further stated that he had discussed the matter with the Respondent's IT Manager, Mr Vipul and explained to him that the delay had been occasioned by the Respondent's financial constraints at the material time that led to the delayed payment of staff payroll tax [PAYE].
13. He contended that upon receipt of the letter, he raised a verbal objection and indicated that the matter rested squarely on the former Finance Manager 's [mr. Shelly] office, who knew about the financial situation of the company and advised on the need to hold on the payment, as a result. The Claimant asserted that, that wasn't the only statutory payment that was delayed, NHIF was too.
14. The Claimant asserted that he took the letter with concern, he would not understand why the issue was being raised at the time when the Finance manager who advised him to hold on the payment had



left the employment of the company, and yet the penalties were suffered when he was in office. The letter was occasioned by mal fides.

15. He further stated that on the 23rd September 2019, he was informed that his employment with the Respondent had been terminated and instructed not to report to work the following day. He demanded that there be a formal communication as regards the termination. The following day he reported to work, the termination letter was handed over to him at midday. The termination letter didn't address the aspect of his terminal dues.
16. The termination was unfair as he was not given an opportunity to defend himself against the allegations that led to the termination of his employment.
17. The Respondent knowingly sanctioned him for actions of another employee, this was an act amounting to unfair labour practice.
18. The termination was unlawful unfair, illegal and unconstitutional.

The Respondent's case

19. Though the Respondent entered appearance and filed a response to the Claimant's Statement of claim as hereinabove indicated, this matter proceeded in their absence as when it came up for hearing, neither its witness nor counsel were present. Their absence was without a demonstrated sufficient reason.

The Claimant's Submissions.

20. The Claimant through his counsel filed his written submissions on the 30th September 2022 with three issues for determinations thus;
 - 1) Whether the Claimant was an employee of the Respondent at all material times.
 - 2) Whether the Claimant's termination was lawful/Fair.
 - 3) Whether the Claimant is entitled to the reliefs sought.
21. On the first issue the Claimant submitted he had proved to the requisite standards that he was an employee of the Respondent at all material times and was employed as an accountant within the Finance/Accounts Department.
22. On the second issue whether the termination was lawful/Fair, the claimant submitted that the termination was not carried out lawfully and was not fair. The Claimant relied on section 43(1) of the *Employment Act* which provides that....'In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.'" and the above provision was reiterated by Justice Radido in *Kenya Plantation & Agricultural Workers Union vs Del Monte Kenya Ltd* (2016) eKLR.
23. The Claimant submitted that the Respondent's own document[s] and more specifically the warning letter dated 16th March 2019 contradicts the position taken in its pleadings as regards the reason for the termination of his services. The letter dated showed that he filed the PAYE returns for the month of February 2019 contrary to the averments in its pleadings that he did not file the same.
24. The Claimant submitted further that prior to the termination of his employment vide the letter dated 24/9/2019, the Respondent was bound to adhere to the mandatory provisions of section 41 of the *Employment Act* which provides that...(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or



- physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding 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), make.
25. The Claimant submitted that the evidence on the record showed that the Respondent failed to adhere to the mandatory provisions of section 41 of the Employment Act in terminating his employment and thus the termination was unfair and done without according him the opportunity to be heard contravening the principles of natural justice.
26. On the third and last issue the claimant submitted that from the documents placed before court, there cannot be any doubt that he was earning a gross monthly salary of Ksh 134,995 and a net salary of Ksh 100,000.
27. The Claimant argued that by dint of the provision of section 49 (1) of the Employment Act 2007, he is entitled to the reliefs sought. The provision provides for the remedies for unfair termination.
28. He submitted further that having proved that the termination of his employment was unfair, he is entitled to the compensatory relief contemplated under section 49[1][c] of the Employment Act, twelve months' gross salary, Kshs. 1,616,940.
29. On the Claim for payment for unutilized leave days, the claimant submitted that upon a demand by his, counsel Minishi & Associates to the Respondent, the latter through its response letter dated 19th October 2019, made a partial admission when they stated therein that he was only entitled to Kshs. 31, 604 for unutilized leave days. The Claimant submitted that contrary to the figure stated by the Respondent, his true entitlement is Ksh 58,000. He joined the Respondent's ranks in June 2018 and he had accumulated a total of 26.25 leave days as at the date his employment was terminated, towards the end of September 2019, and out of these he had 13 unutilized leave days.
30. The Claimant also submitted that his evidence on record clearly demonstrates his services were terminated on the 24/9/2019. Therefore, he had worked for 24 days in that month. He had earned 40,000 out of his entitlement for the month and thus entitled to Ksh 68,792, as a balance of the salary for the 24 days.
31. The Claimant further submitted that section 51 of the Act mandated the employer to issue the employee with a certificate of service upon termination of his or her employment. That the Claimant having been employed for one year and three months he was entitled to the same.
32. The Respondent did not file any written submissions in support of their case.

Analysis and Determination.

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



Whether the termination was fair and lawful.

34. Whenever a question of fairness in termination of an employee's employment or summary dismissal is placed before court for determination, consideration shall be on two aspects, procedural and substantive fairness. Procedural fairness has to do with the process leading to the termination or dismissal while substantive fairness has to do with the decision to terminate or dismiss.
35. Section 41 of the Act provides for the procedure that an employer contemplating to terminate an employee's employment should follow. It is now trite that the procedure is mandatory and any deviation from it shall render the termination unfair even if there was any substantive justification.
36. The duty to prove that the mandatory procedure provided for under section 41 of the *Employment Act*, was adhered to, is always on the employer. In the instant matter, the Respondent didn't present a witness to testify on its behalf, to demonstrate that the termination of the Claimant's employment was procedurally fair. Where a legal burden is placed upon a party to discharge, its discharge can only occur if the party adduces evidence sufficient enough to enable him or her prove the facts or matters he is required to prove, to the requisite standard. Absent of any adduced evidence on the part of the Respondent on the procedural fairness of the termination, leaves me to without hesitation conclude that it didn't discharge the burden under the stated provision of the Act, and therefore by dint of the provisions of section 45(2)(c), the termination was procedurally unfair.
37. Further, the court has not lost sight of the fact that the Claimant's evidence that he was not given an opportunity to make representations on the accusations against him, remains unchallenged, in the circumstances of this matter.
38. Section 43 of the Act requires an employer in a dispute like the instant one, to prove the reasons for the termination, otherwise the termination or dismissal shall be deemed unfair by dint of the provisions of section 45. It is imperative to state, however, that it is not enough for the employer to prove the reasons, he or she must go a further mile to demonstrate that the reasons were valid and fair, as required by the provisions of section 45(2) of the Act. The reason must be well-grounded and logically correct, thereof.
39. . The Respondent didn't adduce evidence before this court to establish the reason for the termination of the Claimant's employment and that the same was valid and fair. This court has considered the evidence on record and it is apparent that the separation of the Employer-Employee relationship stemmed from the termination letter dated the 23rd September 2019 informing the Claimant of that the termination of his employment was to take effect the following day.
40. Considering the provisions of section 44 of the *Employment Act*, there is no doubt that the Claimant was summarily dismissed from his employment. That being so, the Respondent had an obligation to prove that his conduct was one which was in fundamental breach of the terms of his employment, and therefore a party who was not keen to continue being bound by its terms. Owing to the fact that no evidence was adduced on the part of the Respondent, I find that there is no evidence before me to demonstrate that the summary dismissal was justified.
41. . I have carefully considered the evidence by the Claimant, I am persuaded that he has discharged his burden of prove under section 47(5), that the summary dismissal was unfair. The court notes the contents of the termination letter, the stated ground[s] for dismissal are too general, to an extent that one can be safe to conclude that it is not a valid and fair ground required by section 45 of the Act.
42. I conclude that the termination of the Claimant by the Respondent was both procedurally and substantively unfair.



Whether the Claimant is entitled to the reliefs sought.

i) One-month Notice pay.

43. The Claimant sought for one-month salary in lieu of notice, Ksh 134,995.00. 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 Ksh 100,000 as salary in lieu of notice. The court has not lost sight of the fact that the Claimant's salary was statutorily being deducted as per section 19 of the Employment Act 2007.

ii) Damages for the unlawful termination.

44. The Claimant sought damages for the unlawful termination at 12 months wages Ksh 1,616,940. The authority of the court to make the award flows from the provisions of section 49(1) (c) of the Employment Act. The authority is exercised depending on the circumstances of each case. The circumstances influence the grant and the extent thereof. I have considered the evidence on record, that the Claimant's employment was terminated without due procedure, without a valid and fair reason, and that nothing suggesting that he contributed to the termination, and conclude that the Claimant is entitled to 6 months gross salary, Ksh 134, 995 X 6= Ksh 815,970, under this head.

iii) Payment of the unutilized leave days

45. The Claimant is hereby awarded Ksh 58,929 as payment for the unutilized leave days. It is clear that the Claimant joined the Respondent's ranks in June 2018 and at the time of his termination he had 13 unutilized leave days.

iv) Payment of the days worked in September 2019.

46. The Claimant was terminated on the 23rd March 2019 and the said termination was to take effect the following day the 24th March 2019, With this, the Claimant had therefore worked for 24 days in the month of September 2019. The Court has further not lost sight of the fact that while testifying the Claimant confirmed having received an advance of Ksh 40,000 in the said month thus leaving a balance of Ksh 64,529 which the Claimant is entitled to and the same is hereby awarded him.

v) Certificate of service.

47. The Respondent is hereby ordered to issue a certificate of service to the Claimant as provided for under section 51 of the Employment Act 2007.

(c) Who should shoulder the costs of the suit.

48. It is trite law that the costs shall follow event, the Respondent is hereby condemned to pay the costs of this suit.

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

- a) A declaration that the termination of the Claimant's employment was both procedurally and substantively and unfair, and unlawful
- (b) One month's salary in lieu of Notice.....Ksh 100,000
- (c) Damages for unfair and unlawful termination.....Ksh 815 970
- (d) Payment for the unutilized leave days.....Ksh 58,929



- (e) Payment for days worked in September 2019.....Ksh 64,529
- (f) Interest on the sums awarded hereinabove from the date of this judgment till full payment.
- (g) Cost of the suit.
- (h) The Respondent to issue Certificate of service, within 30 days of this judgment.

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

OCHARO KEBIRA

JUDGE

In the presence of

Ms. Muthee holding brief Kibiku for the Claimant.

No appearance for the Respondent.

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.

OCHARO KEBIRA

JUDGE

